

**‘THIS IS NOT LIFE AS IT IS LIVED HERE’:
THE COURT OF JUSTICE OF THE EU AND THE MYTH OF JUDICIAL
ACTIVISM IN THE FOUNDATIONAL PERIOD OF INTEGRATION
THROUGH LAW**

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What characterises 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 analyse with conventional and generalising models of explanation. European law is one such context, and it should be perceived as a self-contained sphere governed by a specific rationality that constitutes a self-generating impetus for integration. By way of re-examining the much-debated ‘foundational period’ of the CJEU’s jurisdiction, it will be shown here that only by analysing the context of European law as an independent space of reasoning and action can the role of Europe’s high court in the process of integration be adequately captured.

Keywords: CJEU, EU law, European integration, judicial activism, European legal order

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I. INTRODUCTION

In political science, there seems to be a broad consensus that the role of law can be adequately analysed by adopting the theoretical approaches originally invented to describe and explain integration processes induced by politically motivated actors. Accordingly, European law is understood to constitute just another political arena where, amongst a variety of actors – from private national litigants, to diverse pro-integration activists, to nation states, to the genuine European institutions – the Court and its representatives are seeking to implement a ‘highly politicised’ and ‘pro-integrative jurisprudence’¹ and, by doing so, show their ‘ability or willingness to act as a motor of integration.’² However, recent empirical evidence from the CJEU³ – like that brought to light by Solanke,⁴ Malecki,⁵ and Grimmel⁶ – could not support these assumptions, instead confirming the CJEU judge who states: ‘this is not life as it is lived here.’⁷

This article will follow an alternative approach to examining the role of law and the Court in the integration process, highlighting the options and limitations of reasonable action within European law as a specific functional, historical, and local context. Such a context is to be understood as an autonomous sphere of thought and action that constitutes a self-generating impetus for integration. This does not imply that neither actors

¹ Alec Stone Sweet, ‘The European Court of Justice and the Judicialisation of EU Governance’ (2010) 5 *Living Reviews in European Governance* 27.

² R. Daniel Kelemen and Susanne K. Schmidt, ‘Introduction – The European Court of Justice and Legal Integration: Perpetual Momentum?’ (2012) 19 *Journal of European Public Policy* 1, 2.

³ For the purposes of stylistic flow, the contemporary abbreviation ‘CJEU’ will also be used in a historical context and especially to refer to the European Court of Justice (ECJ) throughout the article.

⁴ Iyiola Solanke, ‘Stop the ECJ? An Empirical Assessment of Activism at the Court’ (2011) 17 *European Law Journal* 764.

⁵ Michael Malecki, ‘Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers’ (2012) 19 *Journal of European Public Policy* 59.

⁶ Andreas Grimmel, *Europäische Integration im Kontext des Rechts* (Springer VS 2013), 275-354.

⁷ Anonymous, personal interview, Court of Justice of the EU, Luxembourg, April 2011.

nor institutions play any role in the litigation processes happening within European law. Political science research, especially constructivist studies of the last two decades, have done a convincing job of showing theoretically and empirically how various institutions and norms are able to shape action and ‘socialise’ actors’ interests. However, to derive substantial explanations about integration through law in Europe this is not enough: one must inevitably engage with the law itself and perceive it as a self-contained, non-positivist space of reasoning and action.⁸ In other words: it is about understanding the rules of the game, not just the motives of the players, or the way the game shapes their thoughts and actions.

By way of re-examining some of the best-known landmark cases and doctrines of the much-debated ‘foundational period,’⁹ it will be shown here that there are good reasons to take the legal context of reasoning and action seriously, and to figure this into theory-driven analyses that seek to understand the roles European law and the Court play in the process of integration through law.

II. OPENING THE BLACK BOX – UNDERSTANDING THE CONTEXT OF EUROPEAN LAW

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 also a broad range of legal traditions, doctrines, and approved customs, as well as craft-bound forms and methods of interpretation, legal reasoning, and argumentation that constitute and shape EU law. All of these became ‘habits’¹⁰ 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 and is shaped by much more than mere statutory provisions and regulations. It constitutes a specific *context* – a dense net of commonly known and accepted rules, concepts, and procedures possessing a specific ‘meaning-in-use’¹¹ and providing actors with reasons for meaningful action

⁸ Gráinne de Búrca, ‘Rethinking Law in Neofunctionalist Theory’ (2005) 12 *Journal of European Public Policy* 310.

⁹ Joseph H H Weiler, ‘The Transformation of Europe’ (1991) 100 *The Yale Law Journal* 2405, 2413; what is meant here is the phase of CJEU jurisdiction starting in the late 1950s and ending in the mid 1970s.

