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Why the European Court of Justice is
not a Political Actor**

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Abstract:

What characterizes the EU today is that it is not only a multi-level governance system, but also a *multi-context system*. The making of Europe does not just take place on different levels within the European political framework, executed and fostered by different groups of actors or institutions. Rather, it also happens in different and distinguishable social contexts – distinct functional, historical, and local frameworks of reasoning and action – that political science alone cannot sufficiently analyze with conventional and generalizing models of explanation. The *European law* is such a context and it should be perceived as a self-contained sphere governed by a specific logic and rationality that constitute a self-generating impetus for integration. As a consequence, Europe's legal sphere and the processes happening within its boundaries have to be carefully distinguished from politics. Following this line of argument, it will be shown that the perception of the European Court of Justice as an actor engaging in judicial politics or politically motivated expansionist lawmaking has to be rethought. Only by examining and analyzing the context of European law as an independent space of reasoning and action may the role of Europe's high court in the process of integration be adequately captured.

Résumé:

Ce qui caractérise l'UE aujourd'hui, c'est que ce n'est pas seulement un système de gouvernance multi-niveaux, mais aussi un système multi-contexte. La construction de l'Europe n'a pas seulement lieu à différents niveaux dans le cadre politique européen, exécuté et encouragée par différents groupes d'acteurs ou d'institutions. Au contraire, elle est aussi en cours dans des contextes sociaux différents et distincts – cadres fonctionnels, historiques et locaux de raisonnement et d'action – que la science politique seule ne peut pas analyser de façon satisfaisante grâce aux modèles classiques et généralisant. Le droit européen constitue un contexte de ce type et devrait être perçu comme une sphère autonome régie par une logique spécifique et une rationalité qui constituent un moteur en soi du processus d'intégration européenne. Par conséquent, la sphère juridique de l'Europe et les processus qui se déroulent à l'intérieur de ses limites doivent être soigneusement distinguée de la politique. Dans cette perspective, ce texte remet en cause l'idée selon laquelle la Cour de justice européenne serait un acteur politique et engagé en faveur d'une expansion juridique européenne. Ce n'est qu'en examinant et en analysant le contexte du droit européen comme un espace indépendant de raisonnement et d'action que le rôle de la haute cour de l'Europe dans le processus d'intégration pourra être correctement saisi.

Introduction¹

Since the trailblazing works of Hjalte Rasmussen (1986, 1988), Joseph Weiler (1991, 1993, 1994), and Cappelletti et al. (1985) in the late 1980s and early 1990s, European law as a factor of integration has increasingly moved into the focus of political science research. Ever since, the European Court of Justice (ECJ), as the central actor in Europe's legal sphere, has attracted the interest of integration studies. But it is not just the law's importance to integration and the ECJ's central role that are widely accepted among scholars. There also seems to be consensus that "integration through law" (Weiler 1991) can be analyzed adequately by adopting the theoretical approaches originally invented to describe and explain integration processes induced by politically motivated actors. Accordingly, EU law is no longer perceived as mere texts negotiated by various political actors and written down in the Treaties. Once passed, it is also supposed to be an *instrument* or *tool* for facilitating and advancing European unification by means of judicial interpretation – with the ECJ as its main proponent. Paradoxically, the law is also understood to constitute a new and distinct political arena and battleground where, in addition to a variety of actors – from private national litigants, to diverse pro-integration activists, to nation states, to the genuine European institutions – the Court is trying to exert its influence and implement its interests by using rational strategies of enforcement (see Burley and Mattli 1993: 72, Bouwen and McCown 2007). It will be shown, however, that this perception of the rule of law in Europe is a momentous misinterpretation and has severe consequences for the perception of the legitimacy of European law.

In an article recently published, Alter and Helfer rightly pointed out that "prevailing scholarship puts too much emphasis on the self-interested power-seeking of judges, the importance of institutional design features, and the preferences of governments to explain lawmaking by international courts" (Alter and Helfer 2010: 563). Yet, they did not go far enough in their criticism to fix the main problem underlying current debates. The core difficulty with contemporary studies is that they lack a substantial examination of the law itself, and therefore, of the ECJ's work. They miss the possibilities and limitations arising from Europe's unique legal community and treat the Court as a *political* as well as an *interest-rational* actor steadily advocating for deeper integration.

Within the given framework, both ideas are as fundamental as they are problematic. First, perceiving the ECJ as an actor engaging in pro-federalist politics (e.g. Stone Sweet 2004: 232; Josselin and Marciano 2007; Alter 2009b: 44) ignores the legal and craft-bound foundations of its work. It obscures how embedded the Court is in the context of European law, as well as the options and restrictions resulting from that. Second, claiming the Court is a rational actor is not false *per se*, but the notion of what could be called a "trivial rationality"² employed in the current debates is quite inflexible, mechanistic, and universalistic. It is a one-size-fits-all-concept that could be described as a linear and non-changeable function connecting actor and action in a predetermined, unchangeable way without being influenced by social institutions or frameworks of reasoning and action. Moreover, the concept of rationality remains an analytical black box – an object that has a shape, but an unknowable content. Ascribing this notion of rationality to the ECJ obstructs the view of the broad

¹ The author thanks Dr. Arif Ahmed, Prof. Catherine Barnard, Prof. Bengt Beutler, Prof. Thomas Bruha, Prof. Alan Dashwood, Prof. Renaud Dehousse, Dr. Geoffrey Edwards, Dr. Markus Gehring, Prof. Armin Hatje, Prof. Jane Heal, Prof. Christopher Hill, Prof. Cord Jakobeit, Dr. Julie Smith and Dr. Marianne Takle for their advice, guidance, and many helpful comments on this research.

² The concept possesses all features of what Heinz von Foerster once called a "trivial machine." It is "characterized by a one-to-one relationship between its 'input' (stimulus, cause) and its 'output' (response, effect). [...] Since this relationship is determined once and for all, this is a deterministic system; and since an output once observed for a given input will be the same for the same input given later, this is also a predictable system" (von Foerster 2003: 208). Therefore, I will call theories relying on such a understanding of rationality as "trivial rationalistic," or will refer to the underlying theory as "trivial rationalism." The term is not meant to depreciative or degrading, but as a description of the typical explanatory mechanism in these rationalist theories.

foundation of shared legal knowledge and tradition that forms the core of the common legal system, and which must be the inevitable basis for the enduring acceptance of the whole integration project. It clouds the processes happening in the interior of Europe's legal sphere and detracts from the fact that the legal system grew, developed, and was differentiated over time by means of law – not just politics.³ Significantly, Alter and Helfer did not even consider a judicial explanation in their study. Instead, merely stating the importance of law, they claimed that the influence of “scholarly and practitioner associations that united pro-integration advocates and worked to educate the larger legal community about the ECJ's view of European law” (Alter and Helfer 2010: 584) can be a convincing explanation for expansive judicial lawmaking. But would it not be much more plausible to understand the demand for the creation of legal scholarship as a logical result of the establishment of European law itself? And would it not be necessary and only logical to first eliminate the possibility that there is an explanation for the Court's expansive lawmaking within law before assuming a political setting and looking for “legal advocacy networks” (Ibid.: 585) enforcing their preferences?

This article will offer an alternative approach highlighting the options and limitations of reasonable action within the context of European law. It will be shown that there are good reasons to shift the focus away from actors and their interests and to concentrate more on the “rules of recognition” (see Hart 1961) effective in a specific functional, historical, and local framework of action. This does not imply that neither actors nor institutions play any role in the litigation processes happening in Europe. Political science research, especially constructivist studies in the last two decades, have done a convincing job of showing theoretically as well as empirically how various institutions and norms are able to shape action and socialize actors' interests (for an overview see Zürn and Checkel 2005). However, to derive convincing explanations about “integration through law” in Europe, one must inevitably engage systematically with the law itself and perceive it as a self-contained space of reasoning and action. In other words: it is about understanding the rules of the game, not just about the motives of players for playing the game or the way the game shapes the thoughts and actions of the players.

