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THE EUROPEAN COURT OF JUSTICE AS A POLITICAL ACTOR

EVROPSKÝ SOUDNÍ DVŮR JAKO POLITICKÝ AKTÉR

Master Thesis

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DECLARATION

I hereby declare that I have written this master thesis on my own, that I have duly referred to all the sources and literature used, and that this master thesis was not used to obtain any other academic degree.

In Prague …….…. Signature …….……

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List of Abbreviations

AG	Advocate General
CCC	Czech Constitutional Court
CJEU	Court of Justice of the European Union
EC	European Communities
ECJ	(European) Court of Justice
EGC	(European) General Court
EP	European Parliament
EU	European Union
MS	Member States
OJ	Official Journal of the European Union
TCE	Treaty Establishing a Constitution for Europe
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	TEU & TFEU
US	United States

Introduction

"*Call it empathy, call it prejudice, but whatever it is, it is not law.*
In truth, it is more akin to politics. And politics has no place in the courtroom."
- US Senator Jeff Sessions[1]

In the summer of 2009, political elites of the United States of America were deciding about an empty seat at the US Supreme Court. President Barack Obama nominated Judge Sonia Sotomayor[2] as a suitable candidate. This nomination aroused a vivid public debate, not only because of Judge Sotomayor's Puerto Rican background but mostly because of her previous political public statements in favour of Hispanic women.[3] She was even labelled as a racist, although many later withdrew this accusation.[4] Judge Sotomayor's nomination was discussed by the Senators for several days before she was finally appointed to the US Supreme Court. The Senators' deliberations were intensely discussed by the media which gave the general public the opportunity to witness and comment on the whole process.[5] The political flavour of the appointment was thus balanced by the vivid public debate on the issue.

But American politics is not what this thesis is going to be about.

In the spring of 2010, there were three positions at the CJEU to which new judges were to be appointed; one at the ECJ and two at the EGC.[6] This was the first chance to test the new 'Article 255 Panel', a body created "*to give an opinion on candidates' suitability.*"[7] In the case of the ECJ everything went smoothly and Ms Alexandra Prechal was appointed as the Dutch judge after receiving a 'favourable opinion' from

[1] See (Phillips, 2009).
[2] For a short biography, see: http://www.supremecourt.gov/about/biographies.aspx.
[3] See for example (Sotomayor, 2001).
[4] See (Davis, 2009).
[5] See for example: (Phillips, 2009), including the discussion under the post.
[6] According to Article 19 of the TEU, the full judicial institution of the European Union is called the Court of Justice of the European Union (CJEU) and it is composed of the Court of Justice (ECJ), the General Court (EGC) and special courts, which today only includes the Civil Service Tribunal (CST). This thesis focuses mostly on the ECJ. However, when referring to the full judicial institution, the abbreviation CJEU is used. For the functioning of the CJEU, see for example (Barents, 2010).
[7] See Article 255 TFEU.

the Panel.[8] A few months later, however, the Panel was less generous in their opinions. Upon the expiry of term of fourteen EGC judges, the Panel was in session again, assessing fourteen candidates. We do not know much about the candidates' profiles, nor can we see into the Panel's deliberations. The only thing we know from the published Council documents is that after the Panel "*[had] given an opinion on the suitability of the […] judges,*"[9] two names were mysteriously dropped from the list of the candidates: Judge Czúcz (the Hungarian candidate standing for reappointment) and Mr Christos Vassilopoulos (the new Greek candidate).[10] No formal decision, no reasoning, and no public debate to testify to their reasoning.[11]

The contrast is obvious: in the US, the discussion about the judges' appointment is available to the public, the arguments are available to citizens and an on-going public debate is self-evident. In the EU the appointment happens *in camera*, the documents are either cryptic or non-existent and citizens are only faced with the final decision. By doing so, the EU is essentially making a unilateral decision to for citizens with no transparency or reasoning, in essence telling its citizens: '*take it or leave it.*'

When reading a case from the US Supreme Court, one always knows who wrote the judgment; you can often even hear the judge's voice in the reasoning. And then, moving on to the concurring and dissenting opinions, you can look into the contrasting views of other Justices. Why is this so? The Justices of the US Supreme Court are celebrities, their personalities and preferences are well-known, law students often have their favourite Supreme Court Justice.[12] In the EU, an average law student would hardly be able to name one or two of the twenty-seven ECJ judges. The case-law of the ECJ is a product of 'teamwork': the individual judges do not sign the judgments, dissenting or concurring opinions do not exist, and judicial deliberations are perfectly secret.

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[8] See Decision 9720/10 (2010).
[9] See Decision 9720/10 (2010).
[10] See (EU Law Blog, 2010), see also (Bobek, 2010).
[11] The CJEU has even "*categorically rejected any duplication of the "American" model of congressional scrutiny of candidates for nomination at the Supreme Court.*" See (Barents, 2010), p. 713.
[12] The US Supreme Court established its own authority early in its history (*Marbury v Madison*, 5 U.S. 137 [1803]) and has made crucial decisions that should have gone through the legislature but did not (*Brown v Board of Education*, 347 U.S. 483 [1954], *Roe v Wade*, 410 U.S. 113 [1973], *United States v Alfonso Lopez, Jr.*, 514 U.S. 549 [1995], etc.). Transparency in the judicial system (and the federal government in general) is seen as a way of ameliorating the tension between various competing opinions.

In both the US and in the EU, the judiciary is often accused of being political. This thesis does not attempt to compare and contrast the two grand judiciaries; they are too dissimilar to be compared in this context. It only deals with the judiciary of the EU, trying to analyse its presumably 'political' character: why is it that political and legal scholars label the Court as 'political' or 'activist'?

This thesis seeks to investigate the validity of these accusations by proposing a synthesis of various political theories and a certain clarification of the terminology in the context of the European judiciary. Chapter 1 deals with the ECJ as an institution, discussing its functioning and its presumably constitutional character. Chapter 2 then focuses on the notions of 'politics' and 'political', firstly in terms of their definitions by various authors and consequently in terms of the various political theories of European integration. Chapter 3 then deals with the central question of the thesis: is the ECJ a political actor or not? The analysis in the third chapter is split into five dimensions: (1) the judges' motivations in adjudication, (2) the appointment of judges, (3) the subject-matter of the Court's adjudication, (4) the institutional balance within the Union, and (5) the impact of ECJ's case-law in the MS.

This thesis should serve as an introduction to an extremely interesting and extremely wide field of research. I have not even come close to exhausting all the topics that could be included in the study of the political role of the ECJ or courts in general. There are numerous works that deal with judicial activism, political aspects of the judiciary, comparative analyses of various courts and many other fascinating topics. What I have studied so far is only a degustation of my future doctoral research in this topic in which will further develop many of the questions which are only briefly outlined in this thesis.

1. The ECJ as an Institution

"The European Court has emerged as one of the most powerful political institutions in the European Union and the most influential international court in existence."
– Karen Alter[13]

"The fact that the ECJ shaped European integration from the beginning does not necessarily mean it had political motives in doing so."
– Andreas Grimmel[14]

The European Court of Justice is presumably the most powerful international court in the world.[15] One could even say that it is only thanks to the ECJ that the European Union is more than just an ordinary international organisation.[16] While being 'a guardian of the Treaties', the ECJ actually constructs EU law and decides the future direction of the united Europe in various fields. Before delving deep into the analysis of the Court's presumably political nature, this chapter is meant to briefly summarise the Court's, composition, functioning and the various types of procedures it deals with.

1.1 The Organisation and Composition of the European Judiciary

The Court of Justice of the EU is currently composed of 'three judicial bodies':[17] the Court of Justice (ECJ), the General Court (EGC) and the Civil Service Tribunal (CST).[18] With a great deal of simplification, the CST could be seen as a labour court for EU employment disputes, the EGC as an administrative court of the EU and the ECJ as

[13] See (Alter, 2009), p. 1.
[14] See (Grimmel, 2011), p. 21.
[15] Karen Alter consistently argues that the ECJ, despite its special characteristics, is only an international court. See also: (Koopmans, 1986); (Mancini, 1989); (Lenaerts, 1990) and (Weiler, 1993).
[16] Professor Geert de Baere (KU Leuven) accentuates that when comparing two things, one should realise whether the difference between them is 'a difference in degree' or 'a difference in kind'. In his opinion, the European Union is not different 'in kind' from other international organisations; it only is different 'in degree'; the only thing that truly distinguishes the EU from other international organisations, it is its very powerful Court of Justice.
[17] See also (Barents, 2010), pp. 709 ff.
[18] See Article 19(1) TFEU. The Treaty only mentions the ECJ and the EGC explicitly, then it speaks about an open category of 'specialised courts'. According to Article 257 TFEU, it is up to the European Parliament and Council to establish such 'specialised courts'. At the moment, there is only one: the CST.

a constitutional court of the EU.[19] All these courts are entrusted – within their respective jurisdictions – with the task of ensuring "*that in the interpretation and application of the Treaties the law is observed*."[20] This Treaty Article has in fact allowed the Court to shape its very broad "*independent sphere of influence over the years*."[21]

The ECJ is composed of thirty-five Court members: twenty-seven judges, one from each MS,[22] and eight Advocates-General,[23] five from the biggest MS (France, Germany, Italy, Spain and the UK) and three rotating between the remaining twenty-two MS. In order to become a member of the Court, one needs to be nominated by a MS and appointed for a (renewable) term of six years "*by common accord of the governments of the MS.*"[24] The Treaties do not explicitly require that the candidate be a citizen of the MS of nomination;[25] however, the candidates need to "*possess the qualifications required for appointment to the highest judicial offices in their respective countries*"[26] which might include the requirement of citizenship. The appointment to the EGC follows similar patterns.[27]

As to the procedures before the ECJ / EGC, the Court's agenda is composed of various types of actions. The most typical procedures include the action for infringement,[28] the action for annulment,[29] the action for failure to act,[30] the action for damages[31] and the 'preliminary ruling mechanism,'[32] the most frequently used procedure.[33]

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[19] See (Lenaerts, et al., 2006), p. 9.
[20] See Article 19(1) TEU.
[21] See (De Búrca, 2003), p. 49. This claim will be analysed in chapter 3.3.
[22] See Article 19(2) TEU.
[23] See Article 252(1) TFEU.
[24] See Article 19(2) TEU. For further details regarding the appointment procedure, see chaper 3.2.
[25] See (Lenaerts, et al., 2006), p. 5.
[26] See Article 253(1) TFEU.
[27] See Article 19(2) TEU and Article 254 TFEU.
[28] See Article 258 TFEU.
[29] See Article 263 TFEU.
[30] See Article 265 TFEU.
[31] See Article 268 TFEU.
[32] See Article 267 TFEU.
[33] This enumeration is not exhaustive. There are several other procedures which are less common, such as the review of an international treaty, EU staff cases, the 'arbitration clause' procedure, etc. For a thorough study in European Procedural Law, see (Lenaerts, et al., 2006) (third edition forthcoming in 2013).

1.2 Is the ECJ a Constitutional Court?

"*But, of course, from what the Court says (constitutionally)*
we can learn a lot about what the Court is,
or more accurately, what the Court believes itself to be,
or, at least, claims to be."
– Joseph Weiler[34]

In the spring of 2010, Václav Klaus, the Czech President, accused the Czech Constitutional Court of being a political actor.[35] In reply to this accusation, the President of the CCC, Pavel Rychetský said to the media: "*One can hardly expect the Constitutional Court not to be a political body, when its main, fundamental function is to supervise a political body.*"[36] A similar opinion has been defended by Eliška Wagnerová, the former Vice-President of the CCC, who confirmed Rychetský's statement and added that such an approach prevails in both legal and political circles all around Europe and that there is no reason to question it.[37]

Karen Alter has consistently argued that the ECJ is an international court and that it can serve as a model for the study of other international courts.[38] She admits that there are three "*design features*" which distinguish the ECJ from other international courts,[39] but she refuses to see the ECJ as a constitutional court. On the contrary, many other authors claim that the ECJ is clearly a constitutional court, since it has formulated landmark legal principles which "*have defined the very nature of the EU, constitutionalising it and distinguishing it from other international Treaties*."[40] The classic works of Eric Stein and Joseph Weiler speak of the so-called 'constitutionalisation' of the Treaties.[41]

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[34] See (Weiler, 1993), p. 418.
[35] See (iDnes.cz, 2011).
[36] See (iDnes.cz, 2011).
[37] See (Wagnerová, 2012).
[38] See (Alter, 2009), in particular Chapter 12: *Private Litigants and the New International Courts*. See also (Arnull, 2008), p. 1174: "*The ECJ is widely recognised as one of the world's most successful international tribunals and has been held up as a model for others.*"
[39] See (Alter, 2009), p. 32: (1) its compulsory jurisdiction, (2) the preliminary ruling mechanism, and (3) the possibility of non-compliance charges against MS.
[40] See (Craig, et al., 2011), p. 63.
[41] See (Stein, 1981) and (Weiler, 1982); see also (Dehousse, 1999), (Arnull, 2008), and (Conway, 2012).

Judge Lenaerts describes the functioning of the Court in three different settings: as a constitutional court, as a supreme court and as an administrative court, assuming different roles depending on what current procedure it is dealing with.[42] When the Court decides disputes between institutions (mainly annulment and infringement actions), it acts as a constitutional court. When issuing judgments within the 'preliminary ruling mechanism', it acts as a supreme court, since it assures that EU law is uniformly applied throughout the Union. And when the Court offers judicial protection to individuals against the acts of other institutions, it acts as an administrative court.[43]

In my opinion, there are two aspects of the ECJ which make it constitutional: (1) the power of judicial review vis-à-vis legislative acts, and (2) the power to interpret the Treaties. These powers are characteristic of constitutional courts all around the world.

Firstly, the ECJ is endowed with the power to strike down legislation adopted by EU institutions. That puts it in a position of a constitutional court. Shapiro and Stone Sweet moreover claim that "*constitutional judicial review has always been viewed as the most politically controversial power held by judges, precisely because its exercise obliterates boundaries that allegedly separate things 'political' from things 'judicial'.*"[44]

Secondly, the ECJ is endowed with the power to interpret the Treaties which are at the top of the legal hierarchy in the EU. Weiler remarks that the Court "*has, of course, considerable power in interpreting the Treaty and being the ultimate arbiter of its meaning.*"[45] Section 3.3 will illustrate that the interpretation of the Treaties by the Court has often been creative and the ECJ thus not only construes but also constructs the European constitutional law.[46]

This thesis will therefore be built on the presumption that the ECJ is indeed a constitutional court. Admittedly, this label could upset those who fear a strong Union, since it has connotations of the EU being more than just an international organisation. However, considering the ECJ a 'constitutional court' does not necessarily mean

[42] See (Lenaerts, 1991), pp. 32 ff.
[43] See (Lenaerts, 1991), pp. 32-33.
[44] See (Shapiro, et al., 2002), p. 142. The question of institutional balance will be dealt with in section 3.4.
[45] See (Weiler, 1999), p. 189, footnote 3.
[46] See also (Stone Sweet, 2000), p. 135.

regarding the EU as a state. In the end, 'constitutional' may also be understood as 'constitutive', 'constituent', or 'fundamental' – and those adjectives definitely do represent the nature of the Treaties.[47]

1.3 Studying the Court in a Dual Context

Bohumil Baxa, a Czechoslovak constitutional lawyer, once pointed out that looking only at the legal importance of a certain institution and omitting its political importance means not only seeing it incompletely but also losing sight of the dynamic evolutionary moment which transforms a legally important institution into an institution which is politically meaningless or even outdated.[48] Indeed, one does not get to know the ECJ (or any other institution) by only reading the relevant Treaty articles; the power and nature of an institution are shaped by more than just institutional provisions.

The Treaty provisions related to the CJEU have not changed considerably over time; today's Treaty wording is in fact very close to the wording in the Treaty of Rome as far as the Court is concerned. However, "*the ECJ has not been a consistently 'activist' court at all times or in all policy spheres*"[49] and its role has fluctuated over time.

Unfortunately, legal documents only offer a limited insight into the Court's importance over time. As Andreas Grimmel rightly notes, "*interdisciplinary cooperation is the foundation for understanding how law influences the European integration process.*"[50] Lawyers seek to analyse issues in a strictly technical manner, distinguishing between matters which are of legal importance and matters which are not. Political scientists often simply wonder why and how things happen. The interdisciplinary research then makes it possible to know both: how things are and why they happen. I will demonstrate both in the following chapters.

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[47] Even business corporations have their 'constitutional' documents; it simply means that those documents include the very basic rules of their functioning, just like the Treaties do for the EU.
[48] See (Baxa, 1917), cited in (Kysela, 2011), p. 181.
[49] See (Craig, et al., 2011), p. 64.
[50] See (Grimmel, 2011), p. 22.

2. ‘Politics’ and ‘Political’

“*Everything is politics.*”

– Thomas Mann[51]

The European Court of Justice has been discussed by many authors, mostly scholars from a political science background. Although there are a handful of those who label the Court as a political actor, there are almost none who would define what they actually mean by ‘political’. As a result, the discussions led by the authors in this field often amount to diverging monologues rather than a sensible dialogue. Moreover, “*constitutional lawyers and political scientists have had […] traditionally similar professional problem: an academic allergy to each other*”[52] – so the discussions sometimes slide down to a mutual criticism without any mutual understanding.[53]

Although all the authors describe the same institution, their opinions on the ECJ differ to a great extent. What is controversial is that even though many of the authors share the same views and ideas of the Court, they simply use different labels for describing it.

For the sake of clarity, this chapter will attempt to propose an overview of a number of definitions of ‘politics’ and ‘political’. After a general introduction into the terminology of political science, the focus will switch to expressions such as the ‘politicisation of judiciary’, ‘judicialisation of politics’ and ‘judicial activism’. At the end of the chapter, the four main political theories of European integration will be introduced. All these clarifications are meant to unify the terminology and offer a platform for analysis in the next chapters.

[51] Thomas Mann: *The Magic Mountain*, 1924.
[52] See (Husa, 2011), p. 456.
[53] I am definitely not the only researcher who stumbled upon this problem; see for example (Dyevre, 2008) who writes that “*the academic debate on courts and judicial review is still characterized, on both sides of the Atlantic, by a mixture of confusion and misunderstanding. Criticising the works and approaches of the other discipline, political scientists and lawyers often end up talking past each other.*”; or (Trochtová, 2010) who complains about legal and political scholars “*mixing apples with oranges*” and about “*bits and pieces of confusing information*.”

2.1 Many Definitions of *Political*

Even amongst political scientists, there is no single definition of politics which would be widely accepted.[54] The notion of 'political' differs to a great extent – it has a certain meaning in everyday life and various other meanings in the world of social sciences or law. Some citizens identify 'politics' as a dirty word and see politicians as "*power-seeking hypocrites who conceal personal ambition behind the rhetoric of public service and ideological conviction.*"[55] In this sense, labelling something as 'political' simply means putting a dirty sticker on it, linking it with biased decision-making.

Andrew Heywood proposes numerous definitions of 'politics'. Within some of them, the ECJ (and any other court) would always be a political institution. Politics may be defined in its broadest sense as "*the activity through which people make, preserve and amend the general rules under which they live*," as "*a process of conflict resolution in which rival views or competing interests are reconciled with one another*" as "*the exercise of authority*," or as "*a dialogue.*"[56] Labelling a court as 'political' under these definitions is not intended to imply a negative connotation, but rather indicative of its function as necessary societal authority in conflict resolution and rule amending.