¹⁰ Ted Hopf, ‘The Logic of Habit in International Relations’ (2010) 16 *European Journal of International Relations* 539.

¹¹ Antje Wiener, ‘Enacting Meaning-in-use: Qualitative Research on Norms and International relations’ (2009) 35 *Review of International Studies* 175.

– that are distinct from other contexts in one or more of the following three different dimensions:

1. *Functional*

Every context can be delimited by the mere fact that it is a functionally distinct social institution. As such, it constitutes a space of specific meaning and rational reasoning. Max Weber argued very convincingly in his seminal ‘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 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 where inter-subjective legal rationalisation, justification, and acceptance of certain actors 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 shall, and at least in democratic systems, never be legal politics: there has to be an ideal dividing line between both. The fact that Courts sometimes have to deal with questions that also arose in political circles or are subject to political debates does not yet make the judicial process political, or the Courts political actors.

Although in effect, law and politics elaborate and concretise 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. It has to be kept in mind that, other than in politics, all this is determined by a highly formalised procedure and by litigants or Member State courts approaching the CJEU with very concrete questions. As Judge Prechal notes:

People sometimes just forget how our work functions over here. [...] We first need to have a case to do something ... if there is no case and no arguments by the parties we cannot just send out messages.¹²

Beyond this, courts and their judges have to provide legal explanations – the basis of which must be certain forms of argument that rationalise the actions within the borders of a legal community, thereby distinguishing the context of law – at least ideally, but also in some kind of actual practice – from politics and other functional distinct contexts. Of course, a legal text

¹² Alexandra Sacha Prechal, personal interview, Court of Justice of the EU, Luxembourg, 06.04.2011.

can be interpreted in manifold ways – there is quite simply no coercive ‘causal mechanism’¹³ in law. But there are also commonly shared rules about how to interpret rights that can never be solely subject to private interpretation: these are the acknowledged forms of legal argument¹⁴ that allow deliberation of the more fundamental problems by specific rules and concepts. They are specific to each legal order and must be seen as ways of producing convincing, or at least acceptable and therefore legitimate, judicial outcomes. The decision about which legal arguments and decisions are acceptable and which should be refused is one that can certainly not be undertaken by merely referring to a legal formalism.¹⁵ It can only be made by asking for the concrete embeddedness and justifiability of the argument in the wider context of law, and with regards to the following two dimensions of the context.

2. *Local*

The European Union has developed an autonomous legal order with its own forms of legal rationalisation 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 simply in the fact it is *European* law, possessing a unique legal tradition and genesis. In this sense, 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. These, together with the stock of legal norms, build the inevitable basis of meaningful action in European law. However, there can never, as Hunt points out, be ‘acceptance of legal rulings simply because they have the quality of law.’¹⁶ To develop an inter-subjective ‘persuasion pull’ and ‘compliance pull’¹⁷, judges cannot merely rely on the

¹³ Michael Zürn and Jeffrey T. Checkel, ‘Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State’ (2005) 59 *International Organization* 1048; cf Marlene Wind, Dorte Sindbjerg-Martinsen, and Gabriel Pons-Rotger ‘The Uneven Legal Push for Europe: Questioning Variation when National Courts Go to Europe’ (2009) 10 *European Union Politics* 63.

¹⁴ Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’, in Gráinne de Búrca and Joseph H H Weiler (ed) *The European Court of Justice* (Oxford University Press 2001), 43.

¹⁵ cf Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002).

¹⁶ Jo Hunt, ‘The End of Judicial Constitutionalization’, (2007) 3 *Croatian Yearbook of European Law and Policy* 155.

¹⁷ Joseph H H Weiler, ‘Journey to an Unknown Destination: A Retrospective and

power bestowed by their institution or a legal formalism, but have to build upon the shared European legal repository of rules, concepts, and methods that allow common comprehension and acceptability. What is most characteristic in the local dimension, however, is the fact that Europe is a largely incomplete construct that has to be further developed, also by means of law. The term 'Europe' neither marks a fixed territory nor a settled political or judicial system: it is in constant movement. This is true also in a temporal sense.

