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**Judicial Interpretation or Judicial Activism?:
the Legacy of Rationalism in the Studies
of the European Court of Justice**

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Abstract

During the last two decades, law as a factor in European integration has attracted great scientific interest. Numerous studies and theoretical analyses have been published which have undertaken the task of examining and explaining the role of law in the progress of integration. The European Court of Justice (ECJ) in particular, as Europe's judiciary body, draws much attention in this context. However, the inflexible, mechanistic and universalistic notion of rationality that these works employ leads to serious misinterpretations and unjustified criticism regarding the role the ECJ takes in the course of integration. Within the frameworks of contemporary approaches the Court is perceived as just one more *political* player among other actors and institutions able to shape the EU in the pursuit of its own *rational* interests. By outlining the theoretical concept of *context rationality*, this article shows that the logics of law and judicial law making are based on a non-trivial and non-political rationality and cannot be understood appropriately without paying attention to the context of European law.

1. Introduction

Today, something remarkable and almost paradoxical shows up in the debates about integration through law and the European Court of Justice (ECJ): of all the different approaches and analyses offered by political science, none draws much attention to the law itself – as an independent context of legal reasoning and action. Law is just perceived as a variable that is dependent upon the actors' interests and their shortsighted wills to proceed in the course of integration. It is viewed from the exterior, as a mere *tool* of integration, while the interior processes, i.e. the rules of law, are not considered significant. Put another way, integration theory today treats the law as a black box: an object that has a shape, but an unknowable content. Accordingly, research in political science has been focused extensively not on integration *through law* (Weiler 1991), but on integration generated *by rational actors in the field of law*.

In its ability to shape the European law and the integration process the European Court of Justice has become the object of several analyses which characterize it as a powerful *rational* actor, able to shape the European law and the integration process by its “judicial activism.” “The Court of Justice is also a strategic rational actor” (Garrett 1995: 173) Geoffrey Garrett notes in an early study, and he is not alone in this appraisal. The concept of rationality and the rational actor model – which occupies a central position in scientific studies – became the primary explanation for the integration fostered by the ECJ's judicial lawmaking. Astonishingly, at this juncture, one encounters almost unanimous agreement among the different theoretical approaches to the concept of rationality. While the various integration theories and schools of thought – from neofunctionalism, through neorationalism and liberal intergovernmentalism, to supranationalism – offer an abundance of explanatory patterns, all are based on a generalizing, linear and mechanistic understanding of rationality. But is it tenable to explain the momentum of European law and the work of the ECJ simply by reference to a universal concept of rationality that was originally designed to explain political processes and the reasoning of political actors? Is law, understood as a social institution, actually only a mere pawn of rational actors' interests? Or is it rather that law constitutes a dimension of genuine legal rationality, a self-propelling momentum that shapes Europe's developing legal sphere?

This article will show that the logics of law and judicial lawmaking are based on a different kind of rationality than has been employed in diverse studies so far. The universalistic

and inflexible notion of rationality – that seems to work in parts of the political sphere rather than in the legal one – has been uncritically used to explain integration through law, and leads to serious misinterpretations about the role the ECJ can and must take in the course of integration. What is even worse is that, by assuming the ECJ could develop the law according some kind of political rationality or self-interested aim, these approaches call into question the legitimacy of the integration process as a whole.

As an alternative to the rationalist and actor-centered view of integration, I propose the concept of *context rationality*, which I outline by critically debating the contemporary research and continuing controversies generated by different rationalist theorists. My thesis proposes that there is not just one kind of rationality, but a multitude of rationalities that are dependent on certain social contexts. European law today constitutes such a context, and it should be perceived as a self-contained sphere of action and thought that self-generates the impetus for integration. Therefore, the role of the ECJ in the course of integration through law may only be adequately understood by examining the idiosyncrasies and rules of the law, i.e. the rationality of the law as an independent space of meaning and reasoning.

This article offers context rationality as an analytical tool for explaining legal integration in Europe. The article does not aim to justify the ECJ's judgments wholesale. Rather, the intent is to use context rationality to pave the way for overcoming the deadlocked and long-lasting scientific debates on the political role of the Court, which result in incomplete and inaccurate views of the role the Court plays in the integration process.

First, I will show that the different approaches towards European integration share a common understanding of reason and action in the legal sphere, an understanding that was originally invented to explain politically motivated integration processes. I will trace how the grand theories of European integration in circulation since the early 1990s have been transferred to legal integration, and still affect the current discussions about the ECJ. Second, the theoretical concept of *context rationality* will be outlined by considering insights from the “Interpretive Sociology” of Max Weber, and Ludwig Wittgenstein's works on the philosophy of language. In doing so, I intend to develop a novel approach that is critical toward a universalistic understanding of rationality. Finally, I will show how this approach can be used to develop a better understanding of the process of legal integration in the European Union.

2. The “rational politics” of legal integration

Since the early works of Hjalte Rasmussen (1986, 1988) and Joseph Weiler (1991, 1993, 1994), European law as a factor of integration has increasingly moved into the focus of political science research. Today, European law is no longer perceived as mere texts written in “constitutional treaties:” it is supposed to be an *instrument* for facilitating and advancing European unification. Accordingly, the law is understood to constitute a new and distinct political arena in which a variety of groups of actors – from private national litigants, to nation states, to the genuine European institutions – are trying to exert their influence and implement their interests (e.g. Granger 2006). The ECJ, being Europe’s highest court and therefore in a powerful position, is assumed to play a key role in this arena. Its influential judicial development of law case by case consistently had crucial effects on the integration process and became the subject of numerous analysis and critiques (e.g. see Burley/Mattli 1993, 1998; Alter 1996, 1998, 2000, 2001, 2009a, 2009b, 2009c; Conant 2002; Garrett/Keleman/Schulz 1998; Heisenberg/Richmond 2002; Höpner 2008, 2010; Hunt 2007; Kilroy 1999; Moravcsik 1995; Pollack 1997; Rasmussen 1986; Slaughter/Stone Sweet/Weiler 1998; Stone Sweet 1999, 2004, 2005; Scharpf 1999, 2006; Schepel/Blankenburg 2001; for an overview see also Conant 2007; Schepel 2000).

However, although all these approaches seem to offer different explanations, they all share a short and simple assumption that has led to considerable misapprehensions: that the European Court of Justice is a *rational* and *political* actor. Although this finding seems convincing at first sight, it contains many unanswered questions and implies some severe, unsolvable problems. To show how these questions and problems are interrelated, I will start with a short overview of some of the most popular and influential schools of thought in European integration theory, and the way they incorporate the ECJ and its position. This retrospective should be especially interesting, because more recent studies have continuously referred to the popular assumptions outlined by these theoretical frameworks. I will begin by discussing neorationalist, liberal intergovernmentalist, neofunctionalist and supranationalist scholars, and how these have tried to explain the integration happening in the legal sphere. After that, I will take into account how some more recent works have uncritically adopted some central suppositions and fundamental beliefs from these theories. I will show that assuming the ECJ is a political and rational actor is a misinterpretation of the rule of European law, and casts doubt on

the legitimacy of the whole integration project. I will argue that the conception of the ECJ used so far in the theories and studies of European integration is not able to draw a convincing picture of integration through law. The aim, from this vantage point, will be to offer a more convincing explanation for legal integration and to allow concrete predictions for the process of further integration.

