ceur
center for european union research

CEUR Working Paper Series No.4 August 2012

Politics in the Court of Justice of the European Union? Governments before the Bench

Anders Kruse

CEUR Working Paper Series
No. 4 August 2012

Anders Kruse is a retired Ambassador and Swedish Government Agent in cases before the European Court of Justice. He lectures regularly at the Universities of Lund and Stockholm, Sweden.

anders.kruse88@gmail.com

More information on the Center for European Union Research at Central European University can be found here:
http://ceur.ceu.hu

Introduction

Non-lawyers often find it difficult to understand the role and the decisions of the European Court of Justice. Lawyers sometimes have problems in understanding the judgments of the Court but usually have no difficulties with the role of the Court. This paper deals with the role and mission of the Court of Justice of the European Union and also discusses the role of Member States' governments, i.e. politics, in litigation. The cases cited are only examples from my own practice as a government Agent before the Court, but there are of course a plethora of other similar cases.

Many of the cases in the Court raise issues not only of substantive EU law – such as free movement of trailers and motorcycles, or the control of transatlantic air flights, or trade unions' right to take industrial action – but also of fundamental political and constitutional character. What is now left of national sovereignty for a Member State of the European Union? How far may the EU institutions, or the Courts, go to interfere with conditions in the Member States? Or, if you put that question differently, how much solidarity does a Member State have to show with other Member States or EU institutions or with decisions jointly decided within the framework of the European Union? Is the Court of Justice open to political arguments concerning national interests, to national pressure or even threat – in particular from the big Member States – and can the Member States acting together push the judgments of the Court in their favor? Is the Court actually a political Court? Who controls the Court? And what do Member States do to avoid the effects of the Court's judgments?

There are no short or simple answers to those questions, of course, but the issues are well worth a discussion. I want to highlight some political aspects of the activities before the Court, especially as they appear from the outlook of a Member State representative. But that necessitates some initial remarks about courts in general and the Court of Justice in particular.

CEUR Working Paper Series
No. 4 August 2012

Understanding the role and decisions of the European Court of Justice

A political sociologist said at the Central European University a year ago, according to the abstract on the university's website

> "The European Court of Justice remains an enigma in the field of European studies. While the other major institutions have had changing priorities and agendas over time and across policy domains, the Court has continuously maintained a pan-European jurisprudence over the decades. This is all the more striking that the Court has been facing at the same time a growing internal heterogeneity (in particular following the recent waves of enlargement) and increasingly critical audiences (in particular following recent landmark cases in the domain of social rights). How is it then that the Court acts as a consistent and unfailing institution in such context?" [1]

Another speaker at the University, also a year ago, argued that "even in policy

[1] Professor Antoine Vauchez, "The European Court of Justice, Transnational Esprit de Corps and the Social Fabric of Pan-European Jurisprudence: New Research Paths", CEUR Lecture 20 January 2011.

areas which still largely remain national competence, such as healthcare or industrial relations, EU Member State governments increasingly need to design their policies 'with Luxembourg in mind', i.e. taking into account European market freedoms as interpreted by the Court of Justice."[2]

It is quite clear that both speakers – among other things – had the Court's judgments in the *Viking Line*[3] and *Laval*[4] cases in mind, judgments that attracted much attention because they were considered by many as surprising and unacceptable limitations in trade unions' right to take industrial action in their fight for the improvement of workers' conditions and for fighting social dumping. And, it has been said, the Court decided as usual in favor of businesses' right to free movement of services and right to establishment. The Laval case touched upon century-old central Swedish values of workers' and trade unions' rights to industrial action which the Swedish government defended strongly before the Court since these values are considered as an essential part of the "Swedish model of society". The frustration felt in the Swedish society with the outcome of the litigation is therefore very understandable. However, to lawyers involved with the cases, the judgments were not so surprising.

Also, the *Laval* judgment and, as a matter of fact, a long-time academic discussion has led some to claim that the European Court of Justice is not an ordinary court of law, but a more or less political court or at least a court that takes decisions of a political nature.

I shall return to the discussion about the judgment in the *Laval* case a little later. But before that, I want to take up the discussion of what a court of law really is, and in particular the preconditions for and the context of the jurisprudence of the European Court of Justice. My view is of course not a sociologist's or political scientist's view but a practising European lawyer's view.

Politicians and judges

A court of law is a body of judges set up to adjudicate in disputes that the parties bring before the court; and when it comes to the European Court of Justice, the court shall also give preliminary rulings on questions of the validity and interpretation of EU law which national courts raise before the Court. This, I think, is essential: a court of law does not of its own motion bring about cases, it has no "agenda" of its own but it is entirely dependent on the litigants and the questions and disputes they want to bring to the court for a judgment.

In this respect, a court of law is very different from political bodies. A distinctive, and very important, element in politics is to "set the agenda". The political actors want to decide which issues shall be part of that agenda, they try to highlight problems in society that they want to solve, they define the problems and they design their own solutions to these problems and try to find public support for them. The political actors are active whereas the courts are passive.

So you may say that politics, and politicians, are occupied with the future and how it should be shaped, whereas courts of law are occupied with the past, with what has happened and with confronting reality with the existing law. When the courts are solving problems, they deal with existing law. In that sense, courts in general are conservative and apply existing law, as a means of preserving the so-

[2] Dr. Michael Blauberger, "With Luxembourg in Mind ...the making of National Policies in the Face of ECJ Jurisprudence", CEUR Lecture 17 February 2011.

[3] Judgment in case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union[2007] ECR I-10779

[4] Judgment in case C-341/05, Laval un Partneri[2007] ECR I- 11767.

ciety as it is shaped by realities and conflicts and by the decisions of the political actors. Politicians in general look forward, they deal with the society as they want it to be, and they use their programs and the law to change society, to make it as they want it to be in the future.