3. *Temporal*

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 and dependent on the social and political developments that surround it. As Vassilios Skouris, president of the European Court of Justice, describes it:

The historical context plays an important role. [...] And the political environment also plays a role. [...] Jurisprudence does not grow by itself. Jurisprudence grows together with legislation and also with the questions that arise then. You sometimes have to state your position on highly political and socially important questions. [...] All of this is of course time-related.¹⁸

This embeddedness of jurisprudence in certain historical and political circumstances does certainly not imply that it is politicised and pro-integrative, or that European law comes into being from nowhere. From the dawn of the European Community, the legal order could not have been brought into being without considering the repository of joint legal knowledge and commonly shared legal traditions that still build the core of the EU's legal system today. The same applies to the way the CJEU 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 and in order to ensure the consistency and historical coherence¹⁹ of its decisions, the CJEU's decision-making is very path-dependent²⁰ and can hardly make

Prospective of the European Court of Justice in the Arena of Political Integration' (1993) 31 *Journal of Common Market Studies* 417, 419.

¹⁸ Vassilios Skouris, personal interview, European Court of Justice, Luxembourg, 12.04.2011.

¹⁹ Seminal on coherence still Nicholas Rescher, *The Coherence Theory of Truth* (Clarendon Press 1973).

²⁰ cf Susanne K Schmidt, 'Who Cares About Nationality? The Path Dependent Case

abrupt changes in direction. Or as a judge of the CJEU vividly depicts it: ‘The Court is like an oil tanker. It moves extremely slowly, which is probably right, [because] you do not want a court going zig-zag all the time.’²¹

From a contextual perspective of the law, it is not of paramount importance to figure out if judges have a certain attitude towards a legal issue or case at hand or are a ‘true believers.’²² This is for a simple reason that lies in the institution of law itself: the goal of a judgment is 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. Otherwise, adjudication would not be about legal provisions and their appropriate application, but about showing 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 legal argument. Beyond this, the need to ensure acceptability by judicial reasoning has very practical reasons, namely to ensure the functioning of the Court. As one judge with many years of experience of on the Court explains:

[N]one of us [judges] wants to see the Court lose in standing or public influence. In order to function as a court you need to have general respect for your judgments. [...] You have to explain [your decision] in the language people expect from judgments.²³

For one reason or another, although judges possess their own interests, motives, and preferences, the judgments and rationale behind a decision must stand alone and detached from the personalities in charge of the decision-making.

Therefore, the proposed shift towards the context should not be misunderstood as proposing a naïve perspective on law as a world where interests have no relevance. It is indisputable that judges – in national as well as in the European Court’s chambers – can never be totally free of personal considerations. Notwithstanding the importance of these and other factors, like institutional entanglements,²⁴ the core power a Court

Law of the ECJ from Goods to Citizens’ (2012) 19 *Journal of European Public Policy* 8.

²¹ n 7.

²² Alastair Iain Johnston, ‘Conclusions and Extensions. Toward Mid-Range Theorizing and Beyond Europe’ (2005) 59 *International Organization* 1013.

²³ n 7.

²⁴ cf Fritz W Scharpf, ‘The Joint-Decision Trap Revisited’ (2006) 44 *Journal of Common Market Studies* 548; Fritz W Scharpf, ‘Perpetual Momentum: Directed and

has and that its judges must rely on is still the ability to convince; and it can only be convincing by reference to the *common* European legal norms, procedures, and traditions that are specific to a certain context of reasoning and action. In this sense, neither the proof nor the disproof of ‘politics in robes’ can be found outside the law. To open the black box of European law and understand it and the Court in context, therefore, must be seen as a pre-condition of engaging with law, legal argument, and legal actors.

III. ESTABLISHING AND DEFINING THE AUTONOMY OF EUROPEAN LAW: THE MYTH OF JUDICIAL ACTIVISM IN THE FOUNDATIONAL PERIOD OF INTEGRATION

Today it is hardly contested in political science anymore that, in the early years of integration, the CJEU created the autonomy of European law driven by a political interest in expansionist law-making, laying the cornerstone for a series of steps that siphoned ever more power from the nation states to the European level – all without state consent. In this reading setting up a common European legal system was a ‘power struggle’ the CJEU fought ‘with the help of the definitional power (symbolic capital) available to it.’²⁵ This would render institutionally influential cases like *Fédéchar* and *AETR* on the principle of implied powers, *van Gend en Loos* on the principle of direct effect, *Costa/ENEL* on the principle of supremacy, or even *Internationale Handelsgesellschaft* on the protection of fundamental rights,²⁶ ‘original sins’ in a continuing story of European judicial empowerment. This story, however, seems to be a myth reflecting a certain theoretical perception of the Court as a political and interest-driven actor, rather than recounting the actual reasons for the European judicial process and the historical circumstances in which the decisions were made. It will be shown that although the legal decisions of the foundational period can be unhesitatingly characterised as a ‘quiet revolution’²⁷ spearheaded by the CJEU and had a considerable political impact, they were not only quite understandable from a contextualist viewpoint, but also necessary in light of the historical, local, and functional dimensions of the context of the

Unconstrained?’ (2012) 19 *Journal of European Public Policy* 127; R Daniel Kelemen, ‘The Political Foundations of Judicial Independence in the European Union’ (2012) 19 *Journal of European Public Policy* 43.

