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The European Court of Justice and the Myth of "Judicial Activism"

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Andreas Grimmel*

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 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 of argument and action that generates impetus for integration. Therefore, the role of the European Court of Justice in the process of integration may only be adequately captured by examining European law as an independent space of reasoning and action.

key words: European Court of Justice (ECJ); Integration through Law; Integration Theory; Regional Integration; Rationalism; Trivial Rationalism; Context Rationality; Context of Law; Context Analysis; Judicial Politics.

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1. Introduction

Since the trailblazing works of Hjalte Rasmussen and Joseph Weiler in the late 1980s and early 1990s, European law as a factor of integration has increasingly moved into the focus of political science research (Rasmussen 1986, 1988; Weiler 1991, 1993, 1994; also Cappelletti et al. 1985). 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" 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" (see Burley/Mattli 1993: 72, Diez 2001, Bouwen/McCown 2007) where, in addition to a variety of actors – from private national litigants, to nation states, to the genuine European institutions – the Court is trying to exert its influence and implement its interests. This perception of the rule of law in Europe, however, is a momentous misinterpretation.

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 legal community and treat the Court as a *political* and *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 (see e.g. Josselin/Marciano 2007, Alter 2009b: 44) ignores the legal and craft-bound foundations of its work. It just fades out the embeddedness of the Court 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 trivial notion of rationality[1] employed in the current debates is inflexible, mechanistic, and universalistic. It could be described as a linear and non-changeable function connecting actor and action in a predetermined, un-changeable way. Moreover, the concept of rationality remains an analytical black box. Ascribing this notion of rationality to the ECJ obstructs the view of the broad foundation of shared legal knowledge and tradition that forms the core of the common legal

[1] 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).

system, and which must be the inevitable basis for enduring acceptance of the whole integration project. It clouds the processes happening in the interior of Europe's legal sphere and detracts from the historical fact that the legal system grew, developed, and was differentiated over time by means of law – not just politics (for a close discussion on trivial rationalism see Grimmel 2010a, 2010b).

This article will begin with a brief overview of the theoretical approaches towards 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 shift the focus from integration generated *by actors in the field of law* to integration *through law*, which may only be adequately understood by examining the idiosyncrasies and rules of the law stored within a certain social *context* of reasoning and action. Third, in examining groups of selected landmark cases, the promise and benefit of such a *context-analysis* will reveal 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 convincing picture, one that reflects the actual options and restraints of the context. The article will conclude with some general remarks, and an overview of how and why such a contextual approach should be used to develop a better and much more promising understanding of the process of integration in Europe.

2. 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 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/Mattli 1993, 1998; Alter 1996, 1998, 2000; Garrett/Keleman/Schulz 1998; Kilroy 1999; Mattli/Slaughter 1995; Moravcsik 1995; Pollack 1997; Slaughter/Stone Sweet/Weiler 1998; Stone Sweet 1999, 2004, 2005; Scharpf 1999, 2009; Shapiro/Stone Sweet 2002; for an overview see also Schepel 2000; Conant 2007, 2002; Grimmel/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 just transferred existent approaches, models, and concepts from politics to the field of law. Their project was solely to show how their preferred and already elaborated explicatory 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 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 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 (cf. 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 (for a detailed discussion on the notion of rationality in general see Grimmel 2010b, and in regard to integration theory, Grimmel 2010a). Put another way, law and legal integration were considered as "jurisprudential policy" (Cohen/Vauchez 2007: 80) 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 (cf. Moravcsik 2002). At first glance, *Neofunctionalism* seems to be opposed to these approaches, but it shares the crucial belief of a self-interested and rationally acting Court with a political agenda (Mattli/Slaughter 1995: 185) and the ambition to gain "prestige and power" (Burley/Mattli 1993: 64) by using law as "mask and shield" (ibid.: 73; cf. 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"[2] (Stone Sweet 2004: 37).

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? Do the member states and the supranational Court actually share the same instrumental rationality, so that the difference is only dependent on the actor's perspective and political agenda? Even more importantly, from an analytical point of view: does the undeniable fact that the ECJ has expanded the rule of law in Europe inevitably lead to the conclusion it had an interest in doing so? Is it true that cause and effect are the same? But the biggest and most pressing question 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 these 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

[2] 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).

or later plunge into crisis, since the law would lose the acceptance of those whom it concerns – the European people?

Today, discussions have not moved far beyond this point. Contemporary approaches dealing with the ECJ seem to be indeed "trapped in a supranational-intergovernmental dichotomy" (Branch/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" (2009c: 287) and marked by the will "to expand its own authority" (2000: 513) and the rule of European law by "aggressively interpreting and enforcing ECSC rules" (2009a: 8). *Josselin/Marciano* highlight the principal-agent relationship between the Court and the EU member 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/Häge* (2007) and *Carrubba/Gabel/Hankla* (2008, cf. also Carubba/ Murrah 2005) contributing empirical studies, center on the "strategic behavior by judges in the face of political constraints" (ibid: 449) and, thereby, narrow their cognitive interest to match the assumptions about European law made by earlier theoretical approaches (for a close theoretical examination and discussion see Grimmel 2010a).

