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The European Court of Justice: Do all roads lead to Luxembourg?

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Abstract

The increasing tendency to submit questions of great political and constitutional significance to the European Court of Justice prompts the question whether the Court has become the arbiter of all major problems facing the European Union today.

In discussing recent trends in case law, Judge Allan Rosas observes that de Toqueville's description of the importance of the US Supreme Court could apply to today's European Court of Justice. That said, the Court can only deal with questions that have been specifically submitted to it.

In this paper the author refers to the EU's external relations, asylum and immigration, economic and monetary policy, citizenship, the rule of law in general, and Brexit, as cases that would probably not have come before the Court were it not for the Treaty of Lisbon. Other explanations for the more recent reliance on the Court may be the inability of the political process to resolve the thornier issues facing the EU, and the fact that the Court is considered by many to be one of the more effective EU institutions.

Finally, the author stresses the need for the Court to honour its judicial mandate and to do everything it can to preserve its legitimacy, an objective also furthered by the depoliticised appointment of judges through the so-called 255 panel procedure.

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1. Introduction

In 1835, Alexis de Tocqueville described the Supreme Court of the US in the following terms:

In the hands of seven federal judges rest unceasingly the peace, prosperity, the very existence of the Union. Without them, the Constitution is a dead letter. To them, the executive power appeals in order to resist the encroachments of the legislative body; the legislature, to defend itself against the undertakings of the executive power; the Union, to make the states obey; the states, to repulse the exaggerated pretensions of the Union; public interest against private interest; the spirit of conservation against democratic instability. Their power is immense; but it is a power of opinion.¹

If de Tocqueville were to study democracy in Europe today, could he claim that this role – historically played by the US Supreme Court – is now shared, or even taken over, by the European Court of Justice (ECJ)? In fact, looking at the current case law and agenda of the ECJ, one could argue that the focus has shifted in this direction: the European Court has increasingly been asked to perform the functions of a constitutional court that has to decide burning issues of considerable constitutional and political importance, and this takes place in the framework of a constitutional order which is dynamic and far from settled.²

This state of affairs can be compared to that in the US situation, where the US Supreme Court has already shaped and clarified the constitutional order through extensive and longstanding case law. The number of important questions that still need to be decided seems more limited than in the EU context. It could also be argued that the reputation of the US Supreme Court is being negatively affected by the overt politicisation of the system of appointments.

Be that as it may, the ECJ seems to assume an ever greater role as the final arbiter of a broad range of issues, including of constitutional relevance, in the context of a vast body of Union law that is constantly evolving.

I will look, first, at recent developments in ECJ case law, with some concrete examples, and finally pose general questions about the role of the Court in the affirmation and development of the EU constitutional order and in this context, relating to the legitimacy of the ECJ

2. Examples from current case law

The main tasks of the ECJ consist of providing **preliminary rulings** to national courts that request such rulings on the interpretation of Union law and the validity of so-called secondary law; ruling on **direct actions** brought by the Commission against EU member states for alleged non-fulfilment of Union law (infringement cases) or by EU institutions or member states concerning the legality of acts adopted by Union institutions (in most cases so-called actions

¹ Alexis de Tocqueville (1835), *Democracy in America*, Vol. I, edited by Eduardo Nolla and translated from the French by James T. Schleifer (2012), Indianapolis, Liberty Fund, Online Library of Liberty, Part I, Chapter 8.

² Allan Rosas and Lorna Armati (2018), *EU Constitutional Law: An Introduction*, 3rd revised edition, Oxford: Hart Publishing.

for annulment). Most direct actions of the latter category are today decided by the General Court (the former Court of First Instance) but may be brought on **appeal** before the ECJ. It should be added that the ECJ and the General Court are not the only components of the EU judicial system but that an equally important role is played by the national judiciary of the EU member states, which are in constant dialogue with the ECJ mainly through the preliminary ruling procedure.³

The number of cases brought before the two Union Courts is constantly increasing (in 2018 849 cases were brought before the ECJ and 834 cases before the General Court) while these cases present an ever-wider range of subject matters. In the past the great bulk of cases concerned internal market matters in the strict sense (the four economic freedoms, competition and state aid, etc). Later, the internal market agenda was broadened to include issues such as the environment, social policy and consumer protection. Today an increasing number of cases concerns the area of freedom, security and justice, which includes immigration and asylum law as well as civil and criminal judicial cooperation. Other areas which have gained in significance lately include EU external relations and issues concerning economic and monetary policy.

By way of examples, the following refer to some recent judgements in the fields of EU external relations, asylum and immigration law, economic and monetary policy, citizenship, the rule of law in general and, finally, Brexit. It is not possible in this context to describe or analyse each judgement separately; only brief indications about the main issue or issues involved will be provided.