Neorationalism

An early study from a neorationalist point of view was proposed by Geoffrey Garrett et al. (Garrett 1992, 1995; Garrett/Keleman/Schulz 1998). The explanatory strategy of neorationalists has been to show convergence in the interests of different groups of actors in judicial lawmaking. Basically, Garrett et al. had to solve the question of why the nation states have been willing to let the ECJ impair their sovereignty, although this obviously contradicts their vital interest in safeguarding their autonomy and latitude of political action. Garrett argues that, contrary to its appearance, progressive case law is quite in line with the interest of the nation states for two reasons:

First, the states find themselves in the following, fundamental economic dilemma, well known in rational choice theory as the free-rider problem: adherence to the common rules of the community is the preference of every member state; otherwise, the effectiveness of European law and all its advantages is endangered. At the same time, however, states strive to maximize their own benefits and tend to defect when they do not have to fear sanctions. One way of overcoming this dilemma, could be to establish a common legal framework that is safeguarded by a neutral institution (in this case the European Court of Justice), which guarantees general compliance with the *acquis communautaire*.

Second, the EU treaties and secondary law need to be interpreted, since the member states that originate these legislative acts are simply not able to anticipate all the cases and developments that may occur in the future. For that task, the states have to accept a common adjudication body that is able to decide from case to case how the law is to be interpreted. The ECJ performs this function of application and completion of the law for the EU (cf. Garrett 1992: 557).

In either case, members participating in a community adjudicated by the ECJ can expect more benefits than those who do not participate in institutionalized cooperation (cf. Garrett 1995: 172). States are therefore acting rationally when they accept the rule of law and the ECJ, as long as the benefits outweigh the disadvantages: “The benefits of accepting a decision are a function of the magnitude of the country’s economic gains from the internal market. Where the broader benefits a government derives from having an effective legal system underpinning the internal market outweigh the specific domestic costs associated with the court’s ruling in a given case, the government’s rational strategy will be to accept the decision” (Garrett 1995: 172).

From this perspective, rationality in law and other fields of action is calculable, predictable, and reduced to something that advances somebody’s interest. In a neorationalist perspective it follows to suppose that: “The Court of Justice is also a strategic rational actor” (Garrett 1995: 173). Thus, “the justices’ primary objective is to extend the ambit of European law and their authority to interpret it. [...] From the court’s perspective, the best decisions are those that both expand European law and enhance the court’s reputation for constraining powerful member governments” (Garrett 1995: 173). To make sure that its own legal decision-making and position of power is not contested, the ECJ – if it acts wisely – therefore has to foresee the reactions of the member states, to make sure a boycott does not undermine its authority and future influence. The Court has to keep the reactions of its opponents in mind and will only rule against national governments in cases where it can be sure that these will ultimately accept the decision (Garrett 1995: 181). The neorationalist perspective paints a picture of a court that is little more than a “constitutional court,” dependent on the rational interests and willingness of the member states to comply with certain decisions. The law here again is, and can only be, a dependent variable of the participating actors’ interests.

Liberal Intergovernmentalism

The liberal intergovernmentalist approach put forth by Andrew Moravcsik bears some essential resemblances to the neorationalist framework of analysis. It doubts the true and independent autonomy of the Court, and views supranational decision-making as the last step of a process that can only originate in the nation states. In the state, preferences are formed in a pluralistic process in which governmental officials and other political actors are pressured by domestic societal actors and the groups they form to enforce their interests. After national

preferences have been established, these will be stated and negotiated by the government on the supranational level (Moravcsik 1993: 480 ff.). In this approach, the presence of the ECJ must be understood as an attempt of “pooling” sovereignty on the supranational level (cf. Moravcsik 1993: 482, 1995: 612, 622 ff.). This kind of “merging” of state competences, indeed, is not much more than a summary of foreign political preferences and the interests of all the member states (see also Grimmel/Jakobeit 2009: 192 ff.). In other words, what is delegated to the ECJ is not the authority to act in trust for the long-term interests of the community of European states, but the task of providing certain benefits that lie in the short-sighted interest of individual states and their governments. “Pooling,” in a liberal intergovernmentalist understanding, means that the ECJ is perceived as just a repository of *national* interests: neither the law, nor the work of the ECJ is understood as genuinely European. So national support for the European law will come to an end on the same day that it is no longer in the best interests of the states’ officials: “Governments delegate or tolerate the delegations of authority in order to achieve the benefits of an entire stream of decisions interlinked by delegation” (Moravcsik 1995: 622).

The role of the ECJ in the liberal intergovernmentalist theory can be described as a servant of national interests, not as a servant of the law. The Court has to live with the persistent fear of being overruled or even suspended by the states and their governments if its adjudication does not match the aggregated interests of the member states. In this case, it seems astonishing that the states have borne the interference of the European judges, and what is characterized by Moravcsik as “radical judicial activism.” As an explanation for this “judicial anomaly” (Moravcsik 1995: 623), Moravcsik suggests that the states see themselves faced with a dilemma they cannot escape. For him, the main reason why they have been willing to accept the activism of the ECJ and its judges – and here he seems to turn Garrett’s argumentation upside-down – lies in the enormous follow-up costs that the governments have to face if they do not comply with the ECJ-judgments *every time*. “[N]on-compliance in a single case of the ECJ implicitly calls into question the enforcement of other EU laws” (Moravcsik 1995: 623; cf. id. 1995: 178; see also Sander 1998: 70 ff.). In case of an open rebellion against a certain judgment, the rule of the whole body of EU-law would be in doubt, because every state could begin to refuse decisions that are not in its direct interests, according to Moravcsik.

In liberal intergovernmentalism the European Court and the nation states are rational actors, though their preferences and their abilities to enforce their interests vary. The Court can

wield its influence and power only to the extent that nation states are willing to accept this. The agent is still accountable to the principal in this framework of analysis: he, as well as the law, is dependent upon the rationally calculated will and ongoing acceptance of other, political actors.

Neofunctionalism

Although neofunctionalism offers a distinct explanatory pattern and also arrives at another conclusion, it is based on the same generalizing and linear understanding of rationality, and implies a similar model of the law's role in the process European integration. The most important difference is that neofunctionalism, unlike neorationalism and liberal intergovernmentalism, emphasizes another group of actors in the field of law and lawmaking on the European level. In a neofunctionalist perspective like that of Burley/Mattli and Alter in early years, it is not nation states, but the actors below and above the level of national governments that are assumed to crucially influence the progress of integration; in particular, the European Court (its judges and advocates general), the Commission, national courts, and private litigants (cf. Burley/Mattli 1993: 58 ff.; see also Alter 1998). Due to this focus, neofunctionalism provides a different explication of the decisive factors in the ongoing legal integration of Europe. Integration in and by law here is perceived as a classical spillover process, propelled by supranational and subnational elites driven by their self-interests into an ever-closer union (cf. de Búrca 2005: 312). There is agreement among neofunctionalism, neorationalism and liberal intergovernmentalism, however, in how the actors are characterized: "The glue that binds this community of supra- and subnational actors is self-interest" (Burley/Mattli 1993: 60), and not an interest in the rule of law, or a belief in the values upon which the European community rests. In this regard, the ECJ and subnational actors do not differ from their opponents in the national governments.