This proposed shift towards the context does not entail a naïve or idealistic perspective on law as a world where interests can never prevail and where actors are striving for justice and nothing but justice. Quite the contrary: interests have and have always had their place in law. Dehousse is right when he states: “good political science cannot ignore legal constraints, just as lawyers must make sense of the politics of laws, i.e. the way in which legal arguments are used by a variety of actors to pursue their own interests” (Dehousse 2002: 123). Put another way, although there might be interests in law, there are also strict and commonly accepted rules defining who might pursue legal claims, how these have to be brought forward, and which forms of argument are legitimate and which have to be refused – in sum, the rules of law.⁴ For this reason, the approach favored in this article must be understood as a “nothing-without-law approach,” rather than a “nothing-but-law approach.”

The model of *context analysis* outlined here offers a systematic analytical framework for approaching and assessing the role of law in Europe. As a contribution to the discussion about “integration through law,” it aims to close a gap in current research. Unlike earlier approaches and studies, such as that of Cappelletti et al., this context perspective will not focus on the role of law in an overall political integration process and how it “defines many of the political actors and the framework within which they operate, controlling and limiting their

³ For a close discussion on “trivial rationalism” and the possibility to transform the notion of rationality, see Grimmel 2010a, 2010b, 2011.

⁴ For example, nobody would insist that plaintiff and defendant or their advocates are free of interests in their case. Interests might also be legally relevant, e.g. legitimate interest in the right of privacy or health protection. Judges, on the contrary, can never claim legitimate interests. They are always bound to neutrality and have to apply the laws by the means of law.

actions and relations” (Cappelletti et al. 1985: 4). Rather, context analysis concerns itself with how legal frameworks, especially the European one, function; how they change over time, and how they impose demands for reasoning and action on actors – judicial as well as political ones. One can even take the argument one step further and say: by entering the context of law, every actor becomes a legal actor or, more precisely, every actor compulsorily takes a legal role and therefore is unavoidably bound to certain legal rules.

The article will begin with a brief overview of the central theoretical approaches to the European Court offered by political science so far. It will be argued that although all these different analyses and their underlying explanatory patterns seem to offer an abundance of accounts, in effect, they all share a similar understanding of the ECJ as actor predetermining the perception of the rule of law in Europe. In a second step, it will be shown that this disregards the fact that European law itself, to some extent, sets the rules of the game and must be understood as an independent variable providing reason for action. The central thesis of this article is that we have to take into account not only the *actors in the field of law*, but first and foremost, generate knowledge about the *law itself* to be able to understand the European integration through law. The latter can only be done by systematically examining and analyzing the idiosyncrasies and rules of the law stored within a certain social *context* of reasoning and action. Third, by way of debating some of its best-known landmark cases and doctrines of the “foundational period” it will be examined how the ECJ established autonomy of European law. This empirical evidence will outline how integration theory has to re-conceptualize both European law and the Court to draw a more realistic picture of both. The article will conclude with some general remarks, and an overview of why such a contextual approach should be used to develop a better and much more promising understanding of the process of integration in Europe.

1. The “Rational Politics” of Legal Integration – a Critical Appraisal

Scientific engagement with the ECJ started at a surprisingly late point in the history of European unification – long after the Court had rendered some of its most fundamental and momentous judgments. The first major debate in political science about the role of high court decision-making in the integration process arose in the early 1990s between scholars of neorationalism and neofunctionalism, and was later joined by proponents of liberal intergovernmentalism and supranationalism (see Garrett 1992, 1995; Burley and Mattli 1993, 1998; Alter 1996, 1998, 2000; Garrett, Kelemen and Schulz 1998; Kilroy 1999; Mattli and Slaughter 1995; Moravcsik 1995; Pollack 1997; Slaughter, Stone Sweet and Weiler 1998; Stone Sweet 1999, 2004, 2005; Scharpf 1999, 2009; Shapiro and Stone Sweet 2002; for an overview see also Schepel 2000; Conant 2007, 2002; Grimmel and Jakobeit 2009). What is remarkable here is that none of these theorists endeavored to formulate a tailor-made, empirical-analytical theory to explain “integration through law.” Instead, they all transferred existent approaches, models, and concepts from politics to the field of law. It seems that their project was solely to show how their preferred and already elaborated explanatory structures could be used to explain the ever-growing influence of the Court, which could no longer be ignored in the 1980s. More precisely, research was obviously driven neither by the ambition to develop an understanding of European law or “integration through law,” but to show the superiority of certain theoretical presumptions.

This venture was afflicted with great and, in the end, unsolvable problems right from the beginning, due to the fact that these theories had originally been designed to explain politically steered and elite-driven integration processes. Although they were quite convincing in the early years of the EC/EU, which had been widely shaped by the interests of a growing group of states and their political leaders, these explanations were unsuitable and insufficient to examine the rule of law in Europe. Over the years, the EU has evolved into a highly complex entity in which integration implies far more than governmental bargains, negotiations at roundtables, or decision-making in Brussels. By incorporating the ECJ into these theories, and consequently classifying it as one more *political* player among other

actors and institutions trying to shape the EU in the pursuit of its own *rational* interests (see e.g. Vanberg 1998), no attention was paid to the idiosyncrasies of law, nor to the fact that the ECJ is delimited by a craft-bound, legal rationality.⁵ Put another way, law and legal integration were considered politics hiding behind a façade of legalese:

Neorationalism claims that the “justices’ primary objective is to extend the ambit of European law and their authority to interpret it” (Garrett 1995: 173). To advance this purely political agenda and safeguard its position of power vis-à-vis the nation states, the ECJ has to act rationally in the sense that judges try to foresee the reactions of the member states to make sure a boycott does not undermine the Court’s authority and future influence. *Liberal Intergovernmentalism* comes to a very similar conclusion by attributing a “radical judicial activism” to the Court (Moravcsik 1995: 623), but focuses more on the motivations behind the governments’ acceptance of the Court’s judgments (see Moravcsik 2002). At first glance, *Neofunctionalism* seems to be opposed to these approaches, but it shares the crucial belief in a self-interested and rationally acting Court with a political agenda (Mattli and Slaughter 1995: 185) and the ambition to gain “prestige and power” (Burley and Mattli 1993: 64) by using law as “mask and shield” (Ibid.: 73; see also de Búrca 2005). *Supranationalism* concurs: “ ... all legal actors are instrumentally rational, in the sense of generally pursuing their own individual or corporate interests, however defined” (Stone Sweet 2004: 37).⁶

Retrospectively, many open questions remain in these approaches: which kind of rationality, exactly, can be ascribed to an institution that consists of twenty-seven judges who come from different European countries with distinct legal traditions, all trained in these traditions and their national laws for many years, who are now sitting in different constellations in the eight different chambers of the ECJ? Did these judges change their personalities the day they moved to Luxembourg so that they reflexively exercise European “judicial activism,” or pursue their “integrationist agenda aggressively and with political acumen” (Perju 2009: 330) instead of considering the interests of their individual nations? Or does the ECJ as an institution make the difference, changing the attitudes judges have towards law and legal reasoning? Is there a hidden political agenda inherent in the ECJ bending the will of judges and advocates general? Even more importantly, from an analytical point of view: does the undeniable fact that the ECJ has expanded the reach and scope of European law inevitably lead to the conclusion it had an interest in doing so? Is it true that cause and effect are one and the same?

Today, discussions have not moved far beyond this point. Contemporary approaches dealing with the ECJ seem indeed to be “trapped in a supranational-intergovernmental dichotomy” (Branch and Øhrgaard 1999). The core assumptions of early political science integration theories prevail – and so do the many open questions. The rationalist “classics” obviously determined the perception of the European Court and its work in recent studies, just a few of which will be cited here: Höpner sees it as an acknowledged fact in law, political science, and sociology that the European Court, by expanding “European law extensively ... has become an ‘engine of integration’” (Höpner 2010: 3; cf. 2008). For Scharpf there is no doubt that the ECJ is willing and “able to exercise policy-making functions” (Scharpf 2006: 851) and he criticizes the “Court’s power of judicial legislation” (Ibid: 852). Alter, explicitly drawing on neofunctionalism as a theoretical basis, typifies the Court as a “political actor in Europe” (Alter 2009a: 5) equipped with significant “political power” (Idem 2009c: 287) and marked by the will “to expand its own authority” (Idem 2000: 513) and the rule of European law by “aggressively interpreting and enforcing ECSC rules” (Idem 2009a: 8). Josselin and Marciano highlight the principal-agent relationship between the Court and the EU member

⁵ For a detailed discussion on the notion of rationality in general see Grimmel 2010b, 2011 and in regard to integration theory, Grimmel 2010a.

