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Judicial activism at the Court of Justice of the European Union

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Introduction

Established in 1952, the Court of Justice of the European Union (CJEU or Court) plays a vital role in the European Union (EU or Union). Often described as the ‘motor of integration’¹ ‘tucked away in the fairyland of the Duchy of Luxembourg’,² the institution ‘ensures that in the interpretation and application of the Treaties the law is observed’.³ Meaning, the Court has a pivotal role in maintaining and developing the legal field of the EU.⁴ Given the size and complexity of the cases the Court undertakes, the judgments are prone to attract criticism. The Court is often condemned for acting in an activist manner by furthering the Union’s policies without having the required competencies. However, to facilitate a healthier and more nuanced debate on the topic, the vast academic literature developed to protect the Court from such claims must be studied first. This paper does not aim to promote any position but rather offers viewpoints on how the Court’s conduct can be defended. It will first discuss the CJEU’s powers and how its activity fit the traditional definition of judicial activism. Followingly, the subject matter will be inspected from a political and institutionalist perspective.

Jurisdiction of the Court of Justice of European Union and definition of judicial activism

The competencies of the CJEU were laid out in Article 19 of the Treaty of the European Union (TEU)⁵ and Articles 251-281 of the Treaty on the Functioning European Union (TFEU).⁶ Article 19 (3) concerns the instances the Court has jurisdiction, while the rest of the treaty provisions stipulate the specific details. The Court, vested with the necessary powers, can interpret the Treaty provisions in preliminary rulings, and adjudicate on actions brought by legal entities and in other specific cases. As the Court has the final word in EU law disputes, it can generally be considered the highest source of law; having jurisdiction over all the Member States. However, the treaties do not contain any provision on how the Treaty should be interpreted. While it can seem to increase uncertainty, the current *status quo* provides the necessary freedom for the Court to achieve the end of an ‘ever closer Union’,⁷ enshrined in the common provisions of the TEU. The CJEU does this by adopting six different interpretation techniques; out of which four are deemed to be activists by academics.⁸ It is accepted that the

¹ Thomas Horsley, ‘Reflections on the role of the court of justice as the “motor” of european integration: legal limits to judicial lawmaking’ (2013) 50 Common Law Review 931, 931.

² Eric Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75(1) The American Journal of International Law 1, 1.

³ Consolidated Version of the Treaty on European Union [2008] OJ C 202/27.

⁴ ‘Court of Justice of the European Union (CJEU)’ (*Official website of the European Union*) <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en> accessed 10 February 2022.

⁵ Consolidated Version of the Treaty on European Union [2008] OJ C 202/27.

⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326/157-C 326/167.

⁷ Consolidated Version of the Treaty on European Union [2008] OJ C 326/16.

⁸ Fabien Terpan & Sabine Saurugger, ‘Assessing judicial activism of the CJEU the case of the court’s defence procurement rulings’ (2019) 41(4) Journal of European Integration 543, 545-547.

Court mainly relies on the progressive methods⁹ which, however, give rise to accusations of judicial activism.

Nevertheless, there is a disparity between what is traditionally understood as judicial activism and the criticism of the CJEU's conduct. The term, judicial activism, is usually understood as judges altering or disregarding the existing law based on their beliefs to further policy ends.¹⁰ Due to the term being adopted in a wide variety of circumstances, mainly in the US legal debates; some academics argued that the definition has lost its meaning.¹¹ This would also prove to be true when talking about the CJEU as the original definition does not take into account the various ways the judges can achieve an activist judgment. While there were attempts to overcome this theoretical obstacle by developing a multi-dimensional framework which would incorporate the various forms of judicial activism,¹² given the unique institutional setting of the EU and the Court's place within it, the new approach fails to embed a contextual consideration of what role the CJEU plays within the EU and how their judgements fit within the Union. Moreover, it also does not define the end aimed to be achieved by the judges and the length of they are going to achieve it. Thus, given the wide variety of subject matters the judges adjudicate, the criticisms of judicial activism can promptly become generalisations. This is a crucial point when disputing the actions of the CJEU since the traditional definition does not provide any more useful guidance, one must look at the Court's conduct from various perspectives. This essay will continue doing so from a political and institutionalist view.