The sole difference between sub-national and supranational actors, on one hand, and governments and other national officials, on the other, is their self-interest in European law and their abilities to enforce their wills. The actors emphasized by neofunctionalism are described as being in a better position of power, and therefore have been able to circumvent the national governments and expand their influence in the political sphere. The preliminary ruling mechanism (Art. 267 TFEU)¹ has been especially emphasized by neofunctionalists as placing the ECJ in a position to legally circumvent the states' authority (see Alter 1996, 1998; cf.

¹ ex. Art. 234 EC Treaty

Carrubba/Murrah 2005). Though the nation states try to slow down the process of legal integration to safeguard their political maneuvering room and to preserve their autonomy, the “concatenation of interests above and below the state gave a self-sustaining impetus to the process of integration” (Burley/Mattli 1998: 180 ff.). It is obvious that in this process of the struggle for influence, there is not much space left for either the law itself, or legal reason. This gets very clear in the explanation offered by Burley/Mattli: “[L]aw functions both as mask and shield. It hides and protects objectives in the purely political sphere. [...] Law can only perform this dual political function to the extent it is accepted as law. A ‘legal’ decision that is transparently ‘political’, in the sense that it departs too far from the principles and methods of the law, will invite direct political attack. It will thus fail both as mask and shield” (Burley/Mattli 1993: 73).

This is a remarkable thesis that implicitly relies on the “language and logic of law” (Burley/Mattli 1993: 44) and the common bonds of European law. To fulfil these two functions (1. as a mask, and 2. as a shield), the law must already be acknowledged as a simultaneously independent and binding context.

1. *The law as mask*: The recognition of the rule of law is reflected in the fact that the true motives behind legal reasoning always have to be covered by a mask of legalese. This means, for example, that the ECJ cannot justify its ruling with an interest in “prestige and power” (Burley/Mattli 1993: 64), but has to find legal arguments to make its decisions acceptable to others, especially the state governments. The latter then cannot rebel against the Court, because it has camouflaged its true reasons: “The courts’ effectiveness in advancing its own agenda thus depends on how convincingly it speaks as the technical and apparently non-political voice of ‘the law’” (Mattli/Slaughter 1995: 185 ff.).

2. *The law as shield*: As far as the Court uses legal arguments, all opponents of its ruling are forced to do the same in the legal domain. The critics of the ECJ therefore have to use the language and logic of law to counter the judges’ claims. Although a state might have economic or political interests in a certain case, it might not be able to argue convincingly by referencing these interests: “... overt political arguments are illegitimate” (Mattli/Slaughter 1998: 196). The law imposes certain rules in the legal game that shield it from criticism.

In Neofunctionalism the law can be used or misused by actors, (and this goes beyond the neorationalist and liberal intergovernmental approaches), in order to camouflage the ECJ judges' true interests behind a veil of legalese. The great advantage the ECJ has in this game, however, is the fact that it is in the position of interpreting the law and therefore is able to *decide* which arguments are legitimate and which not. Thus, it is not the law, but the will of the Court that rules the decision-making: the language and logic of law are only a pretense (see also de Búrca 2005: 316 ff.).

Supranational Governance

In a more recent theoretical approach developed by Alec Stone Sweet et al., the ECJ and the EU law are characterized as part of a broader supranational governance structure. In this context Stone Sweet distinguishes between dyad (as a direct exchange pattern between two disputants) and triad (an indirect exchange pattern with two disputants and a dispute resolver body) constellations (cf. Stone Sweet 1999: 148 ff.). The core of a governance perspective is seen in the latter, the “triadic dispute resolution.” The precondition for the development of such an institution is the existence of a normative structure, i.e. patterns of behavior that have been consolidated over time and that are the precondition for any social interaction. At the same time, “[b]ehaviour that responds to these opportunities, once locked in (e.g., in dyadic forms), reinforces normative structure” (Stone Sweet 1999: 151). Transferred to the European legal system and the Court of Justice this means: “Once fixed in a given domain, European rules – such as relevant treaty provisions, secondary legislation, and the European Court of Justice’s case law – generate a self-sustaining dynamic that leads to the gradual deepening of integration in that sector and, not uncommonly, to spillover into other sectors” (Stone Sweet/Sandholtz 1997: 299).

To generate and uphold this self-sustaining dynamic, it is necessary for all involved parties (national interest groups, member states and their governments, private litigants and their advocates, and also national and supranational judges), to share a continuing interest in the triad institution. The value of an institution like the ECJ, therefore, is dependent on the benefit that actors expect from it.

In this supranationalist framework rationality also plays a key role: “People are rational in the sense of being purposeful and goal-orientated” (Stone Sweet 2004: 5), and “...all legal actors

are instrumentally rational, in the sense of generally pursuing their own individual or corporate interests, however defined” (Stone Sweet 2004: 37). Stone Sweet and Brunell see the main benefit of an adjudication body as the cost-reducing function it pursues (cf. Stone Sweet/Brunell 1998: 64). The ECJ performs this function to the extent that it produces common rules “that serve to reduce the transaction costs, enhance the legal certainty, and stabilize the expectations of those engaged in or contemplating exchange” (Stone Sweet/Brunell 1998: 64). By doing so, the Court can be seen as the agent of the member states.

On the other side, the ECJ also plays an active role in this process, which directly emerges from the preferences of the Court and the interests of the judges (cf. Stone Sweet 2005: 39). What are these preferences? The answer Stone Sweet proposes reminds us of the neofunctionalist approach and the concept of law as mask and shield (see above): “Judges, I expect, will seek to maximize, in addition to their own private interests, at least two corporate values. First, they will seek to enhance their legitimacy, vis-à-vis all potential disputants, by portraying their own rulemaking as meaningfully constrained by, and reflecting the current state of, the law. Second, they will work to strengthen the salience of judicial modes of reasoning vis-à-vis disputes that may arise in the future. Propagating argumentation frameworks allows them to pursue both interests simultaneously” (Stone Sweet 2004: 37).

Hence, the law in itself is, in the analysis of the supranational approach, subsequent to the partly private and partly institutional interests of different actors. Hence, it is not the rule of law that governs the EU, but the interests behind the law. The common European law is not developing in compliance with common judicial claims or legitimate forms of argumentation, it is only superficially characterized by these. In the understanding of Stone Sweet, the law is just a dramatic performance on the grand stage of the ECJ.

