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The Europeanization of national judiciaries: definitions, indicators and mechanisms

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ABSTRACT

The article is underpinned by the idea that the national courts/judges are expected to act as decentralized European Union (EU) judges. This is motivated by the fact that the general knowledge concerning the impact of EU law on the functioning of national courts as EU judges and the process of Europeanization of national judiciaries is still somewhat scattered and fragmented. The central ambition of this article is to provide a theoretical framework that would contribute to the understanding of Europeanization of judiciaries by: (1) offering a definition and theoretical developments useful for the study of Europeanization and its dynamics; (2) exploring the diverse indicators to operate the concept; and (3) providing explanations on how Europeanization might happen by identifying the distinct mechanisms potentially in play. By and large, the article proposes theoretical and empirical developments, which will facilitate embracing the project of constructing a composite framework for the socio-legal study and measurement of the Europeanization of national courts.

KEYWORDS CJEU; court of justice of the EU; EU law; Europeanization; national courts; national judiciaries

European Union (EU) law can directly affect interests, rights and obligations of individuals and, under certain conditions, it can be invoked and relied upon in national courts. In this regard, national judges are essential to the process of enforcing rights derived from EU law and are sometimes referred to as decentralized EU courts (Jaremba 2014: 4). The issue concerning the functioning of national courts as EU courts remains one of the most fundamental but also complex aspects related to the EU integration process. Accordingly, the question regarding 'Europeanization' of national judiciaries in the context of EU law, and the factors that (might) influence the way national judges make decisions, has been mainly researched by way of analyzing the process of co-operation between national courts and the Court of Justice EU (CJEU) through the preliminary reference system (art. 267 of the Treaty on the

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Functioning of the European Union [TFEU]). There are also many invaluable legal contributions discussing the application of EU law by national courts. These focus in particular on legal analysis of individual cases and the legal correctness of the way national judges proceed with EU law or the way in which EU law has influenced national jurisprudence, doctrines and styles of judicial reasoning. On the basis of the findings following from this stream of research, scholars sometimes draw far-reaching conclusions about the process of Europeanization of national judiciaries.

Against this background, it can be observed that the present knowledge regarding the *general* impact of the process of Europeanization on national judiciaries is somewhat limited and scattered. Nyikos' seminal work (2008: 4) underlined the necessity to deepen the study of the Europeanization of national legal systems and judiciaries. She observed that there is too little study of the effects of Europeanization on domestic courts, and that research has so far mainly been focused on the reasons for referring preliminary questions to the CJEU. Hence, it is the core ambition of this article to contribute to the understanding of Europeanization of judiciaries in the context of EU law by: (1) defining the *concept* of Europeanization; (2) offering *indicators* to operate this concept; and (3) providing explanatory *mechanisms* evaluating how Europeanization might happen. The foregoing task is aimed at constructing a composite framework for the study and measurement of Europeanization of national courts. Importantly, this contribution addresses the process of Europeanization in the context of 'EU law' and not 'European law' in general. Hence, in this article Europeanization in the context of European Convention on Human Rights (ECHR) law will not be discussed.

This article is structured as follows. First the concept of Europeanization of national judiciaries used in this contribution is expounded and explored. Next, the possible indicators related to the process of Europeanization are discussed. Subsequently, the different mechanisms of Europeanization of national judiciaries are addressed. Finally, we draw some conclusions.

The concept and dynamics of Europeanization of national judiciaries, courts and judges

As observed by Olsen (2002: 921), Europeanization is a 'fashionable but contested' concept, and even an 'academic growth industry'. Regardless of the discipline, the term always refers to a process of domestic adaptation in a specific area that results from EU membership. The theme has gained considerable attention from legal and political science scholars. In particular, research has examined how the different institutional, legal, political or sociological factors (may) bear on the judicial behavior and the processes of applying EU law (Jupille and Caporaso 2009; Slepcevic 2009, among others). The relevance and pressure that the CJEU can exert through its judgments on

national courts has also been explored (Conant 2002; Martinsen 2011; Panke 2007; Schmidt 2008).

However, despite the broad attention that has been paid to the process of Europeanization, there still seems to be no agreement regarding the precise meaning of the concept in relation to national courts. In the context of national courts, the study of Europeanization has been focused on processes of 'judicial Europeanization' which relate to the effects CJEU rulings exert at the national level. Nevertheless, in our understanding, national judges might be Europeanized by actors and dynamics other than those produced by the CJEU. In particular, we refer here to the role and impact of EU legislation, and the socialization effects of judicial networks or legal cultures, among others, on the Europeanization of national judicial institutions. Moreover, the judicial Europeanization literature is mostly focused on changes in the behavior of national courts, including judicial references and compliance with CJEU rulings and EU legislation, while it disregards indicators based on attitudes and profiles of national judges that are also relevant for measuring the Europeanization.