These differences should not be pushed too far, because it is not necessary for the discussion in this paper. Of course, it is common knowledge, and widely accepted, that judges and courts sometimes have to make new law where there is no explicit written law or where the old law is outdated and unsuitable for solving today's problems. But developing the law within the framework of an existing jurisdiction does not make a court a political body – it is simply a way of keeping the law alive and efficient in a modern society.

Accordingly, in their judicial practice, judges are, or should be, different from politicians in a number of ways. We expect a judge to be totally impartial and independent. The judge shall not yield to pressure from outside, from wherever it comes: the parties in a case, the public opinion or media, those in power such as governments, enemies, friends or colleagues. The judge shall not be punished if he or she decides contrary to what the public or those in power have expected – the judge shall be honored and protected for his or her integrity, otherwise there is no real independence. And he or she shall not be prejudiced, shall not express any opinion on how to adjudicate before the procedures are over, the parties have been heard and the case is finally decided. And then, the judge shall do his best to solve the case with legal means and arguments, to adjudicate according to the law.

The role of politicians and politics in our democratic societies is entirely different. We expect politicians to express their opinions on how to solve social problems before we elect them to office. They shall be visionaries and express themselves about the future. Politicians have public programs on how to shape society, they argue for their programs and their way of life, they try to win the public over on their side, to give them power to pursue their political ideas. It is important for politicians to be popular! And we hold them accountable if they do not keep their promises or if we do not like their programs; we punish them on election day and do not reelect them but choose their competitors instead.

This, of course, is a simplified, even primitive, description of what courts and judges do and what political bodies and politicians do. But it seems necessary to describe the difference between courts of law and political bodies before the discussion goes on to describe the European Court of Justice and its jurisprudence and its role in the development of the European Union in interaction with the politicians. Although the Court is one of the seven institutions of the European Union, its role and importance is fundamentally different from those of the other institutions. This is not an unconventional or extreme view, but it must be highlighted as a background to the following discussion.

CEUR Working Paper Series
No. 4 August 2012

Why is there a European Court of Justice?

It seems useful to start the following discussion with a fundamental question. Why is there a Court of Justice for the European Union? And why is it composed and administered as it is?

The Court was born in the aftermath of the disasters of the second World War, the catastrophe, set in motion by European politicians, that saw the breakdown of international relations and international law and the slaughter of millions of individuals, on battlefields, in concentration camps and elsewhere. When rebuilding Europe and creating the European Communities that have now become the European Union, the founding fathers realized that the classical instruments of international law for solving conflicts between sovereign states would not be enough to avoid such conflicts and wars in the future. History taught them that the traditional diplomatic tools, international conventions and agreements and voluntary political co-operation, were not enough to create a peaceful European development. They knew that the states' own national interests would stand in the way for solutions which were better for all of them in the long run. They realized that they also needed strong independent supranational institutions to safeguard the common interest and to solve conflicts between the states, to mediate and act as brokers, and to be able to interpret their agreements and take binding decisions over issues that they had decided in common. So they gave up sovereign rights in favor of supranational decisions by international institutions.

One can see this development also in a wider international context. The decades after the second World War have seen a certain institutionalization and judicialization of international relations to solve international conflicts and promote peaceful conflict resolution and human rights. Apart from the United Nations itself, a number of international courts have been created: the International Court of Justice, founded in 1945; the European Court of Human Rights, founded in 1950; the Inter-American Court of Human Rights, founded in 1969; the Court of Justice of the Andean Community, founded in 1979; the International Tribunal for the Law of the Sea, founded in 1982; the Appellate Body of the World Trade Organization, founded in 1994; the EFTA Court, founded in 1992 and the Caribbean Court of Justice, founded in 2001. And of course all the international criminal courts: the Tribunal for the former Yugoslavia, the Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court.[5] They all represent an international unanimity – or almost unanimity – that there is a need for multilateral, peaceful, judicial conflict resolution in the world, rather than armed force and unilateral actions by sovereign states. And by creating these institutions and courts, the sovereign states have in fact agreed to limit their own sovereignty in order to submit to legal decisions for the common good.

Back in Europe, the founding Member States, the early six members of the European Communities, established the Commission and the Court of Justice to safeguard the common interests of the new international body that they set up and to balance the power of the Member States. In order to keep the balance of power between themselves, and to satisfy the need to trust these supranational institutions, they decided that each of the two institutions should be composed of one representative of each of the Member States, appointed by the governments. In the Treaties, the Commission was given a political role – to initiate new legislation and to decide over matters of common concern – whereas the Court of Justice was given the role to "ensure that in the interpretation and application of the Treaty,

[5] The list of international courts is taken from "The International Judge", App. A, by D. Terris, C.P.R. Romano and L. Swigart, Oxford University Press 2007

CEUR Working Paper Series
No. 4 August 2012

and of rules laid down for the implementation thereof, the law is observed" as was stated in the 1951 Treaty establishing the European Coal and Steel Community; and that task is still there in the Treaty on the European Union. Article 19 of the Treaty reads: "The Court of Justice of the European Union shall ensure that in the interpretation and application of the Treaties, the law is observed." And Member States shall help and support; they shall ensure effective legal protection in the fields covered by Union law.

So the Court of Justice is intended to be a court of law, and it has no political mandate. But it must be admitted that there are many different views – at least in academia – on the Court's performance. Some (although they seem to be a minority) think that it is political and activist, whatever that means; others find it brave and creative. I belong to those who find the Court brave and creative, and in my opinion, it has not taken on a political role either.I shall come back to that later.

The Court cannot define its own competence; the task and jurisdiction of the Court has been carefully defined by the Member States in the Treaties. Apart from the Court's rather limited role to adjudicate in conflicts over EU law between individuals – i.e. natural and legal persons – and the EU institutions, now administered mainly by the General Court, the Member States have given the Court the role to adjudicate in conflicts over EU law between Member States or between EU institutions and Member States, or between EU institutions. In that respect, the Court is essentially an international court, solving conflicts under international law and the Treaties.