⁶ Stone Sweet adds: “Judges, I expect, will seek to maximize, in addition to their own private interests, at least two corporate values. First, they will seek to enhance their legitimacy, vis-à-vis all potential disputants, by portraying their own rulemaking as meaningfully constrained by, and reflecting the current state of, the law. Second, they will work to strengthen the salience of judicial modes of reasoning vis-à-vis disputes that may arise in the future” (2004: 37).

states by trying to show “how a legal agent undertook actions and made decisions with political consequences” (Josselin/Marciano 2007: 72). Kenney emphasizes the Court’s superior position of power vis-à-vis other actors in the EU, concluding that the “ECJ has used its judicial power to promote greater European integration” and by so doing “expanded its own power and transferred power to national courts at the expense of member states” (Kenney 2000: 597). Cichowski (2007), Selck, Rhinard and Häge (2007) and Carrubba, Gabel and Hankla (2008, see also Carrubba and Murrah 2005) contribute with empirical studies centered on the “strategic behavior by judges in the face of political constraints” (Ibid: 449) thereby narrowing their cognitive interest to match the assumptions about European law made in earlier theoretical approaches (for a close theoretical examination and discussion see Grimmel 2010a).

In summary, current political science research dealing with the ECJ and its work is both too narrow *and* too vast in scope: it is too narrow because it tries to explain integration only by reference to actors and their political-rational interests. There is no substantial examination of the legal context and its idiosyncrasies – apart from the very general constructivist claim that ideas, norms, identities, roles, etc. matter. At the same time, the extent is too vast because European integration was never strictly about politics, but has been subject to multiple contexts, each with its own inner logic, rationality, and distinctive manner of integration.

The widely shared conclusion that the ECJ had an interest in expanding the ambit of European law into the member states’ national legal systems cannot inevitably deduced from the mere fact that it has *de facto* done so. The law itself, as a self-contained context of reasoning and action, must be seen as the intervening variable. It is not only not helpful to “situate courts in a broader political context, with judges as one actor among others contributing to outcomes” (Conant 2007: 62), like Conant proposes. From an analytical point of view, it is also highly problematic to treat legal actors as political ones and to conclude that “showing how judicial influence varies depending on differences in the configuration of interests and institutions” is the “type of research [that] is most likely to advance our understanding of legal integration” (Ibidem.). The biggest and most pressing question arising here is: what does it mean for the European law and the common legal order if it is a dependent variable of actors’ rational interests, as rationalist theories suggest? What does that mean for the legitimacy of the EU? Can a judicial system operating on such an interest-driven foundation ever be accepted? Or will the whole legal system sooner or later plunge into crisis, since the law would lose the acceptance of those whom it concerns – the European people?

At this point the well-intentioned ambition of “building bridges” (Zürn and Checkel 2005; Checkel 2005; Johnston 2005; see also Müller 2004) between rationalism and other scientific traditions like constructivism must necessarily come to an end, since the entire quest for interests, which is a core element of rationalist approaches, seems to be flawed in regard to the ECJ, its judges, and the law as a whole. Even to resort to the very basic assumption that the European judges must at least have an interest in law must be refused, since it is based on a fundamental confusion: judges do not administer justice because they have an interest in doing so, but because it is the professional assignment imposed on them when they took office. Nobody would ever even think of claiming that a bus driver has an interest in driving buses or transporting people, nor would one conclude that the tax accountant has an interest in dealing with taxation, although these are their jobs and they might feel dedicated to their work. Interests are neither a meaningful category in law, nor a relevant one.⁷ Not the interest in law, but the law itself is the key to understanding “integration through law.” Thus, it becomes necessary to first abandon the ambitious but overstretched research agenda of rationalist integration theory and second, to open up the black box of European law (see also Dehousse 2002).

⁷ With the exception it is codified as object of legal protection.

2. Opening the Black Box of EU Law – Context Analysis as an Alternative Model for Approaching Europe’s Legal Sphere

European law today is based on a variety of norms, rules, methods, and procedures. Not all of these are codified and written down in the texts of the Treaties, or the countless initiatives, regulations, directives, decisions, recommendations, and statements originated in Brussels and Strasbourg. There is a broad range of legal traditions, doctrines, and approved customs, as well as craft-bound forms and methods of interpretation, legal reasoning, and argumentation. All of these became “habits” (Hopf 2010) and are widely acknowledged and accepted by lawyers, legal scholars, and legal representatives throughout Europe as coercing legally relevant action. In short, the EU’s legal system consists of much more than mere statutory provisions and regulations. It constitutes a *context* – a dense net of commonly known and accepted rules and procedures providing actors with reasons for meaningful action.

Such a context never *causes* (cf. Wind, Sindbjerg-Martinsen and Pons-Rotger 2009) or predetermines either action (as in “trivial rationalist”⁸ conceptions) or categorical agreement with action, but provides *reasons* for action as well as for their acceptance or rejection. It is the repository of commonly shared legal knowledge, of doctrines, concepts, and arguments, that provide the basis for mutual understanding in Europe’s legal sphere, enabling the justification of meaningful action.

It is the nature of law that there is no “causal mechanism” (Zürn and Checkel 2005: 1048) coercively leading to a certain conclusion or action. Law is a human institution consisting of legal patterns of how to deal with social problems. In this regard, it should not be confounded with formal logic or mathematics where there has to be conclusive evidence all the way down. It is not fixed once and for all, but is in constant motion and has to be negotiated over and over again. However, this does not mean that legal judgments are subject to arbitrariness or private actor’s interests. Although it needs individuals to apply and further develop law, legal argument and decision-making can never be just private acts of reasoning or mere “mental exercise.” There are strict rules always guaranteeing a minimum of stringency, consistency, coherence, and public verifiability (Strauch 2000, 2002, 2005; on coherence in law see Bracker 2000; also Rescher 1973; Coomann 1983; Benoetxea 1993; Benoetxea, MacCormick and Moral Soriano 2001).⁹ For this very reason this article will not center on the “cause-effect scheme.” Instead, I will examine how the “reason-decision scheme” has to be embedded in the wider context of law to make determinable which claims, actions, and judicial judgments are well-founded and compelling in front of the legal audience and which are not.

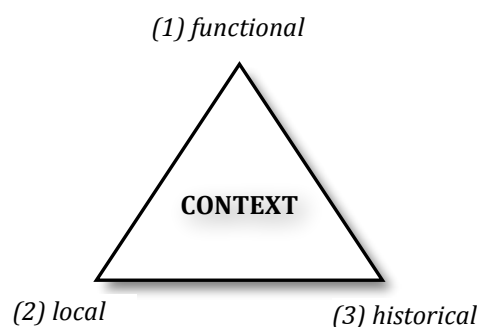


Figure 1: The three dimensions of a context

⁸ Cf. note 2.

⁹ Cf. Strauch 2000, 2002, 2005; on coherence in law see Bracker 2000; also cf. Rescher 1973; Coomann 1983; Benoetxea 1993; Benoetxea, MacCormick and Moral Soriano 2001.