To cover this gap in the scholarship, in this contribution we define 'Europeanization' as the adaptation of the national judiciary/courts/judges to their role as EU judicial institutions. This process of adaptation has traditionally been studied by exploring the application of EU law by national courts, such as whether they refer to or comply with CJEU rulings. However, we assume that for this process to happen, national courts also ought to share the capability, skills, knowledge, resources, epistemic frameworks, legal culture or principles in order to be able to function as genuine EU judges who can assure the effectiveness of EU law. This operational approach is in line with the claim that Europeanization is not limited to changes in the content in judicial decisions but goes much beyond that, by considering attitudes and profiles of national judges that might precondition the way they fulfill their role of EU judges. Along this line, we support the idea that 'European values and policy paradigms are also to some (varying) degree internalized at the domestic level, shaping discourses and identities' (Olsen 2002: 935). This definition will be used for operationalization of indicators regarding the scope and extent of the Europeanization of national judiciaries, in order to improve the conceptualization and framing of (future) research.

Both top-down and bottom-up dynamics in the process of Europeanization of national judiciaries are identified. On one hand, top-down dynamics, which are sometimes referred to as 'downloading processes' (Börzel 2002: 193), track the impact of EU institutions (the CJEU, EU legislator and European judicial networks), judicial and institutional procedures (preliminary references, socialization at European institutions) or policies (in forms of EU legislation, CJEU jurisprudence and policy recommendations) from the European level into the domestic level. On the other hand, bottom-up dynamics, or 'uploading

processes' (Börzel 2002: 193), indicate changes that depart from the member states (high courts, national judicial councils, training schools, universities and networks, national governments and parliaments) and the effects are tracked up to the level of the EU or other member states (Howell 2004). In case of top-down processes, the national judiciary adapts and conforms to the European mandate that has been conferred upon it, whereas the bottom-up Europeanization starts at the level of member states and results in changes at the EU level that are later disseminated among the other member states. An adequate illustration of a bottom-up process relating to the judiciary is the 'uploading' of policies and recommendations to EU level by judicial national networks, or the way national courts influence the development of EU law principles and values (Jacobs 2003: 549), such as the way the German Constitutional Court shaped the development of primacy of EU law.

Finally, we refer to the *horizontal* processes or dynamics, where the interaction of national judges with other member states' judges exclusively affects the level of Europeanization of judges at the national level. These horizontal interactions can happen formally (e.g., interaction between national judicial training networks) or informally (e.g., connections with foreign judges). A good example of a horizontal dynamic is the influence that transnational networks or judicial training schools exert on improving the knowledge of EU law, boosting the co-operation between domestic actors and disseminating EU law concepts among the judiciary.

It should be observed that top-down dynamics are mainly (but not exclusively) related to rational-based mechanisms through which Europeanization happens – defined as traditional, direct and formal based on incentives and coercion (Radaelli 2003: 41). Socialization mechanisms, then, refer to those processes where no pressure for (domestic) adjustment or a direct need to conform to a policy exist – that is, adaptation is established through networking, arguing, persuasion, socialization, learning or exchange of experiences (Börzel and Risse 2012: 1).

Operationalizing Europeanization: in search of indicators

As observed above, the current measures related to the level of Europeanization of national courts mostly refer to the visible and relatively easy way to track behavior of judges, as expressed in the number of preliminary references or in the relative annual increase in them. We argue that the rates of preliminary references do not necessarily reflect all the different modes in which national judges engage with EU law. In particular, there are other attitudinal and behavioral indicators that might enrich the study of the level of national courts' Europeanization. Following Nyikos, we suggest going beyond the approach of designating the referral of preliminary questions as a proxy of

Europeanization. Instead, we focus on the different indicators, which we categorize as either behavioral or attitudinal/profile.

Behavioral indicators

Behavioral indicators refer to the level of engagement with, or application of, EU law by national courts as evident in their judicial decisions. Thus, judicial decisions are considered an observable action (behavior) expressing the choices regarding EU law that judges make and which are relevant for evaluating their behavior as EU judges (Epstein 2017). The different actions that demonstrate the Europeanized behavior of national courts can be classified as follows: asking for preliminary questions, referring to and/or complying with CJEU rulings, EU legal doctrines and EU legislation. For the analysis of each of those actions, two different but complementary approaches might be adopted that are based on (1) quantitative analysis based on, for example, a quantification of citations of CJEU rulings; or (2) qualitative analysis exploring how judges effectively approach and apply EU law and conduct the dialogue with the CJEU. In this regard, quantitative approaches, even if they are useful to the study of the increasing co-operation of national courts with the CJEU, can hardly explain the real nature of the judicial dialogue. In particular, the quantitative approach makes it difficult to discern cases where national courts criticize, do not apply or limit the effects of the CJEU rulings. In order to fully understand the nature of those actions, more qualitative analysis of the application of EU law is needed. Such analysis will help us to understand whether a 'citation' implies actual compliance with EU law and not, for instance, (partial) rejection of the way EU law is understood and interpreted by EU institutions and the CJEU. Next, we aim at clarifying and exploring these concerns by introducing this discussion into the framework of the different instruments available for the enforcement of EU law – such as preliminary references, CJEU precedent, EU legal doctrines and legislation.