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.

In other words: it is unjustified to conclude the ECJ had an interest in expanding the ambit of European law into the member states' national legal systems based on the mere fact that it has *de facto* done so. The law as a self-contained context of reasoning and action is 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." It is simply 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" (Conant 2007). Not the interest in law or the ECJ as an institution, 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 integration theory, and second, to open up the black box of European law (cf. also Dehousse 2002). As an alternative to the previous

approaches, the next chapter will outline what a more promising analytical concept looks like, and how it can be used to shed light on the integrative effect of European law.

3. Context Analysis as an Alternative Model for Approaching EU 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 a broad range of legal traditions, doctrines, and approved customs; as well as forms and methods of interpretation, legal reasoning, and argumentation widely accepted by lawyers, legal scholars, and legal representatives throughout Europe: all of these shape the European rule of law. In short, the EU's legal system consists of much more than mere statutory provisions and regulations. It constitutes a *context* – a commonly known and accepted framework providing actors with reasons (not causes!)[3] for meaningful action. In other words: only within its borders do inter-subjective reasoning, justification, and acceptance – as an inevitable fundament of Europe's legal community – become possible. Contexts are always distinguishable from other contexts in three ways:

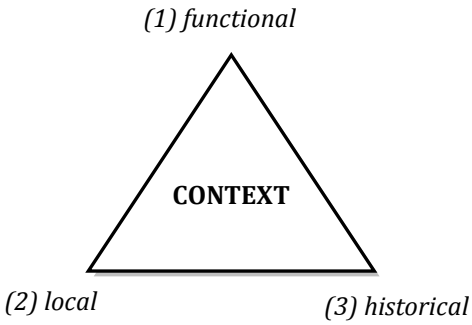

Figure 1: The three dimensions of a context

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 distinction of value spheres (economy, politics, law, science, religion etc.), this important insight is extremely useful for understanding the autonomy of law. In modern functional differentiated societies, the "sphere of law" forms a certain space of reasoning and structures action by the sum of the practical-linguistic rules within its borders. In this sense, it has to be distinguished from the legislative and political democratic processes that aim to set and negotiate law. The task of jurisprudence is interpreting, applying, and, to some extent, further developing laws, which in praxis can neither be self-enforcing nor logically coercive. Rather, it has to provide convincing explanations – the basis of which must be certain forms of argument that rationalize the actions within its borders, thereby distinguishing the context of law from politics. In short, legal reasoning is not political law-making. The context of law, not the interest of actors, tells

[3] Cf. Wind/Sindbjerg-Martinsen/Pons-Rotger 2009.

which claims and arguments are legitimate and which have to be refused.[4] Based on Toulmin (1958), the basic and ineluctable scheme of argument in European law can be displayed as followed (see also Alexy 1983, 1992; Patterson 1996, 2004):

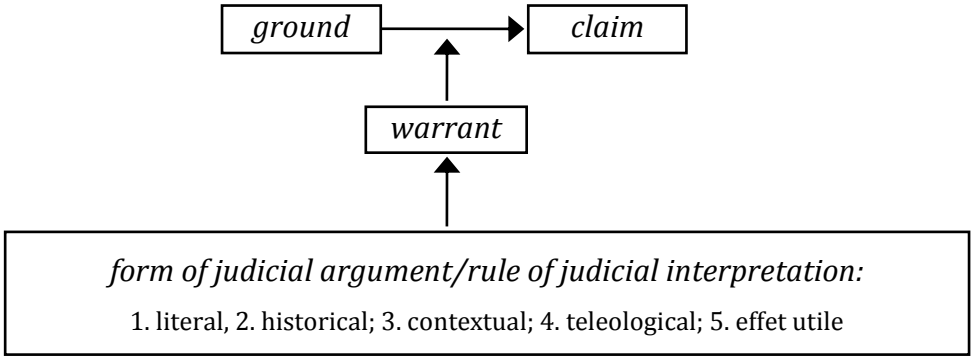

Figure 2: The basic scheme of argument in the context of European law

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.[5] Second, the premises and propositions must be true and sufficiently justified (cf. 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, 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 law and must be seen as ways to produce convincing or at least acceptable, and therefore legitimate, judicial outcomes.[6] 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 that sense, the borders of the context consist of membership in the European legal Community, which constitutes a unique 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" (Figure 2; for a close examination of legal argument in EU law see Bleckmann 1982, Benoetxea 1993, McCormick 1996, Anweiler 1997, Benoetxea/MacCormick/Moral Soriano 2001, Seyr 2008, Walter 2009). These, together with

[4] This does not mean that interests are per se illegitimate in law, but they have to be transferred into legal arguments to be acceptable and considered valid claims.
[5] The conclusion (claim) must directly result from the premise (grounds for the claim).
[6] This does not necessarily imply that everybody accepts or appreciates the legal decision.

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) European 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 European law as a context.