²⁵ Richard Münch, ‘Constructing a European Society by Jurisdiction’ (2008) 14 *European Law Journal* 534.

²⁶ Cases 8/55, *Fédéchar* [1956] ECR 245; 22/70, *AETR* [1971] ECR 263; 26/62, *van Gend en Loos* [1963] ECR 1; 6/64, *Costa/ENEL* [1964] ECR 614; 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

²⁷ Joseph H H Weiler, ‘A Quiet Revolution. The European Court of Justice and Its Interlocutors’ (1994) 26 *Comparative Political Studies* 510.

emerging European legal order.

The line of argument is the following: to draw a picture that can convincingly explain the CJEU's role in these early days, it is not sufficient to merely note 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*, on *which basis*, and for *which reasons* the law was developed. These questions can be only answered sufficiently by taking the context into account. So, other than in an analysis by Alter and Helfer that examined how the CJEU established 'its legal and political authority,'²⁸ the focus here will be not on the fact that the Court possesses a considerable *authority*, but on how and under which contextual circumstances the CJEU established *autonomy of European law*²⁹ in the early years of integration.

The picture that will be drawn here about such landmark doctrines on implied powers, direct effect, and supremacy in the foundational period of adjudication will be a different one than those of actor-centred and rationalist theories of EU integration.³⁰ First and foremost, it is a story about law, although the aim is not and cannot be to provide judicial argument for or against particular CJEU rulings. To judge the veracity of judicial argumentation is and must remain the task of jurisprudence. Also, it is not a perspective that attempts a close reconstruction of historical evidence.³¹ The promise, however, is to offer a broader understanding about integration through law in the early years of integration, and to try to understand the Court as a *judicial* actor embedded in the context of law rather than a political actor functioning as a motor for integration.

1. *The Historical Context – The Need for Coherent Adjudication Over Time*

To approach the Court's decisions and most fundamental doctrines in the early years of integration, it is essential to first envision their institutional

²⁸ Karen J Alter and Lawrence Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64 *International Organization* 563, 569.

²⁹ 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 to interpret and implement laws.

³⁰ An overview and critique on the legacy of rationalist studies can be found at Andreas Grimm, 'Judicial Interpretation or Judicial Activism?: The Legacy of Rationalism in the Studies of the European Court of Justice' (2012) 18 *European Law Journal* 518.

³¹ cf eg Bill Davies and Morten Rasmussen, 'Towards a New History of European Law' (2012) 21 *Contemporary European History* 305.

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 organisation since the end of World War II, the Rome Treaties establishing the European Economic Community (EEC, 1957/58) were signed. Today, it is largely undisputed in law that unlike the Treaty of Paris, which formed the basis of the ECSC, the EEC-Treaty was not a 'traité loi,' but a 'traité cadre.'³² As such, it did not just contain explicit legal regulations for a specific area of common action, but laid the cornerstone for a supranational entity with autonomous institutions and equipped with far-reaching legal competences. This builds the backdrop of the further legal developments, one that is crucial for comprehending the judgments made by the CJEU in the following years.

Apart from this, it is important to bring to mind the particular historical situation in which the doctrines of implied powers, direct effect, and supremacy were developed. This must be carefully differentiated from other past and future configurations of the context of European law. Against a background of long and devastating warfare, 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 within an effective institutional structure.

Therefore, the explanation that 'the most assertive supranational court of that time managed to fly under the radar so successfully'³³ and Member States did not notice the reach of its jurisdiction is too simplistic. From a historical standpoint, there can hardly be any doubt that the Member States knew the consequences of their decision to take the Community agreement, including the European Judiciary, to a higher level.³⁴ But, as Heisenberg and Richmond analyse, 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. This Group was given broad authority in devising a judicial system.'³⁵ This certainly does not

³² cf. eg Koen Lenaerts and Piet Van Nuffield, *Europees recht in hoofdlijnen* (Maklu 2003) 43.

³³ Vlad Perju, 'Reason and Authority in the European Court of Justice', *Boston College Law School, Legal Studies Research Paper Series*, Research Paper No. 170, 331.

³⁴ cf G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595; G Federico Mancini and David T Keeling, 'Democracy and the European Court of Justice' (1994) 57 *Modern Law Review* 186.