Empirically, the existing contributions are mainly focused on the number of preliminary references; and there are many factors that influence the national variations between reference rates to the CJEU. Alter and Vargas (2000: 452) argue that the study of preliminary references as an indicator of judicial involvement in the EU legal integration process is a mistake, since many EU law–related cases in national courts are decided without direct involvement of the CJEU. Figure 1 displays quantitative evidence supporting this argument, showing how the total number of national EU law–related cases doubles or triples the number of actual preliminary references. The columns in black include judgments, not only enforcing CJEU rulings, but also those that have been solved without a reference. The figure seems to reflect the extent to which an undoubtedly relevant part of the story on Europeanization remains for the most part unexplained.

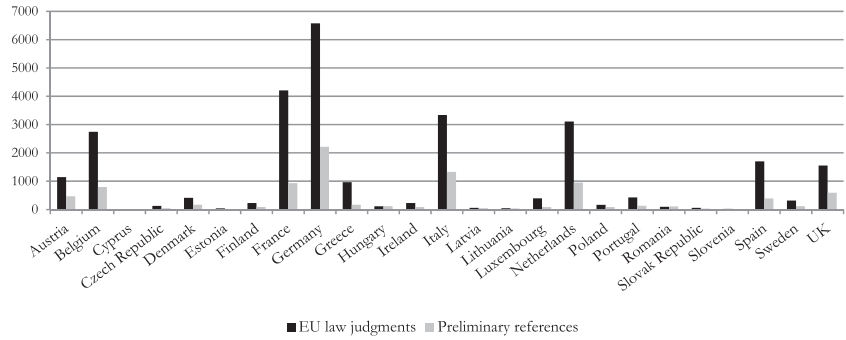

Figure 1. EU law judgments and referrals to the CJEU by national courts (1961–2015). Source: DEC.NAT – National Decisions database of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union & CJEU 2015 Annual report (accessed 4 May 2016). Hungary, Croatia and Malta were not available.

Since most EU law judgments take place outside the channel of the preliminary reference mechanism, it is crucial to assess the importance of national court's EU-law-related rulings for legal integration, and, consequently, for the study of national judges' behavior as EU judges. We suggest investigating the day-to-day application of EU law, for instance by looking into the way national courts follow the CJEU's jurisprudence. Since the early 2000s, scholars such as Nyikos (2003) have emphasized that national courts almost always follow and apply CJEU rulings in particular cases that have been referred to the CJEU (93.45 per cent). However, to fully understand the preliminary references as an indicator of Europeanization, we should go deeper in exploring how judges deal with other dimensions related to the use and treatment of CJEU jurisprudence and EU law.

From the above, it can be concluded that national courts noticeably follow and apply interpretations of EU law provided by the CJEU. Nevertheless, if attention is paid to all kinds of cases in which courts resort to the CJEU's jurisprudence (i.e., including the application of CJEU precedents), then we observe that the compliance with interpretations of EU law is lower. For example, in the case of Spain (1986–2000) (Ramos 2006), in 81 per cent of cases the national courts did comply with CJEU precedents. This underlines the importance of compliance with the Court's jurisprudence in understanding and measuring the level of Europeanization of national courts.

The issue concerning the use of EU legal sources is not exhausted by the problem related to the application of the CJEU rulings. Also, the relevance of the domestication or indigenization of European legal principles and doctrines by national courts should be addressed. Quantitative research shows how the domestic discourse of UK judges became increasingly Europeanized 'by the courts' exposure to alien legal concepts emanating from the EU'

(Jupille and Caporaso 2009) such as 'purposive interpretation', 'proportionality' and 'legitimate expectations'. Similarly, Corkin (2013) pointed to the increasing use of what she called informal references to European values or obligations by the German, Austrian and Italian constitutional courts.[1] These studies illustrate an increasing trend regarding the use of legal doctrines and principles. Still, it is evident that more qualitative legal analyses are needed to assess whether national judges do apply the cited doctrines and notions when dealing with cases.

