Chapter 12
The Judicial Activism of the European Court of Justice

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12.1 The Concept of Activism and Its Application by the European Court of Justice

1. The discussion regarding the judicial activism of the European Court of Justice (ECJ) was launched by Hjalte Rasmussen in 1986,[1] who labeled its practice in that way—not without some rebuttal voices provided namely by Joseph Weiler and Mauro Capelletti, who questioned the corresponding assumption.[2] The debate also took place in the field of Political Science with Anne-Marie Burley and Walter Maltti considering that the ECJ has an activist perspective developing beyond the control of EU's member states.

Even if one takes ECJ's activism for granted, two further aspects, regarding its nature, must be analyzed. The strength of such activism is the first aspect to be considered. The second aspect concerns the differences between activism at the level of states, on the one side, and activism at the level of international organizations, on the other, in particular those resulting from integration such as the European Union.

In order to analyze these aspects, one must begin by briefly considering the concept of judicial activism, the situations it entails and the areas in which it has become usual to consider the ECJ's practice to be of an activist nature.

The concept of judicial activism is a fuzzy one, entailing situations such as result oriented judging, invalidation of actions of other branches, failure to adhere to

[1] See Rasmussen (1986) and also De Waele (2010).
[2] See Weiler (1987), Capelletti (1987) and also De Waele (2010).

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precedent or judicial legislation and system building.[3] One can also distinguish two levels of intensity of judicial activism based on the degree of intervention of the judicial branch in the legislative and executive areas.

If one used this scale and applied it to the ECJ, its practice could be qualified as strongly activist, since it has actually overstepped into the mentioned areas as it will be elaborated below.

Another way of measuring the real impact of judicial activism, though, is to assess the corresponding inputs into a legal framework, namely the creation of new rules and the definition of positive obligations of citizens.[4] In this sense, strong and weak forms of activism can also be distinguished: whereas a strong activism has a direct impact in material regulation, a weak activism has only an indirect material impact, concerning procedural rules, sources of law and system building principles and concepts.

In a way, one could say that a strong activism is Kelsenian in nature—implying the judge to actually intervene in politics, as Kelsen admitted he would[5]—and a weak activism is of an Hartian[6] nature, interfering only in areas of penumbra.[7]

2. At the procedural and system building levels, one can identify three main areas of intervention of the ECJ: (i) supremacy of the EU Law; (ii) direct effect; (iii) extension of the judicial review powers, implied powers and enhancement of the internal market. At the material level, the protection of human rights, particularly LGBT rights, can be mentioned even if it is sustained that the intervention of the ECJ is mostly aimed, in that case, at enhancing European Union powers and not, primarily, at protecting rights.

Regarding the supremacy of EU Law in face of national legal orders, the well known decisions of *Costa Ennel*[8] *(6/64)*, *Internationales Handelsgesellshaft (111/70)*[9] *and Simmenthal (106/77)*[10] are the best examples of ECJ intervention. As it is known, supremacy has no direct basis on the treaties—that still being the case since the Treaty establishing the EU Constitution was not ratified and the Lisbon Treaty doesn't, expressly, foresee it. Even if one takes into account Declaration 17 annexed to the Final Act of the Intergovernmental Conference—considered by some as an interpretative instrument of the Treaty of Lisbon, in light of article 31 of the Vienna Convention[11]—one must still consider the primacy rule as previously developed by the ECJ, who was thus unquestionably responsible for a major innovation in EU Law.

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[3]See Zarbiyev (2012) and Harwwod (1996).

[4]See Bossuyt (2014).

[5]For further developments, see the contribution by De Brito in this volume.

[6]See Hart (1957).

[7]See Zarbiyev (2012).

[8]See *Costa v. Ennel* [1964] EUCJR 1141.

[9]See Internationales Handeslgesellshaft [1970], EUCJR 114.

[10]See Amministrazione delle Finanze dello Stato v. Simenthal SpA [1978], 629.

[11]See Quadros (2013).

The innovative role of the ECJ has been recently observed in the *Kadi* decision,[12] which aimed at establishing that EU Law prevails over International Law—at stake were UN Security Council decisions—and not only over national legal orders, thus taking the meaning of "supremacy" to an entire new level.