Political analysis of the CJEU's judicial activism

The Court of Justice of the European Union operates as the European Union's judicial branch, therefore, interactions and conflicts with other institutions or Member States inevitably arise as the CJEU tries to mediate between interests and upholding the Treaty provisions. Therefore, given the highly political nature of the EU system, consideration must be given to how the Court's decisions fit within the political framework in order to better assess political the CJEU 'activism'.¹³

Vital in this process is understanding the overarching political goal of the Union: the integration of the Member States; enshrined in the Preamble of the TEU. This can give an explain why the Court always adopts a pro-Unionist approach.¹⁴ Prominent critics of the CJEU such as Rasmussen have argued that the Preamble is only a political statement and should not supplement the Court's decisions.¹⁵ Despite the fact that the principle does not have any specific Treaty provision, it was interpreted as the general aim of the Treaty to guide the judges in which direction they need to develop EU law.

⁹ *ibid.*

¹⁰ Margit Cohn & Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 *Can J L & Jurisprudence* 333, 334.

¹¹ Randy E Barnett, 'Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases' (2002) 73 *U. Colo. L. Rev.* 1275, 1275-76. See also Keenan D Kmiec, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92(5) *California Law Review* 1441.

¹² Bradley C Canon, 'Defining the Dimensions of Judicial Activism' (1983) 66 *Judicature* 236. See also Margit Cohn & Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model' (2005) 18 *Can J L & Jurisprudence* 333, 333-335.

¹³ Fabien Terpan & Sabine Saurugger, 'Assessing judicial activism of the CJEU the case of the court's defence procurement rulings' (2019) 41(4) *Journal of European Integration* 543, 543.

¹⁴ Gunnar Beck, 'Judicial Activism in the Court of Justice of the EU' (2017) 36 *U Queensland LJ* 333, 339-342.

¹⁵ Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study In Judicial Policymaking* (1st ed, Kluwer Academic Publisher 1986) 31-32.

The Preamble provides the judges a firm basis for their rulings so they will always have the opportunity to support a more pro-integrationist approach. Thus for multiple decades, the Court has relied upon the Preamble to expand the scope of EU law. This in return increased the Court's predictability and therefore, the legal certainty of the Union as the CJEU's approach was known to every practitioner. One academic has even called this aspect as the Court's 'mission' which in other terms, is enforcing the Union's philosophy.¹⁶ This shows the pivotal role politics can play in the Court's life.

Nevertheless, it is still not a dominant factor, judges have to respect the Treaty provisions but the fact that the CJEU's and the other EU institutions' overarching goals align could be a sign of the Court's subsidiary political motives. Therefore, if one wishes to criticise a judgment of the CJEU, one must start by giving a new direction to EU law and dismantling the idea of the 'ever-closer Union'.

However, the political ambition of furthering the integration of Member States requires the widening of the EU's competencies. As it can only be achieved by unanimous Treaty provisions, developing the community law with each Court decision is much more flexible. This can also be understood as a subsidiary motive of the CJEU. A recent example of how political policies are often supplemented by the Court's decisions can be seen in the cases of *Commission v Italy*¹⁷ and *InsTiimi Oy*.¹⁸ The rulings demonstrate how the Commission's aim for a shared EU military¹⁹ was complemented by the CJEU's decisions. The Court interpreted Article 42(2) TEU in a moderate activist approach in both cases, to open up the defence market to further the EU's policy.²⁰ Thus, the question arises whether under the 'pressure' of external political considerations on integration, to which the CJEU must adhere as they accepted the Preamble as their 'guiding light', can the Court still be regarded as activist. Adopting the approach of historical institutionalism could help to provide a more nuanced answer to the question.

The theory conceptualises that actions were taken by an institution 'lock-in' future decisions if they receive external positive feedback.²¹ Earlier choices based on the overarching goal of integration have subsequently predetermined the Community's actions. This 'path-dependence' can also be found in the case law developed by the Court.²² While precedent does not have a binding effect on the CJEU; litigants' reliance on previous cases and arguments restricts the court from effectively deviating from their earlier opinions.²³ This can be demonstrated through the Court's rulings developing fundamental rights. After an early denial in *Stork v High Authority*,²⁴ the Court accepted fundamental rights as an integral part of the EU's law system in *Stauder v City of Ulm*.²⁵ In *Stauder*, the Court has referred to the superiority of the

¹⁶ Mauro Cappelletti, 'Is the European Court of Justice "running wild"?' (1987) 12(1) European Law Review 3, 3-4.