Undoubtedly, resorting to CJEU rulings and doctrines does not reflect the full range of instruments available to national judges when integrating EU law into their domestic legal systems. The fact that national courts in their daily practice deal with primary and secondary sources of EU law (e.g., treaties, regulations or directives) also seems crucial to our understanding of Europeanization. The example of the Spanish Supreme Court[2] (1986–2016) shows that while the court cites CJEU precedent quite often (4,827 times in the researched period), the total number of references to EU primary and secondary law is much higher (7,595 times). The integration of primary and secondary EU law in the day-to-day practice of national courts therefore seems the most evident and relevant example of an extensive Europeanization of national judges' behavior, but the issue remains largely unexplored.

Certainly, many legal scholars do address the problem of the application of EU law instruments, but existing studies are somewhat limited in their scope (to seminal cases, specific member state, specific policy field or type of jurisdiction, or even a specific national court). This phenomenon can easily be explained, though, in that the issue is particularly difficult or perhaps nearly impossible to be researched on a broader scale. Nevertheless, we suggest going further in studying the degree of national courts' compliance with EU legislation by arguing that the degree of Europeanization could be tested by looking at the level of compliance not only with the Court's precedent but also with EU legislation as such. One example of such an effort is Bapuly (2003)'s work, which scrutinized whether national courts followed and applied the requirements imposed by EU legislation.

Attitudinal and profile indicators

Here we refer to the relevance of socio-legal indicators such as professional experience, knowledge and preferences for studying and measuring the level of Europeanization of national judges. Incipient literature (Jaremba 2014; Nowak et al. 2012) has attempted to show how national judiciaries actually perceive the role imposed on them by EU law, how they experience this role, and whether they are capable of exercising it. This new approach appeared as a reaction to existing scholarship's assumptions about national judges' preferences and whether these could predict their behavior as EU judges.

Different attributes might be highlighted as a way to depict judges' EU law profiles. One such relevant proxy is the level of knowledge of EU law that national judges have. Recent studies (European Parliament 2012) show for EU-27 how judges to some extent agree (48 per cent) or strongly agree (20 per cent) that they have a 'good knowledge of when to apply EU law directly'. It would be equally relevant to map the skills, links with Europeanized actors/institutions (e.g., CJEU judges, scholars and judicial networks specialized in EU law), attitudes, and identity of judges. As an example, recent data from the Spanish judiciary (128 judges) shows how most of the surveyed judges (69 per cent) accept EU law primacy (Mayoral et al. 2013). Consequently, these attitudes might help to understand how judges comprehend their role as EU judges and to what extent they agree with the fundamental principles of EU law or support the EU.

This evidence highlights a new perspective on how to deal with individual attributes of judges and the potential influence of those attributes on their functioning as EU judges. However, this research strategy should be accompanied by a recognition of the large methodological difficulties that scholars face in terms of collecting solid and reliable data that would allow for making a comparison across member states and assessing how contextual differences might interact with the personal characteristics of the judges.

Having discussed the possible indicators of Europeanization in the case of the judiciary, we now address the issue of the mechanisms that play a role in that regard.

Mechanisms of (de-)Europeanization of national judiciaries

In Europeanization studies two logics of domestic change or Europeanization have been theorized, that might occur simultaneously or characterize different phases of the process of Europeanization. Those are (1) the logic of consequences, where Europeanization creates new power or organizational structures which offer national judicial actors incentives and resources to pursue their interest (Börzel and Risse 2003); and (2) the logic of appropriateness which focuses on socialization processes by which actors learn to internalize new norms, values or cultures that transform them into members of the European judiciary (Checkel 1999).

Against this background, we can identify rational-based and socialization mechanisms. The operation of those mechanisms depends on whether the actors behave or act according to EU law expectations due to (1) external incentives and expected benefits following from EU instruments that allow to pursue national interest (e.g., coercion, competition or learning), or (2) a change in its policy goals, preferences and attitudes in favor of the EU that encourages judicial actors to act as true EU agents (e.g., political-legal culture/context, networking, legal discourses, judicial trust). These

mechanisms, taken from the literature on Europeanization, might be distributed in accordance to the bottom-up, top-down and horizontal dynamics of Europeanization. Moreover, we also distinguish scenarios in which those mechanisms might lead to a process of de-Europeanization, where Europeanization is impeded or hindered, such as in coercion and political-legal culture/context cases.

Coercion

This mechanism brings in an institutional argument that refers to the adaption of national judges to European demands caused by coercive pressure (Knill and Lehmkuhl 2002). It would be easy to assume that EU law mechanisms induce automatic compliance on the part of national courts. Coercion has scarcely been explained in the study of the judicial application of EU law. This gap might be a result of difficulties to find instruments or institutional mechanisms that would pressure judges to apply EU law. Even though the doctrine of state liability that makes member states accountable for judicial non-compliance with EU law has been developed,[3] and the enforcement mechanism based on article 258 TFEU that can be triggered by the Commission, there is no evidence supporting the coercive effect of those mechanisms. Instead, other mechanisms that bring an element of coercion at the domestic level might be relevant. For instance, the risk of the case being brought to the appeal court might be seen as an intimidating element that may encourage lower judges to invest more resources in the correct application of EU law.