The 'political' may also be defined by drawing a line between the roles of the legislature and of the judiciary. The most important difference between the two is apparently the scope of their agenda: while the legislature may be active on its own initiative, the courts may only decide questions which are referred to them. Once the judiciary starts creating general norms instead of solving individual cases, the balance is disturbed. In the words of Alexis de Tocqueville, if a judge "*pronounces upon a law without resting upon a case, he clearly steps beyond his sphere and invades that of the legislative authority.*"[57] However, even if the judge does *rest upon a case*, he needs to respect certain limits in order not to enter the sphere of the 'political'.

Bohuš Tomsa, a Czechoslovak legal theorist, distinguished two models of judicial decision-making. 'Adjudication', on the one hand, is a process where a judge recognises

[54] See (Heywood, 2007), pp. 3-23.
[55] See (Heywood, 2007), p. 7.
[56] See (Heywood, 2007), pp. 3-7.
[57] See (Tocqueville, 1841), pp. 142-144.

and interprets previously given legal rules. 'Legal politics', on the other hand, is the activity of a judge who creates new rules on the basis of general principles inherent in the legal order.[58] Another author trying to define the limits of judicial decision-making is Radoslav Procházka, a contemporary Slovak constitutional lawyer and politician who remarks that it is up to the legislator to decide what is good or bad and up to the courts to decide (in the boundaries defined by the legislator!) what is right or wrong.[59] If a judge crosses the line delimited by the legislator, he enters the area of values which is reserved to the legislator.

David Easton, a Professor of political science at the University of California, offers one of the most popular contemporary definitions of 'politics' which he describes as "*the authoritative allocation of values for a society*."[60] Therefore, a court that does not wish to be seen as a political institution must respect the rules laid down by the legislature.

In *Trop v. Dulles*,[61] the US Supreme Court entered the forbidden zone of 'political' when it ruled against the text of a statute concerning the loss of citizenship for deserting from the US Army. Even though the legislator had (shortly before) adopted a statute which was clear and precise, the Supreme Court modified it in order to reduce its severity. Justice Frankfurter did not agree with such a solution. In his dissenting opinion he wrote that the Constitution "*[had] not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do*" and that the Supreme Court was pronouncing policy on the basis of "*its own notions of what is wise or politic.*"[62]

To sum up, a court apparently deserves a label of 'political' when it starts drafting rules instead of ruling on a case (Tocqueville), when it enters the sphere of legal principles instead of interpreting legal text (Tomsa), when it decides what is good instead of deciding what is right (Procházka, Easton) or when it refuses to apply a rule drafted by the legislator and drafts its own instead (Justice Frankfurter).

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[58] See (Tomsa, 1946), pp. 71 ff., cited in (Kysela, 2012).
[59] See (Procházka, 2006).
[60] See (Neubauer, et al., 2012), p. 9.
[61] US Supreme Court, *Trop v. Dulles*, 356 US 86 [1958].
[62] US Supreme Court, *Trop v. Dulles*, 356 US 86 [1958], cited in (Koopmans, 2003), p. 106.

2.2 'Judicialisation of Politics' & 'Politicisation of the Judiciary'

In the past few decades, the media overflows with two phenomena: the 'judicialisation of politics' and the 'politicisation of the judiciary'.[63] Although the two terms do not mean the same, they are often used interchangeably; not only by the media but also by legal and political scholars. Any definition of these notions requires a bit of simplification, as they cover "*a very wide spectrum of different, interdependent problems.*"[64] However, a simplified definition is better than no definition.

Carl Schmitt once claimed that 'politicisation of the judiciary' would be worse than 'judicialisation of politics'.[65] He wrote this in reaction to Gerhard Anschütz, a German legal positivist who suggested that questions of interpretation of the German constitution should be assigned to the Reichsgericht. Schmitt disagreed: in his opinion, that would be too much of a threat to the prestige of the judiciary. Courts are only competent to answer legal questions, not questions of a political nature. Using the example of the Napoleonic Constitution, Schmitt argues that it would be more convenient to assign the task of interpreting the constitution to a highly political body, such as the senate.[66] In his article "*Das Reichsgericht als Hüter der Verfassung*" (*The Reichsgericht as the Guardian of the Constitution*), Schmitt explains that the institution which is to be empowered with constitutional review and interpretation powers should be one with a very intensive political legitimacy.[67] If the power of constitutional review were given to the Reichsgericht, the institution would lose its judicial character. In cases where the constitution is unclear, it is not for the judiciary to make up its content, since that would amount to judicial lawmaking which is impermissible and which leads to the undesirable politicisation of the judiciary. Rather, political institutions should fill in the gaps in the constitutional text.

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[63] See for example (Dyevre, 2008), p. 1: "*the influence of judges and courts on policies and practices in every facet of public and private life has increased significantly over the past three decades.*"
[64] See (Trochtová, 2010), p. 1.
[65] See (Schmitt, 1993), pp. 118-119, cited in (Kühn, 2010). The expressions in German original are: 'die Politisierung der Justiz' and 'die Juridifizierung der Politik'.
[66] See (Schmitt, 1993), pp. 118-119, cited in (Kühn, 2010). A similar opinion was expressed by Judge Musil of the Czech Constitutional Court who claims in his dissent to case Pl. ÚS 27/09 [2009] that the review of constitutional laws adopted by the Parliament should be exercised by the Senate of the Czech Parliament rather than by the Czech Constitutional Court.
[67] See (Schmitt, 1973), p. 69, cited in (Laufer, 1968), p.275-276.

Apparently, in Schmitt's terminology, the 'politicisation of judiciary' happened when courts decided questions of a political nature, whereas the 'judicialisation of politics' occurred when questions of legal interpretation were passed on to political institutions which could legitimately interpret law beyond the limits of the written text. However, the understanding of these notions has changed over time and Schmitt's definitions are apparently no longer applicable.[68] What Schmitt used to call 'politicisation of judiciary' is today called 'judicialisation of politics', meaning 'judicial activism': moments when courts in their adjudication enter the arena of the 'political'. And what Schmitt used to call 'judicialisation of politics' is now covered by the expression 'political restraint': instances where courts refuse to answer a certain question for its political character and leave the solution up to the legislator.

2.2.1 Judicialisation of Politics: Judicial Activism

Ran Hirschl, a contemporary political scientist from the University of Toronto, begins one of his articles by defining the 'judicialisation of politics' as "*the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies*."[69] When looking at the world's judiciaries from a comparative perspective, Hirschl notices that the 'judicialisation of politics' is an increasing phenomenon all around the globe. Although courts have always touched questions of politics, such as human rights issues,[70] they have recently delved deeper into 'mega-politics' – "*matters of outright and utmost political significance that often define and divide whole polities.*"[71]

Zdeněk Kühn, a Czech legal theorist and a judge at the Czech Supreme Administrative Court, argues that 'judicialisation of politics' means the same as 'judicial activism', and that this expression is to be understood in two ways. On the one hand, 'judicial activism

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[68] See also (Kühn, 2010), part V.
[69] See (Hirschl, 2008), p. 2. This understanding of 'judicialisation of politics' is widely accepted.
[70] See (Rehder, 2007), p. 7. Rehder argues that while the judiciary in Europe had always been separated from politics, "*the experience of totalitarianism and its violation of citizenship rights changed this attitude*" and the shift from pure law to a politically controversial judicial agenda was connected to the rising protection of human rights by courts. See also (Stone Sweet, 2000), p. 135: "*What Kelsen has not wished for and warned against was the codification of human rights in constitutions. He believed that due to their characteristics as 'natural laws,' the judges would try to discover the scope and depths of such natural law, which would politicize constitutional judges even further*."
[71] See (Hirschl, 2008), pp. 1-2.

stricto sensu' is such adjudication in which courts interpret highly vague legal principles and norms and occasionally even fills in the legal gaps, believing in the fictitious completeness of the legal system. On the other hand, 'judicial activism *largo sensu*' moreover covers any adjudication that has far-reaching political consequences.[72] Judge Kühn then states that both these forms of 'judicial activism' are an inevitable component of the European judiciaries and therefore it is even more important for the judiciaries to be absolutely independent from any bias.[73] In other words, the more political the agenda of the courts gets, the more apolitical their motivation needs to be.

2.2.2 Politicisation of the Judiciary: Political Influences

The second expression, the 'politicisation of the judiciary', can nowadays be understood as "*a question of manipulation of the judiciary administration by the politicians.*"[74] This phenomenon does not concern the agenda of the courts; it concerns mostly the personal, financial or other relationships between courts and political institutions, between judges and politicians. Otto Kirchheimer mentions examples such as courts composed of politicians or courts influenced by politicians (cabinet justice, justice on the telephone),[75] other examples could include political administration of the judiciary (issues such as the appointment of judges and the financing of courts), trials with politicians, or adjudication concerning political crimes.[76]

2.2.3 Constitutional Review: The Two Phenomena in One

There is one field of judicial activity which in fact relates to both 'judicialisation of politics' and 'politicisation of the judiciary': constitutional review. On the one hand, as far as its substantive result is concerned, it amounts to 'judicialisation of politics', since

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[72] See (Kühn, 2006), part II.
[73] See (Kühn, 2006), part II.
[74] See (Trochtová, 2010), p. 7. Similarly also (Rehder, 2007), or (Mancini, 1980), p. 3: "*the trend towards a more politicised and politically polarised judiciary is detectable all over Europe*."
[75] Otto Kirchheimer, cited in (Kysela, 2011), p. 194.
[76] Examples from the Czech context would include cases such as the President's refusal to appoint the judicial candidates (Judgment of the Supreme Administrative Court of the Czech Republic, 4 Aps 3/2005-35), the dispute concerning the withdrawal of Judge Brožová from the Supreme Court of the Czech Republic (Decision of the CCC, Pl. ÚS 87/2006), or the famous dispute in the field of defamation of the judiciary, known as 'judicial mafia' (Judgment of the Regional Court in Prague, 36 C 8/2008 and Decision of the High Court in Prague, 1 Co 349/2008). See also (Kysela, 2011), pp. 183-184.

it allows courts to make value choices. On the other hand, if it is used by politicians as a tool of political competition, it amounts to 'politicisation of judiciary'.

Radoslav Procházka elaborates on the idea of legislators deciding what is 'good' and judges deciding what is 'right' and claims that in constitutional courts, this concept is challenged. In fact, in abstract judicial review, constitutional courts decide the question of 'good' and in concrete judicial review they decide the question of 'right'.[77]

2.2.4 Judges Are Becoming Politicians, Politicians are Becoming Judges

The classical Montesquieu's model of judges being only "*the mouth of the law*"[78] does not seem to exist in its original form anymore.[79] It is becoming more and more common that judges decide questions of policy and value choices, whereas legislators need to 'judge' the constitutionality of their laws before passing them, in order not to have them cancelled by constitutional courts. Nowadays, "*constitutional courts are seen as specialized de facto legislative chambers and law-makers as de facto constitutional judges. Traditional roles, as divided by the separation of powers scheme, are altered.*"[80] With a little bit of exaggeration one could say that "*judges are becoming politicians and politicians are becoming judges*."[81]

2.3 Political Theories of European Integration

When lawyers and political scientists study European integration (or the European Union in general), they focus on very different topics. I have recently attended a summer school where students of law and of political science discussed various topics in advanced EU law: it was very interesting to see the difference in their respective points of view. While law students saw the ECJ as the central actor in the European legal system, political scientists could not understand the lawyers' obsession with the

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[77] See (Procházka, 2006).
[78] In the French original: "*Les juges de la nation ne sont [...] que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur*." See (Montesquieu, 1748), book XI, Chapter 6, cited in (Pattaro, 2005), p. 233.
[79] Personally, I am not sure if it even existed. Maybe the grey areas of Montesquieu's theory are just becoming more obvious under the challenges of modern society.
[80] See (Husa, 2011), p. 458.
[81] See (Trochtová, 2010), p. 18. See also (Shapiro, et al., 2002), p. 149: "*the traditional separation of power dogma was shattered*" when constitutional courts started to participate on the development of the modern constitutional law, and especially of rights.

Court which (from their point of view) was only an insignificant player whose decisions are not even enforceable.[82]

Despite the general scepticism of political scientists towards the ECJ, some political scientists in fact do study the Court and its role in European integration.[83] There are two main streams of thinking in this field: intergovernmentalism (emphasising the role of the MS), and neo-functionalism (based on its famous spill-over theory). There are two more 'schools' of opinion: neo-rationalism (focusing on the actors' strategies) and supranationalism (stressing the independence of EU institutions).[84] The following subsections will try to offer some insight into these four theories.

2.3.1 Neo-rationalism: Geoffrey Garrett

Neo-rationalism sees both the ECJ and the MS as strategic rational actors.[85] The MS have concluded an international agreement but they realise that "*it is very difficult, if not impossible, to write complete contracts [Treaties]. Delegating authority to the ECJ is thus essential to the efficient functioning of the rule of law in Europe*."[86]

The rationality of the MS means that they have created an arbiter of their disputes and they are willing to follow its jurisprudence as long as it offers them more benefits than disadvantages. The rationality of the ECJ is manifested in its 'careful' decision-making which endeavours not to manifestly oppose the other actors' interests.[87]

In this context of reciprocal rationalism, the jurisprudence of the ECJ should be predictable and calculable. Expectably, the ECJ will always try to uphold its credibility and authority and to rule in a way which will be accepted by the MS, since without acceptance by MS governments, the Court's rulings would be without effect.[88]

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[82] See Karen Alter's similar observation in (Alter, 2009), p. 139.
[83] These authors are sometimes accused of underestimating the role of law and treating it as a 'black box' which is "*a mere tool of integration.*" See for example (Grimmel, 2010), p. 1.
[84] Of course, there are also other 'classifications' offered in the literature, for example Karen Alter divides the literature into three 'scholarships': the legalist narrative, the international relations narrative and the comparative politics narrative. See (Alter, 2009), pp. 34-40.
[85] See (Garrett, 1995), pp. 172-173.
[86] See (Garrett, et al., 1998), p. 156.
[87] For an economic overview of the MS' motivation, see (Grimmel, 2010), pp. 4-5.
[88] See (Garrett, 1995), p. 173.

2.3.2 Intergovernmentalism: Andrew Moravcsik

Intergovernmentalism is based on the idea of democratic legitimacy: it is the MS governments, not the Union institutions, who decide about the crucial issues and who have final decision power. Just like neo-rationalism, intergovernmentalism also stresses the necessity of acceptance of the Court's case-law, but for a different reason: the absolute dependence on the will of MS who play the role of principals. According to intergovernmentalists, the ECJ is nothing more than an agent of the MS' interests.

The principal-agent theory has been introduced by Andrew Moravcsik, the main representative of intergovernmentalism. Supranational actors do not have much power; they are only agents of the MS who still remain the driving forces behind integration.[89] A nice overview of the intergovernmentalist theory is offered by Andreas Grimmel who writes: "*The Court has to live with the persistent fear of being overruled […] by the MS […] if its adjudication does not match the aggregated interests of the MS.*"[90]

2.3.3 Neo-functionalism: Burley and Mattli/Slaughter

Neo-functionalism is probably the most popular theory of European integration. In a strong contrast to intergovernmentalism, neo-functionalism claims that national governments are extremely weak in the political arena of European judiciary; they are actually being completely 'circumvented' by national courts within the scheme of the 'preliminary ruling mechanism'.[91] The strong actors in the European legal system are national courts, private litigants, the European Commission and the ECJ itself.[92]

The central idea of neo-functionalism is the spillover theory: "*because of the interconnection of policy areas, integration in one would lead inevitably to integration in another*."[93] The spillover may be either functional, meaning that integration in one policy area brings integration in another policy area; or political, meaning that the integration creates new political pressures and those political pressures push for even

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[89] See (Craig, et al., 2011), p. 66.
[90] See (Grimmel, 2010), p. 6.
[91] See (Burley, et al., 1993), p. 54: "*Thus governments may either choose to or feel constrained to yield to the pressures of converging supra- and subnational interests.*"
[92] See (Burley, et al., 1993), p. 58; see also (Micklitz, et al., 2012).
[93] See (Chalmers, et al., 2010), p. 676.

more integration, which is sometimes called "*the calculated self-interest of political elites.*"[94]

The main representatives of neo-functionalism, Anne-Marie Burley (now Slaughter) and Walter Mattli, describe law as a mask and a shield: law may function as an instrument to cover political motivations, but only as far as it remains 'legal'. "*Law functions as a mask for politics. […] The result is that important political outcomes are debated and decided in the language and logic of law. […] At a minimum, the margin of insulation necessary to promote integration requires that judges themselves appear to be practicing law rather than politics. Their political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning. In a word, the staunch insistence on legal realities as distinct from political realities may in fact be a potent political tool.*"[95] Everything thus stands and falls on trustworthiness: if the ECJ reasons its decisions with arguments which seem to have a legal ground, the case-law will be trustworthy and accepted. On the contrary, if its arguments are clearly politically motivated, its legitimacy as a non-politically motivated actor is compromised.

2.3.4 Supranationalism: Alec Stone Sweet

Supranationalism is a contemporary theory that is becoming increasingly popular. It sees the Union institutions as independent actors and the ECJ as a crucial policy-maker who has had a great influence on the creation of EU law and doctrines.

Alec Stone Sweet, one of the main representatives of supranationalism perceives the whole story of European integration as "*a dramatic performance on the grand stage of the European Court of Justice.*"[96] Stone Sweet refuses the principal-agent theory proposed by intergovernmentalists; rather, he claims that the ECJ is an actor who is

[94] See (Bache, et al., 2011), p. 10.
[95] See (Burley, et al., 1993), p. 44.
[96] See (Grimmel, 2010), p. 10.

fully independent from MS' will. Moreover, it can produce '*unintended consequences*' that were not foreseen by the founding fathers of the Union.[97]

2.3.5 Criticism of the Four Theories

The introduced theories are four possible ways of explaining the process of European integration. Neither of them is perfect, but neither has been absolutely denied. They often criticise each other, pointing at their drawbacks and misunderstandings.

Neo-rationalism, for example, has received two main points of criticism. Firstly, Arthur Dyevre claims that Geoffrey's theory "*is premised on a wholly erroneous understanding of the preliminary ruling mechanism and its legal effect.*"[98] Secondly, Andrew Moravcsik points out the extreme costs of non-compliance: it would not be rational for MS to disobey the Court's rulings,[99] since such disobedience would trigger an infringement procedure pursuant to Article 258 TFEU which could lead to severe sanctions against the non-compliant MS.