There is a fairly extensive and longstanding case law relating to **EU external relations** law; this case law not only has a bearing on EU external relations as such but is also relevant for an understanding of the EU constitutional and institutional order in general. During recent years, there have been a number of ECJ judgements relating to the procedures for approving international commitments, as regulated above all in Article 218 of the Treaty on the Functioning of the European Union (TFEU).⁴ Even more important from a constitutional point of view, however, are some judgements and Opinions given by the Court on the question of the competence to conclude international agreements (whether the competence is EU exclusive or shared with the member states) and the compatibility of such agreements with the EU legal order.

As a prominent example of the former type of cases, Opinion 2/15 concerning the competence to conclude a Free Trade Agreement with Singapore should be mentioned, in which the Court held that the agreement belonged to the sphere of exclusive competence,

³ See, e.g. Opinion 1/09 EU:C:2011:123 relating to a unitary patent litigation system. The envisaged system was considered incompatible with Union law as, in providing for an international judicial system, it would have deprived the courts of the EU member states of their powers as essential components of the EU judicial system.

⁴ See, e.g. Allan Rosas (2017), "Recent Case Law of the European Court of Justice Relating to article 218 TFEU", in Jenö Czuczai and Frederik Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice: Liber Amicorum in Honour of Ricardo Gosalbo Bono*, Leiden: Brill/Nijhoff, pp. 365-379.

with the exception of its provisions on so-called portfolio investment and on investor-to-state dispute settlement (ISDS).⁵ This ruling will, generally speaking, facilitate the conclusion of Union-only trade agreements with other third states as well. The compatibility of a draft international agreement with Union law was addressed in Opinion 2/13 relating to a draft accession agreement to enable EU accession to the European Convention on Human Rights.⁶ This Opinion has put the question of EU accession to the Convention on hold, in view of the fact that the Court found the draft to be incompatible with the Union legal order. The question of compatibility will also be addressed in Opinion 1/17, pending, which concerns a Comprehensive Economic Trade agreement (CETA) with Canada, and more precisely, its provisions concerning ISDS.

Another area which has preoccupied the ECJ recently is **asylum and immigration** law. The so-called refugee crisis, which peaked in 2015, has, of course, rendered this area of law particularly sensitive from a political point of view. The case law relating to the interpretation of Union acts such as the Dublin Regulation and three directives relating to refugees and persons eligible for subsidiary protection⁷ is extensive indeed.⁸

To mention just three examples, in the Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council*, the Court dismissed the actions brought by the two respondent member states against the legality of certain Union decisions establishing relocation quotas for asylum seekers in a situation of the sudden inflow of nationals of third countries into certain member states; in the Case C-490/16 *A.S.* the Court did not accept that a member state of first entry of persons who have irregularly crossed its border and which is thus the member state responsible for asylum requests could shift the responsibility to other member states simply by tolerating the entry and transit of a large number of persons wishing to transit its territory; in the Case C-638/16 *PPU X and X* it was held that the Union Visa Code relating to short-term visas does not apply if third-country nationals applying for such visas on humanitarian grounds in the embassy of a member state in a third country submit the application with the view to applying for asylum in the member state in question, and thus with a view to staying in that member state for more than 90 days.

The legislative and institutional developments in the area of **economic and monetary policy** which have taken place since the euro and debt crisis of 2009-11 have understandably triggered cases brought before the ECJ.⁹ In C-370/12 *Pringle*, the legality of the Treaty establishing the European Stability Mechanism (ESM) was challenged, inter alia as it was concluded as an intergovernmental treaty rather than in the form of a Union legislative act

⁵ Opinion 2/15 EU:C:2017:376. See more generally Allan Rosas (2015), "EU External Relations: Exclusive Competence Revisited", *Fordham International Law Journal*, 38: 1073-1096.

⁶ Opinion 2/13 EU:C:2014:2454.

⁷ Regulation (EU) No 604/2013 ('Dublin III'), Directive 2011/95/EU, Directive 2013/32/EU and Directive 2013/33/EU.

⁸ See, e.g. Rosas and Armati, note 2 above, 183 -191.

⁹ See, e.g., Rosas and Armati, note 2 above, chapter 14.

but was confirmed by the Court. The cases of C-62/14 *Gauweiler* and C-493/17 *Weiss* concerned European Central Bank programmes to bolster a sufficient inflation rate and liquidity by buying bonds in secondary bond markets. These programmes were held not to violate, inter alia, Article 123 TFEU, which prohibits the Central Bank from purchasing “directly” from public authorities of member states (as the programmes concerned purchases from private investors) and the legality of these programmes was upheld.