³⁵ Dorothee Heisenberg and Amy Richmond, 'Supranational Institution-Building in

preclude the development of a ‘transnational judicial esprit de corps’³⁶ amongst judges. However, the assumption that the CJEU extended European rules constraining national sovereignty far beyond the Member States’ original intent³⁷ 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. Therefore, the Court was granted a considerable leap of faith in the conscientious and competent development of the legal system by judicial interpretation.

Moreover, from an empirical point of view, it is also interesting to note that even as the wind began to change in the wake of de Gaulle’s self-confident nationalist politics of 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. This, however, should have been the logical consequence from a rationalist perspective, since it can be assumed that there was a broad convergence of interests, only few players,³⁸ 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 obviously could and should have had a high incentive to do so? From a contextual perspective, an answer can be found in the law itself, namely in the fact that the CJEU formulated its decisions in a quite coherent way, and based on reference to former judgments (if available), shared legal knowledge, and common legal traditions, which made it hard for the Member States to find a good reason for calling the legitimacy of the CJEU jurisprudence into question and obstructing the further development of European law. This is all the more true since it is the Member States themselves who have been the main promoters of ‘peace through law’ in Europe, and who created the Court to ensure the

the European Union: a Comparison of the European Court of Justice and the European Central Bank’ (2002) 9 *Journal of European Public Policy* 201, 204.

³⁶ Antoine Vauchez, ‘Keeping the Dream Alive: the European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence’ (2011) 5 *European Political Science Review* 1, 3; cf also Antoine Vauchez, ‘How to Become a Transnational Elite. Lawyers’ Politics at the Genesis of the European Communities (1950-1970)’, in Hanne Petersen et al (eds) *Paradoxes of European Legal Integration* (Ashgate 2008), 129; Antoine Vauchez, ‘The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU Polity’ (2010) 16 *European Law Journal* 1; Morten Rasmussen, ‘The Origins of a Legal Revolution: The Early History of the European Court of Justice’ (2008) 14 *Journal of European Integration History* 77.

³⁷ Karen J. Alter and Lawrence Helfer, (n 28).

³⁸ The Community just consisted of six members in those days (Belgium, France, Italy, Luxembourg, the Netherlands and Germany).

effectiveness and bindingness of the newly established legal order.

It is important to note in this regard that the landmark cases were not decided by the judges on an ad-hoc basis, but had to be constantly unfolded over time, ensuring connectedness to earlier precedents and existing jurisprudence, and trying to anticipate future judicial problems.³⁹ The function of such a continuity of coherent decisions, and the resulting ‘collage effect’⁴⁰ of judgments, should be considered much more than a mental exercise for judges, or seen as filling new bottles with old wine.⁴¹ There is a deeper reason to this practice that should be taken seriously. What it ensures is that:

[...] there is a degree of legal certainty which is an important principle – that people do not come to the Court finding that it is like playing the lottery every day where they do not know what the result is going to be. There has to be at least some degree of certainty. But obviously, sometimes the Court will have earlier cases that will not necessarily grapple with the same situation, and then it has to try and find out which of the earlier cases is closest to the [current] situation. [...] Not all cases are exactly the same, so the Court tries to develop concepts to be found in other cases and to apply the relevant principles to the new case.⁴²

At this point, one might object that there could still be some kind of motivation or intent ‘to reduce the domain of national autonomy ... and create the conditions for the gradual Europeanisation of national administration and judging’⁴³ hidden behind a veil of legalese, and that the

³⁹ This fact can be seen, for example, 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* in the cases 8/81 *Becker* [1982] ECR 53; 152/84 *Marshall I* [1986] ECR 723; 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969; 103/88 *Fratelli Costanzo* [1989] ECR 1839; 106/89 *Marleasing* [1990] ECR I-4135; joined cases C-6/90 and C-9/90 *Francovich* [1991] ECR 5403; 91/92 *Faccini Dori* [1994] ECR I-03325; 80/97 *Inter-Environnement Wallonie* [1997] ECR I-7411; 131/97 *Carbonari* [1999] ECR I-01103; C-443/98 *Unilever* [2000] ECR I-7565.

⁴⁰ Loïc Azoulay, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization’ (2008) 45 *Common Market Law Review* 1335, 1339.

⁴¹ Antonin Cohen, ‘Constitutionalism without Constitution: Transnational Elites between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s-1960s)’ (2007) 32 *Law & Social Inquiry* 109, 131.

⁴² Aindrias Ó Caoimh, personal interview, Court of Justice of the EU, Luxembourg, 12.04.2011.

⁴³ Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 232.

ongoing process of judicial law-making 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).⁴⁴ This leads us to the functional dimension of the context.

