

## The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment

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### 1. Introduction

Some twenty years ago, the European Court of Justice (hereinafter: the ECJ) was first accused of being an excessively activist judiciary.<sup>1</sup> Two new rounds of debate on the issue have followed in the course of the 1990s.<sup>2</sup> For the past few years, however, no new instalments in the series have been published, and the discussion appears to have been terminated without having been properly concluded. Nowadays, critical comments on supposed *faux-pas* of the Court tend to emerge in isolation only, cropping up incidentally, in editorials, in the margins of case notes, or in articles mainly devoted to other themes. At present, it seems as if legal scholarship has given up altogether on the idea of assessing the conduct of the ECJ from a general normative perspective. The current contribution attempts to do just that, and rekindle the debate on the Court's role and practise.<sup>3</sup> It aims to present a thorough and up-to-date account, and to point out as objectively as possible whether the ECJ can be said to have overstepped the line or not – thus seeking to either substantiate or disprove the claim once and for all that it has ever genuinely exceeded the limits of its judicial function.

Of course, all earlier attempts at providing a rock-solid critical assessment of the ECJ's demeanour have themselves been the subject of hefty criticism.<sup>4</sup> Thus, the debate could be considered to have been satisfactorily concluded already, culminating, at the turn of the last century, in a victory for the apologists of the Court. As will be argued below, however, many of the contra-arguments invoked to justify the ECJ's performance may well be dismantled in turn. Most of them can even be discarded altogether, although up until now, rather stunningly, no author has yet ventured to do so.

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<sup>1</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-Making*, Dordrecht: Martinus Nijhoff Publishers 1986. Critical reviews were conducted by Mauro Cappelletti, 'Is the European Court of Justice "Running Wild"?', (1987) 12 *E.L.Rev.* 1987, pp. 4-17; J.H.H. Weiler, 'The Court of Justice On Trial', (1987) 24 *C.M.L.Rev.*, pp. 555-589; A.G. Toth, 'On Law and Policy in the European Court of Justice', *Y.E.L.* 1987, pp. 411-413.

<sup>2</sup> Challenger in the first round: Sir Patrick Neill, *The European Court of Justice: A Case Study in Judicial Activism*, London: European Policy Forum 1995; opponents: Geoffrey Howe, 'Euro-Justice: Yes or No?', 21 (1996) *E.L.Rev.*, p. 192-198; Takis Tridimas, 'The Court of Justice and Judicial Activism', (1996) 21 *E.L.Rev.*, p. 199-210. Challenger in the second round: Trevor C. Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', (1996) 112 *The Law Quarterly Review*, p. 95-109; opponent: Anthony Arnall, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley', (1996) 112 *The Law Quarterly Review*, p. 411-423. See also Trevor C. Hartley, *Constitutional Problems of the European Union*, Oxford: Hart Publishing 1999, and the review thereof by W.T. Eijsbouts, 'Classical and Baroque Constitutionalisms in the Face of Change', (2000) 37 *C.M.L.Rev.*, pp. 213-220, as well as Anthony Arnall, *The European Union and its Court of Justice*, Second Edition, Oxford: OUP 2006, pp. 639-667.

<sup>3</sup> The role and performance of the former Court of First Instance (CFI), now the General Court (GC), will not be addressed, as it remains a relatively young creature which has, for the longest time, only had limited competences, and is at present still subservient to the ECJ in many respects. *Mutatis mutandis*, the same holds true for the newly created Civil Service Tribunal.

<sup>4</sup> See the publications referred to *supra*, fn. 1 and 2.

In what follows, we will first take stock of the available evidence and go through relevant case-law samples of ECJ activism, selected from the past forty-odd years, and distributed evenly across the various sub-domains of EU law (section 2). Intentionally, a broad brush-approach will be employed, as most readers will already be familiar with (the upshot of) these judgments. Next, we shall look at earlier critiques and defences, and subject the various arguments pro and contra to the Court's *modus operandi* to close scrutiny (section 3). Where the results of previous polemics are found wanting, rejoinder arguments are provided, seeking to settle the score and establish which of the opposing sides can lay the strongest claim to truthfulness.<sup>5</sup> Hereafter, we will highlight the most problematic aspects of the ECJ's role and practise one more time, and go through the main objections that can be lodged against its past performance (section 4). In the final part of this contribution, we shall indicate which alterations and modifications appear desirable (section 5). It will be advocated here that it is mainly up to the Court itself to change tack and increase the consistency and authority of its case-law, but that the judicial architecture of the Union requires a few adjustments as well.

## 2. Taking Stock: Evidence of Activism across Time and Space

### 2.1 The Twin Milestones

However trite and predictable it may have become fifty years *ex post facto*, any account of the more audacious jurisprudence of the ECJ still ought to set off in the early 1960s. After all, the judgments in *Van Gend & Loos* (1963) and *Costa/ENEL* (1964) are universally thought to be the twin pristine heralds of a court treading higher ground, leaving behind traditional conceptions of what international judges do and are capable of.<sup>6</sup> Although both judgments play a vital proof-furnishing role for complainants of an ECJ running wild, it may nonetheless be questioned whether these judgments truly deserve the revolutionary epithet that has so often been ascribed to them. After all, in *Van Gend & Loos*, the Court did not launch an entirely new doctrine, as in truth, direct effect is not a phenomenon exclusive to EC law. Under different guises, and especially manifest in the form of 'self-executing provisions', it is also well-known in international law.<sup>7</sup> At the same time, the move of the Court does retain a bold flavour, since by creating the possibility to invoke rules of a supranational origin before the national courts in *all* of the EC Member States, it coolly pierced through the vested monism/dualism dichotomy, and decommissioned the relevant applicable rules in the various constitutions. Likewise, *Costa/ENEL* initially does not seem to provide for too great of a novelty: after all, a cardinal principle of international

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<sup>5</sup> Demonstrating the complete one-hundred-percent veracity of these arguments is, *ratio disciplinis*, as impossible here as it is in all legal scholarly writing. After all, academic discourse and research in the field of law is wholly distinct from that in the 'real' sciences, where claims to truthfulness can be empirically tested.

<sup>6</sup> Case 26/62, *NV Algemene Transport en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1; Case 6/64, *Flaminio Costa v ENEL*, [1964] ECR 585.

<sup>7</sup> This is still insufficiently recognised in European legal scholarship, despite having been pointed out by more than one author from the early 1980s onwards: Derrick Wyatt, 'New Legal Order, or Old?', (1982) 7 *E.L.Rev.*, pp. 147-166; Bruno de Witte, 'Retour à Costa. La primauté du droit communautaire à la lumière du droit international', *R.T.D.E.* 1984, p. 425-454. The message seems however to be slowly seeping through; cf. Ricardo Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', (2006) 43 *C.M.L.Rev.*, pp. 337-394, at 367-375.

law is its supremacy over national law.<sup>8</sup> A sharp divide remains nonetheless between the international and the national plane: although the former assumes itself hierarchically superior, most states in their national legal systems do not actually accord supremacy to international rules of law.<sup>9</sup> Since 1964, owing to *Costa/ENEL*, Community law is markedly different, in that national legal systems in case of conflict are obliged to always award absolute priority to the applicable supranational rules. As such then, the judgments on supremacy and direct effect carry an indelibly activist mark, as the doctrines launched, not enshrined in the Treaties themselves, are products of judge-made law, created purely for the benefit of the *effet utile* of European law. Thence, the subsequent case-law expanding the scope and gist of these notions further, carries an activist stamp as well.<sup>10</sup>

## 2.2 Strengthening the Constitutional Edifice

With the passing of time, the ECJ has become the architect of ever more numerous institutional innovations, transforming and constitutionalising the Treaty architecture, and amending both the horizontal (inter-institutional) and the vertical (EC – Member States) division of powers in equal measure. *Les Verts* (1986), *Chernobyl* (1990) and *Francovich* (1991) represent some of the well-known, more modern paradigm cases.<sup>11</sup> Again, little or no foothold was to be found in the Treaties for any of the decisions reached. In *Les Verts* and *Chernobyl*, Article 173 (now 230) EC contained an exhaustive list of ‘active’ and ‘passive’ litigants, yet the Court single-handedly decided to pry open this provision and broaden the catalogue, under the cloak of preserving the rule of law in the Community, respectively, owing up to the supposed overriding requirements of the principle of institutional balance. *Francovich* then delivered the famous sermon from mount Kirchberg regarding the liability of Member States for violations of EC law. All previous attempts at codifying such a rule having failed,<sup>12</sup> the ECJ was happy to proclaim it a principle actually already ‘inherent’ in the Community legal order, reining in the various particular (and often divergent) national rules that regulated the matter up until then. The Court’s fundamental rights jurisprudence forms another renowned contribution to the constitutionalisation process. Again, even though the Treaties originally contained not a single line on the subject, the ECJ progressively fleshed out a ‘bill of rights’ in cases such as *Stauder* (1969),

<sup>8</sup> See e.g. the Advisory Opinion of the Permanent Court of International Justice in the case of the Greco-Bulgarian Communities, *Publications of the PCIJ* 1930, *Series B*, no. 17, p. 32: “[I]t is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty”, as well as the Advisory Opinion of the International Court of Justice with regard to the Applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947, *ICJ Reports* 1988, p. 34, par. 57: “It [is] sufficient to recall the fundamental principle of international law that international law prevails over domestic law.” Implicitly, it also flows from article 27 of the 1969 Vienna Convention on the Law of Treaties.

<sup>9</sup> See e.g. Antonio Cassese, *International Law*, New York: Oxford University Press 2005, p. 236.

<sup>10</sup> See e.g. Case 9/70, *Franz Grad v Finanzamt Traunstein*, [1970] ECR 825, Case 43/71, *Politi v Italy* [1971] ECR 1039; Case 41/74, *Yvonne van Duyn v Home Office*, [1974] ECR 1337; Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

<sup>11</sup> Case 294/83, *Parti Ecologiste ‘Les Verts’ v Parliament*, [1986] ECR 1365; Case C-70/88, *Parliament v Council (Chernobyl)* [1990] ECR I-204; Case C-6 and C-9/90, *Francovich & Bonifaci v Italy*, [1991] ECR I-5357.

<sup>12</sup> In the past, on at least three different occasions, calls were made to introduce the relevant rules into primary law: thus the proposal of the Court of Justice to Leo Tindemans, *Bull. EC*, Supplement 9/75, pp. 17-19; the Resolution of the European Parliament of 12 May 1983, published in O.J. 1983, C 68/32, and the Report of the European Commission of 21 October 1990 for the 1991 IGC, *Bull. EC*, Supplement 2/91, pp. 165-169.