Co-operation with national courts

But EU law is also integrated in national law, is part of Member States' national laws. And the Member States have also given the citizens a tool to scrutinize the application of EU law in the Member States themselves through the preliminary reference procedure (Article 267 of the Treaty on the Functioning of the European Union). Both the application by the Member States and their authorities when implementing EU law, and the application of EU law by certain other individuals – competitors, employers, trade unions – can be brought before the courts by individuals. By this procedure, the courts of the Member States have the right, and the supreme courts even the duty, to ask the Court of Justice for a ruling on the interpretation or validity of EU law in a national case before that national court. This way, citizens are given access to the European Court. And it is by these preliminary rulings – responses to national courts to their questions concerning the interpretation of EU law – that the Court has developed most of its jurisprudence which affects the rights and duties of the citizens and the European Member States.

It is important to remember this fundamental structure of application of EU law. Most of the interpretation and application of EU law is done within the Member States by the national courts, with the guidance by the Court of Justice. This fact has considerable consequences, especially regarding the control of the activities of the Court of Justice. Without the acceptance and consent of the national courts to co-operate with the Court of Justice, the decisions of the Court of Justice would probably play a very limited role in the life of Member States and EU citizens. That is my first thesis.

But, as cited in the beginning of this paper, some commentators seem to have a problem with the fact that the Court of Justice does not develop its policies in the changing international environment and that it keeps a "pan-European" jurisprudence despite the fundamental changes due to the enlargement of the Union and

CEUR Working Paper Series
No. 4 August 2012

social needs in Europe and maybe globally. This is an old discussion that touches on the discussion whether the Court takes, or should take, political interests of the Member States into account when it adjudicates and what the role of the Court really is, or should be.

Lawyers probably would find it rather strange to talk about a court's policy, or agenda. Should a court of law actually have a policy, an agenda? Is that possible in the observance of the law? Yet, the Court seems to have two explicit policies: integration of Europe and protection of individuals' rights. But none of these policies makes the Court a political institution.

European integration

If we want to discuss the question of policies of the Court, it is necessary to go back to the origins of the Court, to the instruments laying down the context within which the Court is supposed to work. That means the Treaties of course. The Court must take the Treaties as a whole into account, not only the abstract concept of the observation of "the law". The Court shall interpret and apply the substantive provisions of the Treaties. They are "the law".

There are a number of key words and concepts that are decisive for the Court when administering "the law" of the European Union. According to the preamble of the Treaty of the European Union – words from the original Treaty of Rome which reflect the aims of the founders of the Union – the Union is there to end the division of the European continent and to create a firm basis for the construction of the future Europe; it shall promote economic and social progress for the peoples of Europe; it shall continue the process of an ever closer union among the peoples of Europe – those are the famous words of the preamble - and it shall take further steps in order to advance European integration. These are some of the intentions behind the creation of the European Union. There are of course other goals, such as respect for principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, but the aims concerning the promotion of integration are at the forefront for the present discussion. These aims have then become concrete in the substantive articles of the Treaty and in secondary legislation by the Union legislators – the Council and the Parliament.

And therefore, to promote the integration of Europe and to promote the process towards an ever closer union must be two of the most important guiding-stars and priorities for the Court of Justice when it interprets the Treaties and solves conflicts of EU law. It is unconceivable to imagine that the Court should forget about the aims of the Union and adjudicate in ways that lead to the disintegration of Europe, the split up of the Union, a renationalization of EU law without changes in the Treaties. But no European political leader has advocated such changes of the Treaties. On the contrary, steps towards further integration have been taken in all Treaty reforms. And so therefore, a fundamental "policy" of the Court must be to promote the development of a united Europe, to promote integration, to promote common interests instead of singular interests – that implies to promote Union interests instead of national interests. And that is what the Court usually has done over the years: it has promoted European Union interests at the expense of the interests of the Member States as part of the process of integration. But that is not a political choice by the Court; it is a policy decided by the Member States, it is well founded in the Treaties of the Union, and it is what the Member States wanted and expected when the lay down the rules for the Union and for the Court.

But the role of the Court is not all that simple. According to the Treaties, the

CEUR Working Paper Series
No. 4 August 2012

Court must also respect the national identities of the Member States and it may not go beyond the limits of the competences that the Member States have conferred on the Union. It shall also respect other principles such as the principles of subsidiarity and proportionality – i.e. not go beyond what is necessary to achieve the objectives of the Treaties. So of course there is a room for interpretation of how far Union law goes in limiting the sovereignty of Member States. To solve potential conflicts here, to balance common interests against the interests of Member States if there is a room for it under Union law, is difficult but a classical legal task for an international court of law. But when considering these issue, the Court has always, according to the aims of the Union, given priority to the integration aspects. That is my second thesis.

Maybe it is time to make this discussion a little more concrete. What does this mean in practice?

There are numerous examples of the Court's approach of integration, from the early decisions about direct effect of the EU Treaties in the famous *van Gend en Loos* case[6] from 1963 – the case where the Court concluded that the Treaties not only were binding on the Member States but also gave rights to the citizens of Europe which the courts should protect -, the likewise famous decision about primacy of EU law over conflicting national law in *Costa vs. ENEL*[7] in 1964, to the cases of free movement of goods in the *Dassonville*[8] and *Cassis de Dijon*[9] cases in 1974 and 1979. A recent example is the case *Commission vs. Italy*[10] about free movement of motorcycles and trailers, decided in 2009.