The direct effect doctrine, connected with the supremacy aspect, but not to be confused with it, was also a construction of the ECJ, developed with no express basis on the Treaties in cases such as *Van Gend & Loos (26/62)*,[13] *Van Duyn (71/74)*,[14] *Grad (9/70)*,[15] *Defrenne (43/75)*,[16] *Les Verts (249/83)*[17] *and Chernobyl.*[18] Moreover, despite rejecting the direct horizontal effect of some EU acts (namely directives and third pillar decisions, now extinguished), some decisions accepted their indirect effect, namely on the cases *Marleasing (C-106/89)*,[19] *CIA (C-194/94)*,[20] *Unilever (443/98)*[21] *Pupino (C-105/03)*.[22] The indirect effect was also accepted in the *Chen* case *(C-200/02).*[23] These cases serve as particular examples of the self-image of the ECJ as an adjudicator of competences and even as a constitutional builder.

It should be mentioned that there are different readings regarding the real meaning of the said decisions, some pointing out that the corresponding activism concerns mostly the super-constitutionality of Treaty provisions,[24] or that the Court has used its legal reasoning and interpretative methods as tools for the evolution of European social law.[25]

Either way, the ECJ's innovations have proven to be resilient, namely in face of efforts by member states to resist them. In the case *Metock (127/08)*,[26] the ECJ even required Ireland to grant some rights to third country family members of EU nationals.

The innovative nature of the doctrines of primacy and of direct and indirect effect can be seen, not only as lacking base in the Treaties, but also as challenging the principles of conferral and constitutional pluralism. The position of the ECJ, as established by those doctrines, may even entail a relaxation of the ultra vires

[12]See Yassin Abdullah. Kadi and Al Barakaat International Foundation [2008], EUCJR I-6351.

[13]See Van Gend and Loos [1963] EUCJR 3.

[14]See Van Duyn [1974] EUCJR, 1337.

[15]See Franz Grad [1970] EUCJR 825.

[16]See Defrenne [1976], EUCJR, 455.

[17]See Parti Ecologiste "Les Verts" [1986], EUCJR, 166.

[18]See Parliament v. Council (Chernobyl), [1990] EUCJR, I-204.

[19]See Marleasing [1990], EUCJR, I, 4135.

[20]See CIA Security International SA [1996], EUCJR, I-2201.

[21]See Unilever Italia SpA [2000] I-7535.

[22]See Maria Pupino [2005], EUCJR, I-5285.

[23]See Zhu and Chen [2004], I-9925.

[24]See Oreste Pollicino (2004).

[25]See footnote 25.

[26]See Blaise Maheten Metock and others [2008], ECJUR, I 6241.

doctrine of the EU acting, a doctrine that should only be annulled when there is a manifest violation of competences (case Honeywell, 610/10[27]).

Also in light of the *Mangold decision (C-144/04)*[28] there might be an evolution in the judicial review control since it has suggested that general principles of EU law may now qualify for direct effect.

Regarding the judicial review, some cases are worth mentioning taking into account that the ECJ fostered its jurisdiction to new, and previously unknown, frontiers. Amongst these cases we can mention *Foto-Frost (181/73)*,[29] *Haageman (269/81)*,[30] *SPI (267/81)*[31] *and Busseni (221/88)*,[32] adding to the already mentioned cases *Les Verts*, *Chernobyl, Pupino e Ecowas (C-91/05)*,[33] which extended judicial review to the then CFSP.

Regarding fundamental rights and the activity of the ECJ in such field, its system building activity is well known (even if some of the liberties contained in the initial treaties can be considered as fundamental rights) and the classic cases *Stauder (29/69)*,[34] *Nold (4/73)*[35] *and Rutili (36/75)*[36] worth mentioning. However, in the first period of its activity, and in the mentioned cases, the ECJ was more concerned in creating a framework for the protection of fundamental rights than in effectively protecting them, since it allowed significant restrictions to their content (Coppel and O' Neil 1992).

There are, however, some exceptions. In some areas the ECJ effectively created certain rules that can be considered as new material law. Regarding LGBT rights, one should mention cases *PU.S (13/94)*,[37] *Richards (C-423/04)* (regarding a British pension fund refusal to grant a male to female transgender an entitlement to an old age pension, which was considered unlawful discrimination), and *Grant*, *C-421/04*[38] (regarding the granting of benefits to same sex spouses). These cases are the ones most notoriously involving a material activist perspective, with the exception of Grant, were some found a form of "creative "self restraint"" (Oreste Pollicino 2004).