*Hauer* (1979) and, more recently *e.g. Omega* (2004), which is still waiting to be incorporated in binding rules of law at the present date and time.<sup>13</sup> In 2007, in *Segi* and *Advocaten voor de Wereld*, the ECJ effortlessly extended its preliminary reference competence in the ‘Third Pillar’ (what was then Title VI of the EU Treaty).<sup>14</sup> Two years before, in *Pupino*, by exporting the doctrine of indirect effect from the First Pillar to the Third, it had already brought a strong supranational flavour to this predominantly intergovernmental domain.<sup>15</sup> In the recent *ECOWAS*-case, the ECJ broke yet newer ground and extended its jurisdiction into the ‘Second Pillar’: it boldly declared itself competent to review the legality of instruments adopted within the scope of the Common Foreign and Security Policy, despite its formal exclusion from that domain on the basis of (the former) Article 46 EU.<sup>16</sup> True, it may not be so easy to question the legitimacy of this case-law, at least when keeping in mind the *leitmotiv* of recognising inalienable rights of individuals, and of ameliorating their legal position when faced with governmental acts that would otherwise remain non-reviewable. Nonetheless, all of these judgments do neatly fit an activist bill – after all, the ECJ *proprio motu* laid down new legal rules and principles, largely of its own devising. It thus bears the sole responsibility for the changes to the European edifice, constitutionalising and supranationalising its architecture ever more gradually, even when some of these decisions were codified in rules of primary and secondary law afterwards.<sup>17</sup>

### 2.3 Entrenching the Internal Market

The internal market would definitely never have been what it is right now without the relevant case-law from Luxembourg, regardless of whether one looks at free movement or competition law. Now surely, key provisions like Article 28, 39, 49 and 81 EC should not have remained a dead letter, but at the same time, they should have been interpreted in a slightly more limited fashion. In the free movement of goods, for example, the prohibition of quantitative restrictions and measures, having an equivalent effect, did not need to receive the spectacularly broad reading given in *Dassonville* (1974) and *Cassis de Dijon*

<sup>13</sup> Case 26/69, *Stauder v Ulm*, [1969] ECR 419; Case 44/79, *Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727; Case C-36/02, *Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609.

<sup>14</sup> Case C-355/04 P, *Segi and Others v Council*, [2007] ECR I-1657; Case C-303/05, *Advocaten voor de Wereld v Leden van de Ministerraad*, [2007] ECR I-3633. For critical comments, see Vassilis Hatzopoulos, ‘With or without you... Judging Politically in the Area of Freedom Security and Justice’, (2008) 33 *E.L.Rev.*, pp. 44-65; Damian Chalmers, ‘The Court of Justice and the Third Pillar’, (2005) 30 *E.L.Rev.*, pp. 773-774. With the benefit of hindsight, these judgments may not appear particularly surprising, with earlier judgments such as Case 181/73, *Haegeman v Belgium* [1974] ECR 449, Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v SPI and Sami*, [1983] ECR I-801, as well as Case 221/88, *European Coal and Steel Community v Acciaierie e Ferriere Busseni SpA*, [1990] ECR I-519, serving as relevant precedents.

<sup>15</sup> Case C-105/03, *Criminal Proceedings against Maria Pupino*, [2005] ECR I-5285; for further analysis, see *e.g.* Maria Fletcher, ‘Extending “Indirect Effect” to the Third Pillar: The Significance of Pupino’, (2006) 30 *E.L.Rev.*, pp. 862-877; Eleanor Spaventa, ‘Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Ruling in Pupino’, (2007) 3 *EuConst.*, pp. 5-24.

<sup>16</sup> Case C-91/05, *Commission v. Council (ECOWAS)*, [2008] ECR I-3651.

<sup>17</sup> The Court’s judicial amendment of Article 173 EEC (now Article 263 TFEU) in *Les Verts* and *Chernobyl* was finally endorsed by the Member States at the Maastricht IGC. Also, they have progressively given their blessing to the Court’s fundamental rights jurisprudence, *e.g.* by the insertion of what is currently Article 6 EU, and by the adoption of the Union’s Charter of Fundamental Rights. The *Francovich* principle has, however, not (yet) been taken up in the same way and/or copied into primary law (*cf. supra*, fn. 12).

(1976).<sup>18</sup> The same goes for Article 49 EC (now Article 56 TFEU) and the Court's stern construction thereof in *Säger* (1990).<sup>19</sup> Similarly, those seeking to avail themselves of the Treaty rules on free establishment were aided quite generously by landmark rulings, such as *Reyners* (1974), *Gebhard* (1994) and *Centros* (1999).<sup>20</sup> The liberal approach to the concept of 'worker' also continues to be striking, evident from cases such as *Levin* (1982), *Kempf* (1986), *Steymann* (1988) and *Trojani* (2004), encompassing situations in which one might seriously question the genuine and effective character of the employment activity pursued.<sup>21</sup> For the relatively new rules on EU citizenship, the Court has been willing to blaze a trail with most remarkable fury, creating residence rights as well as entitlements to social welfare on startlingly feeble grounds, e.g. in *Martínez Sala* (1998), *Grzelczyk* (2001) and *Baumbast* (2002).<sup>22</sup> Almost undreamt of was the brazen rhetoric with which the ECJ, in these and other cases, declared Union citizenship "destined to be the fundamental status of nationals of the Member States" – stilted words, undoubtedly fit for use in visionary speeches of politicians, but possibly somewhat out of place when employed amidst legal vernacular.<sup>23</sup> Finally then, in EC competition law, the Court did not shun an activist stance either, though the exact dosage has varied through the years. Yet, the judgment in *Continental Can* (1975), though decidedly dated nowadays, provides singularly important evidence of judges that do not necessarily feel constrained by a lack of black-letter law when it comes to furthering "une certain idée de l'Europe".<sup>24</sup> In the case in point, the absence of any specific rules regarding merger control in the Treaty or anywhere else presented no bar to the creation of adventurous judge-made law on the subject.

<sup>18</sup> Case 8/74, *Procureur du Roi v Dassonville*, ECR 837; Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

<sup>19</sup> Case C-76/90, *M. Säger v Dennemayer & Co. Ltd.*, [1991] ECR I-4221. One may here also point to the groundbreaking case-law on patient mobility, sparked by the Court's grand conception of what constitutes a service; see *inter alia* Case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés* [1998] ECR I-1831; Case C-158/96, *Raymond Kohll v Union des caisses de maladie*, [1998] ECR I-1931; Case C-372/04, *Yvonne Watts v. Bedford Primary Care Trust*, [2006] ECR I-4325.

<sup>20</sup> Case 2/74, *Reyners v Belgium*, [1974] ECR 631; Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165; Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

<sup>21</sup> Case 53/81, *Levin v Staatssecretaris van Justitie*, [1982] ECR 1035; Case 139/85, *Kempf v Staatssecretaris van Justitie*, [1986] ECR 1741; Case 196/87, *Steymann v Staatssecretaris van Justitie*, [1988] ECR 6159; Case C-456/02, *Trojani v CPAS*, [2004] ECR I-7573.

<sup>22</sup> Case C-85/96, *Maria Martínez Sala v Freistaat Bayern*, [1998] ECR I-2691; Case C-184/99, *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193; Case C-413/99, *Baumbast v Secretary of State for the Home Department*, [2002] ECR I-7091.

<sup>23</sup> The phrase has nonetheless been repeated in a plethora of subsequent cases: Case C-224/98, *d'Hoop v Office National de l'Emploi*, [2002] ECR I-6191, para. 28; Case C-413/99, *v Secretary of State for the Home Department*, [2002] ECR I-7091, para. 82; Case C-148/02, *Avello v Belgium*, [2003] ECR I-11613, para. 22; Case C-138/02, *Collins v Secretary of State for Work and Pensions*, [2004] ECR I-2703, para. 65; Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department*, [2004] ECR I-9925, para. 25; Case C-209/03, *R v London Borough of Ealing & Secretary of State for Education ex parte Bidar*, [2005] ECR I-2119, para. 31; Case C-76/05, *Schwarz and Schwarz-Gootjes v Finanzamt Bergisch Gladbach*, [2007] ECR I-6849, para. 86; Case C-50/06, *Commission v Netherlands*, [2007] ECR I-4383, para. 32.

<sup>24</sup> The words famously employed by Pierre Pescatore in his article 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', (1983) 8 *E.L.Rev.*, pp. 155-177, at 157. Cf. also G. Federico Mancini and David T. Keeling, 'Democracy and the European Court of Justice', (1994) 57 *M.L.R.*, pp. 175-190, p. 186: "The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an 'ever closer union among the peoples of Europe'."

## 2.4 Declaring Full-Scale Independence, Or: Autonomy Mk. II

*Van Gend & Loos* has already been touched upon, yet apart from the introduction of direct effect, it is of course also legendary for proclaiming the existence of a ‘new legal order of international law’. One year later, in *Costa/ENEL*, the Community was even pronounced to be a new legal order – period, and the law stemming from Treaty (“an independent source of law”) as being of a “special and original nature”. For a long time, speculation has been rife on the exact meaning of these phrases. Various authors have questioned the EC’s specificity and its alleged uniqueness. A number of them negated the possibility of a truly autonomous system, immune to the general rules and distinct from its siblings in international law.<sup>25</sup> Scholars have pointed to the fact that the international legal order is actually host to many sub-systems, and that there is nothing revolutionary in creating an organisation for unlimited duration, with its own institutions, competences and legal personality.<sup>26</sup> The Court has nonetheless repeatedly stressed the supposed autonomy of the legal order, and denounced multiple rules and conventions that threatened to clash with, cloud or pollute the Community’s *sui generis* system.<sup>27</sup> Still, as long as the basis of the EC and EU structures continues to be located in a traditional treaty arrangement, both entities remain firmly rooted in international law, and seem unable ever to break free and live the dream of a self-contained, uniquely autonomous legal order.

As theoretically sound as the latter considerations may have been, they discounted or underestimated the willingness of the Court to explode the linkages with international law at long last. In the recent *Kadi*-judgment, the true ambit of the pronouncements in *Van Gend* and *Costa* was finally clarified.<sup>28</sup> In its ruling on appeal from the already astounding dictum of (what was then) the Court of First Instance, the Court dealt the final blow to the idea of an only *quasi*-separate, limited, unoriginal ‘new legal order’. In effect, it considered the general principles of Community law hierarchically superior to international legal rules, denounced the unquestionable overriding authority of the UN Charter and UN Security Council Resolutions, and discarded the convoluted and double-hearted approach the CFI had earlier adhered to.<sup>29</sup> In so doing, it daringly went where no national or international court has gone before, put the independent character of the Community legal system

<sup>25</sup> See e.g. Derrick Wyatt, ‘New Legal Order, or Old?’, *E.L.Rev.* 1982, pp. 147-166; Theodor Schilling, ‘The Autonomy of the Community Legal Order – An Analysis of Possible Foundations’, (1996) 37 *Harvard International Law Journal*, pp. 389-409; Trevor C. Hartley, ‘International Law and the Law of the European Union – A Reassessment’, *B.Y.I.L.* 2001, pp. 1-35.