The intergovernmentalist idea is criticised for being too simplistic in its claim that the ECJ either decides as an agent of the MS or will be overturned. In fact, the problem of overruling may be much more complicated as it seems at first sight. Martin Shapiro points out that the establishment of a supranational court empowered to resolve disputes between MS is a second-best solution next to the direct dispute resolution among the MS themselves.[100] That means in practice that "*when the ECJ chose policies different from the ones the Council collectively had or would have chosen for itself, the Court could get away with such policies so long as they were ones that some of the MS found to be acceptable choices, even if not their most favoured choices*."[101] The legislative

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[97] See (Stone Sweet, 2004), p. 235. This ECJ's creative interpretation of the Treaties will be analysed in more depth in section 3.3 of this thesis.
[98] See (Dyevre, 2008), p. 47.
[99] See (Moravcsik, 1995), p. 623.
[100] See (Shapiro, 1999), pp. 321 ff. On p. 329, Shapiro writes: "*By creating a Parliament without legislative power, a Council totally dependent on the unanimity of its members, and a Court empowered to interpret generally stated community legal norms, the MS subverted their own control. The Court's powers of interpretation would be beyond the correction of the MS whenever they could not achieve unanimity. In the absence of unanimity, individual Member State resistance to the Court generally would be defeated by the `second best' phenomenon.*"
[101] See (Shapiro, 1999), p. 332.

process is too complicated, it involves too many actors and it is practically impossible for MS to put it in motion.[102]

Neo-functionalism has been criticised for overlooking the global context: Stanley Hoffman points out that "*neo-functionalists predicted an inexorable progress to further integration – but this was all predicated on an internal dynamic, and implicitly assumed that the international background conditions would remain fixed*."[103]Another point of criticism aimed at neo-functionalists is that it is already outdated: "*Although neo-functionalist theory nearly fitted events in the 1950s and the early 1960s, subsequent events led to its demise and the rise of intergovernmentalist explanations.*"[104]

Supranationalism often receives criticism for being too ambitious and for disregarding the interests and even the sovereignty of the MS. Nowadays we can witness these tensions in the rulings of the MS' constitutional courts which signalise their unwillingness to accept the Court's jurisprudence as absolutely unlimited.[105] But already in May 1962, Charles de Gaulle expressed a critical opinion: "*These ideas (supranationalism) might appeal to certain minds but I entirely fail to see how they could be put into practice, even with six signatures at the foot of a document. Can we imagine France, Germany, Italy, the Netherlands, Belgium, Luxembourg being prepared on matters of importance to them in the national or international sphere, to do something that appeared wrong to them, merely because others had ordered them to do so? Would the peoples of France, of Germany, of Italy, of the Netherlands, of Belgium,*

[102] On the other hand, it is not absolutely impossible to overrule a case issued by the ECJ; it has happened for example in the cases *Barber* (ECJ, Case C-262/88 *Barber (Douglas Harvey) v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889) and *Kalanke* (ECJ, Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051). For a more thorough elaboration on the difficulties of overruling an ECJ judgment, see for example (Alter, 2009), p. 172.

[103] See (Bache, et al., 2011), p. 11.

[104] See (Bache, et al., 2011), p. 3.

[105] The most powerful of the constitutional courts in relation to the ECJ is definitely the German Bundesverfassungsgericht which has issued rulings such as BVerfGE 37, 271 2 BvL 52/71 *Solange I* [1974], BVerfGE 73, 339 2 BvR 197/83 *Solange II* [1986], BVerfG, 2 BvE 2/08 '*Lisbon Treaty*' [2009], BVerfG, 2 BvR 2661/06 *Honeywell* [2010], or BVerfG, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 '*Euro Rescue Package*' [2011]. The Czech Constitutional Court has also reacted to the ECJ's case-law, for to the European Arrest Warrant (CCC, Pl. ÚS 66/04), to the Lisbon Treaty (CCC, Pl. ÚS 19/08 and Pl. ÚS 29/09) and recently also to the ECJ, Case C-399/09 *Landtová* (CCC, PL ÚS 5/12).

or of Luxembourg ever dream of submitting to laws passed by foreign parliamentarians if such laws run counter to their deepest convictions? Clearly not."[106]

2.3.6 Conclusion

There are two points of reflection which should be mentioned in this context.

Firstly, it is essential to look at European integration in the context of both its history and its present development. The role of the Union and of the MS, the importance of the national and supranational players, the nature of the institutions: all that changes either due to its legal background (such as legislation, Treaty amendments, ECJ's case-law) or due to its political background (the personalities of those in charge, such as national politicians, MEPs or ECJ judges, the political situation in the MS, the economic situation, etc.). Rather than calling the ECJ a 'political actor' *en bloc*, one should look at particular moments and even at particular cases to see whether the Court acts politically.

Secondly, supranationalism may also be seen as a value.[107] It is not only a technique, but also a core value of the EU, a shared interest of the MS, a decision to build an entity 'unified in diversity'. It is the willingness to work on a common project and to achieve common goals while preserving the differences in nationalities and exercising a mutual respect. If the idea of European integration is studied from this point of view, then all four political theories of integration may actually make sense in different contexts.

[106] See (Chalmers, et al., 2010), p. 16.
[107] This is an idea proposed and defended by Judge Lenaerts in his lectures.

3. The ECJ as a Political Actor

3.1 Personalities of Judges

"Judges are taken to be non-political figures while they interpret the law impartially […] but they may be accused of being 'political' if their judgment is influenced by personal preferences or some other form of bias."
– Andrew Heywood[108]

In Joseph Weiler's renowned article '*Europe: The Case Against the Case for Statehood*', Weiler speculates whether it is appropriate for judges to give public statements about the cases they decide, the opinions they have and the reasons they employ for deciding cases. Should the judges talk about these topics? Do we want them to reveal the real motivations of their decisions? In Weiler's words: "*We love the idea of judicial neutrality, the notion of being judged by laws and not men, whilst at the same time we recognize that willy-nilly we are judged by men. We […] cannot decide whether justice and the appearance of justice are better served by knowing as much as possible about the judge and his biases or knowing as little as possible. […] the hermeneutic sensibility of the judge, becoming the mental equivalent of a 'preamble' to any act of interpretation […] is what we fear though that, too, is what we want.*"[109]

Weiler's argument obviously builds on a premise that there is something more behind a judgment than just purely legal reasons; he only asks whether we want to know about it. Such a premise is apparently widely shared in the contemporary legal theory and practice. Judicial decision-making is not seen as a mere mechanical subsumption of factual situations under legal norms; rather, it is seen as a process which requires thinking, attitudes and decisions.

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[108] See (Heywood, 2007), p. 6.
[109] See (Weiler, 1998), p. 46-47; See also (Komárek, 2007) who paraphrases Weiler: "*We want to know as much as possible about judicial decision-making but at the same time we fear that we would find out that judges do not decide on the basis of "Law" but that they also have their political, cultural or social preferences, which played a role in their decision-making just like the legal arguments Maybe this is a paradox of legal realism or of the critical legal studies: do we, lawyers, really want to find out that law is only a façade for politics?*"

Eliška Wagnerová recently expressed a rather radical opinion concerning her idea of a 'good' constitutional judge, stating that constitutional law has its own methodology and that it needs to be treated differently. Thus, a judge who is only used to mechanically subsume a factual situation under a legal norm is not fitted for the position of a constitutional judge.[110]

From this point of view, ECJ judges are in a situation similar to any other constitutional judges. They do more than just mechanic subsumption. Their job requires a great deal of thinking, attitudes and decisions. The cases they solve often reach beyond the limits of the written law. Their judgments often amount to policy choices. And in such a setting, the remark of Andrew Heywood cited at the beginning of this section is very convenient: if judges judge by personal preferences, they should not be surprised if they are ever accused of being political.

The question posed in this section is: does the system of the European judiciary offer sufficient guarantees to insure that judges are not political, that the adjudication of the ECJ is not shaped by their individual political (or 'policy') preferences? As a background to this issue, three leading theories of the twentieth century will be addressed: the normativist theory, American Legal Realism and Critical Legal Studies.

3.1.1 The Normativist Theory: Hans Kelsen, František Weyr

According to the normativist theory,[111] law is an autonomous system which is only defined by itself. Law thus needs to be cleared from any non-legal influences, including the personality of a judge. For normativists, the judgment in *Trop v. Dulles*[112] (analysed in section 2.1) would not be legally valid, since it contradicted the norm which applied to it. In the normativist theory, every legal norm needs to be justified by another legal norm of a higher standing in the hierarchy of norms, only then a legal system will be functional. Within such a legal system, a binding rule cannot be derived from anything

[110] See (Wagnerová, 2012).
[111] This theory is sometimes also called 'pure legal theory', since Hans Kelsen's '*Pure Theory of Law'* is the crucial work of the normativist theory.
[112] US Supreme Court, *Trop v. Dulles*, 356 US 86 [1958].

else than law: neither from facts, nor from moral judgments, nor from the sovereign's authority.[113]

The application of the pure theory of law to judicial decision-making is thus clear: if a judge wishes to issue a legally binding judgment,[114] his arguments must be based on legal norms. If he finds arguments in any other field, his decision will not be legally valid, since "*words uttered in a certain room or inscribed in a certain text get their status as legal decisions only in the context of functioning legal system.*"[115] Any adjudication is thus confined within the limits of law and the law is confined within itself which leaves the judges with a very limited field of arguments.

3.1.2 American Legal Realism: O. W. Holmes, Carl Llewellyn, Jerome Frank

A quite different view on the judicial decision-making and its grounds was offered by legal realism in the early twentieth century. American legal realists focused mainly on the judiciary[116] and their claim was very clear: adjudication based on purely legal motivations is fiction; it is necessary to look beyond the legal arguments, since every judge comes from a certain background that determines his opinions and influences his decisions. Legal realists argued that "*lawyers should look behind the language of judicial opinions and the "paper rules" of the statute book invoked by these opinions in order to uncover the judges' "real" motives.*"[117] For those who are sceptical to such a claim, K. G. Wurzel proposes an exercise: imagine inviting Chinese judges to adjudicate on the basis of your laws: you would find out that they decide quite differently than your own judges.[118]

Legal realists emphasise the importance of a judge's personality in his decision-making: his opinions, his moral judgments, his cultural and social profile, maybe even his

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[113] See for example (Sobek, 2008), pp. 124 ff.
[114] The normative theory is in general not a theory of judicial adjudication. It examines legal validity of norms, just like legal positivism in general. Therefore the application of this theory to judicial decision-making only concerns the validity of the ruling, it does not propose a general normative theory as to what arguments judges should or should not use when deciding cases. For a more thorough elaboration on various theories of legal thought, see for example (Kühn, 2002) or (Sobek, 2008),
[115] See (Green, 2009), p. 3; see also (Kühn, 2002), pp. 228 ff.
[116] In fact, they overvalued judge-made law in contrast to any other source of law, which brought them quite a deal of criticism; see (Kysela, 2011), p. 178.
[117] See (Dyevre, 2008), p. 9.
[118] See (Knapp, 1947), cited in (Kysela, 2011), p. 178.

political preferences may play a role.[119] Judges' education also has a significant influence on adjudication: some judges only think in the intentions of law, some may be educated in economics, sociology or political science. If judges are seen as elite of the society then good education in the field of social sciences may even be expected as a matter of course. Justice Louis Brandeis quotes one of his professors who appealed on his students saying that "*a lawyer who has not studied economics and sociology is very apt to become a public enemy.*"[120] American Legal Realism thus clearly stands in opposition to the normative theory. Law is not a system confined to itself; it needs to be perceived and interpreted in the light of other fields of human life, namely economics and the society as a whole.

3.1.3 Critical Legal Studies: Duncan Kennedy

A few decades later, the claims of the American Legal Realism were exaggerated to an extreme by a movement called Critical Legal Studies represented mainly by Duncan Kennedy. The main claim of CLS was that law and politics are inseparable. Law is in nothing else than a tool for enforcing politics, legal arguments are simply "*covers for the real motives behind the courts' policies and the political agenda of the sitting judges,*"[121]courts are by definition 'political institutions'[122] and judges are "*half-conscious, in a state of denial in respect of the ideological element in their judicial behaviour, and therefore acting in 'bad faith'.*"[123]

3.1.4 The Place of Non-Legal Motivations in the Contemporary Judiciary

Federico Mancini wrote in 1980 that "*judicial decisions may be politically motivated, but their authors […] would never dream of publicly acknowledging this fact or acting in such a way as to make it explicit.*"[124] Of course, judges will always look for legal reasons of their findings, whether in order to cover their political motivations (CLS), in order to subsequently support their original 'feeling' about the case (ALR) or in order to grant legal validity to their arguments (the normativist theory). It is thus difficult to find

[119] This view is shared also by Eliška Wagnerová: see (Wagnerová, 2012).
[120] See (Brandeis, 1916), p. 470.
[121] Duncan Kennedy cited in (Dyevre, 2008), pp. 6-7.
[122] Duncan Kennedy cited in (Kysela, 2011), p. 194.
[123] Duncan Kennedy cited in (Thomas, 2005), p. 24.
[124] See (Mancini, 1980), p. 2. This was before he became an AG and a judge at the ECJ.

out just by looking at the reasoning whether the judgment was truly motivated by the legal reasons or whether the judge followed any non-legal motivations.

Possible non-legal motivation of judges is a general problem of the judiciary, not a problem specific to the European environment.[125] Grimmel argues that judges can never be totally free from personal considerations. There is always a danger that a judge will involve his own opinions, possibly political, in his decision-making. And that brings us back to Weiler's question: do we want to know? In case we do, let us ask: if Chinese judges took up the positions at the ECJ today, what would happen to its case-law?

Clearly, the world of judicial decision-making is not black and white. Neither legal normativism, nor Critical Legal Studies give a truthful impression about the judiciary's functioning. The question then is: in the many shadows of grey, where should the line be drawn as far as non-legal motivations of judges are concerned?

Judges should not be seen as advocates of certain ideologies, as members of the 'ruling class' or as servants of repressive states, since that would make them 'political actors',[126] that would bring the judiciary too close to 'the black'. Still, judges cannot forget where they come from; they will always be influenced by their social and cultural background. When Judge Schiemann was asked about the personalities at the ECJ, he replied: "*We've got mixtures of professional judges, former politicians, former civil servants, former professors, and they each bring something to the table which is actually quite useful, and sometimes you will find that the mental approach of the professors lines up on one side, and the judge's lines up on the other, which is quite interesting, rather than, as it were, national alignments or religions alignments or anything of that kind.*"[127] From Judge Schiemann's perspective, political motivations do not play a significant role at the ECJ. But just in case they did, would there be tools to limit them?

[125] See (Grimmel, 2011), pp. 12 ff.
[126] See (Kysela, 2011), p. 178-179.
[127] See (Schiemann, et al., 2004).

3.1.5 The European Solution: The Four Guarantees

The judicial system of the EU employs various instruments which endeavour to secure judicial independence and to minimise possible non-legal motivations. One of them is common to the judiciaries in general: the Court is a judicial institution with all the guarantees that come with it: the institutional independence on other 'branches' (including both the geographical remoteness from the other institutions and the full self-administration of the Luxembourgish judiciary), the impossibility of lobbying, the financial and social prestige of being a judge, and others.

Secondly, independence is explicitly required from the members of the Court. The Treaty states that judges and AGs of the Court "*shall be chosen from persons whose independence is beyond doubt.*"[128] This provision should ensure that a person with very strong political ties should not be appointed to the Court. The guarantee of independence is reinforced by a Panel composed of professionals on the supra-national level.[129] Moreover, once nominated and appointed, the judges and AGs have to "*take an oath to perform [their] duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court*."[130]

Thirdly, the members of the Court represent the interests of the Union, not the interests of their respective MS.[131] For this reason, rulings are issued collectively, in the name of the Court as an institution, not in the name of individual judges. Even though every case has its Judge Rapporteur who drafts the case, this person has to write the opinion of the whole chamber (composed of three, five or thirteen judges), notwithstanding his or her own opinion. Since the deliberations are secret and since concurring and dissenting opinions do not exist at the ECJ, the voting and the opinions of the judges remain unknown. European judiciary is thus always a 'team game', not a 'one-man-show' (the only exception being the role of Advocate General). On the one hand, this system encourages discourse among the judges and protects the judges' independence by

[128] See Article 19(2) TEU.
[129] See Article 255 TFEU. The appointment process will be dealt with more thoroughly in section 3.2.
[130] See Article 2 of the Statute of the CJEU.
[131] That is true both about judges and about Advocates-General. In April 2010, AG Sharpston gave a lecture about the role of Advocates-General and she introduced her speech with a phrase [paraphrased]: *I am the British Advocate General. In the following hour, I will explain to you why I am not here to be British and why I am neither an advocate, nor a general.*

shielding them from any possible control by their respective MS. On the other hand, it leads to a lack of judicial transparency and it builds the EU legal system on the fiction that only one solution is feasible, which is rarely so.[132]

Fourthly, every judgment needs to be reasoned and signed by the members of the chamber.[133] This is probably the most problematic of all the guarantees since the Court receives a great deal of criticism for insufficient reasoning of its case-law; see for example works of Joseph Weiler,[134] Mitchel Lasser[135] or Michal Bobek.[136] This problem has also been admitted by Judge Schiemann, who stated: "*Well, it is said that a camel is a horse designed by a committee. […] you hammer things out in the course of sitting round a table, and then having hammered it out, there's a temptation to get shot of the thing by sending it to the printers. In an ideal world, you would sit back and redraft the thing again from beginning to end so that it has a cohesive whole, but that then occupies time, and one has a balancing act to do.*"[137] In fact, it was often due to insufficient reasoning that the Court was labelled as political.

3.1.6 Conclusion: Politically Motivated?

Looking back at Andrew Heywood's statement at the beginning of this chapter, ECJ judges could quite easily be accused of being political, especially since their work requires thinking, attitudes and decisions. One can never know what is hidden in a

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[132] Judge Schiemann defends the system of unanimous judgments when he states that "*it really wouldn't help much if you have too much diversity in the guidance. So I think the system, as it were, pushes one towards a single solution, and leaves the room for development and flexibility partly by advocates-general, who quite often blaze paths which the judges don't follow then, but they're picked up by the parties and subsequent arguments, and then gradually it may be ten years down the line, that the court will say: Well, we think our previous jurisprudence is too narrow, we could base it on a broader ground.*" See (Schiemann, et al., 2004).

[133] This follows from Article 36 of the Statute of the CJEU: "*Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.*"

[134] See (Weiler, 2001), p. 225, who criticises the "*cryptic, Cartesian style […] with its pretence of logical legal reasoning and inevitability of results is not conducive to a good conversation with national courts.*"

[135] See (Lasser, 2003), p. 49: "*In fact, despite their abandonment of the single-sentence syllogism, ECJ decisions continue to be unsigned, univocal, magisterial and largely deductive documents that reveal decidedly less than they might: distressingly often, the Court's shorthand reference to, and axiomatic application of, such systemic policies as "the effectiveness" of Community law, "legal certainty and uniformity," and/or the "legal protection" of Community rights tend to leave much – and at times, virtually everything – unsaid.*"

[136] See (Bobek, 2008), pp. 1639-1640: "*The substantive reasoning of the ECJ is becoming shorter and shorter, arguments put forward by parties are considerably cut or sometimes even missing altogether. As a result, the quality of the reasoning of the judgments and their persuasive force suffer*."

[137] See (Schiemann, et al., 2004).

judge's mind and what the real reasons of adjudication are. This led the advocates of Critical Legal Studies to believe that every legal argument is only a mask for a political opinion, very similar to what the neo-functionalists claim about the ECJ's arguments: law is only a mask and a shield for hidden politics.

It is however crucial to realise that not all non-legal motivations are necessarily political. As legal realists have rightly shown, judges are predetermined by many other influences of cultural, social or educational character; this was confirmed by Judge Schiemann when he claimed that the background of the judges matters more than their political ideas. And even the normative theory suggests that the sanction for departing from legal norms is not the label of political, but the loss of legal validity of a judgment.

Moreover, the European judiciary has introduced a number of guarantees that should neutralise possible political profiles of the judges, including the general guarantees of judicial independence, the collective character of the Court's rulings and the obligation to reason judgments. Given a combination of these elements, it is quite improbable that a judge would be able to use the position to promote his own political agenda.

3.2 Selection of Judges: A Double-Check

The position of a judge or an Advocate General at the Court of Justice in Luxembourg is undoubtedly a very prestigious one, presumably one of the "dream careers" for EU lawyers. However, being an excellent lawyer and a specialist in the field of EU law does not suffice to get the job. In order to become a Court member, the candidate must be nominated by his or her national government and newly also approved by a panel composed of judicial authorities at the supra-national level. These, in fact, are two layers of possible political background of the selection process.