At the domestic level, coercive influences related to political actors wanting to protect their national power, policies or jurisdictions from the influence of EU institutions could be explored. Here we refer to processes of de-Europeanization where the interactions between national judges and governmental institutions constrain the discretion of national judges when they consider the application of EU law. Finally, reputation, naming and shaming (Panke 2007) can be considered worthy of further research as a mechanism that explores other dimensions of coercion. Political and social actors might have the capacity to pressure judges publicly or even mobilize public opinion and media to influence the judicial outcome on hot-button issues.

Competition

This well-known mechanism refers to the way that CJEU jurisprudence and EU law change national opportunity structures, helping other actors to empower their position *vis-à-vis* other actors (Knill and Lehmkuhl 2002). This mechanism was mainly used to explain the reasons behind national courts' engagement in the preliminary ruling procedure and precedent. Judicial empowerment accounts pointed out that judges became involved in the mechanism

because it provided them with a new tool for judicial review of the acts of the legislative and executive branch (Mattli and Slaughter 1998; Mayoral 2013; Weiler 1994). Alter (2001) assumes that diverse institutional incentives exist for different types of court and argues that lower courts use EU law to increase their prestige and power in relation to higher courts, which, in turn, defend the prevalence of the national legal system to safeguard their power.

In this last regard, it is important to underline how national courts affected the configuration of the EU legal system (e.g., by suggesting the incorporation of human rights standards, democratic principles or the concept of constitutional identity into the EU legal system). For instance, national higher courts put forward understandings of EU law that are different from those advocated by the CJEU and which curbed the Court's power. Davies (2012: 220–221) points to the interaction between the CJEU and the German Constitutional Court when the former aimed at creating legal principles of EU law (e.g., primacy and direct effect) as a two-way dynamic process.

> While, on the one hand, primacy and direct effect and the use of the preliminary ruling mechanism served to Europeanize national legal orders in a 'top-down' sense, the uploading effect of the Federal Constitutional Court's Solange jurisprudence served to Europeanize a national tradition in a 'bottom-up' manner.

The conflict created by the Solange doctrine had a systematic impact by shaping the relationship and allocation of competences between national courts and the CJEU.

The domestication or internalization of various European concepts or legal doctrines might also be connected to the dynamics of competition. Martinsen (2011) underscored the importance of the CJEU proportionality doctrine as a tool for national courts to restrain national and administrative reaction to the judicial Europeanization of national policies. Similarly, national judiciaries are engaged in European supranational and transnational (or horizontal) network governance and enact a strategy of empowerment motivated by their competition with other branches of power. Judicial networks thus engage in a dialogue with national peers and the CJEU, expressing their common approach as a form of 'collective empowerment' *vis-à-vis* other domestic actors (Benvenisti and Downs 2010: 170).

Learning

Various types of learning process can be identified in the Europeanization literature. The first, is instrumental learning, is used when actors adjust means and strategies to achieve their own national objectives, in consonance with rational choice theory. The second mechanism, social learning, refers to the way in which European norms, values and policies diffuse to particular national settings whereby they socialize agents (Checkel 2005: 804). Checkel identifies different types of social learning: adoption of new roles, and

change of values and interests. Internationalization interacts with both types of social learning. Regarding the first type, internalization can have an impact on agents' behavior in terms of making them adopt a certain role and hence act in accordance with expectations of the legal community. In the second case, internalization makes judges adopt the preferences, motivations or the identity of the EU judiciary and legal norms and principles of which they are part, e.g., through strong support of the EU and adoption of a legal culture of EU law-abidingness.

Two types of learning outcomes have been identified. Firstly, organizational learning outcomes (Zito and Schout 2009), which mostly match instrumental learning processes that can lead to changes in the understanding of judicial processes and routines, whereby national judges use this knowledge to reach their own interest. In this regard, scholars have argued over how national courts co-operate with the CJEU after they learned that referring preliminary questions is the best solution to reach a resolution of complex EU law disputes (Ramos 2006; Stone Sweet and Brunell 1998). Secondly, policy-learning outcomes occur in EU judicial networks (Sabatier 1988) through the sharing of information and learning from collective judicial experiences that may affect national judicial actors' understanding of a problem and their assessment of own preferences. However, in the context of transnational networks, learning can also produce horizontal dynamics, known as lesson drawing/policy transfer (Stone 1999: 51), that refer to what national judges can learn from other judges from different member states in terms of processes of emulation and borrowing. In such cases, the networks created at the EU and transnational level can also serve as a forum where national judiciaries can meet and exchange best practices regarding the application of EU law. Similarly, the judicial Europeanization literature has referred to related mechanisms when stressing how the continuous experience of German social courts with EU case law created a sort of legal tradition/policy of referring EU law issues to the CJEU, increasing the level of national litigiousness on EU social rights (Conant 2001). As such, current examples of learning are connected to judges' daily experience with EU law. The question remains, however, to what extent these learning outcomes are promoted by different factors such as education, collegial discussions, or similar phenomena.