[27]See Solvay SA v. Honeywell Fluorine Products Europe BV, Honeywell Belgium Nv and Honeywell Europe NV [2012], EUCJR 1230.

[28]See Werner Mangold [2005], EUCJR—I 10013.

[29]See Foto-Frost [1987], EUCJR 4179.

[30]See Hageman [1974] EUCJR 449.

[31]See Amministrazione delle Finanze dello Stato v. SPI [1983] EUCJR 801.

[32]See Busseni [1990] EUCJR I-495.

[33]See Comm'n v. Counsil [2008],EUCJR I-3651.

[34]See Stauder [1969], EUCJR, 419.

[35]See Nold [1974] EUCJ, 491.

[36]See Rutili [1975], EUCJR, 1219.

[37]See P v. S. and Cornwall City [1996], EUCJR I-2143.

[38]See Lisa Jacqueline Grant [1998], EUCJR I-621.

One other area of active intervention of the ECJ is the area of residence and social rights. For example, regarding residence and social assistance for students under Directive 93/96, the court created new rights in the *Rudy Grzelezyk case* (at stake was a minimum subsistence allowance to a foreign student in the University of Louvain).

Notwithstanding these later cases, it can still be said that the ECJ developed a more activist oriented jurisprudence in formal terms—engaging in weak activism, in the aforementioned sense—than in material terms. This is not meant at denying the vast effects of the ECJ's system building activity, which exceeded by far the wording of the Treaties. However, one can argue that the inner nature of international organizations fosters the possibility of more activist jurisprudence.

In fact, one could argue that the ECJ's activism would be a strong one if the degree of innovation were taken into consideration. In light of the distinction made, it is a weak activism, though: the ECJ has been mostly focused in system building principles rather than in intervention in the social arena, protecting human rights. The main concern of the ECJ was strengthening the constitutional edifice[39] or acting as a constitutional adjudicator between powers and limitations of powers.[40]

12.2 Judicial Activism and International Organizations

Several aspects determine that an international organization is different from a State in what concerns the main features of the judicial function, that having consequences when conceptualizing and assessing judicial activism. Some of these aspects are also present in EU Law.

Indeed, the concept of the judicial function as applied to international organizations and in EU Law differs from the corresponding concept as applied to states. In the first case, courts may emerge as true political actors of organizations, transcending the position of passive dispute settlers that is traditionally reserved to states's courts.

Aware of the possible scope of their activity, some international bodies consciously establish limits to it. The rejection by the WTO Appellate Body of a law making power is worth mentioning.[41,42] Differently, the International Court of

[39]Waele de (2010). The expression is from Henri de Waele.

[40]Pollicino (Oreste). The expression is from Oreste Pollicino.

[41]In the case *United States Measure Affecting Impacts of Woven Wool and Blouses from India* (of 25 April of 1997), the WTO Appelate Body stated that it does "*not consider that Article 3.2. of the DSU is meant to encourage either panels of the Appellate Body to "make law" by clarifying the exiting provisions of the WTO Agreement outside the context of resolving a particular dispute.*", see DSR, 697.

[42]On this, see Zarbiyed (2012).

Justice for former Yugoslavia and the European Court of Human Rights have both considered that their judgments may have an impact in society.[43]

Several aspects determine a more activist perspective from the international courts.

Firstly, one must admit that international courts in general the ECJ in particular, in absence of a clear system of separation of powers setting limits to judicial practice, tend to have more leeway to engage in law making and to assume a policy guiding role. That is reinforced by the normal existence of advisory functions held by the judicial bodies and by the absence of a clearly organized judicial system. To these aspects, one should add the existing limited control—the political control being almost nonexistent and the specialized control incipient, given the undeveloped character of corresponding legal literature. The vertical separation of powers inherent to regional integration organizations, and to the EU in particular, also enhances the said leeway: the areas of intervention are large and the actions taken can cause preemption of member states competences, with the latter having difficulty in controlling such actions (in the EU, for example, the member states parliaments' control over the subsidiarity principle is limited to legislative acts and does not entail judicial acts).[44]

These aspects inevitably result in judicial activism. In the case of the ECJ, the institutional balance principle does not compensate for the lack of a clear separation of powers. The absence of a defined legislative power worsens the situation: the definition of legislative acts proposed at the Project of the Treaty Establishing a Constitution for Europe was never ratified and only after the Lisbon Treaty did it become possible to speak about a proper a legislative procedure.