<sup>26</sup> Alexander Orakhelashvili, ‘The Idea of European International Law’, (2006) 17 *E.J.I.L.*, pp. 315-347, at 345; in similar vein Bruno de Witte, ‘Retour à Costa. La primauté du droit communautaire à la lumière du droit international’, *R.T.D.E.* 1984, pp. 425-454, at 446.

<sup>27</sup> E.g. Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, [1977] ECR 741; Opinion 1/91, *Draft agreement relating to the creation of the European Economic Area*, [1991] ECR I-6079; Opinion 1/00, *Proposed agreement on the establishment of a European Common Aviation Area*, [2002] ECR I-3493.

<sup>28</sup> Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of the Court of 3 September 2008, n.y.r.

<sup>29</sup> The judgment of the CFI has been the victim of much adverse comment, e.g. Christian Tomuschat, ‘Case Note *Kadi*’, (2005) 43 *C.M.L.Rev.*, pp. 537-551, Jessica Almquist, ‘A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions’ (2008) 57 *I.C.L.Q.*, pp. 303-331; Piet Eeckhout, ‘Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit’, (2007) 3 *EuConst*, pp. 183-206. See also Valentina Azarov & Franz Christian Ebert, ‘All done and dusted? Reflections on the EU Standard of Judicial Protection against UN Blacklisting after the ECJ’s *Kadi* Decision’, (2009) 5 *HanseLR*, p. 99.

beyond doubt, and underscored the unprecedented nature of European law once and for all. This communication has been a rather long time in waiting – but perhaps all preceding cases in the 1962-2008 period have served as some mystical form of preparation, so as to amass the courage to deliver this landmark ruling.

### 3. Earlier Justifications and Their Failings

The Court has on multiple occasions been attacked for its activism (commonly taken to mean: its zealously pro-integrationist stance<sup>30</sup>), and for its many rulings that go beyond the wording, the scope and underlying intentions of the relevant provisions. The general tenor of the criticism is that it has often redrawn the rules in the name of interpreting them, and has attached a disproportionate amount of importance to their necessary effectiveness, to the detriment of all other interests. In the past, four main arguments have been advanced to justify the performance of the ECJ. These will be analysed in turn below. As will be demonstrated, although most of these justifications can lay claim to a certain degree of accuracy, none of them succeed overall in vindicating the Court's role and conduct.

#### 3.1 The Set-Up of the Treaties Makes Activism Unavoidable

In defence of the Court, a commonplace and often-repeated argument is that the set-up of the Treaties makes judicial activism unavoidable: after all, the original EC Treaty (now the 'Treaty on the Functioning of the Union') was a 'traité-cadre' or framework treaty, which regulates few topics in exhaustive detail.<sup>31</sup> In addition, treaties as such are said to be a most particular genre, products of protracted and laborious negotiations. The end-result of such negotiations is usually a vague and open-ended patchwork, replete with delphic formulas that reflect hard-wrought compromises.<sup>32</sup> In conjunction, some authors point to Article 220 EC (now Article 19 TEU), which is believed to contain an exceptionally broad mandate for the Court to lay down rules of law in accordance with its own preferences: the Court was actually expected to come up with solutions to legal controversies that the negotiating parties had failed to address. Thus, the fact that something is not mentioned, or not fully covered by treaty provisions should in itself never be considered decisive: this is meant to leave room for detailed new rules that the ECJ may rightfully bring into being.<sup>33</sup> On top of

<sup>30</sup> Previous authors have been accused of failing to explain what 'judicial activism' denotes. This in fact requires lengthy squabbling nor laborious definition attempts: because of the Court's persistent activities, in which it clearly shows itself to be a stickler for ongoing EU integration (*cf.* below, fns. 49 and 72), it may rightfully be accused to engage in activism to further that particular cause.

<sup>31</sup> See *e.g.* Tridimas, *op. cit.* (fn. 2), p. 205; Michel Waelbroeck, 'Le rôle de la Cour de Justice dans la mise en oeuvre du Traité CEE', *C.D.E.* 1982, p. 350; Charlotte Gaitanides, 'Artikel 220', in: H. von der Groeben, J. Schwarze (Hrsg.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (Band IV), Baden-Baden: Nomos 2003, p. 324; Jean-Victor Louis, Georges Vandensanden, Denis Waelbroeck, Michel Waelbroeck, *Commentaire Mégret. Le droit de la CEE (Tome 10: La Cour de Justice, Les Actes des Institutions)*, Bruxelles: Editions de l'Université de Bruxelles 1993, p. 16.

<sup>32</sup> Philip Allott has even gone so far as to describe treaties as 'disagreement reduced to writing' ('The Concept of International Law', (1999) 10 *E.J.I.L.*, pp. 31-50, at 43).

<sup>33</sup> Or in the words of Pescatore, cited approvingly in Arnulf, *The European Union and its Court of Justice*, Oxford: OUP 1999, p. 77: "The absence of a provision in the Treaty regulating a particular matter should not be taken to reflect agreement by the Member States that the matter concerned should be left outside the Treaty's ambit, but simply a lack of consensus among the Member States at the time the Treaty was drafted on whether, and if so how, that matters should be dealt with. (...) A contrario reasoning (...) should thus be used with extreme caution in interpreting the Treaty."

all this comes the aspect of multilingualism: the Treaties, as well as many of the instruments of secondary law, are available in a plethora of languages, which are all considered equally authentic. When provisions are not phrased in identical or even similar wording, the Court employs a number of techniques to try to seek out the framers' common intention, but is often left no other choice than to craft a solution of its own.<sup>34</sup> Keeping all this in mind, the Court's activism is thought to become wholly understandable, *quia inevitable*.

In essence, there is much truth to these arguments. First, the wording of many provisions is indeed terse and laconic, and this naturally allows for an interpretation that judges consider best, trying to find the 'best fit' in light of the existing rules and the legal system as a whole.<sup>35</sup> This means that, in cases such as *Dassonville* and *Säger* for example, where the Court was approached to speak out on the reach of the free movement provisions, it was perfectly entitled to decide the way it did. At the same time however, there are several cases in which the provision at stake is clear and unambiguous, and does not support construction in the mode preferred by the Court. Of course, many volumes have been written on the art of interpretation, and there is no general theory readily available that is perfectly suited to the ECJ and the European context.<sup>36</sup> This does however not mean that the Court is permitted to twist or distort the plain meaning of words and phrases (prime specimens of which are *e.g. Defrenne*, *Busseni* and *Grzelczyk*).<sup>37</sup> Indeed, Article 19 TEU does provide for a broad mandate: it instructs the ECJ and the GC to ensure that in the interpretation and application of this Treaty 'the law' is observed. Thence, perhaps everything the Court says ought to be accepted as inherently just, and virtually immune to criticism. But, on this view, this article would amount to a 'blank cheque'-provision. It could, at the same time, very well be seen as a neutral competence clause, confirming the institutional existence of the Court, and attributing it a general, but not unlimited power. Moreover and significantly, Article 19 TEU admonishes the ECJ and GC *expressis verbis* to ensure the observance of the law 'within their own jurisdiction'. This delineates their task quite neatly, and appears to militate against judgments such as *Chernobyl*, *Segi* and *ECOWAS*, in which the Court wilfully expanded its own competence, so as to hear claims, review acts, and receive preliminary questions outside and beyond the field chalked out by the explicit jurisdiction

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<sup>34</sup> For an extensive discussion of the various theories of interpretation regarding treaties drafted in more than one language and a defense of the ECJ's approach, see Geert Van Calster, 'The EU's Tower of Babel – The Interpretation by the European Court of Justice of Equally Authentic Texts drafted in more than one Official Language', *Y.E.L.* 1997, pp. 363-393, and Arnulf, *op. cit.* (fn. 33), at 522-525.

<sup>35</sup> After all, the idea that a literal interpretation of words always provides us with a pure and unequivocal meaning, which judges should adhere to at all times, has been proven to be fallacious long ago. Likewise, the impossibility for legislators to codify the rules, their objectives and scope of application in exhaustive detail is nowadays well beyond dispute.

<sup>36</sup> Joxerramon Bengoetxea has attempted to analyse the Court's work through a Dworkinian lens, but this has not resulted in a valid and workable theory as such: see his *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Oxford: Clarendon Press 1993, and the critical review by Giorgio Gaja, 'Beyond the Reasons Stated in Judgments', (1994) 92 *Michigan Law Review*, pp. 1966-1976.

<sup>37</sup> The discussion on the role of the Court cannot be reduced to a simple clash between 'literalists', who hold that constitutional documents must be interpreted strictly, and 'interpretivists', who hold that such interpretation is evolutionary and can change over time (*cf.* Ian Ward, *A Critical Introduction to European Law*, Cambridge: CUP 2009, p. 80). One need not be a die-hard literalist to question some of the remarkably creative solutions crafted by the Court. Conversely, a pure 'interpretivist' would give the Court *carte blanche*; there is then no reason why it (or any court for that matter) should ever adhere to the applicable written rules, and the purpose for which they were created; they could then do just as they please and bend rules and phrases in any desired direction, whenever they think it right.



clauses in the Treaties. This is actually also excruciatingly hard to reconcile with the principle of attributed powers, the cornerstone of all civilised legal communities that base themselves on the rule of law, and which, in the EU, is thought to be firmly entrenched in Article 5 TEU (formerly Article 5 EC). Finally, indeed, the Union's convoluted language regime may at times bring considerable hardships for judges in search of the proper meaning of a word or phrase, but this may, again, not serve as a 'blanket excuse', and will only validate those judgments where interpretation proved difficult due to this particular aspect. None of the rulings discussed above, and arguably, few of the landmark cases overall, fall within this category.

### 3.2 The Court is Obligated to Promote Further Integration

Naturally, the Court does not operate in a vacuum, and the Treaties do provide numerous clues as to the general direction in which the law should be developed. The judges can draw from the preamble and the first articles of the Treaties, which globally elaborate upon the objectives and the means to those ends.<sup>38</sup> Moreover, Article 7 EC has mandated the Court for decades 'to carry out the tasks entrusted to the Community', proving for some that it has indeed been granted a wide remit to preserve and uphold the rule of law. An evergreen opinion in European legal doctrine takes this position one step further, and contends that the Court is in fact legally obligated to steer a pro-integration course, and required to always deliver judgments that strengthen and expand the Community / Union legal order. The shortcomings of the institutional architecture, where progress is easily stalled if institutions do not follow-up on each others' actions, as well as the all-too lengthy and cumbersome legislative process, would even demand such a *habitus*: for the process of European integration was meant to continue incessantly, entailing that any inaction from the side of the other actors (Commission, Council, Parliament) compels the Court to interpret rules of primary and secondary law as boldly and as expansively as possible: by and large, it was the 'most-favoured one' to do so.<sup>39</sup>

Through the years, this line of reasoning has been advanced by a plethora of authors. Historically, Robert Lecourt, who was president of the ECJ from 1962 until 1976, appears to have been the first to voice it. It was subsequently adopted by his successor, Hans Kutscher, who was president from 1976 until 1980.<sup>40</sup> During their times in office, the EC

<sup>38</sup> Robert Lecourt, *L'Europe des juges*, Bruxelles: Bruylant 1976, p. 237; F. Dumon, *The Case Law of the Court of Justice – A Critical Examination of the Methods of Interpretation*, Luxembourg: Europa Institute 1976, pp. 131-8; Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford: Clarendon Press 1989, p. 390-1; Vlad Constantinesco, 'The ECJ as a Law-Maker: Praeter aut Contra Legem?', in David O'Keefe & Antonio Bavasso (eds.), *Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley* (Volume I), The Hague: Kluwer Law International 2000, p. 79.