In essence, this was a case about the Italian legislation concerning a prohibition on trailers to be trailed on roads in Italy by mopeds, motorcycles, motor tricycles and quadricycles. The Commission started an infringement action before the Court against Italy because of that legislation. [11] The Commission claimed that the Italian legislation was an obstacle to the free movement of goods – a fundamental right protected by the now Article 34 of the Treaty on the Functioning of the European Union – because it prohibited the use of trailers towed to motorcycles and therefore was an obstacle to the access to the Italian market of trailers from other Member States. No one in Italy or elsewhere would be interested in buying trailers intended to be towed by a motorcycle in Italy because they knew that the use of the motorcycle-trailer was not allowed on Italian roads.

Now, Italy certainly had good reasons for this legislation. It had to do with the need to ensure road safety in Italy, which obviously had to do with the specific situation on Italian roads.

The case concerned a fundamental principle in Union law, namely the free movement of goods, but also the question whether the principles concerning free movement of goods also apply when Member States regulate the use of goods – for instance traffic rules that affect the use of cars and other vehicles on the roads of the Member States; or the use of weapons for hunting or sports on the territories of the Member States; or the use of water scooters in the waters of the Member States; and a plethora of other national rules concerning the use of goods.

This case caused a great number of interventions from the Member States' governments in the proceedings before the Court of Justice. Member States' governments have the right to intervene in all cases before the Court of Justice and frequently do so, especially in cases where fundamental principles or essential

[6] Case 26/62 [1963] ECR 1.
[7] Case 6/64 [1964] ECR 585.
[8] Case 8/74 [1974] ECR 837.
[9] Case 120/78 [1979] ECR 649.
[10] Case C-110/05 [2009] ECR I-79.
[11] See now Article 258 of the Treaty on the Functioning of the European Union.

Member State interests are involved. In this case, apart from the defendant Italy of course, eight Member States intervened. As a matter of fact, after a preliminary round in a three-judge chamber of the Court, the Court decided to refer the case to the Grand Chamber of 13 judges, intended for the most important cases. And the Court invited the Member States' governments to submit their opinions on how to interpret EU law in the case. One government seems to have argued along the lines of the Commission, namely that allowing for the use of goods to fall outside the scope of the Treaties – like the Court earlier had allowed for concerning selling arrangements – would not solve the problems but create more problems. Whereas the other governments used different arguments for allowing Member States to regulate the use of imported goods despite the Treaty rules. They claimed that Treaty rules were not applicable on the use of goods, only on imports of goods.

My government, which wanted to intervene in the case, had considerable problems to decide what was in the Swedish national interest. On one hand, the government was in strong favor of the Treaty rules of free movement of goods, given that Sweden is a small country heavily dependent on trade and export of goods. Therefore, it would have been natural to support the Commission against Italy even though Sweden was not a producer of trailers. On the other hand, Sweden had a rather harsh legislation concerning the use of water scooters – imported from other Member States. There were strong restrictions for the use of water scooters in the vast inland and sea waters of Sweden because of interests of the protection of birds, animals and people for environmental reasons. And there was at the same time a Swedish case about the use of water scooters pending in the Court of Justice – a reference for a preliminary ruling from a District Court in a criminal case – which raised exactly the same question as the Italian case whether national law was compatible with Union law on free movement of goods. And of course, the Swedish government wanted to defend the principle underlying its own legislation also in the Italian case. So the Swedish intervention in the Italian case became – to put it mildly – rather ambiguous and obscure on the fundamental issue that the European court was about to decide.

The advice from other actors was also ambiguous. Two Advocates General – officials of the Court who are supposed to give the Court independent an qualified legal advice before the Court decides – were involved in the case and had very different opinions on how to adjudicate. A third Advocate General, who was involved in the Swedish case concerning water scooters and was relied upon by Member States in the final hearing of the Italian case, also had a separate opinion on the principal question. So the Court was faced with a wide range of qualified, elaborated and different opinions on how to solve the case before it.

So what did the Court do in such a situation? It went back to the Treaties, according to which restrictions on imports and all measures having equivalent effect shall be prohibited between Member States – Article 34 of the Treaty on the Functioning of the European Union. And it looked at how this rule had been interpreted by the Court in the past. And the Court then came to the conclusion that the Italian prohibition hindered the access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in Member States other than Italy. Therefore it constituted a measure having equivalent effect to import restrictions which was prohibited by EU law.

By this judgment, the Court solved a long-standing problem of the scope and extent of the Treaty provisions about the meaning of import restrictions and the free movement of goods. And it did so in the predictable spirit of integration of Europe, of creating a single internal market, which is so strong in the European Treaties.

CEUR Working Paper Series
No. 4 August 2012

But it must also be mentioned that the Court noted in the Italian case that EU law permits such import restrictions if they can be justified objectively, for instance by non-economic public interests. And when looking into the Italian arguments for justification, the Court came to the conclusion that the specific Italian needs to ensure road safety justified the restrictions on the use of trailers connected to motorcycles. Therefore, the Commission lost the case and Italy could retain its legislation.

So the Treaties admit, and the Court accepts, a balance of the interests of integration of the European market with the interest of the Member States to have a room for implementation of EU law, and for preserving important national non-economic interests. The Italian need for road safety – a need that I personally find a little obscure but which evidently was very important for Italy and Italian circumstances – was accepted by the Court.

The Court obviously had a number of options here, suggested by the Commission, the Member States and the Advocates General, and its solution was not at all self-evident. But the judgment is a good example of how the Court ensures the common Union interests of integration but at the same time manages to balance specific national concerns against those common Union interests of integration.

In consequence with this judgment, the Court later ruled in the Swedish case on water scooters. And it ruled in the same manner: the Swedish rules on restrictions for the use of water scooters were in principle contrary to the free movement of goods' rules in the Treaty. But they could be justified by overriding national interests of protection of the environment under certain conditions which were up to the national court to investigate and evaluate.