The vertical division of powers is also not very clear within the EU, with some scholars believing the ECJ to be obliged to correct the treaties in that regard, promoting further integration, that resulting in further activism. And one must acknowledge that the indeterminacy and generality of the corresponding principles called for an active role of the ECJ.

One other aspect to consider is the lack of control over the ECJ's extended powers. Its rulings were reversed in very few situations. Two cases of reversion can be mentioned though. One is the Grogan Protocol at Maastricht, approved in order to accommodate the fears of the Irish Government arising from the ECJ ruling Case 159/90, Grogan.[45] Another example can be found in the Barber Protocol, intended to limit the effect of the Case C-262/82, Barber.[46]

In most cases, then, the ECJ could count on the cumbersome nature of the Treaties amendment regime to secure its rulings: unanimity as a revision process is

[43]See Ireland versus United States ECHR, Judgment of 18 January of 1978, series A 25, par. 154, Guzzardi v. Italy, Judgment of 6 November 1980, series A, n. 39, par. 86, and Karmer v. Austria, Judgment of 24 July 2003, par. 26. See also Zarbiyed, Fuad (2012).

[44]Zarbiyed (2012).

[45]See SPUC v. Grogan [1991] EUCJR 4685. Waele de (2010).

[46]See D. Harvey Barber v. Guardian Royal Exchange Assurance Europe [1990] EUCJR 1889.

required to reverse them, with amendment initiatives being frequently held back given the uncertainty of results.

Thirdly, the nature of the law applied by the courts and the balance of power framework in which the courts are inserted in—aspects that are present in EU Law—may determine a need for more intervention by the Court.

In fact, some argue that the nature of the treaties, and their indeterminacy regarding central aspects, encourages law creation and law making and demands a teleological method of interpretation (case CILFIT of 1982, process 283/81).[47] In fact, the treaties are Framework treaties that regulate few topics in exhaustive detail.[48]

The enumerated reasons explain why the international courts, and the ECJ in particular, are left free to develop an activist posture without facing the same kinds of reaction state courts face before other state agencies. It is clear that they are subject to less stringent regulations and checks and balances.

The same reasons justify why the jurisprudence of the ECJ regarding the nature of EU Law, and its primacy over national law and International Law (according to the aforementioned Kadi case), has not been challenged (apart from the temporary reaction of the German and Italian constitutional courts in the cases Solange Bechluss[49] and Fratelli Costanzo (103/88)[50] and recently by eastern European constitutional courts, such as the Czech Republic or the Polish Constitutional Courts).

12.3 The Costs of Judicial Activism

There is of course a price to be paid for the achievements of the ECJ. Traditionally, some arguments are used against judicial activism, such as the drawbacks in terms of coherence and clarity inherent to Judge-Made Law. The democratic argument (or the lack of democratic legitimacy of the judges) must be considered as well. Costs may be felt also at the level of judicial authority, which may result weakened (even if some believe that judicial activism can have the opposite effect, creating a culture of obedience).[51]

There are however some compensating aspects that deserve attention.

The coherence arguments, regarding the ECJ, may fail taking into account that the bulk of its activity is to create principles of law for the functioning of the system and not to produce material law and positive obligations, with the corresponding activism not disturbing legal coherence but enhancing it instead.

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[47]See CILFIT and Lanificio di Gavardo SpA [1982], EUCJR 3415.

[48]Pollicino (2004).

[49]See BverfGE, 37, 271.

[50]See Fratelli Costanzo [1989], EUCJR 1839.

[51]De Waele (2010).

A weakening of judicial authority is also something that (at least until now) has not reached the ECJ, also taking into account that the sanction systems within the EU are enough to avoid non-compliances.

The democratic argument persists however, being repeatedly used against the EU in general and the ECJ in particular. And at this level it is indeed hard to escape the fact that the ECJ activism raises delicate questions, as complex as they may interfere with the legitimacy of the whole integration process.

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