Recent Studies and Critiques

All these “classical” rationalist studies and theoretical texts on integration through law had and still have a great impact on the perception of the European Court and its work. Mainly based on the rationalist explanations offered in the early stages of European integration, it has become a general opinion that the ECJ has ambitious and self-interested aims in policy-making and shaping the course of integration. This belief has led to some severe criticism, not only in

political science, but also in public, political discussions about the future of Europe. Among others, the former German president and president of the federal constitutional court, *Roman Herzog*, has sharply criticized the ECJ. In an article published in one of Germany's largest newspapers entitled "Stop the European Court of Justice: Competences of Member States Are Being Undermined – The Increasingly Questionable Judgments from Luxembourg Suggest a Need for a Judicial Watchdog" (Herzog/Gerken 2008), Herzog intervened against the decisions made in Luxembourg. He argued that the ECJ was created as a mere "arbitrator to mediate in the interests of the EU and those of the Member States," yet now "the ECJ undermines the competences of the Member States even in the core fields of national powers" (ibid: 5). This dark appraisal of the Court's work was abetted by the several political science analysis published in the last years that share the presumption of a politically motivated, rational acting, and interest-driven Court of Justice:

In two recent studies, *Höpner* concludes that now it seems to be an acknowledged fact in law, political science, and sociology that the European Court, by expanding "European law extensively ... has become an 'engine of integration'" (Höpner 2010: 3). It is practicing judicial activism and is leading the EU to an ever-closer union in law without being democratically authorized to do so. Under the title "Usurpation Instead of Delegation" (2008), Höpner tries to show how the ECJ has "radicalized" the integration of the common market. Drawing on neorationalist, liberal intergovernmentalist, and neofunctionalist theoretical assumptions (see above), he claims that: (1.) the ECJ takes advantage of different time horizons strategically, (2.) the Court is able and willing to profit from the high costs of coordination within and between member states, from (3.) the inability of politics to react on judicial activism, and from (4.) the heterogeneous interests of those who are affected by its judgments (Höpner 2008: 26 ff.; cf. Höpner 2010).

Scharpf is very critical of the "Court's power of judicial legislation" (Scharpf 2006: 852). For him, there seems to be no doubt that the European Court is a political actor, or is at least "able to exercise policy-making functions" (ibid: 851). Even worse is the fact that the ECJ's political interests are based on some kind of "'liberal' program of liberalization and deregulation" that "may presently be undermining the 'republican' bases of member-state legitimacy" (Scharpf 2009: 245). In Scharpf's view, the decision-making of the Court is illegitimate because it is

perceived to be political, obviously motivated by interests that enhance the erosion of the nation state and its core competences.

Alter, drawing on neofunctionalist and historical institutionalist insights, also shares the central assumptions offered by the rationalist “classics” of integration theory. In several studies the ECJ is characterized as a “political actor in Europe” (Alter 2009a: 5), equipped with significant “political power” (2009c: 287) and marked by the will “to expand its own authority” (2000: 513). In “aggressively interpreting and enforcing ECSC rules” (2009a: 8) and expanding the European law into the national legal systems “... the ECJ has been so exceptional” (2009c: 289). Also, Alter shares the view of the judicial activism and strategic rational behavior the ECJ used to enforce its interests: The “ECJ used legal lacunae to seize new powers and delve into areas that member states considered to be their own exclusive realm” (Alter 2000: 513), and “numerous cases have allowed the ECJ to develop EU law incrementally, a strategy that has been important in building support for its jurisprudence and enhancing the effectiveness of the EU legal system” (ibid: 516).

Josselin/Marciano also employ the rationalist assumptions and highlight the principal-agent-relationship between the Court and the EU member states by trying to show “how a legal agent undertook actions and made decisions with political consequences” (Josselin/Marciano 2007: 72). In their framework of analysis, as in the earlier theoretical approaches, European law is perceived to be far from independent and accepted as an institution possessing intrinsic value. It is dependent on the ECJ’s “right to go beyond the interpretation and enforcement of existing rules [which] necessarily leads to a kind of irreversible shift of power from the (political) principal to the (legal) agent” (ibid: 72).

Kenney focuses on the ECJ and its power position vis-a-vis other actors in the EU to explore the “‘activist’ nature of the court and the ‘juridical’ nature of politics.” In her conclusion, in accordance with the mainstream of rationalist integration theories, the “ECJ has used its judicial power to promote greater European integration” and by doing so “expanded its own power and transferred power to national courts at the expense of member states” (Kenney 2000: 597).

But it is not just theoretical debates that are still influenced by the uncritical acceptance of rationalist theoretical assumptions. Recent empirical studies, like the one by

Carrubba/Gabel/Hankla (2008), are also centered on the “strategic behavior by judges in the face of political constraints” (ibid: 449). These do not even consider that there could be more than just strategy and rational interest enforcement behind integration through law in Europe, merely providing evidence or counter-evidence for rationalist assumptions. The law as a factor of integration, interestingly, is still excluded from these studies and, therefore, is not taken into account as an intervening variable (cf. also Stone Sweet/Brunell 1998).

Conclusion

The major theoretical debate on the role of the European Court of Justice started in the 1990s, when neorationalist and neofunctionalist, and later, liberal intergovernmentalist and supranationalist scholars recognized that such a debate was overdue given the growing influence of the Court in the previous decades. The need for discussion also stemmed from the fact that integration theorists had not yet tried to develop an approach to explain the rising influence that judge-made law had on the building of the European Community. The existing “grand theories” that had already been invented and broadly tested in political science suggested themselves as explanations (for an overview cf. Grimmel/Jakobeit 2009). These, however, had been primarily invented to explain integration implemented in the political arena and advanced by political actors and, without doubt, had been quite successful in making the European integration process understandable. On this basis, it seemed only natural to incorporate the ECJ into these theories. As a matter of fact, the Court was widely perceived to be just one more supranational *political* actor – like the commission or the parliament – steadily advocating for deeper integration (cf. Alter 2009b: 44). It was assumed that the ECJ, too, would engage in pro-federalist politics (see also Josselin/Marciano 2007) by way of judicial lawmaking, at the same time as it was being confronted with the nation states trying to keep and preserve their influence on the European level. And indeed, it looked like the Court was quite successful in expanding and implementing the supranational European law into the national legal systems of the European states.

At this point, it is mainly the intergovernmental skeptics of an ever-closer union who see themselves confronted with a difficult and puzzling set of questions that could not easily be solved within their theoretical framework: how can the continuing transfer of sovereignty towards the European level, which was enormously accelerated by the extensive legal interpretations of the ECJ, be explained? Why have the nation states accepted this erosion of their

sovereignty and control, when they are still supposed to pull the strings of integration? Why did the principal let the agent take over the task of development in law? Why did the national governments not develop the supranational law by themselves, and let the Court occupy parts of their legislative reliability?