<sup>39</sup> Cf. Hjalte Rasmussen, 'Towards A Normative Theory of Interpretation of Community Law', (1992) *The University of Chicago Legal Forum*, pp. 135-178, at 137: "The most-favoured rationale for this involvement has been that judicial activism was needed in order to break the impasse into which the political branches had settled." The 'most-favoured rationale' has throughout the years been rehearsed by many authors, among which numerous (former) Members of the Court itself; e.g. G. Federico Mancini, 'The Making of a Constitution for Europe', (1989) 26 *C.M.L.Rev.*, p. 596-9; Pierre Pescatore, 'Jusqu'ou le juge peut-il aller trop loin?', in Kirsten Thorup & Jens Rosenlov (eds.), *Festschrift til Ole Due*, København: G.E.C. Gads Forlag 1994, pp. 326-7; Constantinos N. Kakouris, 'La Cour de Justice des Communautés européennes comme Court Constitutionnelle: Trois Observations', in: O. Due, M. Lutter, J. Schwarze (Hrsg.), *Festschrift für Ulrich Everling*, Baden-Baden: Nomos 1995, p. 635. See also Pescatore, Mancini & Keeling, cited *supra* (fn. 26); Bengoetxea, *op. cit.* (fn. 38), at 100.

<sup>40</sup> Robert Lecourt, *L'Europe des juges*, Bruxelles: Bruylant 1976; Hans Kutscher, 'Über den Gerichtshof der Europäischen Gemeinschaft', *Europarecht* 1981, pp. 392-413.

witnessed its most flagrant period of inter-institutional lethargy and stagnation, with the judiciary, in the meanwhile, establishing crucial doctrines in judgments such as *Reyners*, *Continental Can* and *Cassis de Dijon*.<sup>41</sup> The idea of both former presidents was that the Court ought to ‘compensate’ for legislative inertia. The underlying reasoning is nonetheless essentially circular: for, the ECJ must act to counter any (threatening) stagnation, because, if it itself would remain idle, stagnation would follow. Though based on essentially flawed argumentation, the ‘most favoured-rationale’ has become a dogma ever since.

Indeed, *initially* the Community suffered from a fundamentally defective design: a parliamentary assembly whose members were not democratically elected, lacking legislative competences (or, for that matter, *any* significant competences) – coupled with a Commission that commanded (not overly impressive) executive powers, whose hands were also rather tied by virtue of the fact that, in most domains, it could only propose and not promulgate legislation itself – coupled with a Council that, as a general rule, could only adopt acts by unanimity. In view of this historical constellation, the spurious reasoning was developed that, when certain rules were needed for the good functioning of the supranational franchise, the Court could deliver, and simultaneously lay claim to just as much legitimacy at that as the other institutions. Yet, with equal force one could posit that the system functioned precisely the way it was designed, and that it should not be considered problematic if there is little regulatory progress in a particular domain: it is natural for many a legislative apparatus to find itself in a muddle of stagnancy once every while. In reality, the claim that the European construct ‘demands’ continuous progress comes down to a political statement, not a legal principle. Moreover, an absence of judicial intervention would not unquestionably have resulted in permanent stagnation. From a democratic perspective, it would anyhow have been sounder if the political institutions had taken the lead in furthering the cause of integration, even if, on occasion, it would have taken them quite some time to get their act together. In fact, it could even be that a more patient and restrained approach of the Court would have given a greater boost to the supranational experiment than its activist stance did: the latter posture might well have imbued the other institutions with a desire for deliberate stalling.<sup>42</sup> So what the aforementioned doctrinarian evergreen opinion does is distil a ‘sollen’ from a ‘sein’, confuse an ‘ought’ with an ‘is’.

Unquestionably, the activist stance of the ECJ has borne great fruit in the past, and much of the success of the Community project can be attributed to it. Nonetheless, the system has witnessed many changes in the past decades, the efficiency has increased, and the other institutions have much improved their democratic record. There is little need anymore for the Court to play the part of the ‘locomotive of European integration’. It is, moreover, the least democratic institution nowadays. Any remaining gridlocks are the result of the system

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<sup>41</sup> This period has been masterfully portrayed by Joseph Weiler in his classic ‘The Transformation of Europe’, reprinted in *The Constitution of Europe*, Cambridge: CUP 1999, pp. 10-101, at 16-63.

<sup>42</sup> Thus speculate Mauro Cappelletti & David Golay, ‘The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration’, in: Mauro Cappelletti, Monica Seccombe, J.H.H. Weiler (eds.), *Integration Through Law - Europe and the American Federal Experience* (Volume I, Book 2), Berlin: Walter de Gruyter 1986, p. 348-9: “[I]t seems reasonable to conjecture that the Member States might, for example, have permitted the Council to adopt policy more frequently by majority or qualified majority voting if there had been developed no such sweeping doctrines as those of the direct effect, supremacy and pre-emption of Community law.” This hypothesis has also been given some credit by J.H.H. Weiler, *op. cit.* (fn. 43), at 35-6.

as it is – even if the cards ever lay differently, nowadays, the ECJ need no longer ‘remedy’ or ‘compensate’ for that.<sup>43</sup>

Of course, the basic argument that we started off with above still stands: the Treaties themselves do appear to point out the direction in which the law should be developed. Obviously, the European construction was not created for nothing, and it was supposed to produce a number of tangible results. So then, the judges of the ECJ can happily take their cue from the preamble and the first articles of the Treaties; and if then they are accused of having a particular agenda of promoting integration, the rebuttal must be that this agenda is actually one that was set by the authors of the Treaties, and which is firmly rooted therein.<sup>44</sup> Allegedly, a certain judicial ‘pro-integration’ prejudice is thus inherent to the system. Against this, one may argue that, for all the clues in the Treaties, the true objectives of the integration process remain lavishly vague: politicians have already been debating for generations on the exact ‘finalité’, the (federal, non-federal, continuously hybrid?) destination the Union and its Member States are, or should be heading for.<sup>45</sup> A former judge of the Court has himself admitted that the policies in the Preamble and first few Articles of the Treaties are more notable for their generality than their clarity.<sup>46</sup> Indeed, they are so extremely general in scope and silent on detail that one is hard-pressed to infer concrete solutions to legal problems from them. Even if judges may roughly base a decision strengthening and expanding the European legal order on ‘the system-at-large’, it may be sincerely doubted whether it justifies those judgments in which the ECJ does not take small steps in the general direction, but leaps unexpectedly fast forward: cases like *Defrenne*, *Grzelczyk* and *Pupino* spring to mind here. In all then, perhaps the Court is supposed to act partisan to a certain extent, and rule in favour of the successful development of the supranational plane on most occasions. But again, there is no compelling reason why it should at any time provide for an *extra* impetus that exceeds the ordinary levels of toleration and knowingly accelerate and intensify the integration process.

### 3.3 Criticisms are Selective: Activism Only Occurs in a Minority of Cases

Much of the criticisms against the Court are believed to be unfounded, as they are based on a selective analysis: the critics bring examples of judicial activism to the fore, but they commonly ignore the many examples of judicial restraint. Moreover, the critics have usually chosen only a small number of decisions from the Court’s vast case-law to substantiate their accusation that it indulges in overly creative jurisprudence. If, however, the entire corpus of decisions would be taken into account, a much more balanced and truly

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<sup>43</sup> In the same vein Stephen Weatherill, ‘Activism and Restraint in the European Court of Justice’, in: Patrick Capps, Malcolm Evans, Stratos Konstadinidis (eds.), *Asserting Jurisdiction: International and European Legal Perspectives*, Oxford: Hart 2003, pp. 255-281, at 277.

<sup>44</sup> Arnulf, ‘The European Court and Judicial Objectivity: A Reply to Professor Hartley’, *L.Q.R.* 1996, pp. 411-423, at 413: “If there is an agenda pursued by the Court, it is therefore one set by the Treaty’s authors.” See also Tridimas, *op. cit.* (fn. 2); Cappelletti, *op. cit.* (fn. 38).

<sup>45</sup> Moreover, as argued by Giandomenico Majone in his *Dilemmas of European Integration* (Oxford: OUP 2005), the model of a United States of Europe, which the ECJ seems to subscribe to in its leading cases (*e.g.* the citizenship judgments), is as such bound to fail, not just due to lack of popular support, but because it finds itself unable to deliver the public goods which Europeans expect to receive from a fully fledged government. Equally unconvincingly though, Majone contends that the present EU ought to mutate into an atypical, yet effective, confederation, built on the foundation of market integration. For critical analysis, see the review essay by Michael Dougan, ‘And Some Fell on Stony Ground...’, (2006) 31 *E.L.Rev.*, pp. 865-878.

<sup>46</sup> Claus Gulmann, cited in Stephen Weatherill & Paul Beaumont, *EU Law*, London: Penguin 1999, p. 191.

nuanced picture would emerge, as for any case that can be labelled (excessively) activist, there is another one that can be considered its counterpart.<sup>47</sup>

This might strike the reader as a pithy and, at first sight, convincing justification. Yet, one may draw an analogy with a physician who, in alternation, heals and kills patients: the latter action does not become any more acceptable or soothing because of the former. Judgments in which the ECJ has been excessively activist, in which clear and unequivocal rules are excessively bended or stretched, remain *eo ipso* reprehensible, even if they would indeed make up only half (or much less) of all decided cases overall. Secondly, if one seriously professes to adhere to a social science-type methodology, one would have to study and classify *every* single judgement since 1954 in order to prove the hypothesis that statistically, there is nothing wrong with the Court's conduct, that no inequality exists in its administration of justice, and that the evidences of activism and restraint weigh up against one another. Such an inquiry would be daunting and inconceivably complicated in nature, as the ECJ has rendered several thousands of judgements up to the present day. Nonetheless, in the absence of such scientifically valid, 100% certain research, the studies that claim that there is a counterpart to each and every activist case base themselves just as much on a selective analysis as the critics they aim to rebuff. It is patently true that the Court does not appear to indulge in activism in every single case. Those conversant with the Court's jurisprudence will nonetheless agree that a global tendency can be discerned, in which in the majority of cases, the decision will be to the detriment of Member States trying to preserve certain sovereign rights or interests, to the detriment of the Council putting its foot down in a certain matter and / or attempting to uphold a piece of legislation, or to the detriment of individuals that seek to challenge EC legal instruments they consider unlawful.<sup>48</sup> In the decisive 'constitutional' cases, restraint seems to be the exception rather than the rule. Moreover, even if restraint is displayed, the Court often makes up for this single step backwards by taking two steps forward in a later case. A new doctrine is often introduced gradually, through 'salami-tactics' (one slice at a time): in early cases, a doctrine is launched, but it may be not (yet) applied and subjected to various conditions; then, in a later case, it can nonetheless be relied upon as an established precedent, and the earlier qualifications can be diluted or erased.<sup>49</sup> Admittedly, this too is conjecture, and impossible to prove with one-hundred-percent accuracy, but for ECJ-watchers, it will be a recognisable and instinctively true supposition.<sup>50</sup>

<sup>47</sup> Tridimas, *op. cit.* (fn. 2), p. 200; Howe, *op. cit.* (fn. 2), p. 189; Arnall, *op. cit.* (fn. 33), p. 189; Albertina Albers-Llorens, 'The European Court of Justice, More Than a Teleological Court', *Cambridge Yearbook of European Legal Studies* 1999, p. 398.