3.2.1 Nomination by National Governments

The first step in the appointment procedure is the nomination by the national government. The EU does not limit the MS in their selection in any way; there is only a requirement of the candidates' independence. Article 19(2) TFEU states: "*The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 TFEU.*" Article 253 TFEU repeats the

requirement of independence and adds that the judges and AGs of the Court of Justice need to "*possess the qualifications required for appointment to the highest judicial offices in their respective countries*" or to be "*jurisconsults of recognised competence.*" Article 254 TFEU imposes similar conditions on the judges of the General Court.

The selection procedure at the national level thus remains unregulated. As the MS are not much limited in this field, the nomination may have a political background at the national level. There is always a chance that a position in Luxembourg may be offered either to those who deserve a reward or to those who need to be removed from national politics. Barents writes: "*That this has occurred is a public secret.*"[138]

3.2.2 Article 255 Panel

The Lisbon Treaty has introduced a new institution, the so-called "Article 255 Panel", which is meant to "*give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the MS make the appointments referred to in Articles 253 and 254.*"[139] The new provision originates in "*the criticism of the secrecy surrounding that appointment procedure as well as the possibility of political nomination to the EU Courts.*"[140] The Panel was thus created to discourage the possible political nominations and to guarantee the independence and professional qualification of the candidates.[141] This was confirmed by Judge Skouris, the President of the Court, in a document where he wrote that the role of the Panel should select the candidates with "*the most suitable high-level experience to perform the duties of a judge*."[142]

However, the new procedure has two drawbacks. Firstly, as Barents rightly remarks, "*although the panel procedure may make MS more demanding as to the choice of candidates, political nominations are not excluded.*"[143] Secondly, the opinions of the

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[138] See (Barents, 2010), p. 712.
[139] See Article 255 TFEU.
[140] See (Barents, 2010), p. 712.
[141] See also (Chalmers, et al., 2010), p. 144: "*The system of appointment was introduced […] to prevent the over-politicisation of the process.*"
[142] See Cover Note 5195/10 [2010].
[143] See (Barents, 2010), p. 713-714.

Panel are not public and the whole system may thus create yet another level of potential political background behind the Court members' nomination.

3.2.3 Conclusion: Politically Influenced?

The Court's 'politicisation' in the process of the judges' appointment is a matter of speculation. In 2010, the Panel assessed several candidates for the functions of judges at the ECJ and at the EGC, the story has already been told in the introduction. The Panel as it functions today cuts both ways: on the one hand, it may eliminate political nominations from the MS, but on the other hand, it may have its own political motivations. The solution which could eliminate this imperfection is transparency: if the Panel publishes its opinions on the respective candidates with a reasoning explaining their (un)suitability, then the guarantee at the EU level will be more efficient.

3.3 Policy Choices: The ECJ as an Artist

"There are three kinds of judge: the artisan, a veritable automaton who, using only his hands, produces mass judgments in industrial quantities, without lowering himself to consider the human aspects or the social order; the craftsman, who uses his hands and his brain, using traditional interpretative methods, which inevitably lead him merely to represent the legislature's intention; and the artist, who, using his hands, his head and his heart, broadens the horizon for citizens, without losing sight of reality or of specific circumstances. Although they are all needed in the fulfilment of the judicial function, the Court of Justice, in the exercise of its proper role, has always identified itself with the last kind, especially now that the constant evolution of the ideas which inspired the creation of the Community has slowed down."

– AG Ruiz-Jarabo Colomer[144]

The European Union is a political project. It has been built around certain values and policies which were determined by the founding fathers in the 1950s and carved out into the primary law of the European Communities. The European Union as a project is also open and dynamic. The framework designed sixty years ago has been shaped through

[144] Opinion of Advocate General RUIZ-JARABO COLOMER in Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161.

various events in the history of European integration. The original ambition was to help the reconstruction of after-war Europe, to maintain peace on the European continent and to make the economy more effective.[145] Today we have a Union which is far from what the founding fathers intended: a Union which guarantees citizens of the MS a "fundamental status" of a Union citizen, a Union which has its own legal system that is superior to and directly applicable in national courts, a Union which cares not only about economic but also about social equality of its citizens, a Union which pursues foreign policy through its own diplomatic service, and much more. Why is today's EU so much different from the original EC; and how has it happened?

Today's EU is very different because in various moments, various actors transformed it at various steps. The EU institutions created a wide variety of legislative acts, the MS adopted Treaty revisions and the ECJ issued judgments in various fields. These steps went hand in hand, influencing one another and transforming the original intergovernmental EC into the supranational EU as we know it today.

Apparently, the ECJ has played a significant role in this process, transforming the founding treaties from an institutional treaty into a constitution[146] and bringing about the changes and innovations crucial for the development of the European legal system. It has shown itself as a central policy-maker when it established direct effect in *Van Gend*[147] and supremacy in *Costa*[148] and *Internationale Handelsgesellschaft*, when it laid down conditions for state liability in *Francovich,*[149] *Brasserie du Pêcheur*[150] and *Köbler,*[151] when it expanded the Parliament's power in *Les Verts,*[152] or when it made

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[145] See for example (Craig, et al., 2011), Chapter 1: *The Development of European Integration*; (Chalmers, et al., 2010), Chapter 1: *European Integration and the Treaty on European Union*; or (Lenaerts, et al., 2011), Chapter 1: *The Establishment of the European Communities*.
[146] See section 1.3: *Is the ECJ a Constitutional Court?*
[147] ECJ, Case 26/62 *Van Gend & Loos v. Neth. Inland Revenue Admin.* [1963] ECR 1.
[148] ECJ, Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585
[149] ECJ, Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italian State* [1991] ECR I-5357.
[150] ECJ, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and the Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.
[151] ECJ, Case C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.
[152] ECJ, Case 294/83 *Parti Ecologiste "Les Verts" v. Parliament* [1986] ECR 1339. This case is very famous for stating that the Treaty is a constitutional charter in its para 23*:* "*It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its MS nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty*." This ruling has been cited in many further cases. See also (Lenaerts, 2007), footnote 40.

bold steps towards the internal market in *Dassonville*[153] or *Cassis*.[154] Too many stories have already been told about these cases, too many authors have already analysed them in depth; this thesis therefore does not have the ambition to do the same over again. Instead, it poses a question why such crucial policy choices have not been made by a political institution,[155] why it was the ECJ that made those steps and how that was possible.

3.3.1 Transforming the Union: A Tool and an Arena

To be powerful, the ECJ needed a tool and an arena: it transformed the Union by the tool of teleological interpretation and in the arena of the preliminary ruling mechanism.

A 'creative' reading of the Treaties has always been the favourite strategy of the Court.[156] Like any other court, the ECJ uses a plurality of interpretation methods;[157] Judge Lenaerts speaks about three "*primary methods*": literal interpretation (text), systematic interpretation (context) and teleological interpretation (purpose).[158] Within teleological interpretation, judges enjoy a wide margin of discretion: they can afford to go beyond the limits of the written text and to enter the area of values and principles.

The teleological methodology of the ECJ finds its basis mainly in Article 19(1) TEU which introduces the principle of 'rule of law' and which empowers the Court to "*ensure that in the interpretation and application of the Treaties the law is observed*." This legal basis has been used as a justification for many grand decisions of the ECJ;[159] it has happened "*in the name of preserving 'the rule of law'*" that the Court has been able to develop "*principles of a constitutional nature […] which bind the EU institutions and MS when they act within the sphere of EU law.*"[160] Some authors claim that the ECJ "*gives the interpretation most likely to further what the Court considers*

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[153] ECJ, Case 8/74 *Dassonville* [1974] ECR 837.
[154] ECJ, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979], ECR 649.
[155] Pursuant to Article 15 TEU, the European Council "*shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof*."
[156] See (Alter, 2009), p. 3.
[157] For a deeper analysis of the interpretation methods see (Melzer, 2010), a thorough work in the field of legal argumentation and interpretation.
[158] See (Lenaerts, 2007), pp. 1016 ff.
[159] See (De Búrca, 2003), pp. 48 ff.
[160] See (Craig, et al., 2011), p. 63.

that provision sought to achieve";[161] however, the Court may hardly know what the provisions sought to achieve, as there are no *travaux prépartoires* available. The interpretations given by the Court therefore very often create something out of nothing; the judges indeed become artists, as suggested by AG Ruiz-Jarabo Colomer.

If teleological interpretation is the 'tool' by which the ECJ decides important policy questions, then the preliminary ruling mechanism is the 'arena' where most of such policy questions are resolved. An overwhelming majority of the crucial decisions issued by the ECJ came up in answer to national courts' references. Through them, the ECJ was able "*to insert itself into national debates regarding the relationship of European law to national law, and to harness national courts as enforcers of ECJ decisions.*"[162]

3.3.2 'More than an Agreement': The Building Blocks of the EU Legal Order

Not all, but certainly many of the crucial and transformative policy choices happened in Luxembourg. The doctrines developed in the Court's case-law, although technically legal, have had a substantial impact on the political formation of the EU. As Karen Alter puts it, these legal interpretations "*became politically transformative*" and the ECJ "*became a political actor that was capable of transforming European and international politics.*"[163] At the same time, the most important cases often lack a solid legal basis.

In his theory (analysed above), Bohuš Tomsa tried to draw a line between adjudication and legal politics: 'adjudication' sticks to the text of written law, while 'legal politics' goes beyond the text and interprets law on the basis of values and principles. When looking at the ECJ and its landmark cases, we have to admit that in the context of Tomsa's terminology the Court is not only 'political', it is in fact 'super-political', since it does not only create law on the basis of legal principles but it even creates legal principles on the basis of the 'spirit' of the Treaties.

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[161] See (Craig, et al., 2011), p. 64.
[162] See (Alter, 2009), p. 32. See also p. 141: "*This process of freezing the national procedure and asking the ECJ for an interpretation of EC law in light of a national law is one of the main means through which the ECJ comes to rule on the compatibility of national laws with European law.*"
[163] See (Alter, 2009), p. 3.

The first time that the Court used this 'super-political' method of creating legal principles was in the case of *Van Gend*.[164] On the basis of "*the spirit, the general scheme and the wording of the Treaty*" the Court ruled that the Treaty is "*more than an agreement*" and created the principle of direct effect which brought about an incredible shift in the character of the whole EU legal system, entrusting individual litigants with the role of guarding the integrity of the European legal order.[165] Similarly in *Costa*,[166] the ECJ built its argumentation on the basis of "*the terms and the spirit of the Treaty*" and pronounced the principle of supremacy of EU law over national legal rules which was confirmed and intensified in the subsequent case-law.[167] By the same token, in *Francovich*[168] the Court ruled that "*the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law […] is inherent in the system of the Treaty*"[169] even though there was absolutely no sign of such a principle in the primary law. It is through these principles that the interlocutors of the European legal order have gained power: individual litigants may claim their EU rights in national courts and the EU law is shaped by the preliminary ruling mechanism.

When Judge Lenaerts writes about "*text, context and purpose*,"[170] when AG Ruiz-Jarabo Colomer writes about a judge who decides "*using his hands, his head and his heart*" and when the Court of the 1960s writes about "*the spirit, the general scheme and the wording of the Treaty*," they all mean the same. With his hands, a judge interprets the text of the Treaty, with his head he interprets its general scheme and with his heart he looks for its spirit. What may be a little uncomforting is the surplus of the Court's creativity and the lack of reasoning. When issuing its landmark decisions, the Court

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[164] ECJ, Case 26/62 *Van Gend & Loos v. Neth. Inland Revenue Admin.* [1963] ECR 1, at 12.
[165] See (Dehousse, 1998), p. 40.
[166] ECJ, Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585
[167] ECJ, Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fur Getreide und Futtermittel* ('*Solange I*') [1970] ECR 1125; ECJ, Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.
[168] ECJ, Joined Cases C-6/90 and C-9/90 *Francovich* [1991].
[169] ECJ, Joined Cases C-6/90 and C-9/90 *Francovich* [1991], para 35.
[170] See (Lenaerts, 2007), p. 1016.

created an atmosphere that everything is legal and obvious, instead of admitting that it was a matter of a policy choice with two (or more) credible solutions.[171]

In the most important moments of European integration, the Court was creative, and since the cases before it were by their very nature 'policy choices', it was in fact 'politically creative'. Craig and De Búrca remark that "*all constitutional courts must engage with political issues, but, given the unaccountability of courts, the nature and origin of the 'unwritten' values which they promote should be critically scrutinized, as should the extent to which their decisions seem to depart from what their express powers would appear to allow.*"[172] This comes, in the end, back to the question of reasoning which is often insufficient, as has already been argued above, and for which the Court often receives severe criticism.

On the other hand, Andreas Grimmel defends the Court in this context: "*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. […] 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, it was also necessary to secure legal security 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. Not judicial activism, but the lack of legislative activism […] was the problem in the early years of integration.*"[173]

Grimmel introduces an extremely important point. It is always crucial to see the institutional context of the Court's creative judgments. In the instances where the Court steps in for the inactive legislator, its case-law is much more legitimate than in the instances where the Court surprisingly develops new legal principles. However, it is

[171] See also (Husa, 2011), p. 459.: "*Judges have a powerful interest in giving impression, concerning their constitutional decision-making, that they are merely applying the norms not creating them. In the European constitutional discourse this is revealed to be more of a façade than anything else*."
[172] See (Craig, et al., 2011), p. 65.
[173] See (Grimmel, 2011), p. 17.

questionable whether cases such as *Van Gend*, *Costa* or *Francovich* were reactions to a lack of legislative action. Rather, they went beyond what the legislator intended.

3.3.3 'Message in a Bottle that Changed Europe':[174] *The Cassis Case*

The *Cassis* case[175] illustrates the second type of the ECJ's creative cases: those which fill in a gap in legislative vacuum, which are surprising, yet still accepted as legitimate. *Cassis* came up in a context where the Union wished to build an internal market but the legislator did not do anything in order to reach that goal. When French alcohol producers wanted to export their product to Germany, they did not succeed since their blackcurrant liquor of 15% was not strong enough to be qualified as alcohol in Germany. Clearly, it was the MS' will not to open their frontiers too much, yet the Court decided to take the initiative and to introduce a new policy of 'mutual recognition', stating that there is "*no valid reason why, provided that they have been lawfully produced and marketed in one of the MS, alcoholic beverages should not be introduced into any other MS.*"[176] This ruling marked the beginning of the 'new approach to harmonisation' which meant that "*it is possible to implement trade between states while still allowing MS to maintain their own laws and avoiding the need for harmonisation*,"[177] and it lead to the adoption of the Single European Act of 1985 which is a crucial Treaty amendment.

The legitimacy of the *Cassis* case is different from the cases mentioned in the previous subsection for two reasons: the setting in which the *Cassis* case was decided and the follow-up of the judgment.

Firstly, the *Cassis* case was decided in a specific context of the 1970s known as a period of 'Euro-sclerosis'. The Court stepped in "*at a time when progress towards completing the Single Market through legislative harmonization was hindered by institutional inaction*."[178] *Cassis*, unlike other cases, was legitimated by a solid legal basis, since the

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[174] This phrase was used as a heading of an article about *Cassis* in *The Independent* on the 6 May 1990.
[175] ECJ, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979], ECR 649.
[176] ECJ, Case 120/78 *Cassis de Dijon* [1979], para 14.
[177] See (Chalmers, et al., 2010), p. 764.
[178] See (Craig, et al., 2011), pp. 63-64.

ECJ only "*rendered the Treaty and EC legislation effective when the provisions had not been implemented as required by the political institutions and the MS.*"[179]

Secondly, *Cassis* was followed-up by a pro-active reaction of other Union institutions. Karen Alter points out that the importance of the Court's rulings is determined by their acceptance by other political actors.[180] Fabio Wasserfallen argues similarly when he writes that *"the judiciary can only influence integration effectively, when its considerations and doctrines become incorporated in the policy-making process.*"[181] The *Cassis* case is a good practical illustration of this argument: even though it was not the first ruling in the field of internal market, it is definitely the most influential one. The *Dassonville* ruling issued five years before *Cassis* was in fact very similar, but due to the lack of interest of other institutions, it never became as famous as *Cassis*.[182]

3.3.3 Conclusion: Politically Creative?

Both previous subsections introduce deal with very creative cases that brought a significant change to the development of the EU. They have some characteristics in common: they did not rest upon the individual case being decided (Tocqueville: political!), they entered the sphere of legal politics (Tomsa: political!) and they made value choices (Easton: political!) about what was good rather than about what was right (Procházka: political!). However, they were issued in a different context and therefore Grimmel's defence of the Court introduced above cannot be applied equally to all of them. While *Cassis* was indeed a case issued in the period of legislative vacuum, subsequently accepted by the legislator and translated into the Single European Act, *Van Gend*, *Costa* and *Francovich* have been controversial for decades.

The Court has clearly been a central policy-maker in the EU. The policy-making power of the Court is however not unlimited, since "*the judicial power is by its nature devoid of action: it must be put in motion in order to produce a result.*"[183]

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[179] See (Craig, et al., 2011), p. 63.
[180] See (Alter, 2009), pp. 139 ff.
[181] See (Wasserfallen, 2010), p. 1129.
[182] See (Alter, 2009), pp. 143 ff.
[183] See (Tocqueville, 1841), p. 102.

In the light of the integrationist theories introduced above, the setting is both neo-functional and supranational at the same time. A lot of power is in the hands of the 'interlocutors', such as private litigants who bring their actions, national courts who refer questions to the ECJ and apply EU law back in their respective jurisdictions, or the Union institutions that may decide to transform the Court's case-law into legislative acts. The ECJ is thus limited from both ends: on the one hand, it only deals with cases that come before it, on the other hand its case-law only has an impact if other actors accept it. Still, what happens between these limits is left completely up to the ECJ. The playing field between the two side fences remains open to the Court's artistic interpretation and the supranational Court is thus free to be 'politically creative'.

3.4 Institutional Balance within the Union

Although many public policy matters still remain beyond the purview of the courts, there has been a growing legislative deference to the judiciary, an increasing and often welcomed intrusion of the judiciary into the prerogatives of legislatures and executives, and a corresponding acceleration of the judicialization of political agendas.

– Ran Hirschl[184]

This chapter will analyse three different examples of the interaction between the Court and other EU institutions. The first example concerns a typical 'judicial review' case where the Court examined the validity of a legislative act and then offered further guidance to the legislator. The second case shows how the legislator delegated the policy choice to the ECJ in the questions of corporate mobility but the Court refused to make the decision. The third example concerns a series of cases on the judicial protection of individuals during which the EGC issued a ruling which was in fact admittedly addressed to the Treaty drafters. What all these cases have in common is that they illustrate the relationship between the judiciary and the legislator and they show that in certain cases the ECJ may be very 'politically influential'.

[184] See (Hirschl, 2008), p. 2.

3.4.1 Giving the Legislator a Second Chance: The Tobacco Saga

Tobacco Advertising[185] highlights the interaction between the Court and the legislator.[186] Concurrently, it is an example of the ECJ being a true judicial review court, keeping an eye out for any possible defects of the legislative process, being able to strike down the legislation which conflicts with the Treaties.