Third, European law is extraordinarily dynamic and, with its unfinished character, subject to 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. This changing character, however, does also imply that European law not came into being from nowhere. Nor does it mean it is arbitrary, or can be subject to "activist case law of the ECJ" (Bouwen/McCown 2007: 426) or a pro-federalist blueprint. From the dawn of the European Community the contrary is 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, which 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 must 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 ECJ has the extremely 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" (Everling 1984: 1309). This means nothing less than 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." The same applies to the adjudication and judicial development of European law. Only by 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 acceptability[7] of its judgments.

The context of European law (cf. Figure 3) therefore 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. It provides the basis for mutual understanding in Europe's legal sphere and therefore enables action, as well as the statement of justification. It never *causes* or predetermines either action (like in trivial rationalist conceptions) or categorical agreement with action, but gives *reasons* for acceptance or rejection. The claim that the Court is a political-rational actor striving for power and trying to expand European law into the national sphere has to be rejected, since it is built on a methodological foundation that ignores the contextual boundedness of judicial decision-making. A context analysis undertaken in the following chapter promises to paint a much more convincing picture, since it systematically draws attention to the logic of law and judicial legislation.

[7] 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.

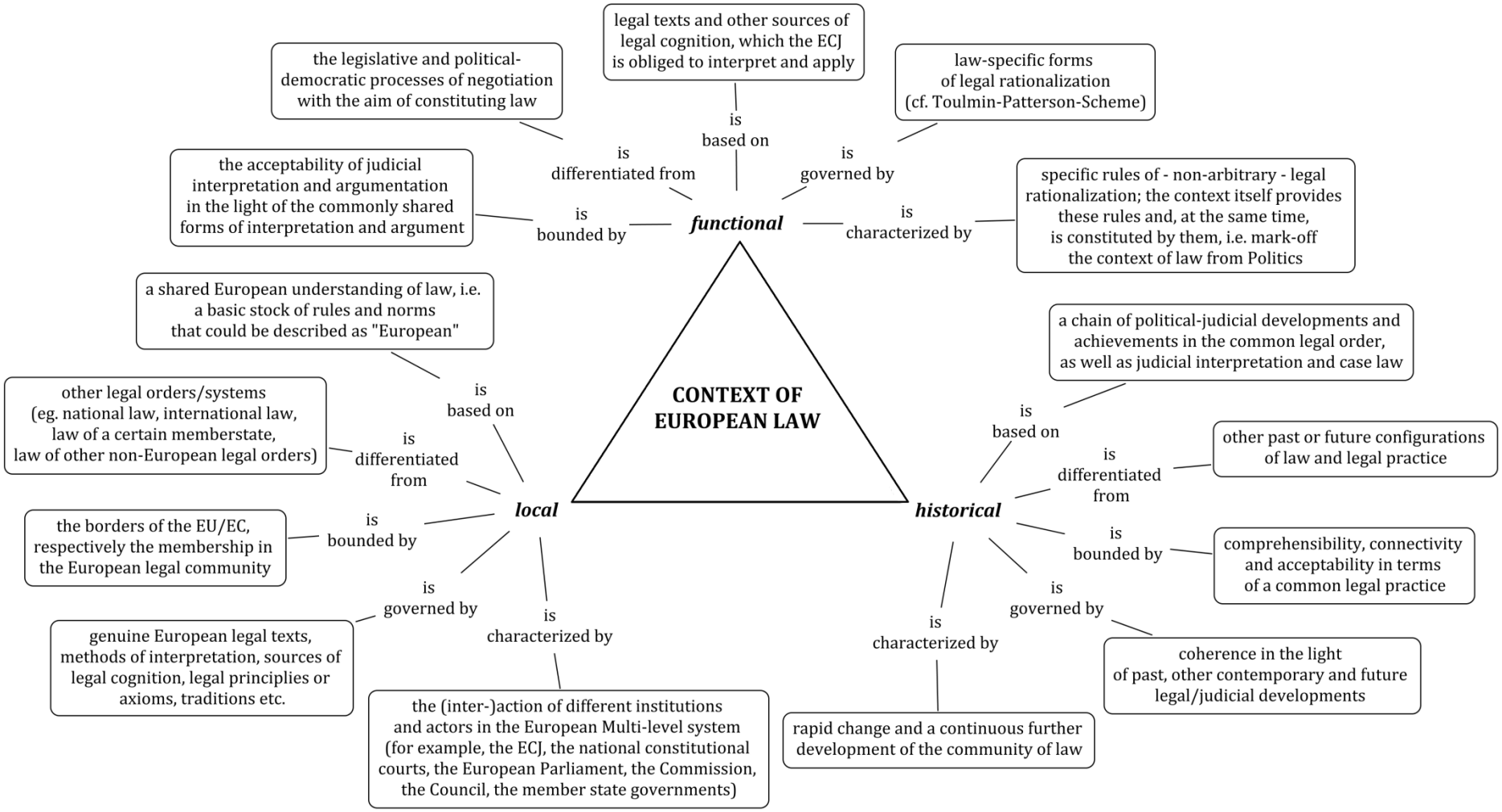

Figure 3: The context of European law as threefold distinct entity

4. Establishing the Autonomy of European Law – Judicial Interpretation or Judicial Activism

To track down the integrative effect of law in Europe and draw a more convincingly complete picture of the ECJ's role, it is not sufficient to state the fact *that* the Court further developed European law, but one must show *how* it is developed. An analysis, therefore, has to concentrate on the process of adjudication, while simultaneously accounting for the circumstances in which it occurs. To prove the relevance of context analysis, which promises a systematic approach of both aspects, the Court's development of European legal autonomy will be examined. Tracking down the Court's contribution to the subject should be particularly interesting, since it was and still is the critical juncture between law as a contextual, independent, and self-contained law-generating system; and law-making as a part of political practice. Here, it will be shown that:

- European law is and must not be predetermined by either a trivial rationality nor a pre-existing political agenda:
  - the law itself, understood as an independent context, provides reasons for action and therefore, shapes the reasoning of actors engaged with law
  - the law has to be imperatively distinguished from politics, since it is governed by different acknowledged rules of rationalization

- Only in the internal view point of context do motives and considerations become understandable:
  - judicial reasoning and action can only be properly understood by considering the historical circumstances in which they are embedded
  - the Court's reasoning and action have to be determined by contextual consistency and coherence
  - judicial law-making in Europe is a non-linear, highly dynamic, and steadily changing process that can only be based on a common understanding of law

- A contextual analysis does not mean to justify the ECJ's judgments wholesale, but fair and appropriate critique of the judicial development of law must be addressed by means of law, not by projecting ultimately non-testable political interests on the Court or its judges.

The establishment of legal autonomy has to be differentiated in two dimensions: *inward autonomy* (i.e., the sovereignty of Community law towards the member states), and *outward autonomy* (i.e., the autonomy of the Community law towards other states or international organizations). Here, only inward autonomy will be examined, since it is central to distinguishing EU law from member state law, and is the recurring object of criticism in political science discussions. The first step (a) the Court made towards establishing inward autonomy was rooted in the so called "foundational period" in which the ECJ set the basis for a second step (b), the phase of consolidation and embodiment. Explicitly, it is not the aim here to provide either a close empirical case study of, nor judicial argument for or against, particular strains of adjudication. To judge the veracity of judicial argument 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 do the nearby: try to understand the Court as a judicial actor, rather than a political one.
So, which are the exact demands a *judicial* actor has to comply with to be considered as rational within the context and which have to be proved here to disprove the assertion of

"politics in robes?" From the perspective of the context, it is not important to have the power or good chances (e.g. 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 within law:

- *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, like national law, international law, law of a certain member state, 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 being coherent in the light of past, other contemporary and future legal/judicial developments.

If one can say of an actor that he acts totally in line with these basic demands imposed on him by the context the question of motivation (interest or not?) becomes necessarily 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 being used here differs significantly from "trivial rationalist," actor-centered or interest-based explanatory patterns in the way it takes an inner perspective on European law. From this point of view the question is not anymore, 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 wills, interests or are mere pawns in the game of European law, but that they are bound to the imperatives that are specific for a certain context and are shared by the other participants of the same social framework. These rules, at the same time, must delimit undue political activism from legitimate judicial action. In other words, to judge if the European Court of Justice is a political rather than a judicial actor has to be decided coming from the context of law, not politics. Otherwise it would already be imposed that law is politics, although this must be a subsidiary explanation that can only be valid in case there is no legal one.[8]

Following this line of argument, the legal practice of the ECJ in the "foundational period" and the "phase of consolidation and embodiment" will be contextualized in its historical, functional and local embeddedness to clarify if the context of European law provides sufficient evidence that the rules of law in Europe have been broken towards politics or not. By way of debating the Court's jurisdiction on *direct effect* and *supremacy* – which are still the most thoroughly investigated cases in political science – and contrasting it to central

[8] 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 other than judicial action.

suppositions of "trivial rationalist" approaches it will be tested if there are compelling explanations *within* law. If this is the case and if can be shown the ECJ had good reasons in all the contexts examined, this must be the intervening variable towards the claim of "legal politics" as it would be invalid/undue to suspect a political motivation in that case. The landmark doctrines on direct effect and supremacy[9] should be especially interesting and challenging here. They must be "hard cases" for an approach trying to refute mere "judicial activism," since it is beyond doubt that the "foundational period" of adjudication must still be seen as one of the most pioneering and prominent ones, with a highly formative impact.

The Foundational Period – Securing Autonomy and Effectiveness

Not long after the European Court of Justice went into session in 1953, it developed some of its most influential and groundbreaking doctrines and principles, setting the stage for integration by creating an autonomous legal system – i.e. a system that is not dependent on its subjects' willingness to accept the implementation of its laws. The enormous influence the Court exercised by taking this step becomes apparent in examining some of its early landmark cases and legal principles/doctrines, such as: *Fédéchar* (1956, Case 8/55) and *AETR* (1971, Case 22/70) on the principle of implied powers, *van Gend en Loos* (1963, Case 26/62) on the principle of direct effect, *Costa/ENEL* (1964, Case 5/64) on the principle of supremacy, or *Internationale Handelsgesellschaft* (1970, Case 11/70) on the ECJ's protection of fundamental rights, just to mention the most important. However, it would be precipitous to conclude that the impact of these decisions on the Community and its member states could be directly derived from the prevailing interest in asserting a pro-European political agenda, or the existence and enforcement of a will to expand the ambit of European law into the national legal systems. Although the legal decisions can be unhesitatingly characterized as a "quiet revolution" (Weiler 1994) spearheaded by the ECJ, they have not only been quite consequent and well-founded, but also necessary in light of the historical, local, and functional circumstances (cf. also Everling 1984: 1305).