Precedents

These judgments also exemplify – as most Court judgments do – the Court's reliance on precedents, on what the Court itself has decided in earlier cases. This is a common feature of all courts, the reliance on precedents, which satisfies the need for consistency in the application of law. It is a principle which exists in order to create legal certainty for individuals and governments. You should be able to rely on a court of law not to change the rules of the game while the game is going on; at least not unless there are compelling needs to establish new law. This must be something that we all expect from a court of law: the court shall adjudicate in correspondence with its earlier jurisprudence, its decisions shall not be arbitrary, decisions shall be reasonably predictable and similar cases should be treated similarly. The law should be equal for all. Therefore, the court should follow its earlier jurisprudence unless there are compelling needs to change the jurisprudence. But of course, this serves as a restriction on the court to create new law, to follow the expectations of an impatient society and eager politicians to adapt existing law to the present political mood.

This principle, in common law called stare decisis, is a common feature of all Western jurisdictions, stronger in some countries, like the United Kingdom for instance, where – according to an English law dictionary[12] – it is called the "sacred principle" by which precedents are authoritative and legally binding and must be followed; and weaker in other countries, such as the United States of America, and also in the Scandinavian countries. It seems that in the pragmatic Scandinavian countries, precedents by the supreme courts are followed in practice by other national courts mainly because otherwise you can count on the Supreme Court to

[12] P.G. Osborn, "A concise Law Dictionary", 5th ed.,Sweet&Maxwell, London 1964

CEUR Working Paper Series
No. 4 August 2012

quash a lower court's decision; however, precedents are not formally legally binding. The European Court of Justice also takes a pragmatic view, in principle following its own precedents but not legally bound by them. The Court also from time to time feels free to diverge from its earlier jurisprudence.

This is my third thesis: the European Court of Justice though not formally bound in practice, follows precedents.

So this is how EU law develops by parties' contributions, facts and legal arguments, through the Court's judgments in the cases brought before it and through precedents. Not through public programs and policies, through arbitrary decisions following the political mood of the day in an attempt to be popular among those in power and the public.

Protection of individuals' rights

Now, let us return to that other policy that is guiding the Court:the need for protection of individuals' rights by the courts. That is a principle that the Court has underlined in numerous cases and followed throughout its existence. It can be seen in judgments concerning cases where there is a conflict between the interests between a Member State and an individual. It can be seen in the Court's acceptance and development of fundamental principles of law: the direct effect of EU law[13], the primacy of EU law over conflicting national law, the protection of human rights and fundamental freedoms – especially in matters of procedural law, such as right to a fair trial, but also freedom of speech and information, right to family life, and non-discrimination. It can be seen in the Court's development of the law regarding remedies for Member States' breach of EU law, notably economic compensation to individuals for damages caused by Member States in the implementation or application of EU law.

These principles have been developed by the Court in the absence of explicit rules in the Treaties but in line with the aims of the Treaties and in correspondence with legal traditions, common to all or most of the Member States themselves. These are principles that have been developed in Europe throughout centuries and they have been found by the Court to be "inherent" in the law of the European Union. To put it simply: whenever there is a conflict between an individual and a Member State concerning the correct implementation or application of EU law, the Court will in most cases adjudicate in favor of the individual.

This is my fourth thesis: the Court has consistently held that the role of courts – national and European – in the application of EU law is to protect the interests and rights of the individuals.

This is in the best tradition of European, Western values, and it is a tradition that has influenced the courts of Europe ever since the Middle Ages. I believe that that is what all of us expect from a court of law: the protection of the individuals against the use, or misuse, of power from those who are in power: kings and queens, presidents, dictators, governments and parliaments. That is not politics, that is law.

But sometimes the Court has to decide in cases where the situation is not so simple as a conflict between a Member State and an individual. There may be several conflicting individual interests and rights that need to be balanced against each other in one way or another.

[13] An early example is the famous van Gend en Loos case, case 26/62, where the Court concluded that Article 12 EC must be interpreted as producing direct effects and creating individual rights which national courts must protect.

This was actually the situation in the landmark *Laval* case[14] decided in December 2007, concerning industrial action by a Swedish trade union against a Latvian construction company, doing construction work on a Swedish school. Laval used its Latvian workers under a Latvian collective agreement with, among other things, Latvian wages which were lower than Swedish wages under Swedish collective agreements. This occurred when Latvia recently had become a member of the European Union, so EU law could be applicable. The Swedish trade union organizing construction workers was not satisfied with the situation and demanded that the Laval company enter into a Swedish collective agreement with the trade union, which would result not only in Swedish wages but also Swedish working conditions, employment requirements, fees to the trade union etc.. When the Laval company refused to enter into a Swedish collective agreement – arguing that it would lead to uncertainty about which wages the company should have to pay to its workers – the Swedish trade unions initiated industrial actions against Laval which eventually made it impossible for the company to perform any kind of work in Sweden. And consequently, the company went bankrupt.

Now, the action of the trade unions was compatible with Swedish law. There were no restrictions on trade unions to use industrial action, such as blockade, strike and so on, in order to bring about a collective agreement with an employer who has no such agreement with the trade unions. And then the question arose in a dispute between the Laval company and the trade unions in the Swedish Labour Court whether the industrial actions were compatible with EU law, and the Labour Court asked the Court of Justice for guidance. The Labour Court's question concerned not only the Treaty provisions but also the implementation in Sweden of the Posted Workers' Directive.[15]

There were several interests involved in the case. The parties to the conflict of course had entirely different interests to protect in the Court of Justice, and the Swedish government had its own interests. The government's main interest was to protect the "Swedish model", which allowed for trade unions to use industrial action to pursue their interests of using collective agreements for controlling the wages and working conditions of the workers – among other things to avoid what they called "social dumping", i.e. competition from foreign employers who pay their workers less than what the Swedish employers do according to national collective agreements. The Swedish model also implied non-intervention from the State in such labour conditions as wages and salaries. To allow the social partners total freedom to agree on remunition – with the State not even deciding on minimum wages – is a "sacred rule" of the Swedish model. So without the government taking sides in the industrial conflict as such, the government wanted to protect the "Swedish model" at all costs. In practice, this meant to try to persuade the Court of Justice to refer the case back to the Swedish Labour Court and let it decide according to Swedish law. The government did not want the Court of Justice to pronounce itself on issues such as proportionality in industrial conflicts, or on how to set wages. Industrial relations belong to the area of national sovereignty where EU law should not be involved unless there is a misuse of legal rights.