<sup>48</sup> Cf. T.C. Hartley, *The Foundations of European Community Law*, Fifth Edition, Oxford: OUP 2003, p. 80: "One of the distinctive characteristics of the European Court is the extent to which its decision-making is based on policy. By policy is meant the values and attitudes of the judges – the objectives they wish to promote. The policies of the European Court are basically the following: 1. strengthening the Community (and especially the federal elements in it); 2. increasing the scope and effectiveness of Community law; 3. enlarging the powers of Community institutions. They may be summed up in one phrase: the promotion of European integration." Hartley may be slightly overstating the point, but see also H.G. Schermers, 'The European Court of Justice: Promoter of European Integration', *American Journal of Comparative Law* 1974, pp. 444-464.

<sup>49</sup> This strategy has been observed and criticised by Weatherill & Beaumont, *op. cit.* (fn. 46), p. 196, and Hartley, *op. cit.* (fn. 48), pp. 81-2.

<sup>50</sup> It receives further credit through the findings of an author who has researched all the Court's case-law in the field of EU external relations, and established that the ECJ has so far always rejected direct reliance on norms of an international law origin when invoked so as to set aside or invalidate secondary norms of Community law, but that it has permitted this course of action *in every single case before it* when this served to set aside conflicting

For sure, it is not suggested here that the Court never exercises restraint. At the same time however, it can be blatantly inconsistent in the practise thereof. In some cases for instance, it goes through fire and water to guarantee (access to) a judicial remedy and protection of basic rights (e.g. *Factortame*, *Les Verts*, *Francovich*); yet, on other occasions where the same issues were at stake, it has been willing an extreme reluctance without a hitch (e.g. *UPA*, *Segi*, *Spain/Eurojust*).<sup>51</sup> The general argument fails anyhow: the Court's activism cannot be justified by virtue of the fact that there is sufficient evidence of restraint as well.

### 3.4 Few of the Court's Rulings Have Ever Been Reversed

A final justification sets off by asking the following question: if the ECJ is truly going too far, why then have so few of the Court's rulings ever been reversed? If indeed many of its judgements should be considered excessively activist, the Member States are unlikely to have resigned sheepishly; they would surely have corrected any erroneous decisions and curtailed the Court's powers. Rather, they have only rarely done so, and even extended its competences at various IGCs.<sup>52</sup> This goes to show that there is nothing intrinsically wrong with the past jurisprudence of the ECJ, and that its integrationist zeal is shared and welcomed by the *Herren der Verträge*, the Member States of the EU themselves.

The great failing of this argument lies in the fact that it takes little account of the complexity of the Treaties' amendment regime. In accordance with Article 48 TEU, the Treaties can only be amended when all Member States agree to this, and any amendments can only take effect when all Member States have ratified them in accordance with their national constitutional provisions. Thence, if a judgement of the ECJ interprets a rule in any of the Treaties in an awkward or misguided way, unanimity is required among the Member States in order to reverse it: one lone dissenting voice is enough to uphold the unwanted judgement and the eventual undesired consequences thereof.<sup>53</sup> So, ordinarily, unanimity is

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rules of a Member State origin. See Mario Mendez, *The Legal Effect of Community Agreements: Lessons from the Court of Justice*, doctoral thesis EUI, defended on 18 June 2009 (not yet published).

<sup>51</sup> Case C-50/00 P, *Union de Pequenos Agricultores v Council* [2002] ECR I-6677 (no locus standi in Luxembourg for individuals adversely affected by EC law, thus leaving them without an effective remedy); Case C-355/04 P, *Segi and Others v Council* [2007] ECR I-1657 (principle of damages liability does not apply where it concerns EU acts); Case C-160/03, *Spain v Eurojust* [2004] ECR I-2077 (no action for annulment possible against adopted acts of Eurojust, notwithstanding their essentially legal character).

<sup>52</sup> The most notable instances of reversal have been the inclusion of the *Grogan* Protocol at Maastricht, to accommodate the fears of the Irish government following the ECJ's ruling in Case C-159/90, *SPUC v Grogan*, [1991] ECR I-4685; the adoption of the *Barber* Protocol so as to counteract the effects of the Court's judgment in Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, [1990] ECR I-1889. Over time, ECJ judgments have also occasionally been reversed by secondary EC acts, e.g. so as to neuter the effects of the rulings in Case C-450/93, *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051, and in Case 117/77, *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik*, [1978] ECR 825. Deirdre Curtin read the Treaty on European Union of 1992 as a grand attempt to curtail the powers of the Court, by excluding it from the Second and Third Pillar, in her famous exposé 'The Constitutional Structure of the Union: a Europe of Bits and Pieces', (1993) 30 *C.M.L.Rev.*, pp. 17-69. In recent times, the Court's powers were, on the whole, nonetheless visibly strengthened in the Amsterdam, Nice and Lisbon Treaties.

<sup>53</sup> Secondary law can of course often be adopted by a qualified majority of the Council. Due to the hierarchy of norms, such rules are however of little use when the desire is to counter unwelcome ECJ interpretations of primary law. Moreover, the Commission would have to propose such measures, Parliament would have to approve as well, and the attainment of even a qualified majority can still prove rather difficult. The recent hardships experienced in the attempted adoption of a new Working Time Directive, necessitated by the Court's judgment in Case C-151/02, *Landeshauptstadt Kiel v Norbert Jaeger*, [2003] ECR I-8389, illustrate the general point. See also Karen J. Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice', *International*

required to change the Treaties, but if the Court through its verdict *materially* amends them, unanimity is required to reverse this. Moreover, due to the fact that every Member State needs to ratify an amendment reversing a Court judgement successfully, and considering that the EU has been absorbing numerous new members in the past decade (a process likely to continue in the coming years), it appears increasingly unlikely that the Treaties will be amended ever again after the envisaged entry into force of the Lisbon Treaty. Therewith, a poignant lack of checks and balances, essential to the proper functioning of any constitutional system, looms large. Due to the cumbersome nature of the amendment regime, and the great uncertainty regarding the eventual success of this procedure, Member States are ever less likely to set it in motion.

As one scholar has pointed out, there is moreover the political cost / benefit calculation that comes into play here. For, those who have the power to destroy or cripple institutions will ordinarily only do so if the marginal gains exceed the marginal costs of doing so. They will balance the particular costs imposed by the Court on a specific Member State against the potential costs in disturbance to the EU architecture as a whole by moving against the Court. Only then if the Court conducts itself in a way as to suggest that it will consistently pile up ever greater costs against one Member or set of Member States, the cost / benefit calculus will turn against it. But, the ECJ's case-by-case method of decision-making makes it difficult for any Member State to anticipate whether its long-term losses from the Court are at any time greater than its long-term gains. This allows the Court to tinker constantly with its cost-benefit yield to each member, so as to avoid any of them concluding that it is clearly worthwhile to initiate decisive action against the Court.<sup>54</sup> But even then, because of the rigidity of the amendment regime, the political threat to correct the Court's decisions – and possible even weaken its role – is usually not credible, so that the Court may assume that political controversy will rarely or never translate into an attack on its institutional standing.<sup>55</sup>

Now of course, there is reason and purpose behind this rigidity, which is also known to other constitutional systems.<sup>56</sup> The concept of the rule of law and the general philosophy of constitutionalism presuppose that the legislator is bound by several basic rules, and prescribe that its decisions and the legal instruments adopted should be susceptible to judicial review. The control by an independent judiciary, whose decisions are not easily reversed, aims to avoid an absolute tyranny of those who happen to be in power, stamping out the notion that 'might' equals 'right'. As history has taught, this prevents or counters legislation that assails basic rights and fundamental principles, particularly where

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*Organization* 1998, pp. 121-147, at p. 136: "EC law based on regulations or directives can be rewritten by a simple statute that, depending on the nature of the statute, requires unanimity or qualified majority consent. A few of the Court's interpretations have been rewritten in light of their decisions, though surprisingly few. This is because ECJ decisions usually affect member states differently, so there is not a coalition of support to change the disputed legislation."

<sup>54</sup> Martin Shapiro, 'The European Court of Justice', in Paul Craig & Gráinne de Búrca (eds.), *The Evolution of EU Law*, Oxford: OUP, pp. 321-347, at 332.

<sup>55</sup> Alter, *op. cit.* (fn. 53), p. 138.

<sup>56</sup> In the US, amendments to the Constitution are only adopted when they have been proposed by two-thirds of the members of Congress or two-thirds of the states, and when three-quarter of the states (or of special conventions of the states) are willing to ratify them. In Germany, a proposed amendment to the Basic Law requires the support of two-thirds of the members of the Lower Chamber (the *Bundestag*) and of the Upper Chamber (the *Bundesrat*). The Constitution of India contains articles that can be amended by simple majority, those that can be amended by a two-thirds majority with a special quorum, and articles which pertain to specific federal matters and require the consent of (at least) half of the states and territories.

minorities are concerned: for in a democracy, a majority should not be left unchecked, as it will possibly further only its own causes, to the detriment of those who do not command large numbers. Therefore, the easier it is to tinker with a community's constitutional charter, the greater the risk that democratic rights and fundamental legal principles will be set aside by the governing majority, without the judiciary being able to stop it. Likewise, when a constitutional charter *is* rather difficult to amend, judges play a most useful role, since, through their judgements, they can bring the rules up-to-date with the prevailing sentiments and convictions of what the rules should be like.

Indeed, a high hurdle for amendments to the constitutional charter ensures the preservation of basic rights and fundamental legal principles. However, the European Treaties contain a great number of provisions that can be interpreted in differing and conflicting ways, without posing any ethical or moral problems, or harming particular minorities. Arguably, if the constitutional charter is easy to amend, the judiciary can play an active role in expounding the document, but it should refrain from doing so when it is characterised by rigorous rules of change – except when there is an overriding ethical or moral reason to steer a different course.<sup>57</sup> Again, this can hardly be said to have been the situation in the cases mentioned above. By amending the Treaties through judicial decision, the Court actually risks harming the position of one type of minority, or at times even a majority: the (groups of) Member States that prefer a different construction of a particular rule, that are unable to let their views prevail due to the unanimity requirement.