Envisioning the *historical context* of European law at this early stage can help to develop a sense of the situation the ECJ was thrown into. 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" (Beutler/Bieber/Pipkorn/Streil 1987: 40; Simson/Schwarze 1993: 26, 1995: 75). 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). It is crucial to recognize this very qualitative difference of the Community's legal foundation in order to comprehend the judgments made by the ECJ in the following years.

It has to be emphasized that against a background of long and devastating warfare and the great success of the ECSC, all six member states made this qualitative step towards deeper integration fully aware of the fact that it was new soil they were stepping on. The explanation that "the most assertive supranational court of that time managed to fly under the radar so

[9] 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 arouse as a consequence from the early case-law. They all represent middle-of-the-road cases and are part of the canonical repertoire in European jurisprudence and in the intersection of most legal textbooks.

successfully" (Perju 2009: 331), that Member States did not notice the reach of its jurisdiction, is too simplistic and, moreover, historically implausible. The governments knew the consequences of their decision to take the Community agreement, including the European Judiciary, to a higher level (Mancini 1989: 595, Mancini/Keeling 1994: 186). "Member states 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" (Heisenberg/Richmond 2002: 204). 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 and go back to the modus of the ECSC Treaty (for an historical overview see also Grimmel/Jakobeit 2009, Heisenberg/Richmond 2002).[10]

Against this background we can approach the *functional context*. Two questions have to be addressed here in regard to the foundational period: first, if the ECJ 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. The second question, presupposing an answer to the first, asks for the reasonability – i.e. understandability, acceptability and, therefore, legitimacy in law – of the Court's justifications delivered as grounds for its decisions. 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 character of the Treaty establishing a Community with supranational institutions – which must have implied building a legitimate governing system in which the separation of powers is secured – Art. 164 EECT[11] 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. 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: to "breathe life into the Treaty" (Weatherill 1995: 185).

From this perspective, the doctrines developed in the foundational period should not be perceived as an expansion of European law that undermines the autonomy of the member states. Rather, they have been invaluable in helping European citizens to assert their legitimate rights and to be protected by law. In a contextual perspective, the ECJ lay 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 enforce an agenda. 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* (1973, Case 81/72), *Westzucker* (1973, Case 1/73) and *Einfuhr- und Vorratsstelle Getreide* (1975, Case 4/75); and the principle of legal certainty in *Brasserie de Haecht* (1973, Case 48/72), *BRT v Sabam* (1974, Case 127/73) and *Minestère Public v Asjes* (1986, Cases 209-213/84). 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:

[10] This would have been the logical consequence from a rationalist perspective, since there should have been a broad convergence of interests and a strong motivation in cutting back the Court's power among the six member states in order to correct or amend the Treaty under Article 236 EECT demanding unanimity.

[11] 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.

54-57, 65-67). This motive already appears in the very early case *Algera* (1957/58, Joined Cases 7/56 and 3-7/57).

Without the supremacy and direct effect of Community law there would have been no binding effect for the European institutions and states at all. As the ECJ argued then, 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,[12] while at the same time, 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). One can only imagine how enormous the EU's legitimization problems would be today without the ECJ's initiative. For these reasons it can and must never have been the intention of the founding states, acting on behalf of the European people,[13] to install a judiciary that is merely "la bouche qui prononce les paroles de la loi" (Montesquieu),[14] 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 (cf. Heisenberg/Richmond 2002: 206). To answer the second question about the legal justification and compellingness of the early landmark cases, we have to take a closer look at the local circumstances.

In regard to the *local context*, i.e. Europe's legal community, The Court was put in an extraordinarily difficult situation right from the very start. Other than the Council, the Commission, and the Parliament, the ECJ had no political room for maneuvering, but was faced with political realities, which from a judicial point of view, created a quite unsatisfactory situation. It had to cope with an inflated but fragmentary, and – in respect to the impact and reach of the Treaty – incomplete and insufficient legal basis, which emanated from complicated, opaque inter-state bargaining, and was full of diffuse objectives and formulaic compromises.[15] Or, as Lord Denning, senior appellate judge of England, once put it: 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" (*British Court of Appeal, Case Bulmer v Bollinger*, 1974). 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 the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member states. "[16]

[12] "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)
[13] See also preamble of the EECT.
[14] "The mouth that pronounces the words of the law," also acknowledged by the German Federal Constitutional Court in the case *Kloppenburg* in 1987, BVerfGE 75, 223.
[15] Art. 5 EECT may serve as an example: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
They shall abstain from any measure which could jeopardize the attainment of the objections of this Treaty."
[16] p. 55.