2. *The Functional Context – Crossing the Dividing-Line Between Law and Politics?*

Three questions have to be addressed here in regard to the foundational period and the Court's role in this phase: first, if the CJEU 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 in these early years of jurisdiction; 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 – ie understandable, acceptable, and therefore legitimate in terms of law.

The first question seems to be relatively easy to answer, although it is certainly 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 – Article 164 EECT⁴⁵ must be read in a broad sense, equipping the CJEU with far-reaching competencies. The European Court of Justice was never intended to be a panel of judges dependent upon the goodwill of its contracting parties, like the International Court of Justice or the European Court of Human Rights. 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,

⁴⁴ If it can be shown the CJEU used sound legal reasoning in all the contexts examined, this must be the intervening variable disproving the claim of 'judicial 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 therefore do what they object to – unduly mix law and politics).

⁴⁵ 'The Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty'; see also Article 169(2) ; 170, 173, 175, 177-180, 228 EECT.

to ‘breathe life into the Treaty’⁴⁶.

To answer the second question about the legal necessity of the Court’s doctrines of supremacy and direct effect, we have to take a closer look at the reasons for its decisions. In numerous political science studies, both doctrines have been portrayed as cutting down the autonomy of the states. However, this is only one side of the coin. More concretely, it is the state-centred side. The other one is that the clarification of supremacy and direct effect have been invaluable and absolutely indispensable in helping European citizens to assert their legitimate rights and be protected by law – not only, but especially in the CJEU’s protection of fundamental rights as in *Internationale Handelsgesellschaft*, *Nold*, or *Defrenne III*.⁴⁷ Rather than wilfully trying to ‘pursuing an integrationist project,’⁴⁸ from a legal point of view the CJEU laid down the necessary constitutional basis that served to protect the legitimate expectations of the people living under the rule of the European Community. 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*, *Westzucker*, and *Einfuhr- und Vorratsstelle Getreide*;⁴⁹ and the principle of legal certainty in *Brasserie de Haecht*, *BRT v Sabam*, and *Ministère Public v Asjes*.⁵⁰ 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.⁵¹ Portraying these cases and judicial developments as expansionist in order to undermine the autonomy of the Member States, or to carry any other institutional or private interests into effect would be a caricature of the decisions and the legal rationale behind them.

Before this backdrop, the CJEU not only possessed the competence to act, but was also called into action in order to ensure the legal protection of the European people. Without the supremacy and direct effect of Community law, there simply would have been no binding effect for European institutions and states (acting on the supranational level) at all. Nor would there have been effective legal control over European politics. As the

⁴⁶ Stephen Weatherill, *Law and Integration in the European Union* (Clarendon Press 1995), 185.

⁴⁷ Cases 4/73 *Nold* [1974] ECR 491 and 149/77 *Defrenne III* [1978] ECR 1365.

⁴⁸ Vlad Perju, (n 33), 331.

⁴⁹ Cases 81/72 *Commission v Council* [1973] ECR 576; 1/73 *Westzucker* [1973] ECR 723; 8/44 *Einfuhr- und Vorratsstelle Getreide* [1975] ECR 475.

⁵⁰ Cases 48/72 *Brasserie de Haecht* [1973] ECR 78; 127/73 *BRT v Sabam* [1974] ECR 314; joined cases 209-213/84 *Ministère Public v Asjes* [1986] ECR 1457.

⁵¹ This motive already appears in the very early joined cases 7/56, 3/57 to 7/57 *Algera* [1957] ECR 41; cf also John A. Usher, *General Principles of EC Law* (Longman 1998), 54-57, 65-67.

CJEU argued in 1964, ‘the obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent,’⁵² an argument which is still very convincing today. In other words, there were not directly providing individuals with any rights, while political integration and the transfer of competences to the supranational level moved forward. It should be clear that this would have primarily meant an erosion of fundamental rights and political control of the people, not the states, since recourse to national courts in cases concerning European regulations or directives would have been impossible.⁵³ For these reasons, it *must* never have been the intention of the founding States, acting on behalf of the European people,⁵⁴ to install a judiciary that is merely ‘*la bouche qui prononce les paroles de la loi*’ (Montesquieu), but instead to create and enforce an institution that breathes life into the young and incomplete legal order, and facilitates legal certainty and trust.⁵⁵

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 the specific rules of legal rationalisation by which the functional context of European law is characterised in the foundational period. It seems beyond controversy that the CJEU never shied away from formal legal demands⁵⁶ in its rationales for decision. However, the contention 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 many studies.⁵⁷ While it is true for the early decisions of 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

⁵² ‘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’ (Case 26/62 *van Gend en Loos* [1963] ECR I).

⁵³ cf. Stephen Weatherill (n 46), 117.