But what then to make of the extension of the competence of the ECJ, at subsequent IGCs? Apparently, all Member States *were* in agreement when various of the Court's judgements were incorporated into the Treaties (*e.g.* the *Chernobyl*-ruling at the Maastricht IGC), and when it was officially given jurisdiction in the Third Pillar, Title VI TEU (at the Amsterdam IGC).<sup>58</sup> One explanation is a lack of awareness of the Court's role and power among politicians. Also, those politicians that did entertain doubts about certain judgements, often have had to hoard their sentiments, while waiting for a next round of Treaty amendments. Therewith, the critical momentum and sense of urgency may have subsided come the IGC, as a judgement, by then, had already deployed its full effects.<sup>59</sup> Moreover, there is the usual political horse-trading during such conferences that enables consensus to emerge on a topic – such as the broadening of the jurisdiction of the judiciary – so long as the hitherto sceptical Member States grabs some alternative (and possibly

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<sup>57</sup> Some authors however follow a contrary argument, and contend that the Court is actually obliged to be activist in pursuing the Treaties' objectives, since they are so difficult to update through ordinary amendment. Hartley, *op. cit.* (fn. 2), has rightly rejected such reasoning: "[I]t is the *whole point* of the Community system as it exists at present. The Community was created by a set of Treaties and this is the foundation on which it rests. It was intended that its constitution could be amended only with the unanimous consent of all the Member States: this follows from its basic nature as an entity created by a group of sovereign states."

<sup>58</sup> The Court's decisions in the *Chernobyl* and *Les Verts* cases were indeed endorsed by the Member States, as evident from the new phrasing of (what was then) Article 173 EEC; similarly, the revolutionary 'unreasonable burden-test', applied by the Court in the *Grzelczyk*-case was later explicitly adhered to in Art. 6 and 14 of the new Citizenship Directive (2004/38). However, the supposed subsequent political approbation still does not do away entirely with the original argument that the Court nonetheless has overstepped the line: the judgments have only been approved of *ex-post*, whereby it should be remembered that Member States and their representatives did not face any real alternatives. In any case, they never made a truly voluntary choice as regards the policy to be pursued; the Court's decisions had already set out the course, defined the law as it stood, and were nigh impossible to overturn. Thus, the provisions subsequently agreed by the political bodies may equally be read as attempts to conserve the *status quo* in the fields concerned, and prevent any further judicial leaps in the near future.

<sup>59</sup> The aforementioned cost/benefit calculus involved may render the Member States hesitant to try to force the convening of an IGC immediately after an unwelcome judgment comes into being.

much more coveted) prizes in return. Indeed, at some points in time, Court judgements *have* been reversed, and its jurisdiction curtailed. But the rarity thereof can be directly attributed to the amendment regime, and emphasises the main point of its excessive rigidity.<sup>60</sup> In the European legal community, more awareness of the gravity of this almost complete lack of checks and balances would be both apt and welcome. Instead of profiting gloriously from this situation, the severely limited constraints on its actions call for severe moderation from the side of the Court.<sup>61</sup>

#### 4. Why Judicial Activism is Reprehensible

Despite much ink having been spilt on the topic, it still is not crystal-clear why judicial activism, especially when performed within a supranational frame, should be rejected. That is why it might be worthwhile to rehearse the three main reasons once more. None of these are specific to the European context, but some of them do apply there with particular force.

##### 4.1 The Drawbacks Inherent to Judge-Made Law

Court rulings, when compared to statute law, have a few obvious weaknesses: when they set general rules and precedents, they could contain less coherency and clarity than when a legislative body would have drafted and adopted them. This may also be due to the fact that judgements are often concocted in the ‘pressure cooker’, whereas statutes may be meticulously prepared and thoroughly reconsidered and revised, before they are officially presented and eventually attain binding force of law. As the judicial decision-making process is ordinarily shrouded in secrecy, those who cherish the idea of transparency are right to object to large doses of judge-made law.

When courts engage in (periods of) activism, these weaknesses ever more intensely make their presence felt. The more frequently judges deliver judgements that contain far-reaching and unexpected interpretations of the law, the stronger the need is for these judgements to be clear and consistent – and the more essential it will be that judges have had sufficient time for reflection on their possible ramifications. More likely than not however, these

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<sup>60</sup> Of course, the unanimity requirement is common in all treaty-based organisations in international law. However, in comparison, EU law has an extremely broad scope and covers an unprecedented number of domains; by consequence, the powers of the judiciary are much greater there than anywhere else. Besides, the main argument emphasised in the foregoing, that a high hurdle for treaty amendment ought to encourage judges to be reticent with ‘judicial amendments’, may equally apply in other international organisations.

<sup>61</sup> An alternative would be to strengthen those constraints, and enable better checks and balances. Former A-G Walter van Gerven, in *The European Union. A Polity of States and Peoples*, Oxford: Hart Publishing 2005, at p. 150-1, has proposed to alter the Treaties’ amendment regime, which also to his mind is overly rigid: “[T]he existing procedure in the European Union for the amendment of the founding treaties is clearly too inflexible. (...) Although that procedure may be adequate for major changes to the treaties, or for enlargement of the Union with new states, it is too inflexible too be used to reverse judicial interpretations of existing treaty revisions. To perform the latter function, a “fast track” amendment procedure would be advisable. Such a procedure should involve representatives of the Union institutions and of national parliaments meeting in an assembly. It should provide for decision-making procedures that would make ratification by the Member States superfluous if a decision is made by consensus.” Unfortunately, the Treaty of Lisbon has alleviated the rigidity only to a limited extent: Article 48 EU paragraphs 6 and 7 now provide for a ‘simplified revision procedure’, in which the European Council would be able to revise Treaty provisions through a unanimous decision, an Intergovernmental Conference would not have to be convened, and no national ratifications would be required. However, this simplified revision procedure may only be employed for alterations to Treaty on the Function of the Union, and is, moreover, restricted to amendments to Part Three of that Treaty.



rulings will be marred by deficiencies as regards clarity and consistency. Yet, once judges lay down strikingly novel rules that have a great societal impact, the inherent lack of transparency in the formative process becomes even more acutely problematic. Courts do not always have the necessary information at their disposal to deliver a ruling that truly does justice to a case, and to any similar cases in the future.

Naturally, by no means are legislators always able to see the big picture with full accuracy, to investigate all dimensions of the topic to be regulated, and to take note of all the possible hazards and pitfalls. Yet, where it concerns cases in which judges leave their usual frame of reference and arrive at the desired solutions only by applying methods of construction that are improbable, or plainly faulty, it would appear more appropriate for them if they would follow a minimalist approach, and leave the heart of the matter to be principally regulated by the legislator.<sup>62</sup> The activist court that takes no heed of this precept, and proceeds at any time to impose revolutionary solutions resting on shaky and doubtful foundations, does not realise that it unavoidably falters, and will be imposing imperfect rules and principles, due to the aforementioned drawbacks that beset all judges in equal measure.<sup>63</sup> As outlined above, many ECJ cases show signs of a court happily pushing forward, arriving at creative solutions that, on more than one occasion, are only remotely connected to the existing regulatory framework. Some of the past judgements have shortcomings that could well have been avoided, if the Court had been more aware of the fact that some decisions should perhaps not be taken by judges at all – or at least, not in the chosen form, or with the broad scope they gave them.

#### 4.2 A Weakening of Judicial Authority

A second reason why judicial activism may be considered reprehensible is that, potentially, it undermines judicial authority. After all, judges develop the rules, but any functioning legal system presupposes that judges are bound by the rules as well. Therefore, the more they distance themselves from the rules set down by the legislator, and come up with

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<sup>62</sup> On occasion, the Court does revert to this strategy, as evident from cases such as C-50/00 P, *Union de Pequenos Agricultores v Council*, [2002] ECR I-6677, para. 41, and Opinion 2/94, *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759, para. 30. Most peculiar is however the inconsistency prevailing in these judgments: in *UPA*, the Court feigned its inability to provide effective judicial protection, as in order to do so, it claimed it would have had to interpret the text of Art. 230 EC beyond its textual remit – while the only thing truly standing in its way was the Court's own inflexible interpretation of that provision, dating back to Case 25/62, *Plaumann & Co. v Commission*, [1963] ECR 95. In Opinion 2/94, the Court interpreted both Art. 308 and the objectives of the EC Treaty in a most disingenuous and restrictive manner, so as to deny competence to accede to the ECHR – while Art. 308 could very well have served as the required legal basis, had the Court been willing to follow its earlier expansive readings of that article, and had it been willing to show the same stridency and commitment as in the past, where a system of optimal observance of fundamental rights was concerned (as e.g. in Case C-260/89, *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, [1991] ECR I-3925).

<sup>63</sup> On the EU plane, this is particularly evident in free movement case-law, where the Court proceeds in almost complete disregard all political obstacles to the establishment of a comprehensive European welfare state, but instead, by judicial fiat, attempts to drive Member States further towards that destination. Yet, as Joerges and Rödl argue, “the respect for the common European legacy of *Sozialstaatlichkeit* seems to require both the acceptance of European diversity and judicial self-restraint whenever European economic freedoms come into conflict with national welfare state traditions” (Christian Joerges & Florian Rödl, ‘On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the ‘Social Deficit’ of the European Integration Project’, (2008) 4 *Hanse Law Review*, p. 19).

solutions that radiate their own tastes and preferences, the less authority the eventual judgements will have.

Plausible as this theoretical argument may seem, scholars have pointed out before that the experiences with activist courts have been rather different in reality. In the past century, despite hefty periods of activism, both the US Supreme Court and the European Court of Justice have actually gained in stature and public approval, and the authority of their pronouncements has increased rather than declined. For the ECJ, it is indeed true that more and more national courts have come to accept its guidance and leadership, and that the high-tide of revolt and obstruction appears to be long over. One may speak of an overall ‘habit of obedience’ to EU law.<sup>64</sup> Historically, only a few notorious exceptions have arisen, and these pockets of resistance mostly evaporated in the mid-1990s.<sup>65</sup>

This should still not spell the death of the theory that activism weakens authority altogether. Though the general picture is indeed one of obedience, few proper statistical inquiries have been conducted, and too little is known of cases where European law has not been applied where it should have been applied. It may be far-fetched to presume that, under the surface, there exists a wide-spread practise of non-compliance (whether inadvertently, due to lack of awareness of a European dimension to a dispute, or on purpose), numerous national cases are known in which preliminary questions have not been raised when they should have been raised.<sup>66</sup> Apart from this, as an earlier author has remarked, a few pathological cases or catastrophes may well be capable of ruining an otherwise sound structure completely and swiftly, and many instances of non-compliance, seemingly insignificant when taken individually, together may prove to be as crucial as one or two blatant instances of revolt, by slowly eroding judicial authority and legitimacy and building up pressure for court-curbing initiatives.<sup>67</sup> As such, extreme activism of the ECJ could in the long run still prove seriously detrimental to its authority – and should thus still be advised against.<sup>68</sup>

<sup>64</sup> Ernst-Joachim Mestmäcker, ‘On the Legitimacy of European Law’, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1994, pp. 615-635, at 623. Comprehensive empirical studies are few and far between, but those that have been conducted so far strongly support the ‘habit of obedience’ assumed by most lawyers; see Stacy Nyikos, ‘The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment’, (2003) 4 *European Union Politics*, pp. 397-419, at 403.