Additionally, the exact legal nature of the Community remains obscure until today (something in between confederation and federation on the road towards an "ever closer union among the peoples of Europe"[17]). Furthermore, the Court did not have the luxury of a long history of genuine European case-law. There were simply no available precedents that could have served as point of reference for legal interpretation and adjudication – just the vast number of 248 Articles of the Treaty (see also Everling 2000: 221). At the same time, the judges never had – qua foundational assignment – the option of rejecting 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/Richmond 2002: 206).

In sum, the ECJ was thrown into a double bind. This dilemma of the early days becomes obvious in all the leading cases noted above. In each of these, be it *Algera*, *Fédéchar*, *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. It is interesting to note that, in part, the states have still not progressed beyond this point: *t*oday, the principle of supremacy especially is widely undisputable among member states and national courts (cf. opinion of the Council Legal Service, EU Council Doc. 11197/07, 22 June 2007; see also Craig/de Búrca 1999: 196-198), although the Lisbon Treaty still does not contain any legal provisions appreciating the Court's early fundamental decisions on supremacy. However, does this have to mean that the principle is still not acknowledged, or that the Court did not have the right to develop it? Is, in the end, the whole legal system built on a false, unjustified foundation? Certainly not. On the incomplete basis set by politics, it could not have been a surprise that the ECJ had to emphasize teleological arguments (relying on spirit and purpose of the Treaty) instead of starting with literal arguments (cf. Weatherill/ Beaumont 1999: 190-192; Dehousse 1998: 38; Schütz/Bruha/König 2004: 74). This way of legal arguing was rather typical for the early years of the Community, and a result of the difficult political realities reflected in the Treaty. Forced to act without being able to rely on a systematic constitutional order or a long history of case law, it was not only consequent, understandable, and legitimate within the legal context to emphasize teleological arguments,[18] it was also necessary to secure legal security (cf. Tridimas 2006: 17-19) and must be seen as a "European way" of judicial interpretation, characteristic and symptomatic of the foundational period. In this sense, the claim that the ECJ is a "political Court" or has been activist is neither convincing, nor can it be acceptable (Ward 2009: 81). 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.

[17] EEC Treaty, preamble.

[18] As evidence, it shall suffice to note that the member states did not show any serious will to correct the legal doctrines by legislative means, but condoned the ECJ's adjudication.

Towards Consolidation and Embodiment – Defining Inward Autonomy

This picture changed gradually in the following years in which the Court continued its line of interpreting and further developing the common law by consolidating, differentiating, and completing its principles, formulated especially in *van Gend en Loos* and *Costa/ENEL* – a process that remains unfinished. In this second stage, the ECJ was now able to draw upon prior established and accepted[19] legal doctrines. Three major strains of adjudication can be distinguished here:

A first strain emerged around the *doctrine of supremacy*. In a broad number of decisions, the ECJ, step by step, closed remaining gaps that became evident over time. Some of the most important have been *Simmenthal II* (1978, Case 106/77) on supremacy in the application of Community law, *Milchkontor* (1983, Case 205-215/82) on the implementation and application of Community law by the member states, *Foto-Frost* (1987, Case 314/85) on the incompetence of national courts to declare legal acts of the Community invalid, *Tafelwein* (1990, Case C-217/88) on the obligation of national administrative authorities to implement Community law, *Factortame III* (1990, Case C-213/89) on effective interim legal protection of individuals, *Zuckerfabrik Süderdithmarschen* (1991, Case C-143/88) on interim legal protection against the implementation of Community law, *Alcan* (1997, Case C-24/95), on aid granted by the state contrary to Community law, *Ciola* (1999, Case C-224/97) and *Kühne & Heitz* (2004, Case C-453/00) on the interpretation and range of supremacy in application.

A second set of judgments concerned the *doctrine of direct effect*. Well-known are *Lütticke* (1966, Case 57/65) on the direct applicability of Community law provisions, *Leberpfenning* (1970, case 9/70) on the direct applicability of decisions in favor of individuals, *van Duyn* (1974, Case 41/74) on the direct applicability of directives, *Defrenne II* (1976, Case 43/75) on individuals as the subjects of rights and duties emerging from Community law, *Ratti* (1979, Case 148/78) on the direct applicability of directives, von *Colson & Kamann* (1984, Case 14/83) on the indirect effect of directives, *Marshall I* (1986, Case 152/84), *Kolpinghuis Nijmegen* (1987, Case 80/86), and *Marshall II* (1993, Case C-271/91) on the direct effect of directives, *Marleasing* (1990, Case C-106/89) on the indirect effect of directives among individuals, *Faccini Dori* (1994, Case C-91/92) on the horizontal direct effect of directives among individuals, *Pfeiffer* (2004, Case C-397/01) on the direct effect of directives among individuals, *Pupino* (2005, Case C-105/03) on the indirect applicability of secondary legal acts in the third pillar of EU law, and *Adeneler* (2006, Case C-212/04) on the obligation of national courts in accordance with directives.

A third line of adjudication dealt with the *liability of the member states* breaching Community law. *Francovich* (1991, Case C-6/90) had broad implications on state liability for failure to implement directives, as did *Brasserie du Pecheur* (1996, Case C-46/93) and *Factortame III* (1996, Case 48/93) on state liability in the case of violation of a directly applicable provision of Community law, and interim legal protection in order to enforce Community law; and *Köbler* (2003, Case Rs. C-224/01) on state liability in cases of violation by national high courts.