The context of European law enables the identification of meaning and action in threefold ways, each of which any relevant actors, and especially Europe’s high court, have to refer to. Contexts are always distinguishable from other contexts in the following ways (cf. Figure 1):

First, every context can be delimited by the mere fact that it is an autonomous societal institution. As such, it constitutes a *functionally distinct space of meaning and reasoning*. Max Weber argued very convincingly in *Economy and Society* (1922) that modern societies have developed several “value spheres” over time, each with its own means and ends. Although one does not have to agree with Weber’s particular distinction of such spheres (economy, politics, law, science, religion etc.), his findings are extremely useful for understanding the autonomy of law. In modern, functional, differentiated societies, the “sphere of law” forms an independent and acknowledged social space of reasoning. Only within its borders do inter-subjective legal reasoning, justification, and acceptance become possible. At the same time, law as a functional differentiated entity must be clearly distinguished from the legislative and political democratic processes whose aim is to set and negotiate the law. Legal reasoning is, and at least in democratic systems, can never be legal politics. Although in effect both law and politics elaborate and concretize legal rules, the specific task of jurisprudence is interpreting, applying, and to some extent, further developing laws, which in praxis can neither be self-enforcing nor logically coercive. For this courts and their judges have to provide convincing explanations – the basis of which must be certain forms of argument that rationalize the actions within the borders of a legal community, thereby distinguishing the context of law from politics. To put it clearly, only the context of law and the sum of its acknowledged rules of recognition by the legal community, not the motives of actors, can tell which claims and arguments are legitimate and which have to be refused.¹⁰

Based on Toulmin (1958), the basic and ineluctable “reason-decision scheme” in European law can be displayed as follows (see also Alexy 1983, 1992; Patterson 1996, 2004):

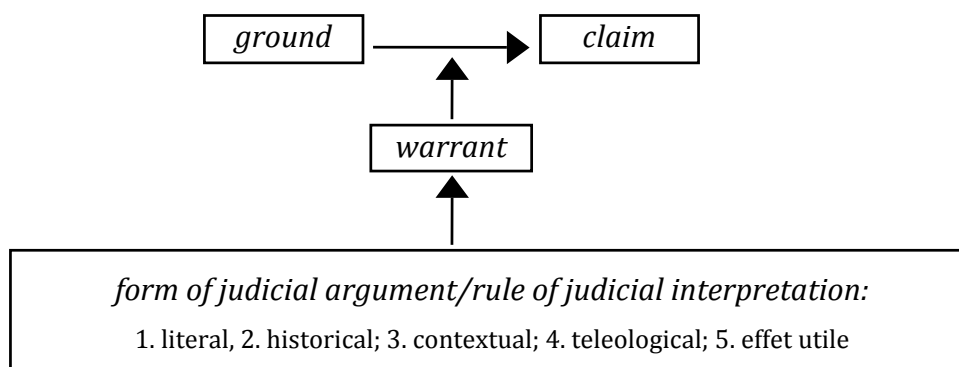


Figure 2: The basic “reason-decision scheme” in the context of European law

Every judicial argument starts with a relevant claim, like “*The national law A in state X is not consistent with the law of the EU*” or “*State Y violates EU law by doing B.*” Additionally, there has to be a ground that proves the claim in order to validate it. It can take the form of: “*The national law A in state X hinders the free movement of goods*” or “*By doing B State Y violates fundamental rights (e.g. health, equal treatment, non-discrimination).*” There are two types of criteria for measuring the validity of a claim: first, it must be consistent.¹¹ Second, the premises and propositions must be true and sufficiently justified (see Bracker 2000: 199). Moreover, claim and ground have to be backed by a legal warrant, which is needed to answer the question of why and to what extent the ground is relevant to the claim. However,

¹⁰ This does not mean that interests are illegitimate in law per se, but that they have to be transferred into legal arguments to be acceptable and considered valid claims.

¹¹ The conclusion (claim) must directly result from the premise (grounds for the claim).

since a legal text can be interpreted in manifold ways, there are commonly shared rules of how to interpret a warrant: these are the acknowledged forms of legal argument. They are specific to each legal order and must be seen as ways to produce convincing or at least acceptable, and therefore legitimate, judicial outcomes.¹² Again, the decision about which legal arguments and decisions are acceptable and which should be refused is one that cannot be undertaken by just referring to the form of the reasoning shown in the “reason-decision scheme” above. It can only be made by asking for the concrete embeddedness and justifiability of the argument in the wider context of law. This extends from the institution of law in general to European law in particular.

Second, the European legal system has developed an autonomous order with its own forms of legal rationalization that make it *locally distinguishable from other legal contexts* like national law, international law, individual member state law, and non-European legal orders. In a local sense, European law is distinct from other legal orders by the fact it is *European* law, possessing a unique legal tradition and genesis. The borders of the context formally consist of membership in the European legal community, which constitutes a specific legal system providing its own, genuinely *European* judicial sources and patterns of interpretation, legal cognition, and justification. This is particularly apparent in the forms of judicial argument that are canonically accepted and commonly used to interpret European law. The rules of argument that the ECJ and all the other actors in the European context have to abide by are literal, historical, contextual, teleological, and “*effet utile*”¹³ (Figure 2) (for a close examination of legal argument in EU law see Bleckmann 1982; Benoetxea 1993; McCormick 1996; Anweiler 1997; Benoetxea, McCormick and Moral Soriano 2001; Seyr 2008; Walter 2009). These, together with the stock of legal norms, build the inevitable basis of meaningful action in European law – this applies to the adjudication of the Court as much as to its critiques. There can never be “acceptance of legal rulings simply because they have the quality of law” (Hunt 2007: 155). To develop an inter-subjective “‘persuasion pull’ and ‘compliance pull’” (Weiler 1993: 419) judges cannot merely rely on the power bestowed by their institution. Instead, they have to convince through compelling legal argument and rely on the argument’s universal understandability and acceptability within a particular European context. What is most characteristic of the local category, however, is the fact that Europe is a largely incomplete construct that has to be further developed. The term “Europe” neither marks a fixed territory nor a settled political or judicial system. Europe is in constant movement. This is also true in a temporal sense.

Third, European law is extraordinarily dynamic and, with its unfinished character, subject to multifaceted, ongoing changes. The rapid developments in the EC/EU forced politics to adjust the Treaties over and over again. But it was not only politics that had to modify the legal order over the course of time. Rather, the law itself had to be constantly changed, interpreted, and improved. European law as a context is and must always be a *historically distinct space that is never identical to other past or future configurations* of the same (functional or local) context. This is due to the fact that, like every legal system, it is in permanent fluctuation. Also, the changing character does not imply that European law came into being from nowhere. Nor does it mean it is arbitrary, or can be subject to “activist case law of the ECJ” (Bouwen and McCown 2007: 426) or a pro-federalist blueprint. From the dawn of the European Community, the contrary has been the case: the comparatively young European legal order could not have been brought into being without considering the repository of joint legal knowledge and tradition that was and still is the core of the common legal system. The same applies to the way the ECJ further develops the law case by case. It can only depend on a steadily adjusted nexus of laws, legal insights, doctrines, and rules that emerged in Europe over decades and centuries. Surrounded by this broad framework, the

¹² This does not necessarily imply that everybody accepts or appreciates the legal decision.

¹³ The principle “*effet utile*” (principle of useful effect or practical effectiveness of EC law) is a principle of judicial interpretation in international and European law, favoring the interpretation which best promotes the objectives of the treaties and obliges the member states and their courts not to diminish the effectiveness of supranational law in their national legal orders.

ECJ has the extraordinary difficult task of ensuring the consistency and historical coherence of its decisions. “The Court of Justice ... creates its own legitimacy primarily by the internal logic and consistency of the actual results expressed in its judgments and by the significance of those results for the development of the Community legal order and the continuation of the process of integration” as former ECJ Judge Everling once put it (Everling 1984: 1309). This means nothing less than the necessity of maintaining the connection to its past and contemporary judgments, as well as foreseeing future problems that might arise through its decision-making. Ludwig Wittgenstein once said: “Words have meaning only in the stream of life” (Wittgenstein 1981: 173). The same applies to the adjudication and judicial development of European law. Only by continuously generating a self-contained and continuous chain of consistent and coherent judicial interpretation and adjudication is the Court able to ensure the indispensable transparency and acceptability¹⁴ of its judgments.

In this embeddedness in a historical and local specific context of law and legal reasoning, the ECJ does not differ very much from European national high courts like the French *Conseil constitutionnel* or the German *Bundesverfassungsgericht*. All of them do not act in an empty space, but have to obey certain legally craft-bound and national standards, procedures, and rules delimiting legitimate from illegitimate action, which are subject to permanent transformation. This basic rule applies to all of them: “... propositions of law are true [and only therefore have to be accepted, AG] if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice (Dworkin 1986: 225)”. Therefore, it is even more astonishing that the European Court, but not individual national judiciary bodies, is regularly confronted with the allegation of engaging in “legal politics” (Conant 2007; see also Josselin and Marciano 2007) or even “radical judicial activism” (Moravcsik 1995: 623). Do the national high courts not also quite regularly produce controversial decisions that have far-reaching political implications that are discussed by legal and political experts and are subject to broad debates on principles in the media? Nobody, however, would consider accusing the *Conseil constitutionnel* or the *Bundesverfassungsgericht* of being political actors following their own interests or an agenda. So why don’t we start to treat the ECJ the same way: as a fallible judicial actor that can only rely on the principle “truth instead of authority” (Neumann 2005; see also Dobler 2008) and must therefore be criticized by *legal* and not *political* argument if it is not convincing in its reasons given for a particular judgment.