The short answer to these pivotal questions has been unanimously proposed by integration theory, and has become a popular and widely uncontested belief: the nation states and the ECJ are *rational actors* and the development of the EU-law case by case so far has obviously been in the rational interest of all involved parties. Ergo, the judicially-driven expansion of European law into the states and their legal orders is a *rational* decision that is therefore, and only therefore, politically acceptable. But what does this exactly mean? Which kind of rationality can be ascribed to a court, an institution that consists of twenty-seven judges who come from different European countries with distinct legal traditions, all trained in their national laws and legal traditions for many years, and now sitting in different constellations in the eight different chambers of the ECJ? Did these judges change their personalities the day they moved to Luxembourg so that they now reflexively exercise European “judicial activism” instead of considering the interests of their individual nations? Or does the ECJ as an institution make the difference, changing the attitudes judges have towards law and legal reasoning? Do the member states and the supranational Court actually share the same rationality and converge in their rational interests? Is the difference, after all, only one of perspective, a result of the actors’ point of view, whether national or supranational?

All these open questions call for a deeper understanding of what is going on in Europe’s legal sphere, yet they have largely been ignored in recent studies. Instead, the notion of the European Court of Justice as a political and rational actor has become an accepted assessment (cf. also Höpner 2010: 3). Against this background, it is no surprise that the ECJ has provoked criticism: an arising European legal order that is shaped by a judiciary more concerned with “legal politics” (cf. Conant 2007), which follows some kind of diffuse, cost-benefit-rationality instead of feeling bound to develop common and just law by drawing on the European legal traditions and values, could never result in a democratic and truly lawful Europe. Such a legal order, created by various political and rational actors strategically trying to enforce their own private interests, can lead to just one disappointing conclusion: the European legal system can never be what it is supposed to be: a *common* legal order and the basis of European Unification.

Instead, it is built on a false foundation that will sooner or later plunge the EU into crisis. Interest-driven, judge-made law will penetrate and replace more and more parts of the national legal orders without being subject to any democratic control that could be the basis for its legitimacy. After all, the law would lose the connection to those whom it concerns – the European people – and would lead to the collapse of the European project.

What becomes clear in this brief abstract of explanations offered by political science, is the great ambivalence with which legal integration is perceived in Europe. On the one side, there is a growing interest in the connection between law and integration. On the other side, a fundamental skepticism prevails when thinking about an ever-closer “community of law” (Nicolaysen 2002), partly designed by steady judicial development. Although judge-made law or judicial development by case law is a well-known task of high courts in the states, it causes mistrust on the European level and is disqualified on the basis of being a political act. European law still seems to be perceived as less legitimate than national law. The reason for these reservations, I will argue in the following part, is to be seen in a certain conception of rationality that predetermines this conclusion, but should re-thought and rejected by political theorists.

3. The legacy of “trivial rationalism”

The differences in the theories of European integration seem to be fundamental at first. However, all these theoretical approaches converge on a crucial point: they share a generalized concept of rationality and use it as a central explanatory factor. Rationality, in these theories, is characterized to be a timeless, universal constant, independent of an actor or the structure in which it is embedded. Consequently, it is inevitable that the integration through law is perceived as a dependent variable of various actors’ interests and their rational actions. Or put another way, rationality persists as a kind of formula or mechanism, although the actors preoccupied by rationality change. This means that, in the same position, every actor would behave just like his counterpart – the national politician as well as the supranational lawyer. This notion of rationality possesses all the features of what Heinz von Foerster once described as a *trivial machine*: “A trivial machine is characterized by a one-to-one relationship between its ‘input’ (stimulus, cause) and its ‘output’ (response, effect). This invariable relationship is ‘the machine’. Since this relationship is determined once and for all, this is a deterministic system; and since an output

once observed for a given input will be the same for the same input given later, this is also a predictable system” (von Foerster 2003: 208).

The conception of rationality that is widely used in political science and theories of European integration shares this mechanistic and predetermined input-output-mechanism with Von Foersters’ trivial machine, where the relationship between input (stimulus, cause) and output (response, effect) is determined “once and for all.” I therefore will call theories relying on such a simplistic understanding of rationality as “trivial rationalistic,” or the underlying theory of rationality “trivial rationalism.” In trivial rationalism different actors, acting in different historical contexts and different institutional surroundings, all share the same predetermined rationality. It does not matter who is acting or for what reason, the only thing that makes a difference is the actor’s interest and the position of power.

Rationality, in other words, is a linear, non-changeable, and deterministic function that connects actor and action. If one can be sure to deal with a rational actor, in as much as one can attach certain interests to this actor, every action becomes not only explainable, but also foreseeable for every situation. From that point on, where the interest of a rational actor is known, it will become possible to calculate concrete explanations and predictions for every particular case. Rationality truly seems to be the marvel of political science.

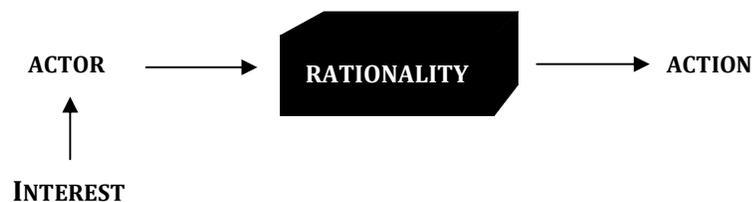


figure 1: rationality as deterministic system and black box

At the same time, and this should cast serious doubt on trivial rationalism, rationality remains an analytical black box. The function of rationality is described only by reference to the way it transforms a certain input to a certain output, but the processes happening in the interior are not considered as explanatory factors. Rationality seems to be some kind of a magical device

that transforms every input to a certain output by a mechanism we could not explore. Interestingly, we know that there is something like rationality, we can say when an actor acts and does not act rationally, but, as per this definition, cannot explain why or how (cf. fig. 1).

This notion of a generalized and linear rationality is more than dissatisfying. It is the central difficulty in contemporary studies of legal integration, clouding the processes happening in the interior of Europe's legal sphere and leading to a grim picture of the ECJ's role in the integration process. In short, in rationalism there is no place for the law as an independent context of legal reasoning. It is a mere placeholder of the interest-maximizing minds of political and strategic-rational actors. Or as Kenneth Armstrong notes, (trivial) rationalism "... offers us an account without law and an account of the ECJ that fails to recognize its function as a court within the institution of law" (Armstrong 1998: 158; see also de Búrca 2005; Arnall 2006).