This was the first time that a question concerning the compatibility of industrial action with Union law was raised in the Court of Justice. Therefore the case caused considerable interest in other Member States and, apart from Sweden, 16 governments intervened in the case. The Member States were divided in roughly two camps: one with the "new" Member States from east and central Europe, and the other with the "old" Member States. And not surprisingly, the new Member

[14] Case C-341/05 [2007] ECR I-11767

[15] Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, 16.12.1996, OJ 1997 L 18, p. 1.

States sided with Laval and the Latvian government, arguing that the industrial action was a breach of Union law since it restricted Laval's fundamental freedom to provide services in Sweden, an important interest for the Union. And most of the old Member States seemed to want to protect the trade union's right to industrial action.

But the situation was not so easy at all. For instance, three old kingdoms, the UK, Denmark and Sweden all took different positions on the important issue of whether EU law was applicable at all. Denmark argued that industrial action as such fell outside the scope of EU law so the Court should not adjudicate in the conflict. Sweden acknowledged that EU law was applicable on the industrial action but argued that the social partners – employers and trade unions – should enjoy a special privileged standing in EU law and be left alone by the courts to decide their own relations, thereby asking more or less for immunity from EU law – a creative invention of how to apply EU law. And the UK argued among other things that trade unions' right to industrial action was not a fundamental right under EU law. And then there were numerous different arguments from all the Member States. For instance France argued that there was no right to an action before a national court on EU law in a case like this.

So again, the Court of Justice heard a number of different arguments, as is often the case in the litigation before the Court. And here, there was no written law or precedent to rely on. So the Court had to decide the case from the context and general scheme of the Treaty and from its jurisprudence in similar situations; it also used the Posted Workers' Directive as an interpretation tool. And at the end the Court came to the conclusion that two fundamental rights were involved: the fundamental right of trade unions to protect their members' interests on one hand – respected by the European Convention on Human Rights, by various social conventions and by the EU Charter of Fundamental Rights – and the Treaty freedom to provide services on the other hand, which is one of the fundamental "four freedoms" of EU law, aimed at promoting the creation of the internal market and a fundamental tool for the economic integration of Europe. And when balancing these two fundamental rights against each other in the Laval case, the Court concluded that the Swedish trade unions were in breach of Union law since they had made demands that went far beyond what was allowed by secondary Union law. Their demands were simply not proportional.

This judgment has been widely misunderstood and misinterpreted. It has been claimed in the public debate that the Court unfairly favored businesses' economic interests at the expense of the just social rights of workers and trade unions.[16] The judgment, some claim, is not a legal decision but is a genuine political decision by the Court. The criticism mainly comes from trade unions, of course, labour lawyers and left-wing politicians.

I do not agree with those that argue that the Court decides out of political considerations, and it did not do so in this case either. The arguments for the judgment are entirely legal, not political. There is no proof either that the Court has any particular aversion to trade unions in general or that the judges were hostile to the trade unions in this case. My conclusion is quite the opposite. By recognizing that the right to industrial action is a fundamental right in Union law, even though there is no provision for it in the Treaty, the Court has in fact given the trade unions a very strong position under Union law, which must be respected by employers and Member States. But as most fundamental rights, it is not absolute, it can be restricted.

But it must be remembered that not only the fundamental right of one "indi-

[16] I have even heard a professor of labor law claim that the Court in this case expressed its long-standing aversion to trade unions.

vidual", the trade union, was at stake here, but also the fundamental freedom of another "individual", the construction company, to provide its services. Two fundamental rights were standing against each other, and the Court had to adjudicate. One should not be surprised that the Court – in accordance with its jurisprudence – gave priority to the Treaty provisions and the integration aspect. But it was very careful in its wording: "Since the [Union] has thus not only an economic but also a social purpose, the rights under the provisions of the ...Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include ...improved living and working conditions, so as to make possible their harmonization while improvement is being maintained, proper social protection and dialogue between management and labor."[17] This is not an expression of hostility against trade unions but a careful balancing of interests of equal value in the context of the whole Treaty.

One result of this judgment was of course that the "Swedish model" was not entirely accepted by the Court. The unions lost the case in the Labour Court and the Labour Court awarded Laval economic compensation from the unions for the breach of EU law. Union law also interfered with the national legislation and consequently, Sweden had to change its legislation to avoid that a situation like in the Laval case appeared again. I shall comment on that a little later.

Member States' influence

You may ask: do the Member States – particularly the bigger ones – have a political influence on the judgments of the Court? Do judges protect their own Member State when that Member State's interests are at stake in a case before the Court? Or, the other way round, should the Court respect the opinions and interests of the Member States, particularly when a majority of them, or all of them, agree on the outcome of a case? After all, the Member States are the masters of the Treaty, they are the creators of EU law, so should they not have a decisive influence on the interpretation of what they have decided?

Let us start with the judges. Again, let us go to the Treaty. According to Article 19 of the Treaty on European Union and Article 253 of the Treaty on the Functioning of the European Union, the judges shall be chosen from persons whose independence is beyond doubt. Independence here is of course the fundamental quality required from a judge, especially independence from influence from outside and from the judge's own Member State. The judges of the Court shall possess the qualifications required for appointment to the highest judicial offices in their respective countries. So we are dealing with Supreme Court judges and the Member States themselves have decided that independence is the required quality. Judges also have to take an oath to perform their duties impartially and conscientiously. So if you believe that your own Supreme Court judges can be independent, impartial and conscientious, you must believe that EU judges also hold those qualities. It is hard to believe that it would be possible for an EU Court judge to function properly within the Court if he or she took sides for his or her own Member State. That judge would soon loose all influence in the Court. No single judge has a decisive influence on the judgments of the Court; there shall normally be three, five or 13 judges deciding the cases.