The commendable attempt of “building bridges” towards “trivial rationalist” theories arguing for a close examination of interest-constellations is futile, at least in the context of law, since it is simply irrelevant if a judge has a certain attitude or preferences towards a legal issue or case at hand or is a “true believer” (Johnston 2005: 1013). It must be pointed out that a judgment has never to prove the integrity or honesty of the judges, but to make a convincing argument in the context of the law by the means of the law. On the contrary, the judges – although they might have interests, motives, and preferences – always have to step back behind their judgments and their rationale for a decision. In other words, the judgments, not the judges, must speak for themselves. Otherwise, adjudication would not be about legal provisions and their appropriate application, but to show the moral qualities of the human beings in charge of interpreting the law. It goes without saying that this, at least in democratic political systems, can and must never be the task of the law or any argument.

Every legal scholar is aware of the fact that judges – in national as well as in the European Court’s chambers – can never be totally free of personal considerations. However, the Court must rely on its ability to convince; and it can only be convincing by reference to the common European legal norms, procedures, and traditions to be able to claim that its legal grounds can be understood and accepted by other actors within the same context. If and only if the latter is not regularly the case – i.e., if the ECJ constantly produces decisions that are obviously biased, badly founded, and show no receptiveness to the critique of

¹⁴ The term “acceptability” does not necessarily imply that everybody appreciates the legal decisions, or that there is never dissent or dispute; nor does it mean that there cannot be critique of the Court’s decision-making.

legitimacy problems – the question about interests becomes relevant. The proof or disproof of this allegation, however, is still missing, since political science has largely missed out on engaging with the context of law and legal argument.

3. Establishing and Defining the Autonomy of European Law and the Myth of Judicial Activism in the “Foundational Period”¹⁵ of Integration

One of the most persistent stories produced within the rationalist framework of analysis, repeated over and over again in many prominent studies, is the appraisal that the ECJ created the autonomy of European law in the early years of integration driven by a political interest in expansionist lawmaking, laying the cornerstone for a series of further steps that siphon ever more power from the nation states to the European level – all without state consent (Josselin and Marciano 2007; Granger 2006; Kenney 2000; Alter 2000, 2009a,b,c; for a good overview see Conant 2007). In this light, the institutionally influential cases like *Fédéchar*¹⁶ and *AETR*¹⁷ on the principle of implied powers, *van Gend en Loos*¹⁸ on the principle of direct effect, *Costa/ENEL*¹⁹ on the principle of supremacy, or even *Internationale Handelsgesellschaft*²⁰ on the protection of fundamental rights, must appear as “original sins” in a continuing story of European judicial empowerment. This story, however, is a myth reflecting rationalist theoretical explanatory patterns rather than the actual reasons for the European judicial process and the historical circumstances in which the decisions were made. Here it will be shown that although the legal decisions of the “foundational period” can be unhesitatingly characterized as a “quiet revolution” (Weiler 1994) spearheaded by the ECJ and had a considerable political impact, they were not only quite well founded, but also necessary in light of the historical, local, and functional dimensions of the context of the emerging European legal order (see also Everling 1984: 1305).

To draw a picture that can convincingly explain the ECJ's role in these early days, it is not sufficient to merely state the fact that the Court engaged in an expansionist construction of European law. It is essential to be able to answer the pivotal question of *how* the law was developed. But other than noting Alter and Helfer's recently published article journal, which examined how the ECJ established “its legal and political authority” (Alter and Helfer 2010: 569), the focus here will be not on the fact that the Court possesses a considerable *authority*, but on how the ECJ established *autonomy*²¹ of European law in the early years of integration. The former is the rationalist and actor-centered approach, while the latter represents the contextual perspective that edges reasoning and action ever closer into the center of European law, while simultaneously accounting for the framework in which it occurs. Explicitly, the aim here is not to provide close judicial argument for or against particular ECJ rulings. To judge the veracity of judicial argumentation is and must stay the task of jurisprudence. The promise of this essay, however, is to offer a more convincing story about “integration through law” and to try to understand the Court as a judicial actor rather than a political one.

So, what are the exact demands a *judicial* actor has to comply with to be considered rational within the legal context, and which of these have to be proved here to disprove the accusations of “politics in robes”? From the perspective of the context, it is not important to

¹⁵ Weiler 1991: 2413; meant is the phase of ECJ jurisdiction starting in the late 1950s and ending in the mid 1970s.

¹⁶ 1956, Case 8/55.

¹⁷ 1971, Case 22/70.

¹⁸ 1963, Case 26/62.

¹⁹ 1964, Case 5/64.

²⁰ 1970, Case 11/70

²¹ The word “autonomy” is composed of the ancient Greek words *auto*=self and *nomos*=law. Here, the autonomy of European law will be referred to as an independent, self-contained space of action and thought no longer dependent on the benevolence of the member states and their political acceptance in interpreting and implementing the laws.

have the power or opportunity (i.e., because of a certain institutional arrangement or an opportune constellation of interests) to enforce certain preferences. Every action in law has to fulfill three basic conditions to be perceivable as rational, legitimate, and acceptable:

first, in the functional context, it has to be in line with the context-specific rules of judicial interpretation and argumentation that delimit law as a social practice from politics and other frameworks of reasoning and action;

second, in the local context, it has to meet the requirements of a shared, genuine, European understanding of law, i.e. a basic stock of rules and norms that make European law distinguishable from other legal orders and systems, such as international law, the laws of a certain member state, or the law of other non-European legal orders;

third, in the historical context, it has to allow comprehensibility, connectivity, and acceptability in terms of a common legal practice that can be only meaningful as part of a chain of political-judicial achievements coherent in light of past, other contemporary, and future legal/judicial developments.

If one can say of an actor that he acts totally in accordance with these basic demands imposed on him by the context, the question of motivation necessarily becomes a minor matter, since the action must be considered as context-rational and therefore acceptable. It has to be emphasized again that this approach does not aim to justify the ECJ's judgments wholesale. Rather, the intent is to suggest context analysis to pave the way for overcoming the deadlocked and long-lasting scientific debates on the *political* role of the Court, and show that it is absolutely necessary to take into account the law in order to understand the integration process fostered by law.

The method of context analysis used here differs significantly from "trivial rationalist,"²² actor-centered, or interest-based explanatory patterns in the way it takes an internal perspective on European law. From this point of view, the question is no longer about which actors prevail in enforcing or implementing their interests, or which causal mechanisms are at work in lawmaking – it has been argued above that both questions are largely irrelevant in the context of law – but about the options and limitations of reasoning and action inherent in a context. This does not imply that actors do not have their own interests or are mere pawns in the game of European law, but that they are bound to the imperatives that are specific to a certain context and shared by the other participants in the same social framework. These rules, at the same time, must delineate undue political activism from legitimate judicial action. In other words, the issue of whether the European Court of Justice is a political rather than a judicial actor has to be decided from within the context of law, not politics. Otherwise it would be presumed that law is politics, although this explanation must be subsidiary and can only be considered acceptable and valid if there is no legal one.²³

Following this line of argument, the legal practice of the ECJ in the "foundational period" will be contextualized in its historical, functional, and local aspects to examine if the context of European law provides sufficient evidence that the rules of law in Europe have been broken by politics or not. Debating the Court's jurisdiction on *direct effect* and *supremacy* – which are still the most thoroughly investigated cases in political science – and contrasting these to the central suppositions of "trivial rationalist" approaches will test if there are compelling explanations *within* law.

If this is the case and it can be shown the ECJ used sound legal reasoning in all the contexts examined, this must be the intervening variable disproving the claim of "legal politics," as it would be invalid to suspect political motivation in these cases (otherwise the critics' argument would obviously violate the essential separation of law and politics and

²² Cf. note 2.