⁵⁴ See also preamble of the EECT.

⁵⁵ cf also Dorothee Heisenberg and Amy Richmond, (n 35), 206.

⁵⁶ cf. Stephen E Toulmin, *The Uses of Argument* (Cambridge University Press 1958); Dennis Patterson, ‘Normativity and Objectivity in Law’ (2001) 43 *William and Mary Law Review* 325.

⁵⁷ See, eg Karen J Alter and Lawrence Helfer, (n 28), 569; V. Perju, (n 33), 369; Martin Höpner, ‘Usurpation statt Delegation: Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf’, *MPIfG Discussion Paper*, No. 2008/12, Cologne, Max Planck Institute for the Study of Societies, 29; cf. also Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986) 526.

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), moved to the centre of the CJEU’s reasoning.⁵⁸

At this point, it might be objected that the Court just picked the forms of argument that best supported its interests, eg, in expanding the ambit of European law or the Court’s power vis-à-vis the nation states.⁵⁹ In light of empirical evidence, however, this explanation is unconvincing, since it is far from true that all landmark cases were decided in favour of the expansion of EU law; not even in cases where the CJEU must have been in a good strategic situation to pursue pro-integrationist or other political interests. It should also be remembered that:

‘[s]upremacy’ is primarily an enabling doctrine, which authorises the CJEU to hand down prescriptions for the handling of legal diversity but not a carte blanche for the gradual building up of a comprehensive body of substantive European law provisions which would suspend Europe’s legal diversity.⁶⁰

In *CILFIT*, 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* and *Rewe v Hauptzollamt Kiel*; ⁶¹ also, in *Keck*, *Grant*, and *Greenpeace*, ⁶² the

⁵⁸ cf eg the influential cases concerning the implementation and embodiment of supremacy and direct effect, like the cases 9/70 *Leberpfennig* [1970] ECR 825; 41/74 *van Duyn* [1974] ECR 1337; 106/77 *Simmenthal II* [1978] ECR 629; joined cases 205-215/82 *Deutsche Milchkontor* [1983] ECR 2633; 314/85 *Foto-Frost* [1987] ECR 4225; 217/88 *Tafelwein* [1990] ECR I-2899; joined cases 143/88 and 92/89, *Zuckerfabrik Süderdithmarschen* [1991] ECR I-534; 46/93 *Brasserie du Pêcheur* [1996] ECR I-1131; 224/01 *Köbler* [2003] ECR I-10290.

⁵⁹ cf Karen J Alter, ‘The European Legal System and Domestic Policy: Spillover or Backlash?’ (2000) 54 *International Organization* 489, 513; Sally J Kenney, ‘Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référéndaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court’, (2000) 33 *Comparative Political Studies* 593, 597; Andrew Moravcsik, ‘Liberal Intergovernmentalism and Integration. A Rejoinder’ (1995) 33 *Journal of Common Market Studies* 611, 623; Geoffrey Garrett, ‘The Politics of Legal Integration in the European Union’ (1995) 49 *International Organization* 171, 173.

⁶⁰ Christian Joerges, ‘Deliberative Political Processes’ Revisited: What Have we Learnt about the Legitimacy of Supranational Decision-Making’ (2006) 44 *Journal of Common Market Studies* 779, 792.

⁶¹ Cases 238/81 *CILFIT* [1982] ECR 3415; 60/75 *Russo v AIMA* [1976] ECR 46; 158/80 *Rewe v Hauptzollamt Kiel* [1981] ECR 1807;

⁶² Joined cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6126; Cases C-249/96 *Grant* [1998] ECR I-636; Case C-321/95 *Greenpeace* [1998] ECR 1702.

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*.⁶³ Here, the judges repeatedly rejected the general horizontal direct effect of directives. This must be even more astonishing from the viewpoint of a rationalist-marked approach, since recognising claims concerning private individuals relying on unimplemented directives would have led to an enormous boost in the enforcement of Community law, and the CJEU had extremely good chances of being successful in its ruling. Yet, in the course of the Single European Act (SEA, 1986/87) and the Treaty of Maastricht (TEU, 1992/93), 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 the much-debated case *Mangold*⁶⁴ did the Court see the necessity of carefully claiming a general principle of horizontal direct effect of directives.

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

3. *The Local Context – Marking Off a Distinct European Legal Order*

In the local perspective of the context, it is very interesting to see that the European Court and EU law have been frequently measured against other 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 emphasised 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, as in the more recent cases *Kadi* (2008) or *Melli Bank* (2009,

⁶³ *Marshall I*, *Faccini Dori*, and *Unilever* (n 39).

⁶⁴ Case C-144/04 *Mangold* [2005] ECR I-10013.