4. The context of rationality

To derive a concept of rationality that is able to incorporate the law as an independent variable and that recognizes the ECJ and its function as a court within this context, I want to begin with two remarks on the trivial rationalistic model, which will be the foundation of a more appropriate and non-trivial notion:

First, the common use of the term "rationality" seems to imply that there is only one form of rationality, or that rationality is something that is necessarily invariable and unchangeable. It seems as if rationality is identical to itself all the time, like a mathematical equation² or that rationality allows no further explanation. Or as Martin Hollis once put it: „Rational action is its own explanation" (Hollis 1977: 20 f.). But is it tenable or at least appropriate to subsume the manifold nature of human action under just one term? Is there not a difference between rationality in law, in politics, or in economics? Rationality in its singular form must be understood as a collective term, and not a concept that can ever describe all the (rational) actions people do or did. The works of Max Weber on "Interpretative Sociology" laid out in "Economy and Society" (1922) already offer a more convincing means of coping with the complexity that lies behind the term. Weber assumed that the modern, functional, differentiated western societies had developed several "value spheres", i.e. distinct contexts of reasoning and action, each having

² E.g., $1=1$ or $\text{rationality}=\text{rationality}$.

its own socially emerged means and ends: e.g. family, economy, politics, science, law or religion. Each of these had a specific kind of logic that determined rational action within its own domain. The merit of Weber's work on value spheres was to have shown that there is not *one rationality*, but a plurality of *rationalities*, with every one of these having only a limited range within modern societies.

Although one might not agree with Webers's concrete distinction of value spheres, the notion of a rationality that is dependent on a certain context is extremely useful for understanding rational action in law, and is convincing in considering the highly specified, craft-bound discourses that dominate the functionally differentiated sectors of society. Often these presuppose long-lasting studies in the field or discipline related to such a context to even take part in its discourse. In today's highly sophisticated and technocratic "sphere of law," this especially seems to be the case (cf. Münch: 2008). Or, as de Búrca notes: "[L]aw defines the framework and context within which political and social actors operate, ... it affects and constrains these actions and relations, ... it determines in part the impact of political acts, and ... it conditions and tempers those acts in translating them into everyday application" (de Búrca 2005: 317). In such a highly socially, culturally and historically determined context, rationality has to be more than just a predetermined transformation of inputs (interests) and outputs (action).

Second, and directly connected to the former point, trivial rationalism contains a paradox that becomes visible from the viewpoint of the philosophy of language. The "language and logic of law" recognized by Burley and Mattli (1993), as noted above, presupposes a common understanding and recognition of the law, and also of what counts as "rational" in the field of law. Or, as Hollis put it: "It is about knowledge of the rational thing to do or the a priori understanding of necessities to which rational action is subject" (Hollis 1977: 165). Simply said, to speak in the language and logic of law, one must first learn to understand and speak this language. By doing so, not only are different words for the same things learned, but the whole system has to be internalized (law consists of far more than just using the technical terms of legal reasoning!). Ludwig Wittgenstein showed very clearly in his later works that "there must be agreement not only in definitions but also ... in judgments" to make communication possible. "It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call 'measuring' is partly determined by a certain constancy in results of measurement" (PI: § 242). The situation is the same with language and the logic of law. The

law does not simply lie in the words and phrases of jurisprudence, but in the acceptance of certain values and ways of applying these to the world, and to manifold cases in a judicial way (see also Dobler 2008: 550 ff.). Speaking the language of law means to confirm and respect the whole system of law – a system that could never be shaped by single actors and their private interests, but only by all those who effectively “measure” the world in legal terms.

So, every time actors speak in the language and logic of law – whether they have private interests or not – they show their consent with the law and its procedures, its “measurements” and “measures.” It is quite simply not possible to speak this language without referring to what all the other participants of the legal discourse understand about law and how it has to be applied. To speak the language and logic of law there must be a common, not a private, way of understanding, otherwise communication would become impossible. So, if we suppose that the treaties, laws, norms, rules and principles in Europe are solely interpreted through a mechanistic rationality and in accordance to private interests, we could expect two things to happen: either the private interpretation could not be understood by the rest of the legal community, or the meaning of law would be adjusted over time and cease to exist in any substantial way. The regular use of the law as a function of interests would transform it over time to something else in practice – an order of legal arbitration in which the law itself is not more than an empty shell. Although this is obviously still not the case, it would be the logical consequence of taking trivial rationalist predictions seriously.

To solve these problems, which must remain unsolvable within a trivial rationalist framework of analysis, I propose to open the black box of rationality, and to look inside of what constitutes rational action in law in general, and in Europe’s legal sphere, in particular. To do so, a *non-trivial analytical concept of rationality* has to be conceptualized as a form of reasoning that depends on its surroundings, on a certain context, and could therefore called *context rationality*.³ Here, every context is distinguished from other contexts in three ways: (1) The law in Europe has to be differentiated from other contexts by the specific *legal* rules it contains. Law in modern, functional, differentiated societies is an autonomous and distinct institution that is specified and determined by rules other than political or economic ones. The law constitutes a certain space of

³ On a philosophical consideration of context and rationality, cf. Grimmel, A. 2010. “Where the River meets the Sea: Wittgenstein and the Context of Rationality;“ “Die Transformation des Rationalitätsbegriffs in Wittgensteins Philosophie der Sprache” (unpublished manuscripts).

argument in which non-legal arguments are refused (no litigant would ever argue politically, or with reference to certain self-interests in front of a court). Though interests might be a legitimate motive for making a claim, the law has strict rules about which arguments are acceptable and which are not. (2) A context is a local or cultural space of meaning, defined by the sum of rules that provide reasons (not causes!) for action (cf. Hollis/Smith 1990: 188). European law is distinct from other local legal contexts, such as national or international legal systems, by its own genuine *European* rules. Although it is based on national legal doctrines and procedures, European law is a legal system *sui generis*. (3) The rules that apply in the context of European law are not fixed, but variable and subject to change over time. The meaning of law and certain legal codifications, like the ones in the “constitutional treaties,” changes steadily. By nature, law must be adapted to the never-ending social change it is confronted with. Definitions *and* judgments in the language and logic of law are in permanent motion. European law, in particular, with its unfinished character, is subject to manifold ongoing modifications (cf. fig. 2).

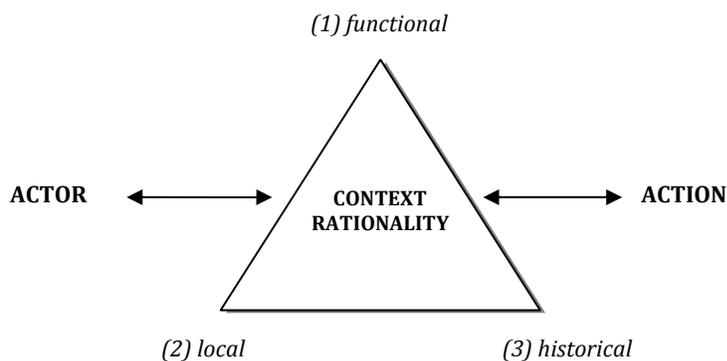


figure 2: the context of rationality

Within a contextual understanding, rationality;

- is able to shape the reasoning of actors, and is, at the same time shaped by action
- is a highly dynamic process, steadily changing within its context
- is not a predetermined constant, but can be learned,
- is not a black box, but can be understood only from an internal viewpoint
- is not mechanistic or directly transferrable to other contexts
- has a stabilizing and constraining effect on reasoning and action within a certain context

To summarize, rationality is embedded in a whole system of meaning, understanding, and reasoning within a certain context. This context must be analyzed to make rationality in law comprehensible: the black box of rationality has to be opened and explored. In short, when thinking about integration through law, there is no way around engaging with the law in general, and European law in particular.