²³ If there is a convincing explanation for the "integration through law" facilitated and promoted by the ECJ, there can be at least no good reason to claim the Court would engage in anything other than judicial action.

therefore do what they object to – unduly mix law and politics). The landmark doctrines on direct effect and supremacy²⁴ that have been widely reviewed by political scholars should be especially interesting and challenging here, since beyond doubt, the “foundational period” of adjudication must still be seen as the most pioneering and prominent one. At the same time, the establishment of direct effect and supremacy must be “hard cases” for an approach attempting to refute “judicial activism” due to the fact that they had a highly formative impact on the shape of the EU and therefore can be seen as a litmus test of whether or not the accusations of legal politics are valid.

Historical Context – the Need for Coherent Adjudication Over Time

To assess if the Court’s decisions in the early years of integration were acts of judicially unsubstantiated activism that must be categorized as politically motivated, or if they were well-founded within the legal framework of that time, it is essential to *first* envision their institutional and contractual basis in the 1950s and 1960s. Only a few years after the European Coal and Steel Community (ECSC, 1951/52) was brought into being as the first supranational organization since the end of World War II, the Rome Treaties establishing the European Economic Community (EEC, 1957/58) were signed. Unlike the Treaty of Paris, which formed the basis of the ECSC, the EEC-Treaty was not a “traité-loi,” but a “traité-cadre.”²⁵ As such, it did not just contain explicit legal regulations for a specific area of common action, but laid the cornerstone of a supranational entity with autonomous institutions and equipped with far-reaching legal competences (Haltern 2007: 40). In this sense, the early European Court of Justice must not be treated as an “International Tribunal” (Plender 1983). It is crucial to recognize this very qualitative difference in the Community’s legal foundation in order to comprehend the judgments made by the ECJ in the following years.

Second, it is also crucial to bring to mind the particular historical situation in which the doctrines of implied powers, direct effect, and supremacy were developed. This situation should be carefully differentiated from other past and future configurations of the context of European law – an aspect that is often overlooked in rationalist analysis. Against a background of long and devastating warfare and the great success of the ECSC, all six member states made the qualitative step towards deeper integration by signing the Rome Treaties in the late 1950s, fully aware of the fact that it was new soil they were stepping on. Although there was indeed no agreement about bringing a European federation into being, there was broad consent that the old system of nation-states has to be contained in an effective institutional structure. The explanation that “the most assertive supranational court of that time managed to fly under the radar so successfully” (Perju 2009: 331) and member states did not notice the reach of its jurisdiction, on the other hand, is too simplistic and historically implausible. The member states knew the consequences of their decision to take the Community agreement, including the European Judiciary, to a higher level (Mancini 1989: 595; Mancini and Keeling 1994: 186). But they “displayed little interest in the details of the legal system. Instead, they delegated the construction of the judicial system to a Judicial Group composed of legal experts, with significant autonomy from member state direction.”²⁶ This Group was given broad authority in devising a judicial system” (Heisenberg and Richmond 2002: 204; see also Everling 1984: 1305). The popular belief that the ECJ

²⁴ All the cases and strains of adjudication chosen here reflect landmark and leading cases that are directly related to the doctrines of direct effect and supremacy, or that arise as a consequence from early case-law. They all represent middle-of-the-road cases and are part of the canonical repertoire in European jurisprudence and most legal textbooks.

²⁵ A “traité-loi” (law making treaty) is a treaty directly constituting rights and duties for the contracting states and it’s the European citizens. A “traité cadre” (framework treaty), in contrast, consciously just states cornerstones and possibly an institutional structure, both leaving lacunae and detail questions to be filled out later by political or judicial means (Beutler, Bieber, Pipkorn and Streil 1987: 40; Simson and Schwarze 1993: 26, 1995: 75).

²⁶ For a very instructive study of the social embeddedness of this Judicial Group and the circumstances of that time see Vauchez 2008, 2010.

extended European rules constraining national sovereignty far beyond the member states' original intent (see Alter 2010: 563-564) is true only in so far as the historical legislator could not foresee all the cases and judicial problems that might one day arise in Europe's unfinished Community and had to grant the Court a considerable leap of faith in the conscientious and competent development of the legal system by judicial interpretation.

From an empirical point of view, it is interesting to note that even as the wind began to change some years later in wake of de Gaulle's self-confident nationalist politics in the mid-1960s, the states did not show any serious incentive to disempower the Court, overturn its rulings, and go back to the modus of the ECSC Treaty (For a historical overview see also Grimmel and Jakobeit 2009; Heisenberg and Richmond 2002). This should have been the logical consequence from a rationalist perspective, since there should have been a broad convergence of interests, only few players,²⁷ and a strong motivation to cut back the Court's power among the six member states in order to correct or amend the Treaty under Article 236 EECT, which demanded unanimity.

So, why did the nation states not act to reverse the Court's decisions if they could? The reason lies in the nature of law itself. Whereas political decision-making might be based on earlier decisions and bound to a set of formal and informal institutional arrangements, jurisdiction and judicial law-making is bound by very strict laws and specific rules of recognition. Although it is possible to just make or refuse decisions on the basis of certain interests in politics, this was never a feasible path for judicial decision-making. Reference to former judgments (if available), shared legal knowledge and common legal traditions, as well as compelling or convincing strains of argument, have always been minimum requirements for securing acceptability. Moreover, the Court had produced consistent and coherent decisions over time, ensuring the required comprehensibility in law. By fulfilling these demands, and only by fulfilling these, it has not provided enough reason to taint the further development of European law politically and call Europe's newly established legal sphere into question.

The fact that the landmark cases have not just been *decided* by the judges on an ad-hoc basis but had to be constantly *unfolded* over time, taking into account earlier precedents and existing jurisprudence and trying to anticipate future judicial problems, can be depicted in the chain of judgments concerning the direct and indirect implementation of directives that arose as a logical consequence of *van Gend en Loos* and *Costa/ENEL*: *Becker*,²⁸ *Marshall I*,²⁹ *Kolpinghuis Nijmegen*,³⁰ *Fratelli Costanzo*,³¹ *Marleasing*,³² *Francovich*,³³ *Marshall II*,³⁴ *Faccini Dori*,³⁵ *Inter-Environnement Wallonie*,³⁶ *Carbonari*,³⁷ and *Unilever*.³⁸ These constitute an excellent example of a typical strain of judgments in which the Court has repeatedly interrelated its decisions over a period of twenty years,³⁹ developing legal doctrines step by step as it felt its way forward in the dark of *legal lacunae*.⁴⁰

²⁷ The Community just consisted of six members in those days (Belgium, France, Italy, Luxembourg, the Netherlands and Germany).

²⁸ 1982, Case 8/81.

²⁹ 1986, Case 152/84.

³⁰ 1987, Case 80/86.

³¹ 1989, Case 103/88.

³² 1990, Case C-106/89.

³³ 1991, Case C-6/90.

³⁴ 1993, Case C-271/91.

³⁵ 1994, Case C-91/92.

³⁶ 1997, Case 129/96.

³⁷ 1999, Case C-131/97.

³⁸ 2000, Case C-443/98.

³⁹ It should be added that all these cases did not come up overnight, but were slowly developed over a period of about forty years.

⁴⁰ Lacunae are not only blank spaces in the legal basis, but also include Treaty provisions that lack legal consistency and coherency with the other objectives of the Treaty.

At this point, one could object that there could still be a secret plan “to reduce the domain of national autonomy ... and create the conditions for the gradual Europeanization of national administration and judging” (Stone Sweet 2004: 232), hidden behind a veil of legalese and that the ongoing process of judicial lawmaking is its proof rather than its disproof. To verify this assumption, however, would require two things: that the strains of adjudication emanating from the early landmark cases reflect a linear, rather than a continuous process (the contrary would be empirical evidence to counter political motivation), and that there is no convincing justification making the adjudication acceptable within law (the contrary would be the intervening variable in a political explanation). This directly leads us to the functional context.

Functional Context – Crossing the Dividing-Line Between Law and Politics?

Three questions have to be addressed here in regard to the “foundational period” to counter the claim of “judicial politics”: first, if the ECJ and its judges had the competency to develop such momentous legal doctrines as *Fédéchar*, *van Gend en Loos*, *Costa/ENEL* and *Internationale Handelsgesellschaft*, or if the judicial development of the law crossed the divide into politics right from the beginning; second, if it was imperative or at least necessary to develop the doctrines, and third, presupposing answers to the former questions, if the Court’s justifications delivered as grounds for its decisions have been reasonable in law – i.e. understandable, acceptable, and therefore legitimate.