Legal and political culture/context

The first contextual mechanism relates to national legal culture where more research efforts have been invested. Those instruments precondition the reception and application of EU law by national courts. Firstly, countries with a common law tradition are attached to the binding precedent rule more than countries with other legal traditions (civil law, Scandinavian law). Judges socialized in this culture are more familiar with and used to applying

CJEU precedents, and hence will be less likely to resort to the preliminary ruling procedure (Hornuf and Voigt 2015). The second cultural divergence is related to the difference between constitutional and Nordic majoritarian democracies. In countries with majoritarian democracies, the lack of familiarity with the judicial review process explains why the local courts are less likely to use the preliminary ruling system in contrast to the practice of that of constitutional democracies (Wind et al. 2009). Third, while monist systems integrate international and European law into the national legal order, implying the unconditional acknowledgment of EU law primacy, dualist systems emphasize the difference between national and international law and do not automatically accept EU law primacy. As a result, national judges in dualist systems are more likely to seek the support and guidance of the CJEU (Carrubba and Murrah 2005).[4] Nevertheless, as suggested by Ladrech (2010), the way post-communist legal cultures affect the application of EU law has still not been analyzed in a satisfactory and sufficiently critical way. It seems necessary to consider how the constitutional basis of Eastern European court systems, with their history of no independent judiciary, are not as 'solid' as in other EU countries.

The second group of contextual instruments refers to national constitutional adaptations to the process of legal European integration. On the one hand, there are examples of national constitutions that regulate the relationship between EU and national law. The Irish Constitution includes provisions on direct effect and primacy of EU law that allow EU law to take precedence even over the Constitution (Claes 2007: 34). Similarly, the Estonian Constitution Amendment Act affirms the primacy of EU law over the national constitution. On the other hand, national high courts have developed doctrines that restrict the automatic reception and acceptance of EU law and doctrines that could undermine their authority in the national constitutional order (Dyevre 2013). Common to all these cases is a lack of knowledge on how these constitutional adaptations might serve to encourage/restrain national ordinary courts' behavior as EU judges.

Finally, specific legal or institutional reforms aim to facilitate the adaptation of national judicial systems to expectations imposed by EU law. The literature on judicial Europeanization has focused on the rules governing 'access to justice' as an important element for mobilizing EU law in national courts (Conant 2002; Conant et al. 2017; Slepcevic 2009). However, little is known about actual changes in terms of courts' compositions and judicial procedures, but different policies or institutional reforms can be employed to explore the phenomenon connected to the increasing Europeanization of judicial systems. The first reform is the adaptation of judicial training programs to EU standards. Piana and Dallara (2015: 18) have shown the variation that exists in the adaptation of judicial training programs to EU standards promoted by judicial networks. Second, individual national initiatives can be

found that show a better adaptation to EU demands. For instance, the institutionalization of networks in the form of regular meetings between national judges dealing with the latest developments in the field of EU law (e.g., Network of Experts on the European Union in Spain) or the specialization of a formally appointed judge who provides information on EU law to peers (e.g., co-ordinators of European law in the Netherlands).

Legal discourse

Europeanization studies have made use of discourse to explain policy change as 'policy ideas that speak to the soundness and appropriateness of policy programs and the interactive processes of policy formulation and communication that serve to generate and disseminate those policy ideas' (Schmidt and Radaelli 2004: 193). Thus, discourse is understood as a dependent variable affected by Europeanization (e.g., judicial decisions of national judges) and as an explanatory factor that might affect Europeanization of national policies (Moumoutzis and Zartaloudis 2016: 343). The study of discourse content can be transposed to the study of judicial decisions, and thereby elicit a new agenda with the aim of exploring how interactive judicial discursive processes affect judges' behavior or application of EU law, and how discourse interacts with other mechanism like learning. For example, the power of judicial discourse to Europeanize national judges would be based on the coherence and persuasion of the CJEU judicial discourse. Here the persuasion or authority of the judicial discourse – defined by highly valued principles such as legal coherence, consistency and certainty – would enhance the application of EU law or follow the CJEU's rulings. Therefore, the legal persuasiveness of CJEU decisions is well embedded in its own jurisprudence through the CJEU citing many of its previous judgments, which is measured using centrality measures developed by network techniques. The technique shows how important a CJEU ruling is in the entirety of CJEU jurisprudence (Larsson et al. 2017: 6). Hence, persuasive judicial discourse originating from CJEU rulings, EU judicial staff, members in judicial policy networks or other domestic judicial actors, might be shared by a larger number of national courts, rendering change in the patterns of judicial application and compliance more likely. However, despite the existence of measures able to account for the persuasiveness of legal discourses, we still lack studies testing the actual impact of this mechanism as a useful tool for inducing compliance.