¹⁷ C-337/05 *Commission v Italy*, ECLI:EU:C:2008:203 [2008] ECR 2008 I-02173.

¹⁸ C-615/10 *InsTiimi Oy*, ECLI:EU:C:2012:324 [2012] Digital Reports - general.

¹⁹ 'Defence: is the EU creating a European army?' (European Parliament News, Security)

<<https://www.europarl.europa.eu/news/en/headlines/security/20190612STO54310/eu-army-myth-what-is-europe-really-doing-to-boost-defence>> accessed 15 February 2022.

²⁰ Fabien Terpan & Sabine Saurugger, 'Assessing judicial activism of the CJEU the case of the court's defence procurement rulings' (2019) 41(4) Journal of European Integration 543, 549-552.

²¹ James Mahoney, 'Path Dependence in Historical Sociology' (2000) 29(4) Theory and Society 507, 512-514.

²² Susanne K Schmidt, 'Who cares about nationality? The path-dependent case law of the ECJ

from goods to citizens' (2012) 19(1) Journal of European Public Policy 8, 9-10.

²³ Alec S Sweet, 'Path Dependence, Precedent, and Judicial Power' in Martin Shapiro & Alec Stone Sweet, *On Law, Politics & Judicialization* (Oxford University Press 2002) 113.

²⁴ Case 1/58 *Stork v High Authority*, ECLI:EU:C:1959:4 [1959] English special edition 1959 00017.

²⁵ Case 29/69 *Stauder v City of Ulm*, ECLI:EU:C:1969:57 [1969].

Community law,²⁶ the principle formulated in the infamous *van Gend en Loos*²⁷ case, six years before *Stauder*²⁸ was decided. Reliance on earlier rulings provided positive external feedback to the Court which combined with the political ambitions of the Union developed a rich case law which was subsequently codified into the EU Charter of Fundamental Rights which as of today provides social and welfare rights to each and every EU citizen. Therefore, to answer the question of whether under the external political consideration on integration the CJEU has accepted as a guiding light, are the judges still activists; one must note that for decades the idea of an ever-closer Union has not attracted as much criticism as today. Breaking with the historical approach would not only cause legal uncertainty but could potentially be considered a politically radical method that critiques of the EU and CJEU would also certainly detest.

One could argue that the driving force behind this process was and is not historical institutionalism but the preferences of the Court's judges,²⁹ henceforth, acting activists. Despite there being no empirical evidence that would disprove this claim as we do not have any knowledge about how the judges arrive at their decisions,³⁰ a few points must be noted. Judges are never allocated to matters regarding their Member States. This removes all the possibility for a judge to affect the decision-making in an activist manner. Moreover, since the Court acts as a *collegium*, meaning there can only be unanimous decisions, the CJEU must adopt a policy end. Therefore, even if a judge would share an extremist, non-integrationist view it would be annulled by his or her peers. Furthermore, given the political nature of the EU and the fact that the Court had positive feedback about using the Preamble as guidance for decades, it would be hard to see why the Court would adopt a non-integrationist approach to all cases. This in return, has led to a situation in which practitioners, politicians and academics all can have a brief idea of what the court ruling will be which also increased legal predictability and certainty.³¹

To conclude, given the political ambitions of further integration by the EU and the difficulties that would arise when the Court would try to deviate from settled case law, the CJEU's decisions are constrained by political considerations which predetermine their outcomes, therefore the Court cannot be regarded as a completely activist institution from this political standpoint.

The institutional nature of the CJEU

Given the CJEU's above-mentioned motive and its place in a unique institutional setting, it can be perceived as operating as an international, constitutional court with an integrationist intent. This aspect will inescapably affect how the Court functions. Therefore, to better assess the claims about its activism, careful consideration must be given to its institutional nature.

International

²⁶ Case 29/69 *Stauder v City of Ulm*, ECLI:EU:C:1969:57 [1969] para 11.

²⁷ Case 26/62 *NV Algemene Transport-Expedite Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1 [1963] English special edition 1963 00001.

²⁸ Case 29/69 *Stauder v City of Ulm*, ECLI:EU:C:1969:57 [1969].

²⁹ Susanne K Schmidt, 'Who cares about nationality? The path-dependent case law of the ECJ from goods to citizens' (2012) 19(1) *Journal of European Public Policy* 8, 10-12.