The first question is relatively easy to answer, although not uncontested in jurisprudence and political science. Keeping the historical circumstances in mind, and on the basis of the objective of the Treaty being the establishment of a Community with supranational institutions – which must have implied building a legitimate governing system in which the separation of powers is secured – Art. 164 EECT⁴¹ must be read in a broad sense, equipping the ECJ with far-reaching competencies. The European Court of Justice was never thought to be a panel of judges merely dependent on the goodwill of its contracting parties, like the International Court of Justice or the European Court of Human Rights.⁴² As the Community’s judiciary body, it was commissioned to balance the shift of legislative and executive power and to construct a legal system that brings the objectives of the Treaty to fruition and therefore “breathe life into the Treaty” (Weatherill 1995: 185).

To answer the second question about the legal necessity of the Court’s doctrines, we have to take a closer look at the reasons for its decisions. Here it becomes apparent that the perception of an expansion of European law in order to undermine the autonomy of the member states or to carry any other interest into effect is a caricature of the decisions: the doctrines developed in the “foundational period” – not only in the ECJ’s protection of fundamental rights in *Internationale Handelsgesellschaft* – have been invaluable and absolutely indispensable in helping European citizens to assert their legitimate rights and to be protected by law. The ECJ laid down the necessary constitutional basis that served to protect the legitimate expectations of the people living under the rule of the European Community, rather than willfully trying to “pursuing an integrationist project” (Perju 2009: 331). It was not by chance that the Court, only a few years later, affirmed the principle of protecting legitimate expectations in the cases *Commission v Council*,⁴³ *Westzucker*⁴⁴ and *Einfuhr- und Vorratsstelle Getreide*⁴⁵; and the principle of legal certainty in *Brasserie de*

⁴¹ In text: “The Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty.” See also Art. 169, second paragraph, 170, 173, 175, 177-180, 228 EECT.

⁴² In general, it also has to be kept in mind that law as an institution – at least, as long as it is effective – must never be reliant on the wills of those concerned in a particular case to accept a certain rule or provision. It is the essence of law that it is a repository of accepted rules that, once established, cannot be changed by individual actors on an ad-hoc basis.

⁴³ 1973, Case 81/72.

⁴⁴ 1973, Case 1/73.

⁴⁵ 1975, Case 4/75.

*Haecht*⁴⁶, *BRT v Sabam*⁴⁷ and *Ministère Public v Asjes*.⁴⁸ Both the protection of legitimate expectations and the principle of legal certainty aim to strengthen the position of individuals and safeguard the citizens' confidence in the law (cf. also Usher 1998: 54-57, 65-67).⁴⁹

In sum, the ECJ did not only possess the competence to act, but was also called into action in order to ensure legal protection for the European people. Without the supremacy and direct effect of Community law there would have been no binding effect for the European institutions and states at all. Nor would there have been effective legal control over European politics. As the ECJ argued in 1964, which is still very convincing today, "the obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent," not directly providing individuals with any rights,⁵⁰ while political integration and the transfer of competences to the supranational level moved forward. It has to be clear that this would have primarily meant an erosion of political control by the people, not the states, since recourse to national courts in cases concerning European regulations or directives would have been impossible (cf. Weatherill 1995: 117). For these reasons it must never have been the intention of the founding states, acting on behalf of the European people,⁵¹ to install a judiciary that is merely "la bouche qui prononce les paroles de la loi" (Montesquieu),⁵² but instead to create and enforce an institution that helps to fill the young and incomplete legal order with life and facilitates legal certainty and trust (Heisenberg and Richmond 2002: 206).

To continue the previous discussion about the historical context and to answer the third question about the legal justification of the early landmark cases, we have to take a closer look at specific rules of legal rationalization by which the functional context of European law is characterized in the phase of establishing direct effect and supremacy. It seems to be beyond controversy that the ECJ never shied away from the formal demands imposed by the "reason-decision scheme" (cf. Figure 2, above) in its rationales for decision. However, the argument that the judges have detached themselves from the texts of the Treaties by arbitrarily using teleological arguments in order to enhance the European rule of law keeps coming up over and over again in critical studies on the ECJ (see e.g. Alter and Helfer 2010: 569; Höpner 2008: 29; Perju 2009: 369; Rasmussen 1986: 526).⁵³ Although this assumption might be quite valid, presupposing political judicial actors, it is not covered by empirical evidence and cannot be supported in context. While it is true for the early decisions in the 1950s and 1960s that the Court had to use teleological arguments in the absence of clear legal provisions, the rulings of the following years, in contrast, show another picture. The preferred forms of judicial argumentation shifted and contextual arguments concerning the coherence of the common legal order, as well as, most notably, the "effet utile" (principle of effectiveness),⁵⁴ moved to the center of the ECJ's reasoning in influential cases concerning the implementation and embodiment of supremacy and direct effect, like *Leberpfennig*⁵⁵, *van Duyn*⁵⁶, *Simmmenthal II*⁵⁷, *Milchkontor*⁵⁸, *Foto-Frost*⁵⁹, *Tafelwein*⁶⁰,

⁴⁶ 1973, Case 48/72.

⁴⁷ 1974, Case 127/73.

⁴⁸ 1986, Cases 209-213/84.

⁴⁹ This motive already appears in the very early case *Algera*, 1957/58, Joined Cases 7/56 and 3-7/57.

⁵⁰ "This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens." (van Gend en Loos, Case 26/62, 1963, ECR 1).

⁵¹ See also preamble of the EECT.

⁵² "The mouth that pronounces the words of the law," also acknowledged by the German Federal Constitutional Court in the case *Kloppenburger* in 1987, BVerfGE 75, 223.

⁵³ For the forms of argument cf. Figure 2, above.

⁵⁴ See note 13.

⁵⁵ 1970, Case 9/70.

⁵⁶ 1974, Case 41/74.

⁵⁷ 1978, Case 106/77.

⁵⁸ 1983, Case 205-215/82.

⁵⁹ 1987, Case 314/85.

⁶⁰ 1990, Case C-217/88.

*Zuckerfabrik Süderdithmarschen*⁶¹, *Francovich*, *Brasserie du Pecheur*⁶², *Factortame III*⁶³ or *Köbler*⁶⁴.

At this point, it might be objected that the Court just picked the forms of argument that best supported its interests, e.g. in expanding the ambit of European law or the Court's power vis-à-vis the nation states. In light of empirical evidence, however, this explanation is unconvincing, since it is far from true that all cases brought to Luxembourg were decided in favor of the expansion of EU law;⁶⁵ not even in cases where the ECJ must have been in a good strategic situation to pursue pro-integrationist or other interests. In *CILFIT*,⁶⁶ for example, the Court restricted its own further jurisdiction, and in *Francovich* the Court reconsidered and revised its earlier judgments on state liability made in *Russo v AIMA*⁶⁷ and *Rewe v Hauptzollamt Kiel*⁶⁸; also, in *Grant*,⁶⁹ *Dori*,⁷⁰ *Keck*⁷¹ and *Greenpeace*,⁷² the Commission's executive competences in financial matters were brought under better legal control. Another interesting strain of decisions emerging from the doctrine of direct effect can be found in *Marshall I*, *Faccini Dori*, and *Unilever*. Here, the judges repeatedly rejected the general horizontal direct effect of directives. This must be even more astonishing from the viewpoint of rationalist-marked contemporary integration theory, since recognizing claims concerning private individuals relying on unimplemented directives would have led to an enormous boost in the enforcement of Community law, and the ECJ had extremely good chances of being successful in its ruling: in the course of the Single European Act (SEA, 1986/87) and the Treaty of Maastricht (TEU, 1992/93), the member states and European institutions displayed a strong will to take further steps towards deeper integration. Therefore, the opportunity to expand the law further into the national legal systems must have been perfect. Nevertheless, not until *Mangold*⁷³ did the judges see the necessity of carefully claiming a general principle of horizontal direct effect of directives.