<sup>65</sup> The history of the opposition to EC law supremacy and direct effect in Germany and France is well known, and has been excellently recounted by Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: OUP 2001. Recently however, judges in the Czech Republic and Poland seem to display a more receptive attitude, and in its ‘Lissabon-Urteil’, the *Bundesverfassungsgericht* has repeated its claim that it will remain the final arbiter of the validity of European law in the Federal Republic of Germany. In the past, several national supreme courts, e.g. in Spain, Denmark and Italy, have taken a similar stance, yet it is doubtful whether they will ever exercise that power.

<sup>66</sup> L. Neville Brown, Tom Kennedy, *Brown & Jacobs. The Court of Justice of the European Communities*, London: Sweet & Maxwell 2000, p. 344; David Anderson & Marie Demetriou, *References to the European Court (Second Edition)*, London: Sweet & Maxwell 2002, pp. 177-180; Damian Chalmers, Christos Hadjiemannuil, Giorgio Monti, Adam Tomkins, *EU Law: Text and Materials*, Cambridge: Cambridge University Press 2006, p. 301.

<sup>67</sup> Hjalte Rasmussen, ‘Towards A Normative Theory of Interpretation of Community Law’, (1992) *The University of Chicago Legal Forum*, pp. 135-178, at 160.

<sup>68</sup> Cf. Samantha Currie, ‘Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court’s Ruling in *Metock*’, (2009) 34 *E.L.Rev.* pp. 310-326, at 326 (referring to Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice*, Judgment of 25 July 2009, n.y.r.): “*Metock* may prove to be the straw that broke the camel’s back. The dissatisfaction and threats of rebellion expressed in the aftermath of *Metock* may be just as much a response to the cumulative build-up of judgments on the free movement entitlement of Union citizens (and their codification in Directive 2004/38) as it is a reaction to the specific judgment itself. In this regard, tensions are clearly running high and the Court may need to tread carefully in future if it wishes to avoid

### 4.3 The Democratic Argument

The democratic argument against judicial activism is plain and simple: how can it be so, that as few as twenty-seven individuals, however wise and well-trained, exert such a great influence on the development of the Union and on the speed and direction of the integration process? Nowadays, judgements may even be delivered by a Chamber with only three or five judges. This is terrific for efficiency's sake – yet, should such a handful of lawyers really be allowed to determine the fate of 500 million EU citizens?

Now of course, the inherent undemocratic nature of all judicial decision-making is one of the feeble and perennial problems of public law. The counter-argument usually goes that it is simply the price to pay for judicial independence: the whole point of a judiciary is to have persons ready to solve disputes and deliver opinions without any form of bias or outside interference. Moreover, the concept of democracy should not be applied too rigorously here, as if only directly elected officials should be allowed to govern and legislate, and all other persons and institutions should not be permitted to do so. Rather, in a world that has grown accustomed to the idea of representative democracy, there are many entities and bodies that wield a considerable decision-making power over large groups of individuals, without being directly elected. The rules and decisions they make cannot be so easily disqualified just because they are undemocratic; these should be considered acceptable, as long as the deciding persons or institutions enjoy indirect democratic legitimacy, which entails they are subjected to some form of control by or on behalf of 'the people'. For the judges of the most powerful courts and tribunals, this is assured by their appointment ordinarily being conditional upon approval by a democratic assembly.<sup>69</sup>

At the same time, the democratic argument still appears to carry significant force where the role of the ECJ in the integration process is concerned. Firstly, although it is true that judicial independence is an equally great feature of the European legal order, this should not serve as a *carte blanche* or *va banque* notion that legitimises all judgements of the Court, and renders them wholly immune to criticism. Once it can be asserted that the content or purport of a ruling does not chime with the prevailing sentiments of what the law should be and of how a certain rule should be interpreted, judges may still rightly be accused of encroaching upon the legislator's prerogatives. Secondly, in modern day society, numerous rules and decisions are indeed taken by persons who enjoy indirect democratic legitimacy, which is rightly thought to be principally acceptable. However, one may still rightly *prefer* that decisions that are of the utmost weight and significance will only be taken with a maximum of support and input from the people affected by them. The fact that there are real and, admittedly, inevitable limits to the democratic character of the legislative and the executive process should not justify the conclusion that no continuous effort should be made to preserve as much democratic legitimacy and representativeness as possible in any form of law-making, including that of courts.<sup>70</sup> The judges in the ECJ are not subjected

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the risk of further uprising; and, moreover, thinking too of the procedural dimensions, of seriously undermining its own credibility as a judicial authority."

<sup>69</sup> *Inter alia* in the United States, where (in accordance with Article II, section 2, of the Constitution) judges to the Supreme Court and other federal courts have to be approved by a majority of the Senate; the Federal Republic of Germany, where (in accordance with Article 95 of the *Grundgesetz*) a special committee of elected representatives (the *Richterwahlausschuss*) is involved in the appointment to of judges to the *Bundesverfassungsgericht* and the other federal courts.

<sup>70</sup> Mauro Cappelletti, 'The Lawmaking Power of the Judge and Its Limits', *Monash University Law Review* 1981, pp. 15-67, at 53.

to any form of control, and enjoy only an extremely weak indirect democratic legitimacy. They are nominated by Member States and appointed by the Council, without any representative assembly having a say on the candidate.<sup>71</sup>

On top of this comes the ‘multiplier-effect’ that the democratic argument against judicial activism undergoes in the context of international and supranational organisations. For the amount of influence that non-elected judges can exert in the framework of such organisations is comparatively larger than within a statal framework, whereas the system of checks and balances is much more weakly developed there. The member countries have all become part of a larger whole and individually, they can no longer steer the organisations in a certain direction. But, this remains comparatively easy for the judicial organ, which is as said hard, or even impossible to curb. The democratic argument against judicial activism may thus carry even greater weight within the particular context of the EU, where it remains the least accountable and least representative institution of all. It can then justifiably be criticised when its unwarranted judge-made law pushes the integration process that little bit further ahead.

## 5. Conclusion

### 5.1 Some Inconvenient Truths

As the recent *Lissabon-Urteil* of the German *Bundesverfassungsgericht* underscores, the EU continues to find itself in a legitimacy crisis.<sup>72</sup> To the Member States and their courts, the authority of the Union’s rules and structures is still not self-evident, despite (or perhaps also because of) the many innovations the Court has supplied or encouraged through the years. The present article did not seek to promote any sort of ‘conspiracy theory’, as if a judicial fringe society in Luxembourg has been furtively attempting to impose its grand design upon the peoples of Europe. It appears misguided to try to accuse the ECJ of an everlasting prejudice in the vein of ‘When in doubt, opt for Europe’, as it is highly implausible that a permanent majority of ECJ judges could have been consciously promoting their cause since 1962. Yet, the remarkable outcomes of many of the resolved cases do speak for themselves, and reveal an inconvenient truth with regard to the Court’s role and practise through the years.

Undoubtedly, the Court always attempts to do justice, and strike the right balance between the interests of the European legal order, the institutions and citizens, and the rightful claims of the Member States that seek to avoid an uncontrolled growth and development of the EU. Also, a recent case like *Förster* proves that the Court is capable of restraint and of giving in to the wishes of the Member States and the European legislator, as long as the latter are persistent and unequivocal as regards the (interpretation of the) rules they consider correct.<sup>73</sup> Besides, all courts are naturally constrained by human and organisational

<sup>71</sup> See Article 253 TFEU. True, the Lisbon Treaty has introduced a ‘suitability evaluation panel’ in an advisory role (see Article 255 TFEU), but this constitutes only a very marginal improvement.

<sup>72</sup> BverfG, 2 BvE 2/08, 30.6.2009. For early reflections, see Daniel Halberstam & Christoph Möllers, ‘The German Constitutional Court says ‘Ja zu Deutschland!’’, (2009) 10 *German Law Journal*, pp. 1241-1258; Christian Tomuschat, ‘The Ruling of the German Constitutional Court on the Treaty of Lisbon’, (2009) 10 *German Law Journal*, pp. 1259-1261; Christoph Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones at Sea’, (2009) 10 *German Law Journal*, pp. 1201-1218.

<sup>73</sup> Case C-158/07. *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, Judgment of the Court of 18 November 2008, n.y.r. In this case, the Court upheld the Dutch condition of 5 year lawful residence in a

limitations; one may not expect the ECJ to be any different, and to be able to always deliver soundly motivated, thoroughly appealing and essentially righteous judgements. Thus, there will always be defects to the Court's rulings, if only because they are products of consensus, and as such, they will continue to be subjected to scholarly criticisms. Some argue however that a larger debate on the role of the Court is uncalled for, and that its overall behaviour must not be called into question at all.<sup>74</sup> As has been argued in the preceding paragraphs, one may nonetheless seriously ask whether doubts should not be cast on those strings of cases in which the ECJ has been activist beyond proper measure. Now more than ever, the awareness should be great that the open-ended character of the Treaties does not provide a justification *per se*, that there is little ground to assume that the Court is in some way obliged to promote further integration, and that the Member States and the other institutions did not wittingly resign themselves to the rulings in question as they have only scarcely been reversed. In the foregoing, the deeply negative aspects of such activism have also been stressed: for all their occasional merit, rules created, or creatively interpreted by judges may well be inadequate and ill-suited to regulate the situation at hand, and serve as truly workable precedents for the future; secondly, repeated bouts of activism threaten to weaken, and may in the long run erode the authority of a court altogether; finally, excessive rule-making by judges remains principally undesirable from a democratic perspective, and this is all the more so in the supranational context of the EU, which is severely marred by an imperfect system of checks and balances. These too are inconvenient, and hitherto neglected truths.

The Member States continue to assure themselves before and after every IGC that they remain the *Herren der Verträge*. Yet, in the absence of a fast-track amendment regime, it is in practise the ECJ that calls the final shots: unanimity amongst the supposed Masters of the Treaties is not so much required to countenance, as to counteract its wheeling and dealing. In this respect, the Treaties appear to be as firmly entrenched as a constitution, and the ECJ would seem to have some right in considering itself an equal of the US Supreme Court or German *Bundesverfassungsgericht*. Nevertheless, however one should qualify the current European Union from a legal institutional perspective, we can at least say with certainty what it is not: a (federated) nation-state. To some, this remains a lofty ideal, something to seek after with full vigour. Realistically, it should be admitted that this goal is now further away than ever, even when the Treaty of Lisbon enters into force.<sup>75</sup> The ECJ keeps reasoning along systematic and teleological lines nonetheless, on occasion delivering such ground-breaking rulings results as if it were a true Supreme Court operating within a

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Member State before an entitlement to student maintenance grants comes into being. This outcome chimes perfectly with the newly created rules (Directive 2004/38, Art. 24), even though the latter did not fully apply to the case at hand. Moreover, the Court was willing to depart from its previous bold ruling in *Bidar* (*supra*, fn. 23), which contained a much more contentious and doubtful interpretation of the (then) applicable rules.