Networking/socialization strictu sensu

In this process, national judges accommodate principles, attitudes and policy models through peer influence of (1) EU institutions, like the CJEU or transnational judicial networks, or (2) pro-European national actors. The socialization

process is determined by the same levels of internalization developed for the mechanism of learning. In fact, the precise distinction and relationship between socialization and social learning is still unclear as they are often confused with other mechanisms that predict similar changes in national actors. Moumoutzis and Zartaloudis (2016: 343) argue that

> Initially, socialization will indeed entail learning, as new members of a community will first be required to learn what the community's norms and rules are. Subsequently, however, socialization will require normative arguments, which will demonstrate discrepancies between national policy and EU rules and which will not necessarily be based on new information.

Recently, the exchange of ideas and interactions in epistemological communities has been viewed as an essential part of improving the judicial dialogue, promotion of judicial-policy goals, and dissemination of European concepts. This connection with EU actors has been formalized in bilateral meetings organized by the CJEU with small delegations of high-ranked national judges participating in closed-door meetings (Leron 2014). As Leron remarked, these meetings have existed since the 1990s and have been growing in size as the process of enlargement of the EU proceeded and the complexity of EU law increased. In the context of Europeanization, these meetings hold the promise of increasing understanding and knowledge of EU law, including of the functioning of the preliminary reference mechanism and the role and position of the CJEU in the system.

Existing literature has tried to test the impact of additional socialization venues on judicial networks by exploring the connections national judges have with a diverse set of European and national actors. At the individual level, judges with extensive personal connections to EU staff and domestic institutions and individuals socialized in EU law, have greater access and opportunities to socialize, and consequently, to improve their knowledge of and adopt EU values. Moreover, referring here to the horizontal dynamics of Europeanization, national judges can enter into dialogue and socialize with colleagues from other member states through European networks, allowing them to improve their knowledge of other legal systems and exchange experiences and ideas about EU law. Such interaction can help in the construction of a truly European community of judges and in the development and implementation of European legal policies (Claes and De Visser 2012).

Two types of networks can be identified via their origins and finalities. First, top-down networks mainly institutionalized by EU institutions with the aim of co-ordinating and supporting national judiciaries and councils, e.g., the European Judicial Training Network. Next, there are bottom-up networks created by, for instance, national judicial councils or associations of judges. What is more interesting about networks is how they integrate dynamics that may contribute to the Europeanization of judges through socialization (and also

learning). Indeed, both combine vertical dialogue between European and national courts and horizontal dialogue among national judges themselves, through which mutual standards are set up, and the interpretations of legal rules are discussed. For example, judges' discussions can serve to establish the conditions under which preliminary references should be asked, or how the principles of direct or indirect effect should be applied. The practices of sharing information and discussing important substantive norms, EU law objectives and their application can contribute to the creation of a common judicial community that socializes judges (Benvenuti 2015).

Other studies refer to the role played by European advocates (Vauchez 2013), Euro-law associations (International Federation for European Law [FIDE]), pro-European transnational networks and fora, and their members and participants (lawyers, judges, politicians or EU officers) in supporting the constitutional practices of the CJEU through acceptance of the EU law primacy practice. Finally, Nyikos (2008) emphasized the importance of former CJEU members to the process of socializing national judges into EU legal principles and in changing the position of national high courts towards the principle of EU law primacy. Current evidence[5] about judges' attitudes towards EU law after serving at the Court shows that among currently active judges (28 out of 60), CJEU judges return to their countries as judges occupying high-ranking positions within the judiciary (11 out of 28) or take up posts as university professors (10 out of 28). These judges may still play an important role in the socialization of other judges, increasing high courts' awareness of EU law and educating new generations of judges.

The above-mentioned scholarship has mostly been focused on identifying the different contexts where socialization happens and its potential effects on Europeanization. However, this hardly explains how, to what extent and under which conditions judicial exchange has a significant impact on the socialization of national judges and their behavior (e.g., an increase in co-operation rates). This limitation is partly caused by the difficulty of obtaining proper information about the networking and socialization of national judges with other Europeanizing actors. The attempt of, for example, identifying the judges that participate in EU judicial networks or in meetings at the CJEU seems quite a challenging enterprise which may require a very dedicated investigation. However, following the socio-legal trends on surveying judges, more systematic data on the linkage of judges with Europeanizing actors and data on the participation of national judges in judicial forums has been collected and become available. Despite such preliminary efforts to map connections between judges and Europeanizing actors/forums, new survey questions must be added to the collection of data that can also describe the nature of judges' exchanges/discussions. This should be done to systematically test assumptions about the relevance and actual impact of personal links and networks for the socialization of national judges as EU judges.