Approaching the *historical context* of this second phase of jurisprudence, it stands out that the judicial development of law in the line of supremacy and direct effect was relatively continuous in comparison to the political developments that have been characterized as a stop-and-go process (Corbey 1995; see also Grimmel/Jakobeit 2009: 227) during the same time

[19] The major critique came up much later in the scientific discussions of the 1980s and 1990s.

period. The reason for this constancy lies in the nature of the law. Whereas political decision-making might be based on earlier decisions and bound to a set of formal and informal institutional arrangements as well, jurisdiction and judicial law-making is bound by very strict procedural rules. Furthermore, it is dependent on references made by national courts, as well as legal action by private litigants, and national or European actors. Beyond such formal and structural demands, concrete reasons have to be provided. The consistency and coherency of case law is essential to ensure the argument's comprehensibility and acceptability. Reference to former judgments, commonly shared legal knowledge, and compelling or convincing strains of argument are minimum requirements here. Or, as former ECJ judge Everling puts it: "Courts create their own legitimacy by the quality of their decisions. The inherent power of persuasion of their judgments entitles courts to expect acceptance by those affected by the decisions. Reliance on the power of persuasion is particularly important in a system such as the Community in which the means for enforcing judgments are limited and in which compliance with them ultimately depends on the recognition by all concerned that the common interest requires respect for the Community legal order" (Everling 1984: 1308).

Other than in the political theories assuming judicial activism, landmark European cases have never been *decided* by the judges on an ad-hoc basis, but have been *unfolded* in the light of earlier precedents and in accordance with existing jurisprudence. At no point of time in the history of the Community it was enough to just promote "a transnational constitutional ideology, through the production and dissemination of a theory of legal and political order with which new 'bottles' could be filled with old 'wine' by borrowing from the different existing politico-legal repertoires and by articulating the different elements taken from these repertoires" (Cohen 2007: 131). The chain of judgments concerning the direct and indirect implementation of directives in *Becker* (1982, Case 8/81), *Marshall I*, *Kolpinghuis Nijmegen* (1987, Case 80/86); *Fratelli Costanzo* (1989, Case 103/88); *Marleasing*, *Francovich*, *Marshall II*, *Faccini Dori*, *Inter-Environnement Wallonie* (1997, Case 129/96); *Carbonari* (1999, Case C-131/97), and *Unilever* (2000, Case C-443/98), which is a consequence of *Costa/ENEL*, can serve as an excellent example of how the Court has over and over again tried to interrelate its decisions,[20] and of how the judges have to develop their legal doctrines feeling their way forwards in the dark of legal lacunae, always bound to the acceptance of their reasoning.[21]

Furthermore, it should be noted that not all cases brought to Luxembourg have been decided in favor of the expansion of EU law, 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.[22] The judges in Luxembourg are indeed receptive to legal arguments, but not political ones. Judicial development of European law has been a constant process, not a linear one pointing in just one direction. It also has to be remembered that "'Supremacy' is primarily an enabling doctrine, which authorizes the ECJ 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" (Joerges 2006: 792). In *CILFIT* (1982, Case 238/81), for example, the Court restricted its own further

[20] It should be added, that all these cases did not come up overnight, but have been slowly developed over a period of about forty years.

[21] 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.

[22] 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).

jurisdiction, and in *Francovich* the Court reconsidered and revised its earlier judgments on state liability made in *Russo v AIMA* (1976, Case 60/75), and *Rewe v Hauptzollamt Kiel* (1981, Case 158/80). Also, in *Grant* (1998, Case C-249/96), *Dori*,[23] *Keck* (1993, Case C-267/91) and *Greenpeace* (1998, Case C-321/95), where the Commission's executive competences in financial matters have been brought under better legal control, the ECJ displayed a diversity of adjudication, not merely deciding in favor of the proponents of an ever-closer union.

Another interesting strain of decisions 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 had displayed a strong sense of departure. Therefore, the opportunity to expand the law further into the national legal systems must have been perfect. Not until *Mangold* (2005, Case C-144/04) did the judges see the necessity of carefully claiming a general principle of horizontal direct effect of directives. Nevertheless, they seemed to follow a different kind of "legal rationality," not merely explainable by the categorical will to expand the ambit of law.

The difference towards politics is displayed most notably in the *functional context*. In critical studies on the ECJ, the argument that the judges have detached themselves from the texts of the Treaties by using teleological arguments arbitrarily in order to enhance the European rule of law keeps coming up over and over again. While it is true for the foundational period that Court had to use teleological arguments in its landmark cases, the stage of consolidation and embodiment, in contrast, shows another picture. The preferred forms of judicial argumentation shifted, so that justification in this second phase contextual arguments concerning the coherence of the Common legal order, as well as, most notably, the "effet utile" (principle of effectiveness), have moved to the center of the ECJ's reasoning in landmark cases concerning the implementation and embodiment of supremacy and direct effect, like *Leberpfennig*, *van Duyn*, *Simmenthal II*, *Milchkontor*, *Foto-Frost*, *Tafelwein*, *Zuckerfabrik Süderdithmarschen*, *Francovich*, *Brasserie du Pecheur*, *Factortame III* or *Köbler*.