When adopting rules, the European legislator makes a policy choice in two regards: firstly, it decides which areas to regulate, and secondly, it decides how it will regulate in those chosen areas. There are a number of legal bases in the primary law for different fields of Union activities and the different legal bases follow different rules and procedures. One of these legal bases is Article 114 which allows for harmonisation in the area of the internal market.[187]

In the 1990s, the European legislator decided to regulate the marketing of tobacco products through the Article 114 harmonisation procedure. The directive in question[188] prohibited "*all forms of advertising and sponsorship of tobacco products*" and "*any free distribution having the purpose or the effect of promoting such products*."[189] The strict regulation was not quite appealing to Germany which thus brought an action for annulment of this directive. The applicant's main claim was the wrong choice of legal basis: the directive clearly intended to protect public health, not to pursue internal market objectives, therefore Article 114 was not applicable and the measure should have been adopted pursuant to Article 168 TFEU.[190] Long story short, the Court followed the argumentation of Germany and ruled that "*a measure such as the directive cannot be adopted on the basis of [Article 114 TFEU]*."[191] This makes the *Tobacco*

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[185] ECJ, Case C-376/98 *Germany v. EP and Council ('Tobacco Advertising I')* [2000] ECR I-8419.
[186] Another very good example would be the case concerning the social dimension of Union citizenship. For a thorough analysis of the *Grzelczyk* case, see (Wasserfallen, 2010).
[187] See Article 114 TFEU: "*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in MS which have as their object the establishment and functioning of the internal market.*"
[188] Directive 98/43/EC [1998], OJ 1992 L 213/9.
[189] See Directive 98/43/EC [1998], Article 3.
[190] ECJ, Case C-376/98 *'Tobacco Advertising I'* [2000] ECR I-8419, para 12.
[191] ECJ, Case C-376/98 *'Tobacco Advertising I'* [2000] ECR I-8419, para 115.

ruling a landmark case, since it is the first time that the Court annulled an act of another Union institution for the reason of its *ultra vires* action.

But there is more to this story. The Court not only annulled the Tobacco directive; it also offered some further advice to the legislator,[192] stating that "*a directive prohibiting certain forms of advertising and sponsorship of tobacco products could have been adopted on the basis of [Article 114] of the Treaty.*"[193] Apparently, between the lines, the Court was sending a message to the legislator: *harmonisation in this field is not absolutely impossible; so, try again and if you follow the reasoning of this judgment, there is a chance that we will not annul the second directive*. The legislator got a chance to rethink the directive's objectives and to try once more.

The Parliament and the Council followed the Court's advice and drafted a second directive[194] in accordance with the Court's guidelines. That led to a successful end – the second *Tobacco* directive stood in the Court's review.[195]

3.4.2 Leaving It up to the Court: Corporate Mobility

Pursuant to the Treaties, companies are free to 'travel' within the European market.[196] The Treaties guarantee two types of corporate mobility: the 'primary right of establishment' within which a company may be set up and managed in any MS,[197] and the 'secondary right of establishment' which allows existing companies to set up agencies, branches and subsidiaries in any MS.[198] The question of corporate mobility is interconnected with the problem of the applicable law: if a company is present in multiple MS, which law is applicable to it? This problem is partly covered by the 'conflict of laws' doctrine (which uses various 'connecting factors' in order to

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[192] Such a judicial 'advice' to the legislator is addressed by Arthur Dyevre who states: "*Blurring, almost to the point of completely obliterating, the traditional dichotomy between "legislating" and "judging", the practice enables constitutional judges to dictate the content of prospective legislation to the legislators.*" See (Dyevre, 2008), p. 2.
[193] ECJ, Case C-376/98 *'Tobacco Advertising I'* [2000] ECR I-8419, para 117.
[194] Directive 2003/33/EC [2003].
[195] ECJ, Case C-380/03, *Germany v. EP and Council ('Tobacco Advertising II')* [2006] ECR I-11573.
[196] See Articles 49-55 TFEU.
[197] See Article 49(2) TFEU.
[198] See Article 49(1) TFEU.

determine the applicable law), but partly unresolved. The delicate questions of the applicable law in the field of corporate mobility were thus left to the Court to decide.

In 1986, the Court issued its first big ruling in the field: *Daily Mail*.[199] Daily Mail was a British company wishing to move its central administration to the Netherlands for tax reasons but to remain governed by British law. British authorities were willing to allow such a transfer, but only under the condition that Daily Mail would be taxed (quite heavily) upon the relocation of their seat. That condition made it unattractive for Daily Mail to move and the company thus went to court, claiming that the British conditions violated its right of establishment under the Treaties.

At the time, the ECJ refused to be activist. At the time, the MS still planned to specify the conditions regarding connecting factors by an international treaty which was to be adopted in the late 1980s.[200] The Court therefore issued a ruling in favour of the UK, stating that "*[…] companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.*"[201] With a bit of simplification, the Court established a rule that as long as a company wishes to be governed by the law of a certain MS, it has to accept all the conditions that the MS imposes on it.

Later, the ECJ dealt with cases on the 'secondary right of establishment' and it was not afraid to be a little more 'creative': the rulings were much more in favour of the private companies and much less in favour of the MS. In *Centros*,[202] a Danish couple established an art company in the UK in order to avoid the Danish capital requirements.[203] Once the British company was established, they opened a branch in

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[199] ECJ, Case 81/87 *Daily Mail* [1988] ECR 5483.
[200] This may be observed for example from the wording used in the case of *Daily Mail* (n 199) where the Court states in para 23: "*It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor […] as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.*" However, such a convention was never adopted.
[201] ECJ, Case 81/87 *Daily Mail* [1988] ECR 5483, para 19.
[202] ECJ, Case C-212/97 *Centros* [1999] ECR I-1459.
[203] While under Danish law it was necessary to pay up a certain amount of money as a minimum capital, in the UK a company could be established without any capital, since the British company law is built on different capital protection rules.

Denmark and started to conduct business there. The end result was that Centros was a company of British law which had absolutely no business activity in the UK, since all of its activities were exercised in Denmark. Danish authorities claimed that this setting was clearly superficial and that it constituted an abuse of the right of establishment.

Quite surprisingly, the ECJ did not agree with Denmark. In response to the abuse argument, it ruled that "*[…] the fact that a national of a MS who wishes to set up a company chooses to form it in the MS whose rules of company law seem to him the least restrictive and to set up branches in other MS cannot, in itself, constitute an abuse of the right of establishment.*"[204] Centros thus won the case and was free to enjoy the benefits of the good 'choice' of the applicable law.

The Court upheld its generous case-law on the secondary right of establishment in two consequent cases. In *Überseering*,[205] a Dutch company gradually moved its economic activities to Germany up to the moment where its German agenda was even larger than its Dutch agenda. When Überseering wanted to sue another company before a German court, Germany refused to recognise Überseering as a legal person, since under German law it was recognised neither as a foreign company (it had too much activity on the German territory), nor as a German company (it was not filed in the German company register). The ECJ did not agree with such a rule. It reminded Germany that companies are free to move within the Union and that "*the refusal by a host MS ('B') to recognise the legal capacity of a company formed in accordance with the law of another MS ('A') in which it has its registered office […] constitutes a restriction on freedom of establishment.*" Germany thus had to accept that Überseering was a valid legal person in the Netherlands and that it had the right to be recognised anywhere in the EU.

Inspire Art[206] was in fact very similar to *Centros*: it concerned a Dutch national who decided to start an art company in the UK but then to exercise its business activities back in the Netherlands. The Dutch authorities, enlightened by the *Centros* ruling, did not block the registration completely, but they imposed some additional requirements

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[204] ECJ, Case C-212/97 *Centros* [1999] ECR I-1459, para 27.
[205] ECJ, Case C-208/00 *Überseering* [2002] ECR I-9919. This is probably the only case in the field of corporate mobility, which is not 'speculative' but which arose naturally.
[206] ECJ, Case C-167/01 *Inspire Art* [2003] ECR I-10155.

on it. However, the ECJ ruled completely in favour of *Inspire Art*, reminding the Dutch authorities of its ruling in *Centros* and stating that "*the fact that a national of a MS who wishes to set up a company can choose to do so in the MS the company-law rules of which seem to him the least restrictive and then set up branches in other MS is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.*"[207]

In February 2004, the European legislator started the works on a 14th company law directive which had been long desired and which would put an end to the unpredictability of the field.[208] However, the directive was not adopted as the MS could not reach a consensus in the question of codetermination. Germany was not willing to give up its rules on employee participation and since Germany is a strong player, the negotiations came to a dead end. Frustrated by the blocked discussion, the European Commission discussed in December 2007 whether a legislative action in the field was even necessary.[209] The Commission decided to leave the issue up to the Court, stating the following: "*Since […] the issue of the transfer of the registered office might be clarified by the Court of Justice in the near future, the assessment concludes that it might be more appropriate to wait until the impacts of those developments can be fully assessed and the need and scope for any EU action better defined.*"[210]

The Court thus faced a situation where the legislator simply refused to regulate a field, since a political compromise in the Council was impossible. And while the legislator may postpone a discussion to a later moment, "*the judges typically do not enjoy the luxury of not making a decision.*"[211] The Court was thus left with a policy choice which the legislator was not able to decide.

In the *Cartesio* case,[212] the main protagonist was a Hungarian society which wished to transfer its real seat to Italy but to keep its Hungarian status. Hungary refused such a

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[207] ECJ, Case C-167/01 *Inspire Art* [2003] ECR I-10155, para 138.
[208] See (EUROPA, 2004).
[209] See (EUROPA, 2007).
[210] Commission Staff Working Document: SEC(2007) 1707, Part I., p. 6.
[211] See (Neubauer, et al., 2012), p. 10. The argument continues as follows: "*Indeed, at times, other branches of government deliberately let the judiciary handle important questions and then criticise them for the decisions they make.*"
[212] ECJ, Case C-210/06 *Cartesio* [2008] ECR I-9641.

transfer and Cartesio went to court, claiming that the Hungarian authorities had infringed its rights under the EU provisions on corporate mobility. On the basis of facts the situation was very similar to *Daily Mail*. However, after all the corporate-mobility-friendly rulings of the Court between 1986 and 2008, the legal public expected the Court to rule in favour of Cartesio, especially after AG Poiares Maduro delivered his opinion in the case, suggesting that the difference between the primary and the secondary right of establishment is of a minor importance, that both situations should be treated equally and that in the case of Cartesio, Hungary indeed infringed the company's EU rights. However, the Court did not follow the Advocate General, it refused to make such a creative step in this area and it in fact refused the delegated legislative role: "*In the absence of a uniform Community law definition of the companies which may enjoy the right of establishment […], the question whether [Article 49 TFEU] applies […] is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law*."[213] Cartesio thus lost its case and the situation in the field of corporate mobility got even more complicated than before the ruling. After Cartesio, there have been so far two cases which offered some further guidance.[214] However, the field of corporate mobility remains very unpredictable, offering answers only on a case-by-case basis.

In February 2012 the legislator reopened the debate which was closed in December 2007. The Commission launched a new questionnaire on the future of European company law.[215] The Parliament backed up the project of the new company law directive and issued a resolution with recommendations to Commission.[216] What will happen next is of course unpredictable, it is up to the legislative process and political debate to decide the future of corporate mobility in the EU.

3.4.3 A Secret Message to the Treaty Drafters: The Jégo-Quéré Case

The case of Jégo-Quéré was one of the cases concerning the admissibility of an action for annulment brought by an individual. The action for annulment pursuant to Article

[213] ECJ, Case C-210/06 *Cartesio* [2008] ECR I-9641., para 109.
[214] ECJ, Case C-371/10 *National Grid Indus*, Judgment of 29 November 2011, not yet reported; ECJ, Case C-378/10. *V.A.L.E.*, Judgment of 12 July 2012, not yet reported.
[215] See (EUROPA, 2012).
[216] See European Parliament Resolution of 2 February 2012, (2011/2046(INI)).

263 TFEU is available primarily to so-called privileged applicants, i.e. the MS and the Union institutions[217] which can ask the Court to review the legality of a legislative or non-legislative act. Natural and legal persons may also file an action for annulment, but the standing of individuals is much more limited. As the Court is not meant to exercise judicial review on the initiative of any individual within the Union, the Treaties limit the standing of individuals to those acts which are of direct and individual concern to them.[218] That means, for example, that an undertaking may bring an action for annulment of a Commission decision according to which that undertaking is fined for participation in a cartel in breach of Article 101 TFEU. However, acts addressed to individuals are apparently not the only acts which may be challenged under Article 263(4) TFEU.

In the famous *Plaumann*[219] case of 1963, the ECJ stated that an individual applicant is individually concerned within the meaning of Article 263(4) TFEU in case that the contested measure "*affect[s] their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee*."[220] This understanding of 'individual concern' was applied by the Court for almost four decades, even though it was often criticised for being too restrictive, making the level of protection of individuals too narrow. In 2002, the General Court (at the time the Court of First Instance) decided to change the scope of protection and introduce a new definition of 'individual concern', even though "*whether or not the degree of judicial protection provided by Article 230(4) is sufficient, is first of all a political question.*"[221]

The case of *Jégo-Quéré*[222] concerned a French fishing company who asked the Court to review the legality of a Commission Regulation on the size of fishing nets. Obviously,

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[217] Under Article 263(2) TFEU, an action for annulment may be brought by a Member State, the European Parliament, the Council or the Commission "*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*". Under Article 263(3) TFEU, an action for annulment may further be brought by the Court of Auditors, the European Central Bank and the Committee of Regions "*for the purpose of protecting their prerogatives.*"
[218] See Article 263(4) TFEU.
[219] ECJ, Case 25/62 *Plaumann v Commission* [1963] ECR 95.
[220] ECJ, Case 25/62 *Plaumann v Commission* [1963] ECR 95.
[221] See (Barents, 2010), p. 724.
[222] EGC, Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365.

the Regulation was an act of general application, not an act addressed to Jégo-Quéré. Still, the company felt directly and individually concerned by the measure, since the new rules significantly limited much of its fishing activities and thus had "*a significantly adverse effect on its business.*"[223] Direct concern was fulfilled quite easily, since it met the requirement of the older case law to: "*directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic.*"[224] Individual concern, however, was much more difficult to establish, since the *Plaumann* conditions were not fulfilled.

The General Court, however, decided not to abide by the rule formulated in *Plaumann*, stating that "*the strict interpretation, applied until now, of the notion of a person individually concerned according to the fourth paragraph of [Article 263 TFEU], must be reconsidered.*"[225] In the following paragraph the EGC suggested the new definition of 'individual concern': "*a natural or legal person is to be regarded as individually concerned […] if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.*"[226] Thus, the applicant no longer needed to be 'unique' and to belong to a closed group of persons, as required by *Plaumann*; now it sufficed to be definitely and immediately affected. The EGC even explicitly reversed *Plaumann* by stating that "*[t]he number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.*"[227]

What was the answer of the ECJ to such a revolution? The ECJ did not even wait for the appeal in the Jégo-Quéré case; it used another pending case to respond to the EGC's innovatory idea. In *UPA II*,[228] another case regarding the standing of individuals, the ECJ refused to adopt the new definition of 'individual concern'; instead, it applied the

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[223] EGC, Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, para 18.
[224] See for example Case C-404/96 P *Glencore Grain v Commission* [1998], para 41; Case C-486/01 P *Front National v EP* [2004], para 34; Case C-15/06 P *Regione Siciliana v Commission* [2007], para 31; Case C-125/06 P *Commission v Infront WM* [2008], para 47; Case C-343/07 *Bavaria NV* [2009], para 43; Case T-68/08 *FIFA v Commission* [2011], para 32.
[225] EGC, Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, para 50.
[226] EGC, Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, para 51.
[227] EGC, Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, para 51.
[228] ECJ, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

good old *Plaumann* doctrine, absolutely ignoring the EGC's judgment in *Jégo-Quéré I.* Quite predictably, two years later in *Jégo-Quéré II*,[229] the ECJ confirmed its ruling in *UPA II* and set aside the judgment of the EGC in *Jégo-Quéré I.*

As to the institutional dimension of these cases, they could be a nice illustration of the relationships between the two instances of the European judiciary; that is however not the reason why they are included in the chapter on institutional balance. In fact, there is much more to this story, which I only realised after hearing two contradictory interpretations of this line of case-law by two of my KU Leuven professors.

Professor Devroe described the situation as the moment of a huge shame for the EGC: when it suggested a revolutionary turn in the case-law, it was (quite drastically!) overruled by the ECJ. The ECJ did not even bother to explain the reasons why the new definition of 'individual concern' could not be accepted. It simply ignored the ruling, as if it was absolutely obvious that the proposed definition was simply wrong.

Another of my professors was Judge Lenaerts, one of the EGC judges sitting in the *Jégo-Quéré* case. In contrast to Professor Devroe, he argued that *Jégo-Quéré* was actually one of the brightest moments for the EGC, since the EGC addressed the judgment neither to the parties, nor to the ECJ, but rather directly to the Treaty drafters. At the moment, the new Constitutional Treaty was being prepared and the EGC wanted the Treaty drafters to realise that the interpretation of 'individual concern' needed to be reconsidered.

Obviously, the intention of the EGC was successful. Even though the Treaty drafters did not adopt the new definition for all the acts, they created a new regime for the so-called 'regulatory acts'.[230] A new sentence was added to Article 263(4) TFEU according to which 'regulatory acts' only need to concern the applicant directly; individual concern is not required. The success of the ECJ's suggestion is thus partial.

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[229] ECJ, Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-03425.

[230] 'Regulatory acts' have been defined by the EGC as "*all acts of general application apart from legislative acts.*" See EGC, Case T-18/10 *Inuit Tapiriit Kanatami and Others v EP and Council*, Judgment of 6 September 2011, not yet reported, para 56; and EGC, Case T-262/10 *Microban v Commission*, Judgment of 25 October 2011, not yet reported, para 21. However, appeals from both these cases are currently pending before the ECJ, so the definition might still be altered.

3.4.5 Conclusion: Politically Influential? (towards Union institutions)

The goal of analysing these selected cases is that the Court is sometimes invited into the political process of the European legislator, either through procedures of judicial review (*Tobacco Saga*), by an explicit legislator's delegation (corporate mobility) or by its own decision (*Jégo-Quéré*). This undoubtedly makes the Court political, or rather 'politically influential' on the level of inter-institutional dialogue in the EU.

As a 'judicial review court', the ECJ cannot avoid being political. By definition, once a court is empowered with judicial review, it unavoidably touches highly political questions, as it supervises the legislative process and thus intervenes with the activity of political bodies when deciding whether the legislator has crossed a certain line or not. In fact, judicial review by constitutional courts may even be labelled as "*the most obvious and spectacular type of judicial politics.*"[231]

3.5 Impact in the Member States

"*European law, judge-made and legislative, is now cutting deeply into the substance of the socio-economic regimes of Social Market economies.*"
– Fritz Scharpf [232]

The law and politics of the EU have gradually become an inseparable component of the law and politics of the MS. Private and public parties solve their disputes not only on the national level, but they also include EU law in their strategies. The European legal system is thus capable of "*shifting the domestic balances of power.*"[233]

In this chapter, three models of EU judicial intervention into MS national politics are analysed. The first example demonstrates how private litigants (and interest groups) may use EU litigation to fight for their interests. The second example shows how the case-law of the ECJ in the field of EU citizenship influences the law-making on the national level. The third example is an analysis of a recent opinion by AG Bot regarding a dispute between Hungary and Slovakia which has been brought to the EU level.

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[231] See (Rehder, 2007), p. 6.
[232] See (Scharpf, 2012), p. 30.
[233] See (Alter, 2009), p. 159.