Since the creation, by the Treaty of Maastricht, of the concept of **EU citizenship**, the ECJ has been confronted with a string of cases normally concerning the interpretation of Articles 20 and 21 TFEU and Directive 2004/38 relating to the right to move and to reside of Union citizens and their family members.¹⁰ While according to Article 9 of the Treaty on European Union (TEU) and Article 20(1) TFEU, Union citizenship depends on national citizenship (nationality), the ECJ, in the Case C-135/08 *Rottmann*, held that because the loss of nationality may lead to the loss of Union citizenship as well, the national competence to regulate nationality is not unlimited (this question is also present in the Case C-221/17 *Tjebbes* (pending)). In a similar vein, the Court has, for example in the Cases C-34/09 *Ruiz Zambrano*, C-165/14 *Rendón Marín* and C-133/15 *Chavez-Vilchez*, held that third-country nationals caring for a child who is a Union citizen, may under certain circumstances have a right to stay, as forcing them to leave the territory of the EU would have as a consequence that the child would have to leave too, thus depriving the child of his possibility to enjoy his Union citizenship rights.

That the right to move and to reside may have various consequences outside the remit of Union citizenship rights proper is illustrated by the Case C-673/16 *Coman*, where the Court held that a third-country national who is lawfully married in a member state to a Union citizen of the same sex has the right to reside in another member state to which the couple wants to move, despite the fact that the latter member states does not recognise same-sex marriages.

The situation in two member states, in particular (Poland and Hungary), has caused a lively discussion about the state of the **rule of law**, including the independence of the judiciary in these countries and the judicial and other remedies that can be applied to rule of law concerns more generally.¹¹ As the predominantly political procedure for suspending member states’ rights contained in Article 7 TEU has run into a stalemate due to the requirement of unanimity provided for in Article 7(2) concerning the decision of the European Council to determine that there exists “a serious and persistent breach by a Member State of the values referred to in Article 2”, the question has been asked whether, and under what conditions, an infringement case could be brought against a member state deemed not to respect the principle of the rule of law, even independently of cases involving the application of a provision of Union law *in concreto*.

¹⁰ Ibid, chapter 10.

¹¹ See, e.g. Allan Rosas (forthcoming 2019), “The EU and the Rule of Law: A View from the European Court of Justice”, in *Essays in Honour of Joaquim Sousa Ribeiro*.

In a preliminary ruling case that raised the question of whether the reduction of Portuguese judges' salaries amounted to an infringement of the independence of the judiciary and which was not considered by the ECJ to relate to a concrete case of the application of a rule of Union law (C-64/16 *Associação Sindical dos Juizes Portugueses*), the Court, while holding that the reduction of remuneration was not serious enough to compromise the independence of the judiciary, held that for it to be competent to examine such situations, it was enough that the judicial body in question generally dealt with issues of Union law. This ruling, which was based on Article 19(1) TEU, according to which "Member States shall provide remedies sufficient to ensure effective legal protection in the fields of Union law", thus indicated that the principle of effective judicial protection, including the independence of courts and judges, can be enforced through the ECJ even if there is no application of Union law *in concreto* in a given case, provided that the court or courts in question are generally dealing with Union law matters (this condition seems today to be fulfilled with respect to practically the whole judiciary of a member state).

In light of this ruling, in September 2018 the European Commission brought an infringement case against Poland concerning the alleged lack of independence of the Polish Supreme Court (C-619/18 *Commission v Poland*). Already in October 2018, the Vice-President of the Court, and in December 2018 the Court, issued an Order prescribing, as interim measures, a halt to the implementation of the changes to the composition of the Supreme Court (which lowered the retirement age of judges and stipulated that sitting judges who had attained the new age limit were forced into retirement). Whilst Poland has subsequently revoked the measures as far as judges appointed before the revocation entered into force are concerned, the case is still pending before the Court.

There are also a number of other cases pending before the Court, most of which are requests for preliminary rulings (and most of these requests are made by the Polish Supreme Court), which concern the same problem of the independence of Polish courts (C-192/18, C-522/18, C-537/18), C-558/18, C-563/18, C-585/18, C-624/18, C-625/18 and C-668/18). Moreover, in a preliminary ruling given already in July 2018, the Court, at the request of an Irish judge, held that concerns relating to the independence of a Polish court which has issued a European arrest warrant against a person present in Ireland may, depending on the circumstances, justify a refusal to surrender that person to Poland (C-216/18 PPU *LM (Minister for Justice and Equality)*).

As for Hungary, some pending cases mainly concern other aspects related to the rule of law than the independence of the judiciary (C-556/17, C-718/17, C-66/18 and C-77/18).