2012).⁶⁵ 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. 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.⁶⁶

In this respect, the CJEU's work is unique and has to be clearly differentiated from that of other constitutional Courts. Direct 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,⁶⁷ as well as national European high courts and even the U.S. Supreme Court,⁶⁸ just fall short. The European Court is embedded in a very different political-structural and legislative setting, and possesses rules and concepts with a different 'meaning-in-use.'⁶⁹

Embedded in the wider context of European law and being dependent on the difficult political realities of EU legislative decision-making, 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 rejects⁷⁰ 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

⁶⁵ Joined cases 402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351. T-246/08 & T-332/08 *Melli Bank v Council*, Judgment of 09.07.2009.

⁶⁶ British Court of Appeal, Case *Bulmer v Bollinger* [1974].

⁶⁷ cf Karen J Alter and Lawrence Helfer, (n 28).

⁶⁸ eg James A Caporaso and Sidney Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63 *International Organization* 593, 613; Sally J. Kenney, (n 59).

⁶⁹ Antje Wiener (n 11).

⁷⁰ This can be seen most recently in case of the negotiations about the Constitutional Treaty and the Lisbon Treaty.

Europe⁷¹). Moreover, it has to be kept in mind that 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.

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. As Vassilios Skouris notes:

[As a judge] you are not able to avoid an answer by saying: 'that this is a difficult question, a highly political matter or the opinions are divided in this question.' The task of the judge is to make a decision.

⁷²

The CJEU never made a secret of this need to fill the lacunae and gaps in the treaties and provisions by judicial means, but stated it explicitly from the start, as documented in *Algera*.⁷³

In short, the CJEU 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 shifting of political questions from politics to law must be seen as the difficult basic condition of a 'European way' of judicial interpretation, especially characteristic and symptomatic of the foundational period. That this situation has not fundamentally changed today also becomes apparent in the words of CJEU Judge Ó Caoimh:

[T]he Union legislator is on occasions vague in what it has done. The legislation may lack precision such that the provisions of law may be very unclear. This may result from the fact that the decision reached at the political level is a compromise, and no one wants to

⁷¹ EEC Treaty, preamble.

⁷² Vassilios Skouris, (n 18).

⁷³ Joined cases 7/56, 3/57 to 7/57 *Algera* [1957] ECR 41.

be too prescriptive in regard to how the legislation should be understood. Those negotiating may agree on the basic statement of law, but they may not wish to commit themselves further and hope that the judges one day or another will come down in one direction or another to support their own views in interpreting the legal text that results from the political decision.⁷⁴

In other words, the European Court is especially dependent on the political realities in the EU – and its well-known flaws. In cases where the legal provisions are obscure or political questions have been shifted from politics to law, the claim that the CJEU is a ‘political Court’⁷⁵ or has been activist can hardly be convincing. From the perspective of the specific situation in Europe’s community of law, it was not *judicial* activism but the lack of *legislative* activism (surely promoted by the Community’s political architecture) that was the problem in the early years of integration and forced the Court to act.

IV. CONCLUSION

In rationalist and actor-centred analyses, the creation of the Court’s influential doctrines in the foundational period of EU law must look like a story of European judicial empowerment. It was argued here that this story turns out to be a myth, although this is not to say that it cannot be proven. The point is, rather, that the proof or the disproof of ‘politics in robes’ has to be found in the context of law itself and not in the allegation of the Court being a political actor. Without a doubt, sometimes the line between politics and the indispensable development of law by judges is not easy to draw, and should therefore be a point of particular attention. The autonomy of European law does not mean immunity from criticism. But such criticism has to be based on more than a ‘broadly positivist understanding of law as a system of authoritative rules, and an instrumentalist view of courts acting as strategic players who sometimes exploit the indeterminacy of those rules to pursue particular interests or achieve particular ends,’⁷⁶ as de Búrca once pointed out.

The model of context analysis outlined here should be understood as a contribution to the discussion about integration through law by offering such a non-positivist analytical framework for approaching and assessing the role of law in Europe. It aims to close a gap in current research by not

⁷⁴ Aindrias Ó Caoimh, (n 42).

⁷⁵ Ian Ward, *A Critical Introduction to European Law* (Cambridge University Press 2009), 81.

⁷⁶ Gráinne de Búrca, (n 8), 318.

focusing on the role of law in a wholly political integration process, but on 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 that constrains him or her within certain legal rules.

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 strive for justice and nothing but justice. Quite the contrary: interests have and have always had their place in law. But, 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. These rules are the dividing line between law and politics, although they are never totally detached from other contexts and therefore also underlie demands arising from politics.