<sup>74</sup> Editorial Comments, 'The Court of Justice in the limelight – again', (2008) 45 *C.M.L.Rev.*, pp. 1571-1579, at 1578: "[I]f properly argued criticism is sound, and often deserved, there is no reason to doubt the usefulness of the EU judiciary. We would be tempted to take over the observation of Robert Lecourt: what would EC law be without the Court?", adding however on the same page that "[t]here is little doubt that the Court of Justice is in favour of integration". Such matter-of-fact type of statements ought to be carefully considered; the last sentence precisely begs the question of whether this general posture should be considered acceptable.

<sup>75</sup> Arguably, decisive for any analysis here should be the 'exit-clause' of Article 50 TEU, introduced by the Lisbon Treaty. Such an explicit provision on voluntary Member State withdrawal is unthinkable for any true federation, and stipulations on secession cannot be found in *e.g.* the constitutions of the US, Germany, Spain, Canada, Australia or India.

truly federal setting.<sup>76</sup> It appears to subscribe to alleged visions of the *pères-fondateurs*, marching towards an ever closer union, where the citizens of the Member States are “destined” to be, primarily, citizens of the EU. But for the Court, the most inconvenient truth of all is that it is far from certain that this vision was ever realistically attainable, or that it is being supported at the present day by a majority of the European *demos* – if that exalted concept can actually be employed here at all.

## 5.2 Shape Up or Slip Out

There are several ways the Court’s role and practise can become more apportioned. Some small but significant adjustments, softening or curtailing its pro-integration stance, could suffice, without any major overhaul of the Treaties themselves being required.<sup>77</sup> For one thing, the style and make-up of the Court’s most important judgements should be appreciably modified. Admittedly, many improvements have been made in past years, and nowadays, some judgements are shining examples of clarity, sparkling with allure and oozing conviction. At the same time, in the wake of enlargement, a more concise style of drafting appears to have re-emerged, and as a result, the persuasiveness and sometimes even the overall comprehensibility have suffered.<sup>78</sup> Over the past decades, the (decisive paragraphs of) the most important constitutional judgements have continued to be magisterial, unequivocal, laconic and sibylline; unfortunately, in this regard, not that much has changed from the days of *Van Gend & Loos*.<sup>79</sup> One could reply that these are defects that are known to judicial decisions in many national legal systems as well.<sup>80</sup> Nevertheless,

<sup>76</sup> As Joerges & Rödl, *op. cit.* (fn. 63), p. 19, point out however, “[t]he ECJ is not a true constitutional court with comprehensive competences”, and is, for instance, “not legitimated to reorganize the interdependence of Europe’s social and economic constitutions, let alone replace the variety of European social models with a uniform Hayekian *Rechtsstaat*.”

<sup>77</sup> Cf. Niamh Nic Shuibhne, ‘Editorial: A Court within a Court: is it Time to Rebuild the Court of Justice?’, (2009) *E.L.Rev.*, pp. 173-174, at 174, who asserts that the judicial architecture needs “a fundamental rethink and rebuilding” for reasons of functionality: “Only through a manageable collegiate structure can a judicial body hope to pull together the threads of a coherent jurisprudence; to maintain them; and to work into that pattern the new legal questions, and solutions, that will continue to arise.”

<sup>78</sup> As observed by Michal Bobek, ‘Learning to Talk: Preliminary Rulings, the Courts of the new Member States and the Court of Justice’, (2008) 45 *C.M.L.Rev.*, pp. 1611-1643, at 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.” He points to Case C-273/04, *Commission v Poland*, [2007] ECR I-08925 as an example of a judgment that “contains an extreme lack of any real reasoning”. See also the array of cases referred to in Jan Komárek, ‘In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure’, (2007) 32 *E.L.Rev.* pp. 467-491, at 482-3.

<sup>79</sup> Tridimas, *op. cit.* (fn. 2); see also Mitchel Lasser, ‘Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court’, *Jean Monnet Working Paper* 1/03, at 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”; J.H.H. Weiler considers “the Cartesian style, with its pretence of logical legal reasoning and inevitability of results [as] not conducive to a good conversation with national courts.” (‘Epilogue: The Judicial Après Nice’, in: Gráinne de Búrca & J.H.H. Weiler (eds.), *The European Court of Justice*, Oxford: OUP 2001, pp. 215-226, at 225). Moreover, some fundamentally important judgments contain glaring and inexcusable mistakes or oversights: e.g. in the *Pupino*-case (*supra*, fn. 15), the crucial paragraph 34 originally read that there existed an “obligation to interpret national law in conformity with Community law” in the Third Pillar. Shortly after, the last three words were surreptitiously deleted from the official text of the judgment.

<sup>80</sup> An excellent overview of the critical debate in France, Germany and the United Kingdom regarding the proper style and tone of high court judgments provides Ulrich Everling, ‘Reflections on the Reasoning in the Judgments

the ECJ is one of the supreme judicial bodies in Europe. It is active at the highest level of jurisprudence, therefore one may entertain the highest of expectations, and demand a maximum of quality from its output.

Naturally, the curt and apodictic style arises partly due to the requirement of consensus and the prohibition on dissenting opinions. The arguments of those supporting the introduction of the latter are well rehearsed, and will not be repeated here.<sup>81</sup> Nonetheless, there are other ways to produce more convincing jurisprudence, and improving quality-control may well be possible within the present parameters, as long as all who are involved in the drafting of judgements are pressed to live up to higher quality-standards.<sup>82</sup> A visible attempt at more balanced interpretation could do wonders already – for, the one-sided systematic and teleological reasoning one still finds in many of the landmark cases remains hard to digest. In the landmark cases, all too often, not even half-heartedly attempt at a textual and/or historical interpretation is undertaken.<sup>83</sup> Here, a crucial problem will be time constraints and a work-load that is already heavily overburdening the judges.<sup>84</sup> Qualitative improvements of the Court's output will probably be hard to attain, as long as it has to deal with the vast and varied range of cases that now come before it. It would then be beneficial if the choice is finally made to fully make use of the opportunities granted by the Treaty of Nice, and to delegate more responsibility to the General Court and judicial panels.<sup>85</sup> Such further devolution would bring a three-tier judicial system closer, and lend credibility to the ECJ at the apex as a quasi-federal supreme court. This course of action has been recommended numerous times before.<sup>86</sup> Yet, one of the most convincing motives, the need for the Union's top court to produce the best case-law in the business, has not yet been weighing in enough. If, in the near future, the ECJ would finally be able to concentrate on a smaller number of the most important cases, it would be better able to do its work, which may eventually take most wind out of the sails of the whole discussion on whether it is performing its tasks properly.

As an auxiliary move, introducing more democratic oversight in the judges' appointment process would take some of the sting out of the aforementioned democratic argument against judicial activism. A greater say for Parliament in this process should not prove too hard to arrange, without there being a need to introduce US-style hearings, and all the

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of the Court of Justice', in: Kirsten Thorup & Jens Rosenlov (eds.), *Festschrift til Ole Due*, København: G.E.C. Gads Forlag 1994, pp. 55-74.

<sup>81</sup> For further discussion, see Arnulf, *op. cit.* (fn. 2), pp. 11-12.

<sup>82</sup> From the 21st century's 'canon of good governance', the requirements of proper and adequate motivation, transparency, coherence, consistency and predictability could well be imported.

<sup>83</sup> On the contrary, the Court does not shy away from distorting unequivocal textual or historical evidence harmful to its preferences. A case in point is *Pupino*, where, as asserted by Fletcher (*supra*, fn. 15, at 872), the suggestion of the Court of an intended parallelism between the First and the Third Pillar does not have any textual support at all, neither in the Treaty nor in the form of travaux préparatoires.

<sup>84</sup> See moreover the predictions for an explosive increase in cases, due to the 2004 and 2007 enlargements, by Bobek, *op. cit.* (fn. 78), p. 1641-1643, and due to the growing need for guidance in the field of European private law, noted by Peter Rott, 'What is the Role of the ECJ in EC Private Law?', (2005) 1 *Hanse Law Review*, p. 15-16.

<sup>85</sup> At the eve of the 20th anniversary of the General Court, its president Marc Jaeger sounded the alarm about its own explosive increase in workload, and the risks this poses for the continuity of justice. The solutions are quite straightforward: the number of GC judges can be increased infinitely (as Art. 254 TFEU permits) and additional judicial panels created. Jaeger pleads, amongst others, for a separate panel for trade mark cases.

<sup>86</sup> Shuibhne, *op. cit.* (fn. 75); Bo Vesterdorf, 'A Constitutional Court for the EU?', in: Ingolf Pernice, Juliane Kokott & Cheryl Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden: Nomos 2006, pp. 83-90, at 87-90; Weiler, *op. cit.* (fn. 41), at 215.

drawbacks that come with those. In so doing, a greater form of legitimacy could be attributed to whatever the judges in Luxembourg decide.

All these suggestions are, however, woefully insufficient if the ECJ does not manage to curb its enthusiasm for promoting further integration a little bit more. *C'est le ton qui fait la musique*, and at this particular day and time, a eurosceptic sentiment is holding sway. Politicians have joined the popular chorus in criticising the existing structures, and are trying to ease the fears about the creation of an EU super-state. One could claim that for the ECJ, there is no alternative; that it has, in a Dworkinian sense, always sought to guarantee 'integrity', and that its solutions still suit the 'rationality' and 'public morality' of the community within which it operates best.<sup>87</sup> But this underplays the amount of discretion that the ECJ actually has, in every single case before it. The Court might want to hide behind the Treaty façade and follow a platonic idea of what the EU should be like. But it is not up to judges to dictate their particular preferences under the guise that they are merely pronouncing what the law 'must' be. As a most distinguished former Advocate-General has admitted, already thirty years ago: if only the Court wants to, it may equally well find support in the Treaties to alter the path of the integration process, and steer towards a 'Europe des patries'.<sup>88</sup>

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<sup>87</sup> See Ronald Dworkin, *Law's Empire*, Cambridge (Mass.): Harvard University Press 1986, and cf. Ward, *op. cit.* (fn. 37), at 80-81.

<sup>88</sup> Walter van Gerven, originally in Dutch, 'Het rechterlijk besluitvormingsproces en de eenmaking van Europa' (The judicial decision-making process and the uniting of Europe), Brussel: Paleis der Academiën 1979, at 20.