Judicial trust

Trust has recently been suggested as a relevant mechanism for the functioning of the EU judicial system and also for the construction of the European judiciary (Mayoral 2017), offering potential new avenues for research. By focusing on national judges' trust in the CJEU, these studies have stressed the presence and formation of judicial trust by defining it as national judges' belief about whether the CJEU will follow an expected course of action under conditions of uncertainty. This approach brings into play a new socio-legal mechanism and attempts to explain the Europeanization of judges' behavior through a mechanism that may increase the willingness of judges to co-operate with the Court. Despite the establishment of a definition, the main challenge still concerns the fundamental issue of finding accurate measures of judicial trust and in identifying and operationalizing its constitutive elements/sources. The first proposed measures of trust have been built following survey measures taken from sociology. Incipient research on the topic already tries to explain which factors might influence judges and make them score higher on trust levels in the CJEU. It is argued that national judges' trust in the CJEU seems to be explained by way of their profiles as EU judges (knowledge and experience of EU law), and attitudes toward the EU and other domestic institutions. Their beliefs about the ability of the CJEU to make decisions also matters to the extent that it (1) provides clear guidance on EU law, and (2) does not undermine their national legal order (Mayoral 2017). Nevertheless, the debate is still open to other possible factors that, according to sociology, might influence judicial trust such as interpersonal trust, legal cultures and networks. The idea of trust between judges might also contribute to the investigation of mutual recognition (Lenaerts 2017). Mutual trust has, for example, been identified as a relevant principle governing the relationship between national judges when enforcing cross-border decisions like the European Arrest Warrant.

Conclusions

The process of Europeanization is an intriguing and intricate issue that can be looked at and researched from various perspectives. However, when we look at the scholarly efforts concerning Europeanization of national judiciaries, it can be observed that the debate has been limited and rationalized according to the methodological and theoretical obstacles that the researchers have come across. In many instances, the problem starts at the very basic level of conceptualization. Producing reliable figures by employing robust methods and, consequently, trying to catalogue the findings to produce generalized conclusions seems a challenging (and sometimes impossible) task. Indeed, there remain many areas in which the Europeanization of judiciaries is hard/difficult to measure or assess. Keeping this in mind, this article aimed

to (1) theorize the concept of Europeanization of national judiciaries, courts and judges, and (2) provide a wider array of socio-legal indicators and causal mechanisms that could broaden our understanding of the process of transition of national judiciaries into European judiciaries.

It should be underscored how different indicators belonging to the concerned categories might also refer to diverse degrees of Europeanization. The empirical instruments at our disposal range from a relatively simple judicial activity (e.g., use of preliminary references) to the effective judicial application of EU law in line with the expectations imposed by it. While the study of judicial activity improves our understanding of the *scope* of Europeanization of the judiciaries, showing the various modes of involvement with EU law, the study of compliance with EU law can illustrate the *extent* of influence of Europeanizing factors on national judges. For example, in comparative terms a recurrent use of CJEU precedent or EU legislation might indicate an openness of the judiciary to the role as EU law judges, which, in the long term, might have positive side effects enhancing the Europeanization of judges based on increased exposure to EU legal instruments. The same goes for attitudinal indicators, which illustrate that national judges can range between having very low and high levels of EU law knowledge, or between very low and very high support of the EU. It should be the aim of scholars, first, to select relevant indicators and, second, to justify the selection of that indicator over others based on the research question posed.

All this opens up a whole new stream in the socio-legal research agenda that is crucial for a more comprehensive understanding of the processes of Europeanization of national courts. However, it should be stressed that developing appropriate measures of Europeanization is a large project in terms of data collection, which will have to be extracted from surveys, historical archives, rulings collections or interviews. For now, we are in possession of evidence concerning the attributes and involvement of national judges for a few member states. While this is sufficient for demonstrating generally how Europeanization should be understood, we would encourage others to gather new data that can contribute to this discussion.

Notes

1. The informal reference to 'European values and norms' encompasses terms like 'European values and norms', 'community obligations, 'European integration', 'European communities', or similar.
2. Data from the official database: http://www.poderjudicial.es/search (accessed 20 May 2017).
3. C-224/01 *Gerhard Köbler v. Republik Österreich*.
4. This dichotomy is becoming less significant in EU law because of the principle of direct effect.
5. Source: iCourts' dataset on International Judges by Mikael Rask Madsen.

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