3.5.1 British Discrimination Case

In the past three decades, the advocates of gender equality in the United Kingdom have faced many challenges and lost many battles on the national political level. However, the European legal system has "*transformed previously weak organisations with little leverage into political players capable of directly influencing national policy*."[234] In her analysis of this shift of power, Karen Alter points out that the potential success of a European litigation strategy is dependent on four conditions: (1) a right guaranteed in the EU legal system, (2) a litigant who is willing to undergo the timely and financial constraints of fighting for such right, (3) a national court willing to make a reference for to the ECJ, and (4) the acceptance of the ECJ's ruling by national actors.[235] Let us now look at the fight for gender equality in Britain in the four respective steps.

The first condition of success is an existence of an EU right. Discrimination has been a matter of concern of the EU legal system from the very beginning: already the Treaty of Rome included a provision in Article 119 which guaranteed equal pay for equal work to men and women.[236] The European legislator has also adopted several anti-discrimination directives, among others the Equal Pay Directive[237] and the Equal Treatment Directive.[238] Moreover, the ECJ has ruled in cases *Defrenne*[239] and *Marshall*[240] that Article 119 and the Equal Treatment Directive respectively are capable of direct effect in the national legal systems. The EU legal order thus guaranteed an enforceable right to individuals and the first step to success was thus fulfilled.

The second condition is the existence of a plaintiff, since the mere existence of an EU right would mean nothing without a litigant willing to claim this right. The battle

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[234] See (Alter, 2009), p. 159.
[235] See Chapter 8: *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy* (2000), in (Alter, 2009), pp. 159-183.
[236] Today Article 157 TFEU.
[237] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the MS relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19.
[238] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40.
[239] ECJ, Case 43 /75 *Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena* [1978] ECR 1365. For an analysis of the *Defrenne* case, see also (Arnull, 2008), pp. 1180-1181.
[240] ECJ, Case C-152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1976] ECR 723.

against discrimination is often fought by various organisations which offer assistance to the victims. These organisations are, however, not legitimated to go to courts and fight for a better world themselves; they need the real victims of discrimination to become plaintiffs. In the case of *Defrenne* for example, it took five years to find a person who would be willing to undergo the litigation process.[241] The main reason for the victims' unwillingness to litigate is probably the length of the proceedings, especially if the full procedure includes several instances of domestic courts and litigation in Luxembourg.

Once the first two conditions are fulfilled, the litigation may begin. The EU judicial system relies on national courts: it is up to them to apply EU law to individual situations or to refer a question on interpretation to the ECJ. Without cooperative national courts, the ECJ would never be able to create such a strong body of EU law and private litigants would never be able to claim their EU rights in national courts. In the UK, "*national judicial support came from an unlikely source: the industrial tribunals, which are the lowest rung of the judicial hierarchy.*"[242] Since they were willing to make references to the ECJ, the third condition was fulfilled and the path of private litigants to Luxembourg was open. In the area of discrimination the ECJ has ruled in favour of the private litigants several times: extending work benefits for part-time workers, equalising pension benefits for men and women, removing the limit on the amount of discrimination awards, or protecting pregnant women who were unfairly dismissed.[243] These rulings are not political per se; they may however be of a political importance back in the MS, if the fourth condition is fulfilled: the follow-up.

Thanks to the *Francovich*[244] and *Köbler*[245] jurisprudence, the MS may not afford to ignore a ruling of the ECJ,[246] since individuals would then be entitled to bring a damages action against the state (even against its judicial bodies). Threatened by such scenarios, the British legislator gave up and adopted a more favourable legislation scheme in the field of discrimination. This way, "*activists have translated legal*

[241] See (Alter, 2009), p. 162, footnote 3.
[242] See (Alter, 2009), p. 166.
[243] See (Alter, 2009), p. 171.
[244] ECJ, Joined Cases C-6/90 and C-9/90 *Francovich* [1991].
[245] ECJ, Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.
[246] See also (Stone Sweet, 2004), p. 27: "*The MS, and the EU's legislative organs, can expect litigation if they choose to ignore rulings that are pertinent to their lawmaking or to limit the scope of such rulings too much.*"

victories into social policy changes with real impacts on the conduct of employers and the government."[247] The ECJ's ruling thus had a visible effect on the political processes in Britain and supposedly also in other MS.

3.5.2 Belgian and Irish Citizenship Cases

Ruiz Zambrano[248] is undoubtedly one of the most controversial ECJ cases of the past decade. The Court ruled in 2011 that a family of two illegal Columbian immigrants and their three children was entitled to reside in Belgium, since two of the children, Jessica and Diego, had acquired Belgian nationality simply by being born in Belgium. Despite all the previous ECJ's jurisprudence on Union citizenship which required 'activation' of citizenship by moving to another MS,[249] the Zambrano family was allowed to stay on the Belgian territory even though they had never moved outside of Belgium.[250]

Union citizenship is a field of EU law where the Treaties say very little and the case-law says very much. The Court's jurisprudence has been quite dynamic in the past two decades and its impact on national laws has been significant.[251] Ireland has changed its nationality legislation in 2004[252], Belgium has already changed its immigration laws twice, both times in connection to the case of *Ruiz Zambrano*. Why is it that the MS react to the Court's jurisprudence by changing their legislation?

According to the Court's case law in the field of Union citizenship, the conditions of acquiring national citizenship are crucial. In the *Micheletti* case,[253] an Argentinian dentist came to visit Europe and since one of his grandparents was Italian, he could claim Italian citizenship. When he wanted to start a business in Spain, the Spanish authorities treated him as an Argentinian and refused to recognise his rights under the

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[247] See (Alter, 2009), p. 170.
[248] ECJ, Case C-34/09 *Ruiz Zambrano*, Judgment of 8 March 2011, not yet reported.
[249] There is one exception to this rule: in the *Rottmann* case (ECJ, Case C-135/08 *Rottman* [2010] ECR I-1449) the ECJ did not require 'activation' of citizenship; rather, the judgment was built on the argument that the withdrawal of nationality falls "*by reason of its nature and its consequences*" within the scope of EU law; see in particular para 42.
[250] ECJ, Case C-34/09 *Ruiz Zambrano* [2011], paras 44-45.
[251] See (Cambien, 2012), p. 1: "*It cannot be denied that Union law, through the provisions on Union citizenship, increasingly influences the MS' immigration policies.*"
[252] See (Cambien, 2012), p. 14.
[253] ECJ, Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-04239.

freedom of establishment. The Court however ruled that if Italy had granted him Italian citizenship, all the other MS were obliged to unconditionally treat him as an EU citizen.

The *Zhu and Chen* case[254] was decided very similarly to the *Micheletti* judgment. The Chen family came to Europe to have their second child, since they could not have two children in China, their country of origin. Mrs Chen went to Belfast to give birth to her daughter Catherine, and since Irish citizenship rules were very generous, Catherine became an Irish national. The Chen family then returned to London and claimed a right of residence on the grounds of Catherine's Irish nationality. British authorities refused this but the ECJ ruled that if Ireland had decided to grant Catherine Irish nationality, the authorities of all the other MS must respect her status as a Union citizen.

The MS soon understood the basic rule: if the legislature of one MS is too benevolent in accepting third country nationals as their own, such a MS not only grants the immigrants the national citizenship, but also the EU citizenship, since "*[e]very person holding the nationality of a MS shall be a citizen of the Union.*"[255] The MS who granted citizenship to foreigners too easily soon started to play the role of the 'open gate' for immigrants. For this reason, countries like Ireland and Belgium have already made changes to their nationality and immigrant law and "*it can be expected that other MS too will follow suit and restrict their nationality legislation*"[256] in response to the ECJ's case-law. It is thus obvious that the rulings of the ECJ have clearly had an impact on the legislative (and thus political) debate in the MS.

3.5.3 The ECJ as an Arbiter of Member States' Disputes?

The ECJ has recently become a forum of a political dispute between two MS: Hungary and Slovakia. On 21 August 2009, László Sólyom, at the time the President of Hungary, decided to visit Slovak territory in order to attend a ceremony where a statute of Saint Stephen was to be inaugurated. The date of the event was 'particularly sensitive' for Slovakia, as it was an anniversary of the Hungarian invasion of Czechoslovakia in 1968. Since Slovak political elites evaluated Sólyom's visit as highly inappropriate and

[254] ECJ, Case C-200/02 *Zhu and Chen* [2004] ECR. I-9925.
[255] See Article 20(1) TFEU.
[256] See (Cambien, 2012), p. 12.

potentially dangerous, they entered into a diplomatic dialogue with Hungary. President Sólyom however tried to pursue his visit anyway. While walking on a bridge between the two countries, he received a diplomatic note that his entry to Slovak territory was prohibited and therefore he turned around at the border and walked back to Hungary.[257]

On 8 July 2010 Hungary brought an infringement action against Slovakia under Article 259 TFEU,[258] claiming that Slovakia had violated Mr Sólyom's citizenship rights under Article 21(1) TFEU and the Citizenship Directive.[259] The Union judiciary was thus directly pulled into an inter-state political conflict

Advocate General Bot issued an opinion in March 2012.[260] He first confirms the jurisdiction of the ECJ to rule on this action, *"inasmuch as the dispute between Hungary and the Slovak Republic is indeed based on an alleged infringement of EU law.*"[261] However, he points out the difference between a private visit and a visit that is 'public in nature'. And since "*it was indeed in the performance of his duties as the President of Hungary, and not simply as a citizen of the Union,*"[262] President Sólyom could not enjoy his Union citizenship rights in this setting.

Interestingly enough, AG Bot reasons his opinion on the basis of the provisions on the division of competences between the Union and the MS.[263] Since visits of MS' Heads of State have not been conferred upon the Union, this dispute is outside the scope of EU law and it remains to be resolved by the MS themselves in the light of international law customs and conventions.[264] The AG thus refuses to interfere with the political conflict between the two MS, concluding that "*visits by Heads of State within the MS of the*

[257] For an overview see for example (The Slovak Spectator, 2009).
[258] This is an extremely rare procedure, there have only been five such actions in the history of the EU, three of which ended with an ECJ judgment: ECJ, Case 141/78 *France v United Kingdom* [1979] ECR 2923; ECJ, Case C-388/95 *Belgium v Spain* [2000] ECR I-3123; and ECJ, Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917.
[259] Directive 2004/38/EC [2004].
[260] Opinion of AG Bot in Case C‑364/10 *Hungary v Slovak Republic* [2012].
[261] Opinion of AG Bot in Case C‑364/10 *Hungary v Slovak Republic* [2012], para 47.
[262] Opinion of AG Bot in Case C‑364/10 *Hungary v Slovak Republic* [2012], para 49.
[263] See Article 5(2) TEU: the principle of conferral.
[264] Opinion of AG Bot in Case C‑364/10 *Hungary v Slovak Republic* [2012], paras 52-56.

Union depend on the consent of the host […] and cannot be understood in terms of freedom of movement."[265]

However, AG Bot suggests that the EU is not completely excluded from political disputes between the MS. Should the MS "*exercise their diplomatic competence in a manner that might lead to a lasting break in diplomatic relations,*" such a "*situation of persistent paralysis […] would be covered by EU law,*" namely by the principle of loyal cooperation embodied in Article 4(3) TEU.[266] The AG, covering himself with the preamble to the EU Treaty speaking of 'an ever closer union among the peoples of Europe', is basically saying: *children, be nice to each other and do not steal each other's toys; if you don't obey now, we'll interfere later*…

3.5.4 Conclusion: Politically Influential? (towards the Member States)

The three areas of case-law analysed in this subchapter show that the ECJ may have a significant influence on the political situation in the MS. In relation to preliminary references, Rasmussen remarks that *"[t]he Court achieved a possibility to reach national audience of decision-makers free from usual governmental political jargon*."[267] Indeed, the British discrimination case illustrated how the EU judicial system makes it possible for private litigants and interest groups to change national legislation.

The second case-study was meant to show another way of the ECJ's influence in national politics: it is not only through EU legislation, but also through the ECJ's case-law that the Union 'forces' the MS to amend their laws.

The last example, very recent and very sensitive, targeted the core of 'the political': the diplomatic relations between two MS and the Union's role in such a conflict. Clearly, the Court does not wish to interfere with the MS' political disputes; still, it cannot stay completely out of them, since the EU is a political project based on a political cooperation and disputes arising out of it could fall into the jurisdiction of the Court as long as they fall into the scope of EU law.

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[265] Opinion of AG Bot in Case C‑364/10 *Hungary v Slovak Republic* [2012], para 57.
[266] Opinion of AG Bot in Case C‑364/10 *Hungary v Slovak Republic* [2012], paras 58-59.
[267] See (Rasmussen 1998), p. 128.

Conclusion

"Judges make low visibility decisions engendered by their duty to resolve conflicts. These decisions involve very small immediate impacts but create major long-term policies in the form of doctrines presented as the product of non-partisan reason and expressed in technical, expert language. Moreover this language constantly stresses stability and predictability so that attacks on judicial policies become attacks on the stability and predictability of law itself."

– Martin Shapiro[268]

The question whether the ECJ is a political actor is not a simple yes/no question. At least not until the notion of 'political' is duly defined and the question clarified. This thesis was meant to offer a synthesis of the various definitions of 'political', and to analyse the European judiciary in the context of those definitions.

Both the US Supreme Court and the ECJ have been labelled as political actors, even though their composition and functioning differ to a great extent. In the US, the 'political' character of the Supreme Court is often based on two issues: (1) the appointment process by the Senate, and (2) the judgments rendered by the Court in the fields of 'mega-politics' (Hirschl), such as constitutional review, racial segregation, separation of church and state, free speech, censorship, pornography, the right to abortion, health insurance and many others.

The European context is quite different. This thesis tried to examine five possible contexts in which the European judiciary could be labelled as political. However, as was demonstrated in Chapter 2, there are as many definitions of political as there are authors who write about politics. For this reason, it is much more convenient to examine whether the ECJ is (1) politically motivated as far as its individual judges are concerned, (2) politically influenced as far as the appointment of judges is concerned, (3) politically creative in its case-law, (4) politically influential towards other Union institutions, and (5) politically influential in relation to the Member States.

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[268] See (Shapiro, 1999), p. 327.

While the first two dimensions in fact overlap with the problem of the 'politicisation of the judiciary', the third, fourth and fifth dimension are linked with the notion of the 'judicialisation of politics'.

On the basis of the analyses provided above, it seems that the ECJ is both politically creative and politically influential. It has decided landmark cases, constitutionalised the Treaties, created legal principles only on the basis of the 'spirit of the Treaty', filled in for the other political institutions in situations of legislative inaction; and its case-law has undoubtedly had impact both in the inter-institutional dialogue within the Union and in the political discussions on the national level. This definitely fulfils the definitions of politics by Tocqueville, Tomsa, or Easton. Looking at such a court, one is tempted to accept the supranational idea of the Court being incredibly strong and independent.

At the same-time, the Court has managed to cover its politically creative decision-making behind a veil of legal arguments, as suggested by the neo-functionalists whose claim is in fact close to the attitude of Critical Legal Studies. The interlocutors, such as private litigants in the British discrimination cases, have therefore been able to pursue their political goals and even to achieve legislation changes, through EU litigation.

Such a Court fits well within the definition of 'judicialisation of politics'. However, as stressed by Judge Kühn: that is not wrong in itself, since a certain degree of judicial activism is nowadays common to all european judiciaries. It is only important to realise that a politically powerful court needs to put even more emphasis on the independence of its members. Reversing the formulation of Carl Schmitt, we could claim that today the 'politicisation of the judiciary' would be much worse, especially in the context of the current degree of 'judicialisation of politics'.

Yes, the ECJ is a political actor: in certain meanings of the word, at certain moments and depending on certain criteria. Yet, it remains a rational actor, since it realises that it still depends on the MS' acceptance. Not in the sense claimed by the intergovernmentalists, since the weakness of their theory may be seen all the way back to the *Van Gend* ruling where the Court clearly went against the interests expressed by the MS governments. However, it is the national constitutional courts that play the role of a guardian of the ECJ: through the preliminary ruling mechanism and through an inter-institutional dialogue, they show the ECJ how far they are willing to let it go.

As suggested above, the role of the ECJ cannot be understood by only studying its legal dimension. The analyses offered by political science, but also by other social sciences, may be extremely helpful in studying the Court.

For the future, it might be very interesting to observe the Court's adjudication in the context of the current economic crisis and of a changing atmosphere in various parts of Europe. The story of the Court is yet to unfold, let us see what the future developments will bring.

Abstract in Czech

I. Úvod

V roce 2009 se ve Spojených státech amerických hledal nástupce na uprázdněné místo soudce Nejvyššího soudu USA.[1] Kandidátkou byla soudkyně hispánského původu, Sonia Sotomayor, která byla známou aktivistkou za práva hispánských žen. Na základě některých svých projevů byla soudkyně Sotomayor dokonce označena za rasistku.[2] Její nominace vyvolala bouřlivou diskusi nejen v politických kruzích, ale také mezi širokou veřejností.

V roce 2010 se na Soudním dvoře EU uprázdnily tři soudcovská místa, dvě na Soudním dvoře a jedno na Tribunálu.[3] Členské státy nominovaly své kandidáty a výběru soudců se poprvé v historii EU účastnil i nově zřízený *Výbor podle článku 255*, který má podle Smluv za úkol vydávat „*stanovisko k vhodnosti kandidátů na funkce soudce a generálního advokáta Soudního dvora a Tribunálu.*“[4] Výbor nejdříve schválil nizozemskou kandidátku (československého původu) Alexandru Prechal, a to s výslovným doporučením,[5] u dalších kandidátů byl však průběh nominace o něco složitější. Poté, co se Výbor vyjádřil k nominacím, ze seznamu kandidátů zmizela dvě jména: maďarský soudce Czúcz a řecký kandidát Vassilopoulos.[6] Stalo se tak bez formálního rozhodnutí, bez jakéhokoliv odůvodnění a bez veřejné diskuse.

Kontrast mezi uvedenými dvěma příklady je zřejmý: zatím co v USA je veřejná debata o soudcovských nominacích samozřejmostí, v EU se výběr soudců děje *in camera*, dokumenty jsou buď nicneříkající, nebo vůbec neexistují a občané se dozvědí až finální rozhodnutí.

V USA má každý student práv svého oblíbeného soudce Nejvyššího soudu, v EU by průměrný student pravděpodobně nevyjmenoval více než dva soudce Evropského soudního dvora. Američtí soudci jsou slavné osobnosti, mají své soudcovské styly a jejich postoje jsou veřejně známé; soudci Evropského soudního dvora jsou jen členy soudcovského kolektivu, který rozhoduje kolegiálně, a tedy anonymně. Když někoho v USA zajímají alternativní názory k tomu či onomu soudnímu rozhodnutí, může si přečíst odlišná stanoviska soudců a získat

[1] (Phillips, 2009)
[2] (Davis, 2009)
[3] Pro hlubší analýzu struktury a fungování Soudního dvora EU po Lisabonské smlouvě srovnej např. (Barents, 2010).
[4] srovnej čl. 255 SFEU
[5] srovnej Rozhodnutí č. 9720/10 (2010)
[6] (EU Law Blog, 2010), viz také (Bobek, 2010)

představu, o čem se mezi soudci diskutovalo. Rozsudky Evropského soudního dvora pojem disentu neznají a soudcovské diskuse v rámci senátů jsou tajné.

Z těchto několika příkladů je vidět, jak odlišné jsou nejvyšší soudní instance v USA a v EU. Oba tyto systémy jsou však často obviňovány ze soudcovského aktivismu, z politizace justice či judicializace politiky, zkrátka z toho, že jsou politické. Média i akademici z řad právníků a politologů se často věnují politickému rozměru Nejvyššího soudu či Evropského soudního dvora, málokdy však definují základní pojmy své analýzy. Tato práce si neklade za úkol srovnat americký a evropský model soudnictví. Cílem je vyjasnit si pojem politiky a politického soudního rozhodování a následně v evropském kontextu analyzovat relevanci obvinění směřujících k politickému charakteru ESD.