What about the political influence from the Member States? Of course, Member States try to pursue their own national interests, their political interests, when they intervene in the Court or appear as parties before the Court. In general, they

[17] P. 105 of the Laval judgment

do not appear before the Court in order to promote general EU interests. As a matter of fact, it is sometimes surprising how shamelessly Member States pursue their own national interests in Court cases, completely contrary to decisions that they have taken in common with other Member States in the Council. But this is the situation, and the Court is well aware that Member States have their national interests in mind before the Court. And it seems that the Court has a very relaxed view on this. If the arguments from a Member State are legally sound and well argued, the Court may take them into account, otherwise not. There is no proof that the Court pays more attention to arguments from big Member States than from smaller Member States. Non-discrimination on grounds of nationality is a fundamental value of the Union, actually the foundation on which the Union rests, and therefore the idea that the Court should treat the Member States differently is unconceivable. What counts is the quality of legal arguments.

Not even when the Member States act jointly and with the same arguments, which they seldom do, do they have any stronger influence on the Court than otherwise. One example of this may be the "Open skies" cases.[18]

The Commission started infringement cases against Sweden and six other Member States because of their bilateral air transport agreements with the United States of America. The Commission claimed that since EU legislation had established a comprehensive system of rules to establish an internal market in the air transport sector, the Member States no longer had the competence to conclude their own air transport agreements which they recently had negotiated with the United States. And the Commission also claimed that these so called "open skies" agreements were contrary to EU primary and secondary law. Behind all this lay a long conflict between the Commission and the Member States on who was competent to enter into air transport agreements with the United States – and in effect with all other countries outside the European Union. The Commission claimed that only the Union was competent, whereas the Member States claimed that they had retained their national sovereignty in this area and were free to enter into bilateral international agreements if they wanted to. Of course, a lot of money was involved: protection of big national airports on the transatlantic route, privileges for national airlines in the United States and so on. The Commission wanted to negotiate one single bilateral agreement with the United States on behalf of the whole Union in order to create one European air transport market but the Member States were unwilling.

This of course was an important case about the external competence of the Union, and the right for Member States to enter into international agreements. Sweden and the other Member States had the same interests here although they or their national airlines were competitors on the transatlantic route. The Member States were all in the same situation, so they engaged in a far-reaching co-operation to defend themselves before the Court. There were several meetings between the Member States, both during the written procedure in the litigation and before the oral hearing before the Court, where the Agents of the governments co-ordinated their arguments and pleadings. The Court had one hearing for all the cases and the governments did their best to persuade the Court that the Commission was wrong.

The Member States lost their cases in spite of all their efforts. The Court found that through the adoption in the Union of internal rules for air transportation, the

[18] Cases C-466/98 Commission vs. UK[2002] ECR I-9427; C-467/98 Commission vs. Denmark[2002]ECR, I-9519, C-468/98 Commission vs. Sweden[2002] ECR I-9575, C-469/98 Commission vs. Finland[2002] ECR I-9627, C-471/98 Commission vs. Belgium[2002] ECR I-9681, C-472/98 Commission vs. Luxembourg[2002] ECR I-9741, C-475/98 Commission vs. Austria[2002] ECR I-9797.

Member States had successively lost their own competence to enter into bilateral external agreements. This was in accordance with the Court's jurisprudence and also with a common concept in international law.

This is a very typical feature of the Court of Justice. Member States succeed when they have good legal arguments. The mere fact that they present a strong argument for the protection of national economic interests does not count, not even when they join together in actions before the Court. This has been a fact ever since the early cases concerning direct effect of EU law, the primacy of EU law over conflicting national law, the liability for Member States to pay compensation for damages for breach of EU law, EU competence versus Member State competence and numerous other cases. The Court has forcefully showed its independence towards the Member States in the interpretation of the Treaties and application of Union law. And this is precisely what the founding fathers of the Union intended.

So this is my fifth thesis: the Court is independent of political pressure from the Member States but in its interpretation of the Treaties, it is sensitive to good legal arguments from Member States in their protection of national interests of essential public policy if that is possible under the Treaties.

Member States accept the Court's judgments

Now, let us turn to Member States' reactions to the judgments of the Court of Justice. Some say that the Member States are reluctant to follow the jurisprudence of the Court of Justice. Some claim that there is always a underlying threat from the Member States not to follow the Court's judgments if they do not accept them. Those assertions are not supported by facts and realities. The Member States in general have a lot of respect for the Court of Justice; after all, they have themselves decided that the Court is a necessary part of the distribution of powers within the Union. And they seem to follow the Court's judgments without major problems even if they are not satisfied with the outcome of the litigation. Even when they, as parties or interveners in the Court, have opposed the view that the Court eventually takes, they have accepted it and even changed Union law to adapt to it. No one opposes the principles of direct effect[19] and primacy of EU law[20] any more, even if the Member States refrained from inserting the principle of primacy in the new Lisbon Treaty. General principles of law, such as process rights, fundamental rights, equal treatment and non-discrimination, proportionality, legal certainty and legitimate expectations, have been developed by the Court and accepted by the Member States.[21] The principles of subsidiarity and proportionality, for instance, are now primary EU law through Protocol (no.2) added to the Treaties. Human rights are now also part of EU primary law through the Charter of Fundamental Rights. In secondary legislation, you can also find numerous examples of how the Member States in the Council have followed the Court's judgments when they have reviewed regulations or directives.

This is therefore my sixth thesis: Member States accept in practice the judgments of the Court.