5. The Context Rationality of European law

Overviewing the dynamics of European law, the role the ECJ played in this context, and the methods it used to advance the ambit of the law in many legal cases, there is good reason to doubt the notion of a universalistic rationality preoccupying Europe's legal sphere. European law today consists of a broad inventory of norms, methods, rules, and procedures that evolved from long legal traditions that originated not only in the nation states, but also in a truly European context. These are codified and conserved in treaties, or in the directives, decisions, recommendations, and statements of the EU, as well as in case law. Furthermore, there is a variety of legal doctrines, methods of legal interpretation, justification, and approved customs; as well as patterns of legal reasoning and arguments, which are approved by lawyers and legal scholars all over Europe. Already, at first glance, (European) law seems to constitute a distinct space of *legal rationality*.

This gets much clearer when envisioning that the possibility of interpreting and developing the law by way of occupying the "language and logics of law," is dependent on a common knowledge and understanding of what law is and has to be about. In other words, within the context of law there must be certain preconditions that allow actors to communicate; there must be some kind of consensus about the rules of law and legal reasoning. To speak of rationality or rational action in law there has to be at least a minimum of disciplinary consistency and coherence within a certain legal context (cf. Ernst 2007: 27; see also Strauch 2000, 2002, 2005; on coherence in law see Bracker 2000; also cf. Rescher 1973, Coomann 1983). The ECJ and other actors have to adjust their actions and reasoning to match these requirements, if their claims are supposed to be heard, recognized, understood, and accepted (cf. de Búrca 2005: 317). The Court must rely on common European legal traditions so that it will be able to claim that its legal grounds and justification *can* be understood and accepted by other actors in the same

context. The ECJ can never just announce its judgments and doctrines, but must communicate them by reasoning in front of the community of European law.

This, of course, does not always mean everybody appreciates the legal decisions, or that there is never dissent or dispute about the Court's decision-making. As far as the judgments are understandable and do not obviously occupy the rationality of another context (in functional, historical or local ways), however, they *must* count as rational decision, and therefore have to be accepted by means of the rationality of the context. In any other case – if, for example, it is obvious that political arguments are used or at least underlie the decision – enduring acceptance could never be the result. This, however, is the foundation of any successful integration process, in law as well as in other contexts.

The notion of *context rationality* outlined above goes beyond attributing interests and a fixed formula of rationality to actors (in the field of law, tried by Vanberg 1998). Here, rationality makes action not calculable, but understandable. It can help us to comprehend integration *through* law instead of sticking to integration generated by rational actors *in the field of* law. European law and its underlying rationality have to be understood and examined in functional, local, and historical terms (see fig. 2, above):

In *functional* terms, the context of law is distinct from other contexts in the fact that action is linked to certain forms of interpretation and argument that are provided by the context, which makes it, at the same time, distinguishable from other contexts, such as politics or economics, that offer different kinds of reasoning. This has special impact on work with legal texts, because these can never be absolutely self-enforcing and coercive like mathematical or logical propositions: interpretation is always needed. Although politics is also concerned with the same subject, the translation and application of legal texts to reality is primarily the task of law and jurisprudence. In the European Union, the European Court of Justice “shall ensure that in the interpretation and application of the Treaties the law is observed” (Art. 19 TFEU). In this function one cannot separate the commonly shared forms of legal argument and interpretation in the context of law, but has to follow quite a strict scheme of legal reasoning. Based on Toulmin (1958), Alexy (1983, 1992) and Patterson (1996, 2004) the basic scheme for legal assertions and legal reasoning can be illustrated in the following way (fig. 3):

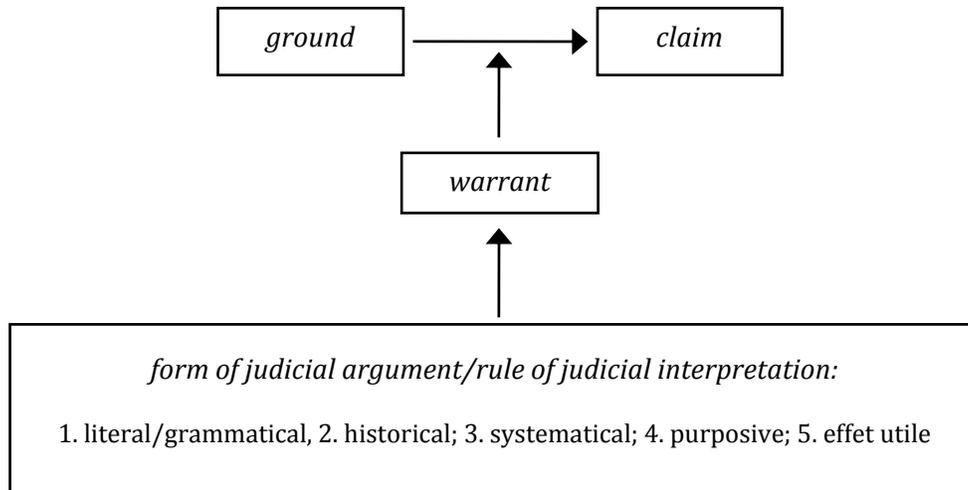


figure 3: basic scheme of argument in the context of European law

Every judicial argument begins with a claim, like “*The national law A in state X is not consistent with the law of the EU*” or “*State Y violates EU law by doing B.*” This mere claim, however, needs more to be recognized as valid. There must be a ground that gives reason or evidence to the claim, such as: “*The national law A in state X hinders the free movement of goods*” or “*By doing B State Y violates fundamental rights (e.g. non-discrimination).*” Two types of criteria can be used to measure the validity of a claim: on the one side, the logical consistency must be proved – the conclusion (claim) must result from the premise (grounds for the claim). On the other side, the premises and propositions itself must be true and sufficiently justified (cf. Bracker 2000: 199). To connect a claim with the ground more is needed than just logical consistency: both claim and ground, have to be connected by a legally codified warrant. Such a warrant is needed to answer the question of why and to what extent the ground is relevant to the claim. In the European Union these warrants may be seen in primary European law laid down in the treaties. But common law, case law, legal traditions, as well as legal acts of secondary law – like regulations, directives or decisions of the EU – can also be used as warrants (cf. Arndt 2004: 77 ff.; McCormick 1996: 173).