The explanation for this switch, however, brings us back to the foundational period. The European Court had created the legal basis needed for the early years, and then began to differentiate and clear up the practical implications of the relationship between supranational and member state law. This is not the place to discuss in detail the reasons given by the Court. It is far more important to see the difference towards political-democratic negotiation processes with the explicit aim of constituting or changing the law. Although the judges in Luxembourg might have "une certaine idée de l'Europe" (Pescatore 1983: 157), they never had the opportunity to politically develop their doctrines according to a cost-benefit oriented rationality, but had to move forward bound by the recognition of their claims and arguments. The rationalist thesis that the law is just a veil of legalese, masking and shielding the true motives behind a decision ignores the fact that law is and can never be a monologue, or that adjudication never heralds decisions. The judges – although they might have interests, motives and preferences always have to step back behind their judgments and their rationale

[23] See above.

for decision. In other words, the judgments, not the judges, must speak for themselves. As Arnull correctly notes: "The allegation of undue activism can only be tested by close examination of legal arguments advanced by the Court in support of its decisions" (Arnull 2006: 4). Otherwise, criticism would not be about the law and its application, but about the moral qualities of the judges 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 as long as the law is accepted as an independent institution.

Finally, this leads us to the *local context* and the distinctiveness of European law from other legal traditions or systems. The European legal order in the second stage of establishing legal autonomy 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 interpretation and application. Europe's legal system is a young one, still struggling for emancipation from individual national legal systems and from the international legal order.[24] It must be neither national law nor international law, but *European* law. In this respect, the ECJ's work is unique and should not be mixed up with the work of other constitutional Courts. Analogies with international appellation bodies, national European high courts, or even the U.S. Supreme Court (e.g. Caporaso/Tarrow 2009: 613, Kenney 2000) fall too short, since the "rules of recognition" (Hart), by definition, cannot be directly transferred from the national or international to the European context. In other words, the European legal community and its Court of Justice has to perform the balancing act of developing a legal system that has no direct precedent, while simultaneously staying connected to the legal knowledge and traditions of all the member states to ensure enduring trust in the legitimacy of its jurisdiction.

5. Conclusion

Without a doubt, sometimes the line between the indispensable further 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: critique is indeed appropriate and necessary. Also, "the Court of Justice is not immune from human error" (Everling 1996: 435), as Judge Everling once put it. However, the fact that the ECJ shaped European integration from the beginning does not necessarily mean it had a political motive 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. At no time did this mean that jurisprudence was dependent on politics: the Court was never (and must never be) just a principal obeying the political wills of the national agents.

The way political science has described the law and its impact on the integration process theoretically simply does not match the way (European) law functions in reality. In light of rationalist theory, jurisdiction is interest- or even agenda-based decision-making in the judge's chambers. This view, however, is misleading. 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/Marciano 2007), or that it is yet comparable to the well-established national legal orders. However, it suggests taking the

[24] C.f. 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).

autonomy (the word is composed of the ancient Greek words *auto=self* and *nomos=law*) of European law seriously, and accepting it as what it has long been since the early years of the EEC – an independent context of reasoning and action.

What is characteristic for the EU today is that it is not only a multi-level governance system (Marks 1993; Marks/Hooghe/Blank 1996; Hooghe/Marks 2001), but also a multi-context system. This means that the making of Europe does not just take place on different levels within a political framework, and is not only shared amongst different groups of actors or institutions. Rather, it also happens in different and distinguishable social *contexts* – functionally, historically, and locally distinct frameworks of reasoning and action – that political science alone cannot analyze sufficiently with either its conventional and generalizing models of explanation, or by stating that "pro-integrative rulings of the ECJ, [have been] institutionalized as precedent" (Bouwen/McCown 2007: 426). The *European law* is such a context, and it should be perceived as a self-contained sphere of argument and action that self-generates the impetus for integration. Therefore, the role of the ECJ in the process of integration may only be adequately captured by examining the idiosyncrasies and rules of the law.

Consequently, this means that much more truly interdisciplinary cooperation and knowledge of the context of law within political science is needed. As Dehousse puts it: "Interdisciplinary approaches are not a kind of exotic trip on which only a few adventurous travelers may embark" (Dehousse 2002: 123). Rather, interdisciplinary cooperation is the foundation for understanding how law influences the European integration process. Political theorists have to abandon the idea of inventing or preserving their "grand theories" that have allowed them an explanation of European integration as a whole. They have to give up the idea of discovering universal and timeless explanatory patterns. Instead, research should focus on the contexts in which integration takes place, and try to examine and understand these before it can explain integration. Therefore, scholars have to get serious about the empty phrases calling for more cooperation between the different academic disciplines. Political science has to open up for law, sociology, and economics, as well as cultural and historical studies, to derive a deeper understanding of how and under which conditions integration through law happens in the EU today. Short, political science has to give up its overstretched research agenda to save its own credibility.

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