³⁰ Michael Malecki, 'Do ECJ judges all speak with the same voice? Evidence of divergent preferences from the judgments of chambers' (2011) 19(1) *Journal of European Public Policy* 59, 67-71.

³¹ Gunnar Beck, 'Judicial Activism in the Court of Justice of the EU' (2017) 36 *U Queensland LJ* 333, 339-342.

As the CJEU provides a platform for public and private bodies to solve their disputes, who have *locus standi* under Articles 258-260 of TFEU,³² its international aspect starts to ‘blossom’. After *van Gend en Loos*,³³ natural and legal persons are also capable of enforcing Treaty articles, another sign of its dedication towards establishing itself as a cross-border body. Furthermore, Articles 3(5)³⁴ and 21(1)³⁵ set out the EU’s commitment to comply and advance international law. This also demonstrates that the Court considers itself to have an international orientation.³⁶

However, its recent reluctance to allow the accession of the EU into the European Court of Human Rights (ECtHR) in Opinion 2/13 and to enable a dispute to be solved by another international court in the *PL Holdings*³⁷ case displays how the Court think of itself as a separate entity constrained by the institutional balance of the EU. While it can seem like an activist move from the Court as they adopted a ‘dualist approach’ to the interpretation of international legal order,³⁸ taken into consideration the place of CJEU within the EU’s institutional framework; enabling an external court to deal with cases would severely damage the already complex institutional balance upon which the EU operates. Moreover, as the EU is not a signee of the ECHR, only its Member States, permitting the ECtHR to adjudicate in cases also concerning EU not just human rights law could severely call the CJEU’s authority. Moreover, as the underlying guiding principles of the CJEU and the ECtHR are not the same, the process would not provide any substantial aid for the CJEU other than showing its dedication to human rights.

Constitutional

As the Treaties define the functioning of the EU and its general principles, they can be perceived as a constitutional basis for a federal state.³⁹ As the CJEU is the institution that deals with legal issues arising from the interpretation of the provisions, in theory, it could be considered a constitutional court. This was reflected in practice; in *Les Verts v Parliament*,⁴⁰ the Court claimed the Treaties as a ‘basic constitutional charter’.⁴¹ As the EU constitution debate is just as extensive as the one on judicial activism, it would be impractical to give a full overview of it here. Nevertheless, it would be beneficial to inspect the criticism regarding the CJEU as a ‘constitutional court’.

The critique concerns the lack of specific provisions for checks and balances between institutions which in return could give a basis for activist interpretations.⁴² At this point it is important to note that the EU does not operate on the classical liberal idea of the separation of

³² Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326/160 - C 326/161.

³³ Case 26/62 *NV Algemene Transport-Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECLI:EU:C:1963:1 [1963] English special edition 1963 00001.

³⁴ Consolidated Version of the Treaty on European Union [2008] OJ C 326/17.

³⁵ Consolidated Version of the Treaty on European Union [2008] OJ 326/28

³⁶ Gráinne de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013) 20 Maastricht JECL 168, 183.

³⁷ Case 109/20 *Republiken Polen v PL Holdings Sàrl*, ECLI:EU:C:2021:875 [2021] Digital Reports - general.

³⁸ Gráinne de Búrca, ‘The European Court of Justice and the International Legal Order After Kadi’ (2010) 51 Harvard ILJ 1, 23.

³⁹ Ole Due, ‘A constitutional court for the European communities’ in Deirdre Curtin & David O’Keeffe, *Constitutional adjudication in European Community and national law: essays for the Hon. Mr. Justice T.F. O’Higgins* (Butterworth 1992).

⁴⁰ Case 294/83 *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166 [1986] ECR 1986 - 01339.

⁴¹ *ibid* para 23.