Even if Member States, in their submissions to the Court in various cases, have tried to explain all the dreadful consequences if the Court interferes with national legislation or practices, these consequences seldom come about. They are part of

[19] Case 26/62 van Gend en Loos[1063] ECR 1.

[20] Case 6/64 Costa vs. ENEL[1964] ECR 585.

[21] See P.Craig& G. de Burca, EU Law, 4th ed., p. 543 ff., Oxford University Press, Oxford 2008

legal rhetoric, but the Court requires proof which the Member States seldom can provide. The cases about free movement for health services are a good example. Member States' governments warned of disasters for national budgets if patients were given the right to free movement for health care where they wanted on the expense of the patient's Member State. The Court did not accept this argument, ruled in favor of free movement and the disasters never occurred. In the *Laval*[22] case, it turned out to be quite easy for the Swedish government and Parliament to change the national legislation so that it became compatible with the Court's judgment. And in practice, the judgment has not become such a disaster as the trade unions and labour lawyers claimed from the beginning; in fact, nothing really important seems to have happened to the right to take industrial action in the Member States. Nor has social dumping occurred. It is like the disaster that was supposed to happen to airports when the tax-free sales within Europe were abolished. No disaster occurred –luxury shops in European airports prosper like never before.

The Court seems to be very careful not to give judgments that in reality would harm the situation in the Member States too much – the judges are aware of the risk that the Member States, as legislators in the Council and masters of the Treaties, should legislate to reduce the impact of the Court's judgments or powers.

This is my seventh thesis. While safeguarding the aims of the Treaties, European integration and the rule of law in the Union, the Court of Justice is careful not to endanger the balance of power between the Union and the Member States and to accept real public policy concerns of the Member States.

Control of the Court

Finally, I would like to add some reflections about the control of the Court of Justice. In academic and political circles, there is from time to time criticism because of the lack of democratic control over an omnipotent Court of Justice. The Court is not accountable to anyone and with an enlarged Union, it has become more and more difficult for Member States to react to judgments from the Court that are not in line with the policies of the Member States. This criticism has been particularly outspoken after the judgment in the *Laval*[23] case.

I think this criticism is misdirected, for a number of reasons. The Member States have always had, and still have, the possibility to change the Treaties or secondary legislation if they are dissatisfied with how the Court exercises its powers. It is true that Treaty changes have become more difficult since the Union has grown from the original six Member States to presently 27 Member States. Yet, the democratic way of reacting to a court which exceeds its powers is still legislative change, and that possibility is open to the Member States – if they can agree.

There is also a lot of control within the Court itself. The judges come from all the Member States and they are all highly qualified professionals with integrity "beyond doubt". From what has been heard from within the Court, they often disagree in their deliberations – particularly in the high-profile cases – and have to compromise to give a unanimous judgment. So there is a lot of control by the judges themselves that the Court does not

[22] C-341/05, Laval un Partneri[2007] ECR I- 11767.

[23] C-341/05, Laval un Partneri[2007] ECR I- 11767.

exceed its competence and misuse its powers but rules according to "the law".

The Advocates General, who are members of the Court but not judges, and whose task it is to deliver in open court reasoned submissions in the cases, acting with complete impartiality and independence (Article 252 of the Treaty on the Functioning of the European Union), in fact exert a powerful control of the judges in the Court too. There are numerous examples of opinions where Advocates General have criticized the Court's jurisprudence and consistently held on to legal opinions which deviate from the view of the Court; and sometimes the Court has developed its jurisprudence in line with the Advocate General or the legislator has changed the law.

The national courts also exert control of the Court. The Court of Justice is entirely dependent on the national courts to follow its judgments in the preliminary rulings and thus execute them when giving final judgments. And national courts, usually being suspicious of external interference with their administration of law, do not accept the judgments of the Court of Justice unless they are really convinced by the legal reasoning of the Court.

And then we have the governments and the EU institutions involved in the cases, who scrutinize the judgments and react to maladministration of justice. They too control the Court.

And finally, there is academia, the public and the media. Even though people in general take little interest in the decisions by the Court of Justice, you can be sure that almost every judgment of the Court is scrutinized, and often criticized, by those involved, by the media and by academic circles. The Court is very aware of how its judgments are received and perceived by the world outside the Court (on the Court's website, you can find a long list of commentators on the Court's jurisprudence and where to find their articles).

So there are in fact many external controls on the Court. The control of the Court of Justice is no less alive than is the control of national supreme courts.

So this is my eighth and final thesis: even though there is no right to appeal against the judgments of the Court of Justice, there is just as much internal and external control of the Court as there is of national supreme courts.

Concluding remarks

It must be understood by now that I am a supporter of the Court of Justice as an institution, even if I do not always agree with the legal reasoning of the Court in various cases. I have great respect for it as a legal – not political – institution.

The real enigma is not the Court and its jurisprudence. The real enigma is why the European Member States often find it so hard to adhere to their obligations under the Treaties and to implement and follow at home the

CEUR Working Paper Series
No. 4 August 2012

decisions they have taken jointly in the Council in Brussels.[24] How shall it be possible to create "an ever closer union" among the European peoples if national politicians exploit nationalism and national interests at home only to gain popular support?

Anyway, the European Union should not have been where it is today in the process of integration of Europe – an open internal market for 480 million individuals with free movement for workers, services and capital and a right to settle wherever you want to in a Union of non-discrimination and fundamental rights – if the Court had not been so brave and creative, and so faithful to the aims and objectives of the Treaties of the Union.

CEUR Working Paper Series
No. 4 August 2012

[24] The Court of Justice has declared infringements of EU law by Member States in 103 cases 2006, 127 cases 2007, 94 cases 2008, 133 cases 2009 and 83 cases 2010 (according to the Court's statistics over judicial activities on the website www.curia.europa.eu)