II. Evropský soudní dvůr jako instituce

Předmětem výzkumu této práce je Evropský soudní dvůr (ESD). Jedná se o jeden ze soudů Evropské Unie, který spolu s Tribunálem a Soudem pro veřejnou službu „*zajišťuje dodržování práva při výkladu a provádění Smluv.*“[7] Tato vágně vymezená pravomoc byla Soudním dvorem již mnohokrát použita k legitimizaci kontroverzních rozsudků s dalekosáhlými dopady, o čemž pojednává i jedna z kapitol.[8]

II. 1 Složení a fungování ESD

Soudní dvůr má 35 členů: 27 soudců (jeden z každého členského státu)[9] a 8 generálních advokátů (5 stálých a 3 rotující).[10] Kandidáty nominují členské státy „*z osob, které poskytují veškeré záruky nezávislosti a které splňují požadavky článků 253 a 254,*“ jmenováni jsou pak „*vzájemnou dohodou vlád členských států na dobu šesti let.*“[11]

Evropské soudní instituce se zabývají rozličnými druhy podání, mezi nejobvyklejší patří řízení o předběžné otázce podle článku 267 SFEU, žaloba pro porušení smlouvy podle článku 258 SFEU, žaloba na neplatnost podle článku 263 SFEU, žaloba na nečinnost podle článku 265 SFEU či žaloba o náhradu škody podle článku 268 SFEU.

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[7] srovnej čl. 19 SEU; všechny tři soudní instituce EU spolu tvoří Soudní dvůr EU (SDEU)
[8] (De Búrca, 2003), str. 49.
[9] srovnej čl. 19/2 SEU
[10] srovnej čl. 252/1 SFEU
[11] srovnej čl. 19/2 SEU

II. 2 Lze ESD označit za ústavní soud?

V posledních letech byl Ústavní soud ČR již několikrát kritizován za přílišný aktivismus, mimo jiné i prezidentem Václavem Klausem, který prohlásil, „*že Ústavní soud se pohybuje mimo ústavu a že vstoupil do čisté politiky.*“[12] Předseda Ústavního soudu Pavel Rychetský na toto obvinění prezidenta republiky reagoval slovy: „*Někdo může těžko chtít, aby Ústavní soud nebyl politický orgán, když jeho hlavní, základní funkcí je právě hlídat politický orgán.*“[13] Bývalá místopředsedkyně Ústavního soudu v Českém rozhlasu potvrdila výrok Pavla Rychetského a dodala: „*...a nejen to – mohu potvrdit, že tento názor naprosto převládá zcela jednoznačně v evropské ústavněprávní vědě, v politologii, prostě tak to je. Ústavní soudy mají jako předmět své činnosti politikum, tudíž samozřejmě s politikem se zabývají.*“[14]

Někteří autoři (např. Karen Alter),[15] obhajují názor, že ESD má přes svá specifika charakter mezinárodního soudu. Jiní (např. Eric Stein[16] a Joseph Weiler[17]) tvrdí, že ESD svou činností proměnil Smlouvy v ústavní dokument a sám sebe postavil do role ústavního soudu. Koen Lenaerts uvádí, že Soudní dvůr EU jedná ve třech rolích v závislosti na typu procedury: jako ústavní soud, jako nejvyšší soud a jako správní soud.[18]

Tato práce vychází z pozice, že ESD je ústavním soudem, a to zejména ze dvou důvodu. Za prvé, ESD disponuje právem kontroly souladu evropské legislativy se Smlouvami, což připomíná přezkum ústavnosti. Za druhé, ESD má pravomoc interpretovat předpisy primárního práva EU, což v mnoha případech dělá i nad rámec jejich textu a tím se stává nejen jejich interpretem, ale také tvůrcem,[19] což je fenomén typický pro silnější ústavní soudy ve 21. století.

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[12] (iDnes.cz, 2011): *Klaus: Verdiktem o stavebním spoření Ústavní soud vstoupil do politiky*
[13] (iDnes.cz, 2011): *Klaus nechápe roli Ústavního soudu, míní Rychetský*
[14] (Wagnerová, 2012)
[15] (Alter, 2009), str. 32
[16] (Stein, 1981), str. 1
[17] (Weiler, 1982), str. 274
[18] (Lenaerts, 1991), str. 32 a násl.
[19] (Stone Sweet, 2000), str. 135

II. 3 Pohled na soud ve dvojím kontextu

Nelze než souhlasit s Bohumilem Baxou, který tvrdí: „*Chtíti určitou instituci právní (státní) posuzovati jen z hlediska jejího významu právního bez náležitého zřetele na její význam politický, znamenalo by nejen posuzovati ji jednostranně, nýbrž i ztratiti s očí právě onen (dynamický) moment vývojový, který z mnohé instituce juristicky veledůležité činí instituci politicky bezvýznamnou neb dokonce i přežitou.*“[20] Platí to i v evropském kontextu, kde ustanovení Smluv často obsahují jen velice rámcové informace, zatímco opravdový charakter jednotlivých institucí lze poznat až studiem jejich interakce s ostatními aktéry.

Andreas Grimmel správně podotýká, že mezioborová spolupráce je základem porozumění tomu, jak právo ovlivňuje proces evropské integrace.[21] Tato práce se proto zabývá jak právním, tak i politickým kontextem Evropského soudního dvora a klade si otázku: nakolik jsou opodstatněná tvrzení, která označují ESD za politického aktéra?

III. Politika, *politizace justice* a *judicializace politiky*

Pojem politiky je u různých autorů různý, čím dál tím víc se také objevují pojmy *politizace justice*, *judicializace politiky* či *soudcovský aktivismus*. Tyto pojmy jsou často používány s negativní konotací ke kritice rostoucí moci soudů a jejich provázanosti s politickými aktéry. V této práci však pojem politiky nemá apriorně negativní kontext.

Andrew Heywood vymezuje politiku několika způsoby, v nejširším smyslu například jako proces řešení sporů, vykonávání moci či dialog.[22] Jestli soudnictví označíme za politické v jednom z těchto kontextů, nejedná se o kritiku, nýbrž o popis jeho společenské funkce autoritativního řešitele sporů, o které není pochyb.

Mnozí autoři vykládají pojem politického soudního rozhodování v kontrastu k pojmu prosté aplikace práva, resp. jako vymezení role moci soudní vůči roli zákonodárce. Alexis Tocqueville považuje za nezbytné, aby se soudce neodchyloval od konkrétního případu, který řeší, jinak by totiž překročil meze své funkce a zasahoval by do moci

[20] citováno podle (Kysela, 2011), str. 181
[21] (Grimmel, 2011), str. 22
[22] (Heywood, 2007), str. 3-7

legislativce.[23] Bohuš Tomsa rozlišuje mezi adjudikací, tj. subsumpcí faktického stavu pod předem danou normu, a právní politikou, tj. vytvářením práva na základě právních principů.[24] Radoslav Procházka uvádí, že zatímco zákonodárce má právo na základě hodnotových soudů rozhodovat o tom, co považuje za dobré a špatné, úkolem soudce je jen určovat (v mezích vymezených zákonodárcem) co je správné či nesprávné.[25] David Easton vyjadřuje podobnou myšlenku, když definuje politiku jako autoritativní alokaci hodnot pro společnost.[26]

Co se týče pojmů *politizace justice* a *judicializace politiky*, jejich význam se často zaměňuje. Důvodem je možná jejich historický vývoj, kdy jejich původní chápání již nezodpovídá tomu, jak jsou tyto pojmy používány dnes.

Carl Schmitt například chápal politizaci justice jako stav, ve kterém soudy rozhodují politické otázky, a judicializace politiky jako situaci opačnou, ve které byly otázky právní interpretace svěřeny politickým institucím. Na příkladu říšské ústavy Schmitt uvádí, že její interpretace by měla být svěřena raději demokraticky legitimovanému senátu než říšskému soudu; politizace justice je totiž podle něj nebezpečnější než judicializace politiky.[27]

Dnes se tyto pojmy chápou odlišně (i když ne zcela konzistentně). Ran Hirschl definuje *judicializaci politiky* jako důvěru v soudy a v soudní řešení morálních otázek, otázek veřejného pořádku či politických kontroverzí.[28] Tento fenomén má původ v době, kdy se soudy začaly zabývat otázkami lidských práv, postupně však prorostl i do otázek „mega-politických“, které Hirschl definuje jako záležitosti nejvyšší politické důležitosti, které často rozdělují společnost.[29]

Zdeněk Kühn ztotožňuje pojem *judicializace politiky* s pojmem *soudcovského aktivismu* a upozorňuje na dvě možná chápání tohoto pojmu. Soudcovský aktivismus *stricto sensu* zahrnuje „*rozhodování soudů, které vykládají a spoluvytváří vysoce neurčité právní*

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[23] (Tocqueville, 1841), str. 142-144
[24] (Tomsa, 1946), str. 71 a násl., citováno v (Kysela, 2012)
[25] (Procházka, 2006)
[26] srovnej výklad v (Neubauer, et al., 2012), str. 9.
[27] (Schmitt, 1993), str. 118-119, citováno v (Kühn, 2010).
[28] (Hirschl, 2008), str. 2
[29] (Hirschl, 2008), str. 1-2

principy nebo normy, event. řeší normativní konflikty s ohledem na fikci bezrozpornosti právního systému.“[30] Soudcovský aktivismus *largo sensu* zahrnuje také „*rozhodování soudů v situacích, kdy jejich rozhodnutí […] bude mít dalekosáhlý dopad na politiku*.“[31] Soudcovský aktivismus v obou těchto formách je podle Kühna „*nezbytnou součástí současné evropské justice, a současně vyvolává dodatečný apel na skutečnou nezávislost justice.*“[32] Jinými slovy, čím političtější je agenda soudů, tím více nezávislí by měli být soudci samotní.

Pojem *politizace justice* se zaměřuje zejména na vliv politiky na soudce a soudnictví[33] a lze pod něj zařadit například otázky jmenování soudců, financování justice, politických procesů či politických vlivů na rozhodování soudců.

Tato práce se pokouší zapracovat výše vymezené pojmy do kontextu evropského soudnictví. Její stěžejní kapitola, věnovaná politickému kontextu ESD, je rozdělená do pěti víceméně samostatných kapitol.

První dvě kapitoly se věnují otázkám, které by bylo možno zařadit pod pojem *politizace justice*. Kapitola 1 zkoumá osobnosti soudců a důvody stojící za jejich rozhodnutími. Klade si otázku, zda je možné, aby bylo evropské soudnictví politizováno v rovině rozhodování soudců. Kapitola 2 se zaměřuje na jmenování soudců ESD a zkoumá, zda v tomto procesu můžou hrát roli politické důvody, ať již ze strany členských států či ze strany Unie.

Poslední tři kapitoly zkoumají samotnou rozhodovací činnost evropských soudů a řeší, nakolik dochází v evropském soudnictví k fenoménu *judicializace politiky*. Kapitola 3 se věnuje klíčovým judikátům ESD, které se staly základem právního řádu EU, jak jej známe dnes, a nastoluje otázku jejich legitimity. Kapitola 4 zkoumá institucionální rovnováhu mezi mocí soudní a zákonodárnou na evropské úrovni, resp. schopnost evropských soudů zasahovat do legislativní činnosti ostatních politických aktérů v EU. Kapitola 5 je nakonec věnována vlivu judikatury ESD na politická rozhodnutí v členských státech.

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[30] (Kühn, 2006), kapitola II.
[31] (Kühn, 2006), kapitola II.
[32] (Kühn, 2006), kapitola II.
[33] srovnej např. (Trochtová, 2010), str. 7

IV. Evropský soudní dvůr jako politický aktér

IV. 1 Osobnosti soudců ESD

Soudní interpretace a aplikace práva je velmi důležitým tématem právní teorie i praxe. Soudci mají pro svá rozhodnutí často důvody právní i neprávní, obzvláště pak na úrovni ústavních soudů či ESD. Tato kapitola si klade otázku, nakolik je možné, že soudci v Lucemburku rozhodují na základě svého politického přesvědčení, resp. jestli justice v EU skýtá nějaké záruky, které by měly politická rozhodnutí eliminovat.

Důvody rozhodnutí by často měly být patrné z odůvodnění, nelze však vyloučit situaci, kdy je odůvodnění nedostatečné, nepřesvědčivé, či nepravdivé (ve smyslu, že je sice smysluplné, ale reálné důvody rozhodnutí byly jiné). Hnutí Critical Legal Studies přistupovalo k soudním odůvodněním s apriorní nedůvěrou a s přesvědčením, že právo je jen zástěrkou pro politiku a právní argumenty ve skutečnosti jen zakrývají opravdové důvody rozhodnutí a politickou profilaci jednotlivých soudců. Soudy proto byly vnímány již z definice jako politické instituce a soudci jako aktéři popírající ideologické prvky ve vlastním soudním rozhodování a proto jednající ve zlé víře.[34]

O něco méně radikální bylo hnutí amerického právního realismu, dle kterého je každé právní rozhodnutí ovlivněno neprávními důvody spočívajícími v osobnosti soudce. Čistě právní odůvodnění rozsudku je sice možné, nikoli však pravdivé, jelikož soudce nemůže rozhodovat bez toho, aby byl ovlivněn svým původem, vzděláním či přesvědčením. Právní realisté proto apelovali na právníky, aby četli mezi řádky soudních rozhodnutí, aby se nespokojili s právními důvody rozhodnutí, ale aby se snažili odhalit opravdovou motivaci soudců.[35] Jan Kysela uvádí, že „*bez ohledu na akcenty právních realistů výstižně ilustruje význam soudcovského „předporozumění" letitá pobídka K. G. Wurzela, abychom nechali soudit podle svých zákonů čínské soudce; dočkali bychom se výsledků velmi odlišných od rozhodování soudců našich*."[36]

Závěry amerického právního realismu se neváží jen na začátek 20. století a na americké právní prostředí. Eliška Wagnerová nedávno uvedla: „*sociální vědy prokázaly, že určité*

[34] srovnej (Kysela, 2011), str. 194; (Dyevre, 2008), str. 6-7 a (Thomas, 2005), str. 24
[35] (Dyevre, 2008), str. 9
[36] (Kysela, 2011), str. 178

sociální faktory, se kterými je spojen konkrétní soudce, jej determinují do té míry, že má přece jenom jiný přístup k realitě a k právu než člověk, který je sociálně determinován nějakým způsobem jinak. Jeden prostě podporuje a tenduje víc k důrazu na sociální vyrovnání, druhý naopak tenduje k tomu, že podporuje neomezenou podnikatelskou svobodu, a tak dále. Přitom, samozřejmě, jednak jde o politické filosofie, také, které ten člověk zastává, ale především jde o to, jak teda vlastně z těch svých pozic, které si vybudoval díky své zkušenosti, díky tomu, do čeho se narodil, v čem vyrostl, v čem vystudoval, v čem se pohyboval, tak prostě díky takto předznamenaným pozicím jak reflektuje politickou a etickou dimenzi ústavního rozhodování.“[37]

Je-li obecně přijímáno, že soudci nerozhodují jen podle práva, lze zajistit, aby se do soudního rozhodování nedostaly politické vlivy? Soudní soustava EU nabízí několik záruk soudcovské nezávislosti, které lze rozdělit do čtyř skupin.

Zaprvé, ESD je soudní institucí, což s sebou přináší určité obecné záruky: oddělenost od ostatních složek moci (v případě ESD i geografická vzdálenost Brusel-Lucemburk), nepřítomnost zájmových skupin, finanční a společenská prestiž soudcovské funkce a v případě lucemburského soudu také úplná soudní samospráva a nezávislost na moci výkonné.

Zadruhé, Smlouvy vyžadují, aby byli soudci a generální advokáti „*vybíráni z osob, které poskytují veškeré záruky nezávislosti.*“[38] Toto ustanovení by mělo zaručit, aby členské státy nenominovaly kandidáty s velice vyhraněným politickým profilem. Posílením této záruky je nově zřízený *Výbor podle čl. 255*, o kterém bude pojednávat další kapitola. Každý soudce a generální advokát má navíc povinnost „*před nastoupením do své funkce složit na veřejném zasedání před Soudním dvorem přísahu, že bude vykonávat svou funkci zcela nestranně a podle svého nejlepšího svědomí a že bude zachovávat tajnost porad Soudního dvora.*“[39]

Zatřetí, rozhodování ESD je kolektivní, přičemž jednotliví soudci nezastupují zájmy svých členských států, nýbrž rozhodují v zájmu integrity evropského právního

[37] (Wagnerová, 2012)
[38] srovnej čl. 19/2 SEU
[39] srovnej čl. 2 Protokolu č. 3 o Statutu Soudního dvora Evropské unie

pořádku.[40] Soudci rozhodují v senátech složených z 3, 5 nebo 13 soudců a každé rozhodnutí je podepsáno všemi členy senátu, bez ohledu na to, jak hlasovali. Vzhledem k tomu, že porady jsou tajné a že ESD nezná odlišná stanoviska, nelze zjistit (či zpětně ověřit), jak hlasoval ten který soudce. Výhodou tohoto systému je ochrana soudců před nátlakem ze strany členských států, nevýhodou je nedostatečná transparentnost činnosti ESD a fikce jediného správného rozhodnutí.

Za čtvrté, Statut SDEU ukládá soudcům povinnost zdůvodnit každé rozhodnutí. Tato záruka je ze všech čtyř nejkontroverznější a nejvíce kritizována,[41] jelikož styl odůvodnění ESD je často „kryptický" a nedostatečný, což plyne mimo jiné i z toho, že každé rozhodnutí je výsledkem kompromisu minimálně tří soudců.[42] Samotná povinnost odůvodňovat rozsudky je však důležitým prvkem moderní justice a není opomenuta ani v soudním systému EU.

Pro shrnutí lze říct, že politizace justice v rovině promítání preferencí soudců do jejich rozhodování není specifickým problémem ESD, ale problémem postihujícím každou soudní instituci.[43] Každý soudce má určité zázemí a hodnotové preference, které nemůžou neovlivňovat jeho rozhodování. Soudní systém EU nenechává prostor pro soudcovskou libovůli, nýbrž poskytuje určité záruky, které by měly zajistit nezávislost soudu i jeho soudců.

IV. 2 Jmenování soudců ESD

Soudci a generální advokáti SDEU jsou do svých funkcí „*jmenováni vzájemnou dohodou vlád členských států na dobu šesti let.*"[44] Samotnému jmenování však předchází (minimálně) dva kroky: nominace členským státem a schválení *Výborem podle čl. 255*.