⁴² Frank Vibert, ‘Europe’s Constitutional Deficit’ in James M. Buchanan et al, *Europe’s Constitutional Future* (Institute of Economic Affairs 1990).

powers but given its size and complexity, it functions using the theory of institutional balance. It means that while there could be overlaps in the institutional structure, other EU bodies oversee and scrutinise other institutions on multiple levels to avoid any forms of abuse of power. Therefore, the EU cannot be understood as ‘monolithic’⁴³ but rather as an ever-evolving institution. In this environment, judges play a pivotal role in developing the law. Since the original intentions were not specified, the Court needs to fill the gaps in the Treaties.⁴⁴ This is rather the historical consequence of the Treaty wording and therefore, cannot be held liable for having to interpret the Treaties. Moreover, the CJEU provides a required platform to navigate competing interests. Their ‘doctrinal negotiation’⁴⁵ provides a successful method of considering the arguments of both parties and the non-binding nature of the rulings provide flexibility to better assess the parties’ interests in future cases. Therefore, the court’s activism can be further disputed given that the Court fulfils a required interpretation of the Treaty provisions in order to advance the integration and consider the litigants’ interests in a unique institutional setting.⁴⁶

At this point one could ask whether in this complex institutional setting why is it the judges that progress the law and not the elected representatives of the EU Parliament. These concerns are reflected in the debate around the judicialisation of the Court of Justice of the European Union. The term refers to the ‘government by judges’ by which the judicial branch can intervene in politics and substantially influence it.⁴⁷ Criticisms mainly revolve around the debate on the ‘counter-majoritarian’ issue. As laws are passed by the legislative branch and they are applied by the judicial. While in modern liberal democracies there exists a system of checks and balances, interactions arise between the branches. The ‘counter-majoritarian’ theory criticises the judges for overturning the laws passed by an elected body.⁴⁸ In relation to the CJEU, critics claim that the Court continuously goes *ultra vires* in its rulings while it is composed of unelected judges, adding to the top of the EU’s democratic deficit.⁴⁹ However, consideration of the institutional background of the EU can dispute these claims in relation to the activist allegations. As judges are selected from all the member states, working as a *collegium* it would be hard to see how they could further their ideas in that restricted legal environment. Moreover, as judges are selected by politicians, they could convey their ideas once they are in office.⁵⁰ This in return would increase the democratic image of the Union, given that the people inadvertently choose the judges for the CJEU. The Court overruling decisions by governments or even the EU Parliament can represent the views of those who are not displayed in the legislative bodies, however, legal supplementation complements it. Therefore, given the unique international and constitutional nature of the Court, claims about its activism can be disputed since the judges have to function in a restrained legal environment in which they must further the EU’s integrationist motives

⁴³ Iyiola Solanke, ‘Stop the ECJ?’: An Empirical Analysis of Activism at the Court’ (2011) 17(6) European Law Journal 764, 764.

⁴⁴ Henri de Weale, ‘The Role of the European Court of Justice in the Integration Process: A contemporary and normative assessment’ (2010) 6 Hanse Law Review 3, 10.

⁴⁵ Karen J Alter, ‘National Judicial Interests and the Process of Legal Integration in Europe’ in Karen J. Alter, *Establishing the supremacy of European Law* (Oxford University Press 2003) 38.

⁴⁶ *ibid* 39-40.

⁴⁷ R Daniel Kelemen, ‘Judicialisation, Democracy and European Democracy’ (2013) 49(3) Journal of Representative Democracy 295, 295-296.

⁴⁸ Alexander Bickel, *The Least Dangerous Branch* (Yale University Press 1986) 16-17.

⁴⁹ Andreas Follesdal & Simon Hix, ‘Why there is a democratic deficit in the EU: a response to Majone and Moravcsik’ (2006) 44(3) Journal of Common Market Studies 533, 534-537.

⁵⁰ R Daniel Kelemen, ‘Judicialisation, Democracy and European Democracy’ (2013) 49(3) Journal of Representative Democracy 295, 303.

Conclusion

As previously stated, this paper does not aim to promote either pro or contra-CJEU positions. However, it does aim to give a deeper understanding of the Court's political and institutional environment and the debates around them. As shown this complex setting does not enable us to apply the traditional notion of judicial activism; this leaves the door open for multiple perspectives about the CJEU's conduct. From a political perspective, the preamble provides an ultimate overarching goal for the 'ever closer Union'.⁵¹ While the utilisation of the Preamble as a legally binding provision is certainly debatable, it does provide legal certainty for the whole EU. Meanwhile, from an institutionalist viewpoint, it was shown how the CJEU thinks of itself as a separate entity within the complex institutional balance of the EU. This will certainly affect provisions as they not only have to take into account the legal and political provisions but they need to constantly consider how the judgements alter the EU's 'frail governmental balance'. Therefore, to better understand and formulate more nuanced critiques of the EU and CJEU one must consider the political and institutional context of each decision.

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