In *local* terms, the rationality of the law is always characterized by particular, culturally specific and commonly acknowledged forms of legal interpretation and practice that make a

certain legal context distinguishable from other legal contexts. Or, as Hollis/Smith once put it: “[R]ationality is not a universal capacity for calculating the costs and benefits of actions which contribute to an outcome, but the applying of a local rule which supplies reasons for acting” (Hollis/Smith 1990: 188). Although in theory, legal texts can be interpreted in many different ways, this may not lead to arbitrary interpretation in practice, because otherwise laws would not be able to provide legal certainty or any shared meaning (see also Strauch 2000: 1023). There have to be commonly fixed rules of how to understand legal warrants, rules which define legitimate forms of interpretation in law. These forms of judicial argument are – like the warrants – dependent on a *certain* legal context (i.e. by being part of the shared cultural, and therefore local, context of law, they always have a limited range of application). The European legal system has developed its own form of legal reasoning that is distinct from other national or international legal orders. It has unique, *European* patterns of justification and rules of judicial interpretation, which connect European law with reality by backing or refuting a claim and its premise on the basis of a warrant. In the context of the European Union, the rules of judicial interpretation that are canonical and commonly used to interpret the European law are literal/grammatical, historical, systematical, purposive and “*effet utile*” (see also Benoetxea 1993, Benoetxea/MacCormick/Moral Soriano 2001, Walter 2009).

These rules of interpretation make the abstract laws applicable to certain cases and, at the same time, transcend the law-interpreting subject by being based on a collective understanding in a genuine legal practice (Neumann 2005: 374). To develop an inter-subjective “*‘persuasion pull’ and ‘compliance pull’*” (Weiler 1993: 419) judges cannot merely rely on the power bestowed by their institution, but on the forms of legal argument and interpretation that are constitutive of the context of law. To emphasize this point, in the context of law it does not matter if a judge has a certain attitude towards the case at hand. Though bound to neutrality, judges can never be totally free of personal considerations (they are, for example, compelled by their consciences). With good cause, the reasons for a judgment are never to demonstrate the integrity or truthfulness of the judges, but to make a convincing argument in the context of the law by the means of the law. Otherwise, adjudication would not be about the law and its application, but about the moral qualities of the human beings in charge of interpreting the law. It goes without saying that this, at least in democratic political systems, can and must never be the task of the law or any argument in law.

Of course, this does not preclude the possibility that judgments might be willfully motivated by the judges' interests, or that individual rulings stretch beyond what is perceived to be appropriate within the borders of judiciary competences. However, this is not a genuine European problem, but a general one which is known in the national legal systems as well. It has nothing to do with the law itself, but is a violation of the rules of law and thus contestable by the means of law. It has to be clear that the rule book of law is not changed because the ECJ from time to time tends to exceed the common sense of legal justification, or is not absolutely convincing in its reasoning for anyone and in any case.

The mere fact that interests must be hidden behind a façade of legal expressions and arguments, shows the validity of recognizing the law as legitimate form of rationality that must not be violated by political arguments. However, if a court regularly employs a political logic and camouflages it behind a veil of legal phrases it will inevitably be discovered and challenged, since its conclusions (or its "measurements," to quote Wittgenstein) will obviously not be in line with the (European) community of law. As Wittgenstein once put it: "If language is to be a means of communication there must be agreement not only in definitions but also ... in judgments" (PI: § 242).

In *historical* terms, law and the rationality of law are continuously developed over time. A legal context is in constant fluctuation, and never identical to earlier configurations of the same functional or local context. The fragmentary and unfinished European law is undoubtedly one of the fastest changing legal contexts in the world. This changing character, however, does not imply that European law is not based on any tradition or has no foundation. It was not by accident that European law was established this way, nor could it have been a purely political decision. The European legal order, though comparatively young, could not have been brought into being without considering a broad foundation of common legal knowledge and tradition that forms the core of the new *European* legal system. The development of European law case by case must be dependent on this nexus of prior, established law, and on legal insights and doctrines that emerged over decades and centuries. As a matter of fact, the linkage to prior achievements is a precondition for the development of judge-made law. The progress of European law has to be coherent with the historical framework in which it is embedded, and must be understood as a long chain of texts and practices to which the ECJ must remain connected in order to secure the understandability and acceptability of its judgments. In this regard Herzog and Gerken are right

when they hypothesize: “if the ECJ abuses ... confidence, it need not be surprised when it breaks down” (Herzog/Gerken 2008: 5). To preserve confidence and to cause the necessary “persuasion and compliance pull” in the judicial development of the law, judges can never just *create* or *invent* law; they must *cull* it from a common pool of knowledge that defines a rational move in the game of law.

The perspective of context rationality casts a different light on the Court, its role in the integration process, and its rationality. Though the ECJ occupies a considerable position of power within the institutional structure of the EU, it can never just rely on its assigned role or its “power of interpretation” (Alter 2001: 226) to evoke trust, consent and acceptance – all of which are undoubtedly the basis for integration. It has to abide by a rationality shared by the people who are affected by its judgments. Rationality in this sense is far more than just a description of reasonable action, it is a justification for and the foundation of the common acceptability of action (cf. Steinvorth 2002: 51), and, at the same time, the precondition for integration. To say that the ECJ acts rationally within the borders of the context of law always implies that its action is justified, and it could not be criticized as acting illegitimately without violating the law itself. So, the only principle judges can rely on to make their judgments convincing, acceptable and, at last, enforceable is “truth instead of authority” (Neumann 2005; cf. Dobler 2008). This truth, however, is not determined by some kind of universal rationality, but can only be one of functional, local, and historical scope. It is precisely due to this point, that fair comment and criticism of the Court and integration through law can and must be applied.

6. Conclusion

The interests that have been assigned *ex ante* or *ex post facto* to the ECJ and its officials have always been and must remain phantasmagorical. Who has ever seen the interest of a judge that might have influenced a certain decision? How can the institutional interest of a court be measured by science, simply by ascribing a generalized rationality and a set of interests to the “players” of the European “integration game?”

The onus of proof has to be reversed: until it has been proven, we should refuse the claim that, behind the façade, the Court is a political actor striving for power and trying to expand European law into the national spheres. We cannot judge the judges for the interests we think

they might have, or for the non-testable belief in a *political* judicial activism – at least not in the context of science. Arnall is right when he claims: “The allegation of undue activism can only be tested by close examination of legal arguments advanced by the Court in support of its decisions” (Arnall 2006: 4). So why don’t we simply start to explore the law before we try to understand integration through law? Why do we try to impose a simplifying, trivial rational actor model on an integration process that is far more complex than just balancing and enforcing interests?

As an alternative, the perspective of *context rationality* introduced in this article allows us to not only address the underlying interests of an actor’s decisions, but focuses on the shared contextual fundamentals of European law. In other words, from this viewpoint, it is not important if the ECJ has a political motivation for deciding this or that case in the one or the other way. Rather, it is about the potential of mutual agreement on the way the Court arrived at its decision. Integration through law does not depend on the fact *that* the ECJ developed this or that law in a certain leading case, but *how* it developed it, and if it is consistent and coherent with the context of European law.

The theories of European integration so far have just focused on the outputs of legal decision-making and by doing so, have completely overlooked the fact that the compliance with the law so far is much more than a sign of the mere convergence of actors’ interests. In reality, it is the core of integration itself that surfaces here, namely in the possibility of mutual understanding and reasoning in the European context of law. Only here – and not in some kind of trivial and predetermined rationality – can we find an appropriate explanation and a deeper understanding for the process of integration through law.

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