Finally, whilst **Brexit** has mainly caused headaches for the political institutions and member states of the EU,¹² the ECJ has not been entirely spared from its effect, either. A case concerning the relevance of a European arrest warrant issued by a British court after the UK initiated, on 29 March 2017, the procedure for withdrawal from the EU, did not cause any

¹² There is already an abundance of literature on Brexit, see, e.g. the references in Rosas and Armati, note 2 above, 3.

particular problems as it is evident, in the light of Article 50 TEU, that the UK remains a full member of the EU at least until 29 March 2019 (Case C-327/18 PPU *R.O.*). A request for a preliminary ruling submitted by the Court of Session of Scotland caused much more discussion, as the ECJ was asked to rule on whether, and under what circumstances, a notification (such as the one made by the UK on 29 March 2017) of the intention to withdraw, may be revoked by the notifying member state. As is well known, in Case C-621/18 *Wightman and Others*, the Court, in a judgement of December 2018, ruled that there is a right of unilateral revocation, provided this is done before the withdrawal enters into force.

3. Concluding remarks

As can be seen from the above, the ECJ has recently been called upon to settle a number of issues that have been both difficult legally and sensitive politically. Has the Court become the arbiter of all major problems facing the EU today? No, certainly not. The Court is in any case not in charge of deciding what will come before it and the cases that do come before the Court in most cases concern specific questions that do not 'solve' all the problems facing the Union. That said, it is my clear impression that during recent years, the number of such sensitive questions coming before the Court has increased, compared to the situation, say, ten or 15 years ago.¹³

How can this trend be explained? First, the entry into force of the Lisbon Treaty, on 1 December 2009, has brought in its wake a number of issues which had not before been regulated in Union law, or regulated to a lesser extent. In fact, most of the cases considered above would not have come before the Court before Lisbon, or at least would have raised different points of law. Second, some of the cases have concerned problems that the political bodies, despite efforts in this vein, have not been able to solve (the obvious example would be the problems relating to respect for the rule of law). Third, the Court is considered by many as one of the few Union institutions that function efficiently. To the extent that this assessment is accurate, and I do see some merit in this view, it is, I would submit, due to the 'federal' character of the Court, which is independent from political pressure and not submitted to the vagaries of political decision-making in the EU.

What I have said so far raises the question of legitimacy. What is the legitimacy of 'unelected' judges, not subject to the 'will of the people'? It may be recalled, in this context, that while one of the arguments in favour of Brexit was presented as a possibility to free the UK from 'foreign' judges and to be ruled solely by English judges, when English judges (the High Court) decided that the notification of withdrawal from the EU required the involvement of the UK

¹³ The speaker joined the Court in January 2002.

Parliament,¹⁴ these English judges, too, were branded “enemies of the people” by a popular newspaper.¹⁵

Such language can be traced back to the French Revolution’s ‘Reign of Terror’ and is not in keeping with a modern concept of democracy, which includes fundamental rights and the rule of law, including the independence of the judiciary.¹⁶

That said, courts should be careful not to overstep their mandate. The quality of judgements is essential. The reasoning should be as clear and convincing as possible, the Court’s procedures and practice should be transparent and the members of the Court should be open to criticism from various circles. It is, in this respect, also important to look at the system of appointing judges and advocates-general. The Treaty of Lisbon has brought about a welcome change, according to which a panel of seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and a lawyer of recognised competence proposed by the European Parliament, should give an opinion on candidates’ suitability to perform the duties of a member of the Court. While the opinion is not binding on the appointing authority (the governments of the member states by common accord), it has in all the 15 or so cases when there has already been a negative opinion led to the withdrawal of the candidate in question and the nomination of a new candidate, who has subsequently received a green light from the panel.

This system, unlike the case for the US Supreme Court, has contributed to a gradual depoliticisation of the procedure. It is my impression, based on the experience of more than 17 years as a judge, that the members of the Court are highly professional and that whilst judges certainly may espouse different societal or ideological views, the Court is far from a political, or even semi-political, body. That said, a judge should be aware of the political context in which he/she is operating and the foreseeable consequences of their decisions. Moreover, the members of the Court are, of course, expected to adhere to the basic values of the Union, expressed notably in Article 2 TEU. Allow me to cite *de Toqueville* once again:¹⁷

So the federal judges must be not only good citizens, learned and upright men, qualities necessary for all magistrates, but they must also be statesmen; they must know how to discern the spirit of the times, to brave the obstacles that can be overcome, and to change direction when the current threatens to carry away, with them, the sovereignty of the Union and the obedience to its laws.

¹⁴ *Miller & Anor R (on application of) v Secretary of State for Exiting the European Union* [2017] UKSC 5 of 24 January 2017.

¹⁵ See, e.g. J. Israel (2015), *Revolutionary Ideas: An Intellectual History of the French Revolution from the Rights of Man to Robespierre*, Princeton University Press.

¹⁶ Rosas, note 11 above.

¹⁷ Note 1 above.