In conclusion, judicial development of European law in regard to the establishment and embodiment of autonomy appears to be more of a constant and continuous process, not a linear one that points in just one direction. The ECJ notably followed a differentiated adjudication rather than merely deciding in favor of the proponents of an ever-closer union. Therefore, all three questions have to be answered in a way that casts into doubt the rationalist claim of the ECJ as an actor engaging in pro-federalist politics. The ECJ has not only had the competency to act and formulate the groundbreaking doctrines of direct effect and supremacy, but it was necessary, and legitimate to develop such momentous legal doctrines within the legal context.

Local Context – Marking Off a Distinct European Legal Order

A common misunderstanding in numerous studies – not only rationalist ones – is the appraisal that the European Court and EU law can be directly measured against other

⁶¹ 1991, Case C-143/88.

⁶² 1996, Case C-46/93.

⁶³ 1996, Case 48/93

⁶⁴ 2003, Case Rs. C-224/01

⁶⁵ Nor is it true that the ECJ paid no attention to the perception of its judgments. Although the judges did not pay much attention to political opinions, they always showed sensibility towards the legal opinions and reasoning of national high courts. The judges in Luxembourg are indeed receptive to legal arguments, but not political ones; e.g. in case of the German Bundesverfassungsgericht in the decisions *Solange I* (1974), *Solange II* (1986), *Maastricht* (1993) and *Banana Market Regulation* (2000, cf. also Everling 1996).

⁶⁶ 1982, Case 238/81.

⁶⁷ 1976, Case 60/75.

⁶⁸ 1981, Case 158/80.

⁶⁹ 1998, Case C-249/96.

⁷⁰ See above.

⁷¹ 1993, Case C-267/91.

⁷² 1998, Case C-321/95.

⁷³ 2005, Case C-144/04.

national or international courts and their legal systems. Although it is true that there are several concordances between the European and other legal systems and it might be indeed interesting to compare these with other political-administrative entities, it should be emphasized that by definition, European law must be neither international nor national law. It is a legal system *sui generis*, comparably young and still struggling for emancipation from individual national legal systems as well as from the international legal order.⁷⁴ Most characteristic of this genuinely European system is the fact that it was and is far from being settled, although many legal gaps have been closed. This applies to political legislation, as well as to judicial aspects of interpreting and applying the law. In this respect, the ECJ's work is unique and has to be clearly differentiated from that of other constitutional Courts. Analogies to international or supranational appellation bodies like the International Court of Justice, the European Court of Human Rights, or the Andean Court of Justice (see Alter and Helfer 2010), as well as national European high courts and even the U.S. Supreme Court,⁷⁵ fall too short. Furthermore, such analogies are out of the question, since the rules of recognition cannot be directly transferred from either the national, international, or specific national legal orders to the European context, although it might be true that the formal institutional arrangements are similar.⁷⁶

The European Court most notably has to perform the balancing act of further developing a legal system with an unknown destination, while simultaneously staying connected to the settled legal knowledge and traditions of all the member states to ensure enduring trust in the legitimacy of its jurisdiction. From a judicial point of view, this is an extraordinarily challenging and difficult situation that is aggravated by the fact that the legislator still avoids and even rejects⁷⁷ stating the exact legal nature of the European community (something in between confederation and federation on the road to an "ever closer union among the peoples of Europe"⁷⁸). The Court does not have the luxury of a long history of genuine European case-law, like the European national courts do. There were simply no available precedents that could have served as points of reference for legal interpretation and adjudication – just the vast number of 248 Articles of the Treaty (see also Everling 2000: 221). Lord Denning, senior appellate judge of England, once described the situation as follows: the Treaty "lays down general principles, it expresses aims and purposes. All in sentences of moderate length and commendable style, but it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty, there are gaps and lacunae. These have to be filled by judges, or by regulations or directives."⁷⁹

At the same time, the judges never had – qua foundational assignment – the option of rejecting the jurisdiction of admissible cases or preliminary reference ("*déni de justice*"), nor did they have the opportunity to pass decisions about justice or injustice on to the legislator, although the Treaties often contained no case-adequate provisions (see Schumann 1968; Hofmann 2000: 250; also Heisenberg and Richmond 2002: 206). The ECJ never made a secret of this need to fill the lacunae by judicial means, but stated it explicitly from the beginning, as documented in *Algera*: "[F]or the solution of [the problem at hand] the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve

⁷⁴ Cf. AETR (1971, Case 22/70), biological resources of the sea (1976, Case 6/76), WTO report (1994); Open Skies (2002, Case C-476/98), Kupferberg I (1982, Rs. 104/81), banana regime (1994, Case C-280/93), Dior (2000, Case C-300/98, C-392/98), Yusuf (2005, Case T-306/01).

⁷⁵ E.g. Caporaso/Tarrow 2009: 613, Kenney 2000.

⁷⁶ Like in case of the Court of Justice created by the Andean Community of Nations in 1979, which indeed has been inspired by the institutional framework of the European Community.

⁷⁷ This can be seen most recently in case of the negotiations about the Constitutional Treaty and the Lisbon Treaty.

⁷⁸ EEC Treaty, preamble.

⁷⁹ British Court of Appeal, Case *Bulmer v Bollinger*, 1974.

the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member states.”⁸⁰

In short, the ECJ was thrown into a double bind right from the very beginning, which must be seen as typical for the nature of the whole EU integration project, not just Europe’s legal sphere. This dilemma is at the heart of all the well-known leading cases of the early days. In each of these, be it *Algera*, *Fédéchar* and *AETR*, *van Gend en Loos* or *Costa/ENEL*, the Treaty lacked sufficiently clear provisions, although it must have been obvious from the viewpoint of the legislator that these general questions about the implementation and enforcement of Community law would arise sooner or later. Yet, this must be seen as the difficult basic condition of a “European way” of judicial interpretation, characteristic and symptomatic especially of the foundational period. In this sense, the claim that the ECJ is a “political Court” or has been activist is neither convincing nor acceptable (Ward 2009: 81). From the perspective of the specific situation in Europe’s community of law, not *judicial* activism but the lack of *legislative* activism (that was surely promoted by the Community’s political architecture) was the problem in the early years of integration and forced the Court to act.

Conclusion

In rationalist theory, jurisdiction is interest- or even agenda-based decision-making in the judge’s chambers – it is “politics in robes”. This assumption turns out to be a myth considering the context of law. The ECJ had good reasons for emancipating Community law from the political influence of the nation states.

The need for political science and EU integration studies to engage in-depth with different contexts of reasoning and action is displayed very clearly in the numerous studies on the ECJ and the “foundational period.” From a rationalist viewpoint, the creation of the Court’s influential doctrines must look like a story of European judicial empowerment. On closer inspection, however, the developments that led to the establishment of the doctrines of direct effect and supremacy and beyond have not only been quite relevant and necessary in light of the historical circumstances, they were also judicially well-founded within Europe’s nascent legal community.

Without a doubt, sometimes the line between the indispensable development of law by judges and illegitimate judge-made law is not easy to draw, and should therefore be a point of particular attention. Autonomy of European law does not mean immunity from criticism. Quite the contrary, critique is indeed appropriate and indispensable, since “the Court of Justice is not immune from human error” (Everling 1996: 435), as Judge Everling once put it. However, the line of current argumentation and criticism is flawed. The fact that the ECJ shaped European integration from the beginning does not necessarily mean it had political motives in doing so. Nor was setting up a common European legal system just a “power struggle” the ECJ fought “with the help of the definitional power (symbolic capital) available to it” (Münch 2008: 541). Rather, the Court had and still has to help to build the Community’s legal order by means of law embedded in certain non-arbitrary circumstances that have been shown in this article to be exemplary for the “foundational period.” At no time did this have to imply that jurisprudence was dependent on politics or engaged in politics. Consequently, fair criticism has to be about law, not politics, as long as we can find compelling explanation within the context of law. For this reason, the preoccupation with the European Court should begin to reflect the shape of national discussions. This does not have to mean that it is perceived as a federal legal order (Josselin and Marciano 2007), or that it is comparable to the well-established national legal orders. It just suggests taking European law seriously, accepting and respecting it as what it has long been since the early years of the EEC – an independent context of reasoning and action.

⁸⁰ 1957/58, Joined Cases 7/56 and 3-7/57, p. 55.

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