Evropská unie v zásadě neklade na kandidáty nominované členskými státy žádné jiné nároky než výše zmiňovanou nezávislost a „*požadavky nezbytné k výkonu nejvyšších*

[40] srovnej čl. 19/1 SEU
[41] viz např. (Bobek, 2008), str. 1639-1640, (Lasser, 2003), str. 49 či (Weiler, 2001), str. 225
[42] K tématu osobností soudců ESD a jejich rozhodovací činnosti viz např. rozhovor se soudcem Schiemannem a generálním advokátem Poiares Maduro: (Schiemann, et al., 2004).
[43] srovnej (Grimmel, 2011), str. 12 a násl.
[44] srovnej čl. 19/2 SEU

soudních funkcí v jejich zemích.“[45] Nelze tak vyloučit, že na národní úrovni budou ve výběru kandidátů hrát roli politické důvody: členský stát může do Lucemburku vyslat někoho, kdo si to "zaslouží“ z politických důvodů. V akademii se lze setkat s názory, že takové praktiky jsou v EU „veřejným tajemstvím.“[46]

Lisabonská smlouva proto zavedla do procesu ustavování soudců ještě jednu instanci, a to výbor složený zejména ze soudců ústavních soudů členských států či z bývalých soudců ESD, kterého úkolem je vydat „stanovisko k vhodnosti kandidátů na funkce soudce a generálního advokáta.“[47] Toto ustanovení vzniklo právě v reakci na kritiku možných politických nominací na úrovni členských států.[48] Problémem tohoto výboru však je, že jeho stanoviska jsou neveřejná, což může ještě oslabit důvěru v legitimitu celého výběrového procesu.[49] Navíc, tato další instance sice klade vyšší nároky na kandidáty nominované členskými státy, nevylučuje však sama politické nominace.[50]

Míra politizace ESD (resp. SDEU) v otázkách nominace soudců zůstává v rovině spekulací. Jmenování soudců předchází dvě instance výběru, obě jsou však pro veřejnost netransparentní a nelze tak vyloučit jistou míru politizace celého procesu. Řešením by bylo transparentnější rozhodování, a to alespoň na úrovni *Výboru podle článku 255*. Kdyby stanoviska Výboru byla veřejná a odůvodněná, byla by potenciální politizace v mnoha ohledech limitována.

IV. 3 Rozhodování ESD v klíčových otázkách:[51]

Evropská unie je politický projekt. Od svého založení v padesátých letech ve formě Evropských společenství prošla dynamickým vývojem, ve kterém hrál ESD velmi významnou roli. Na rozdíl od Nejvyššího soudu USA sice neřešil otázky výsostně politické (ve smyslu Hirschlovy definice *mega-politics*), judikoval však v oblastech jako

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[45] srovnej čl. 253 SFEU
[46] viz např. (Barents, 2010), str. 712
[47] srovnej čl. 255 SFEU
[48] srovnej např. (Chalmers, et al., 2010), str. 144 či (Barents, 2010), str. 712
[49] viz např. komentáře (Bobek, 2010) či (EU Law Blog, 2010)
[50] (Barents, 2010), str. 713-714
[51] Terminologický problém této kapitoly je anglický pojem *policy choices*, který do češtiny nelze dost dobře přeložit. Český pojem politiky totiž odpovídá trojici anglických pojmů *politics – policy – polity*, které jsou významově odlišné. Blíže viz (Heywood, 2007) a (Cabada, a další, 2007).

je přímý účinek[52] a přednost[53] evropského práva v národních právních řádech, odpovědnost státu za škodu pro nesplnění povinností plynoucích z evropského práva,[54] procesní postavení Evropského Parlamentu před ESD[55] či otázky vnitřního trhu EU.[56] Jedná se určitě o otázky právně politické, ve smyslu Tomsovy definice dokonce super-politické, vzhledem k tomu, že Tomsa definoval právní politiku jako vytváření pravidel na základě právních principů, ESD však v uvedených případech dokonce vytvořil právní principy na základě „ducha Smlouvy" – jde tedy ještě o úroveň dál.

Co se týče metody, ESD vytvořil tato klíčová rozhodnutí jednak prostřednictvím teleologické interpretace primárního práva, jednak prostřednictvím mechanismu předběžných otázek. Když ESD interpretuje primární právo, činí tak na základě textu, kontextu a smyslu jednotlivých ustanovení.[57] Generální advokát Ruiz Jarabo-Colomer mluví metaforicky o výkladu rukama, hlavou a srdcem.[58] ESD v judikátu *Van Gend* založil princip přímého účinku „*s ohledem na duch, obecný záměr a text Smlouvy*."[59] Rozhodnutí založená na teleologickém výkladu, ať už se mu říká *kontext, výklad srdcem* či *duch Smlouvy*, je bezpochyby politickým rozhodnutím ve smyslu anglického *policy choice*. Jedná se o případy, kde soud určuje další směřování evropského projektu a mění jeho charakter v otázkách doposud neregulovaných.

Zatímco někteří tuto kreativní interpretaci kritizují za nedostatečnou legitimitu, Andreas Grimmel ESD obhajuje. Hlavním jeho argumentem je, že ESD se do role aktivistického soudu staví v situacích, kdy je zákonodárce nečinný.[60] I Craig a De Búrca argumentují, že aktivismus ESD nebyl v průběhu evropské integrace stejně intenzivní.[61]

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[52] ECJ, Case 26/62 *Van Gend & Loos v. Neth. Inland Revenue Admin.* [1963] ECR 1
[53] ECJ, Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585
[54] ECJ, Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italian State* [1991] ECR I-5357; ECJ, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and the Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029; and ECJ, Case C-224/01 *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239
[55] ECJ, Case 294/83 *Parti Ecologiste "Les Verts" v. Parliament* [1986] ECR 1339
[56] ECJ, Case 8/74 *Dassonville* [1974] ECR 837; ECJ, Case 120/78 *'Cassis de Dijon'* [1979], ECR 649
[57] (Lenaerts, 2007), str. 1016 a násl.
[58] Stanovisko generálního advokáta RUIZ-JARABO COLOMER in Joined Cases C-11/06 and C-12/06 Morgan and Bucher [2007] ECR I-9161
[59] ECJ, Case 26/62 *Van Gend & Loos v. Neth. Inland Revenue Admin.* [1963] ECR 1
[60] (Grimmel, 2011), str. 17
[61] (Craig, et al., 2011), str. 64

Grimmelův argument sice neobstojí ve všech případech soudcovského aktivismu, lze jej však aplikovat na případ *Cassis de Dijon*.[62] *Cassis* se odehrál v době, kdy byl zřejmý zájem Unie na vybudování vnitřního trhu, zákonodárce však k dosažení tohoto cíle neudělal žádné kroky. ESD proto zasáhl a vytvořením politiky vzájemného uznávání zboží mezi členskými státy[63] nastartoval „nový přístup k harmonizaci". Toto rozhodnutí bylo posléze politickými institucemi EU přijato a zapracováno do Jednotného evropského aktu (1985), kterým byly změněny Smlouvy.

Uvedené (a mnohé další) případy ESD hrály v procesu evropské integrace významnou úlohu. Kdybychom je analyzovali ve světle definicí politiky uvedených ve druhé kapitole, všechny definice by je označily za (právně) politické. Jedná se také o *judicializaci politiky* ve smyslu uvedeném výše. V takové situaci, jak naznačuje Kühn, je extrémně důležité, aby v případě rozhodování politických otázek byli soudci nezávislí, důležité jsou tedy záruky uvedené v kapitolách 3.1 a 3.2.

IV. 4 Vztah ESD k ostatním institucím EU

Pavel Rychetský i Eliška Wagnerová shodně argumentují, že politický charakter Ústavního soudu ČR není něčím, za co by měl být Ústavní soud kárán. Naopak, vzhledem k tomu, že ústavní soudy jsou vybaveny pravomocí přezkoumávat předpisy přijaté zákonodárcem, vstupují do oblasti politiky a nemůžou nebýt politické.[64] ESD také disponuje pravomocí přezkoumávat legislativní akty evropského zákonodárce a dostává se tak do situace podobné českému ústavnímu soudu. To lze ilustrovat na třech příkladech.

Případ *Tobacco Advertising*[65] je hezkou ilustrací politické moci ESD ve vztahu k legislativě. Evropský zákonodárce se v devadesátých letech rozhodl regulovat oblast reklamy tabákových výrobků v podobě směrnice, ESD však tuto směrnici na podnět Německa zrušil z důvodu nesprávného legislativního postupu. Zajímavé je, že ve svém rozsudku ESD zahrnul i radu, jakým způsobem by tato směrnice mohla být přijata znovu tak, aby v přezkumu ústavnosti obstála. Druhá směrnice, přijatá podle instrukcí

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[62] ECJ, Case 120/78 *'Cassis de Dijon'* [1979], ECR 649
[63] ECJ, Case 120/78 *'Cassis de Dijon'* [1979], ECR 649, para 14
[64] srovnej (iDnes.cz, 2011), (Wagnerová, 2012) a výklad výše
[65] ECJ, Case C-376/98, *Germany v. EP and Council ('Tobacco Advertising I')* [2000] ECR I-8419

soudu, byla soudem potvrzená jako platně přijatá.[66] Soud se tak aktivně zúčastnil procesu přijímání legislativy, což lze bezpochyby označit za politické.

V jiné oblasti se ESD naopak odmítl postavit do role zákonodárce. Problematika volného pohybu obchodních společností po EU je regulována v primárním právu, avšak jen stručně.[67] V osmdesátých letech se počítalo s přijetím mezinárodní smlouvy, která by tuto oblast upravila, tato smlouva však nakonec nebyla uzavřena.[68] V politických orgánech Unie chyběl konsensus na základních otázkách mobility společností, Komise se proto nikdy neshodla na znění směrnice, která by stanovila bližší pravidla.[69] Tato oblast proto byla regulována Soudem kazuisticky.[70] Když v roce 2007 Komise ukončila legislativní proces s tím, že ESD by mohl právní úpravu v této oblasti vyjasnit v aktuálním případě *Cartesio,*[71] Soud tuto delegaci odmítl a vyřešil jen konkrétní případ, na který se kauza vztahovala. Přidal sice jisté *obiter dictum*, které sahá za hranici samotného případu, nejudikoval však v oblasti práva společností tak obsáhle, jak tomu bylo v sedmdesátých a osmdesátých letech v oblastech účinků evropského práva či v oblasti vnitřního trhu.

Třetím příkladem institucionálního dialogu v EU je kauza *Jégo-Quéré,*[72] ve které Tribunál navrhoval změnu judikatury v oblasti procesně-právního postavení jednotlivců v žalobě pro neplatnost.[73] ESD jako odvolací instance se změnou judikatury nesouhlasil,[74] Tribunál však zrušení svého rozsudku nepovažoval za prohru. Návrh totiž sice neuspěl u ESD, avšak zjevně uspěl v kruzích, kde se připravovala Lisabonská smlouva. Nová úprava v primárním právu totiž částečně přijímá názor Tribunálu, který byl sice Soudem odmítnutý, našel však cestu do Smluv.[75]

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[66] ECJ, Case C-380/03, *Germany v. EP and Council ('Tobacco Advertising II')* [2006] ECR I-11573
[67] srovnej čl. 49-55 SFEU
[68] viz argumentaci v ECJ, Case 81/87 *Daily Mail* [1988] ECR 5483
[69] srovnej (EUROPA, 2007)
[70] viz případy ECJ, Case 81/87 *Daily Mail* [1988] ECR 5483; ECJ, Case C-212/97 *Centros* [1999] ECR I-1459; ECJ, Case C-208/00 *Überseering* [2002] ECR I-9919; ECJ, Case C-167/01 *Inspire Art* [2003] ECR I-10155;
[71] ECJ, Case C-210/06 *Cartesio* [2008] ECR I-9641
[72] EGC, Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365
[73] srovnej čl. 263 SFEU, zejména čtvrtý odstavec a změny vloženy Lisabonskou smlouvou
[74] ECJ, Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-03425; viz také ECJ, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677
[75] viz aktuální znění čl. 263/4 SFEU ve srovnání s předchozím zněním

Účelem nastínění těchto tří linií judikatury ESD je poukázat na to, že Soud může mít velice silné postavení ve vztahu k zákonodárci, buďto v kontextu přezkumu ústavnosti (*Tobacco Advertising*), z důvodu explicitní delegace zákonodárce (volný pohyb společností), nebo v situaci, kde rozhodnutí Soudu inspiruje legislativce ke změnám platné právní úpravy (*Jégo-Quéré*). Tato role Soudu má nesporně politickou konotaci, některými autory bývá tato dimenze dokonce označována za „*nejzjevnější a nejpůsobivější typ soudcovské politiky.*“[76]

IV. 5 Vliv ESD na politiku v členských státech

Poslední dimenzi politického charakteru ESD lze zkoumat ve vztahu judikatury ESD k politické situaci v členských státech. Právo a politika EU postupem času získávají v národním kontextu významnější postavení a evropský právní řád je dokonce schopen ovlivnit domácí rozložení moci.[77] Opět je možné demonstrovat toto tvrzení na třech příkladech.

Ve Spojeném království dlouhodobě probíhal boj rozličných organizací za rovnost žen a mužů, zejména v oblasti pracovního práva. Z důvodu domácího politického nastavení neměli aktivisté vyhlídky na úspěch, zvolili proto metodu evropské litigace. Karen Alter uvádí, že potenciální úspěch této metody závisí na čtyřech podmínkách: (1) existence oprávnění v evropském právu, (2) existence žalobce, který je ochoten absolvovat dlouhou a finančně náročnou litigaci na několika úrovních, (3) ochotu národních soudů aplikovat evropské právo anebo podat předběžnou otázku do Lucemburku, a (4) přijetí lucemburského rozhodnutí národními aktéry. Příklady z judikatury, které potvrzují, že evropská litigace může přinést změnu v interpretaci a aplikaci práva, nebo dokonce změnu legislativy v členských státech, jsou například kauzy *Defrenne*[78] či *Marshall*.[79]

Dalším příkladem je oblast evropského občanství. Radikální rozhodnutí soudu ve věcech *Zhu and Chen*[80] či *Ruiz-Zambrano*[81] vedla členské státy ke změně jejich

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[76] viz např. (Rehder, 2007), str. 6
[77] (Alter, 2009), str. 159
[78] ECJ, Case 43 /75 *Defrenne v Societe Anonyme Belge de Navigation Aerienne Sabena* [1978] ECR 1365
[79] ECJ, Case C-152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1976] ECR 723
[80] ECJ, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925
[81] ECJ, Case C-34/09 *Ruiz Zambrano*, Judgment of 8 March 2011, not yet reported

legislativy upravující národní občanství. Irsko přijalo novelu zákona o občanství v roce 2004, Belgie v posledních deseti letech měnila imigrační legislativu již dvakrát.[82] Soud tak svojí rozhodovací činnosti dal národním zákonodárcům podnět ke změně zákonů, což lze bezpochyby označit za politický vliv.

Třetí příklad se týká velice vzácného typu žaloby před ESD, a to žaloby jednoho členského státu proti druhému.[83] Maďarsko podalo žalobu proti Slovensku na základě politického konfliktu, který se mezi oběma státy odehrál v srpnu 2009 v souvislosti s odhalením sochy sv. Štěpána v Komárně.[84] ESD zatím ještě nevydal rozsudek ve věci, k dispozici je jen stanovisko generálního advokáta Bot, lze však předpokládat, že Soud bude následovat argumentaci nastíněnou generálním advokátem, která je založena na rozdělení kompetencí: spory mezi členskými státy jsou otázkou mezinárodního diplomatického práva, nelze je proto řešit ve světle ustanovení o evropském občanství. Jedině v případě, kdy by byly spory dlouhodobé a narušovaly by přátelské sousedské vztahy mezi členskými státy, dostal by se spor do působnosti ESD z titulu preambule Smluv, jakož i z titulu čl. 4/3 TEU, který zakládá povinnost loajality členských států.

Na těchto třech příkladech lze vidět, že ESD je schopen být silným politickým hráčem ve vztahu k členským státům. Mechanismus předběžných otázek je důležitou součástí soudní soustavy EU, umožňuje totiž soukromým žalobcům domoct se svých nároků plynoucích z evropského práva, za předpokladu, že najdou podporu u národních soudů. Judikatura ESD může mít vliv na národní legislativu i nepřímo, jak bylo nastíněno v případech evropského občanství měnících zákony v Irsku a Belgii. Soud však odmítá vstupovat do politických konfliktů mezi členskými státy, není-li to nezbytně nutné.

V. Závěr

Otázku, zda je ESD politickým aktérem, není snadné zodpovědět. Alespoň ne předtím, než se pojem politického aktéra jasně vydefinuje a otázka tak získá jasnější obrysy. Tato práce měla za úkol podat syntézu rozličných definicí politiky a analyzovat soudní moc EU v jejich kontextu.

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[82] pro hlubší analýzu této problematiky viz (Cambien, 2012), str. 12 a násl.
[83] viz čl. 259 SFEU
[84] pro přehled událostí, viz např. (The Slovak Spectator, 2009)

Jak Nejvyšší soud USA, tak i ESD již byly obviněny z toho, že jsou politické, bez ohledu na to, že jejich složení a fungování se do velké míry liší. Lze předpokládat, že Nejvyššímu soudu USA se politický charakter připisuje zejména z důvodu politického způsobu jmenování soudců a z důvodu, že jeho rozhodnutí se často pohybují v oblasti politických kontroverzí (Hirschlova *mega-politika*), jako například rasová segregace, oddělení církve od státu, svoboda projevu, cenzura, pornografie, právo na potrat, zdravotní pojištění a mnohé další.

Evropský kontext je odlišný. Tato práce definovala pět možných rovin, ve kterých by soudy EU mohly být označeny za politické. Jak však bylo vysvětleno v kapitole věnované definicím politiky, definic je tolik, kolik je autorů o politice píšících. Z tohoto důvodu je vhodnější zkoumat, zda je ECJ (1) politicky motivovaný, tj. složený ze soudců, který rozhodují na základě politických preferencí, (2) politicky ovlivněný ve fázi jmenování soudců, (3) politicky kreativní ve své rozhodovací činnosti, (4) politicky vlivný vůči ostatním institucím EU a (5) politicky vlivný vůči politice členských států.

Zatímco první dvě dimenze se v podstatě kryjí s pojmem *politizace justice*, třetí, čtvrtou a pátou dimenzi lze spojit s pojmem *judicializace politiky*.

Na základě výše uvedených analýz lze říct, že ESD je jak politicky kreativní, tak i politicky vlivný. V minulosti rozhodl klíčové kauzy, proměnil Smlouvy v ústavu, vytvořil právní principy jen na základě *ducha Smlouvy*, vyplnil mezery v činnosti jiných politických orgánů a jeho judikatura měla a nepochybně stále má vliv jak na meziinstitucionální dialog v rámci Unie, tak i na politické diskuse v členských státech. ESD tedy definitivně naplňuje definice politického soudu podle autorů jako například Tocqueville, Tomsa či Easton.

ESD je tak nesporně aktivistickým soudem ve smyslu *judicializace politiky*. Aktuální je tedy názor Zdenka Kühna, který upozorňuje, že soudcovský aktivismus je „*nezbytnou součástí současné evropské justice, a současně vyvolává dodatečný apel na skutečnou nezávislost justice.*“ Jako politický aktér tedy ESD nesmí být politikou příliš ovlivněn ve smyslu *politizace justice*. Nezávislý musí být jak výběr soudců, tak i jejich myšlení.

ESD má jen málo limitů pro svoji rozhodovací činnost. Jedním z nejdůležitějších je však racionalita: praktický dopad judikatury ESD totiž vždy závisí na přijetí těchto pravidel dalšími aktéry. Již dlouhou dobu hrají důležitou roli ústavní soudy členských

států, zejména německý ústavní soud, který Soudu vymezuje určité hranice. Také spolupráce ostatních soudů členských států je nezbytnou podmínkou pro to, aby rozhodování ESD bylo efektivní a vynutitelné.

Jak bylo naznačeno výše, význam žádné instituce nelze pochopit jen studiem jejího právního zakotvení. I role ESD může být pochopena jen díky náhledu do politologie či jiných společenských věd. V budoucnosti by bylo zajímavé zkoumat rozhodovací činnost ESD v kontextu současné ekonomické krize a měnící se atmosféry v různých částech Unie. Příběh o mocném ESD ještě nekončí, uvidíme tedy, co přinese budoucnost.

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