

COMMENT: THE COURT OF JUSTICE OF THE EUROPEAN UNION AS SETTLER OF POLITICAL DISPUTES?



* Published as part of the 2023 CoI conference: '[Towards just institutional approaches to conflict prevention and resolution](#)' *

The main question of my blogpost is as follows: how can the Court balance between its legal and political functions and doing so, how can it contribute to the strengthening of Europe as a political community? In order to answer this question, my research focuses on the Court of Justice of the European Union (CJEU)'s role as settler of politically sensitive legal disputes. Courts usually refrain from political cases because they must administer justice and not take over the functions of elected politicians. However, the CJEU has recently shouldered the responsibility of deciding such matters, eg. the conditionality cases.

1. The CJEU on the borderline between law and politics

The Court of Justice of the European Union (CJEU) is the highest court of the European Union. As a judicial body it has no explicit political function but can solve political debates within the EU (between member states or between EU bodies or member states and EU bodies). In deciding individual cases and interprets EU law, the CJEU often makes rulings on politically and socially sensitive issues. Consider, for example, the [Lothar Matthäus-case](#) in the 1978, the cases regarding the so-called conditionality mechanism and rule of law ([Hungary](#) and [Poland](#)) or climate change cases ([Armando Ferrão Carvalho and Others](#)). As a result, the CJEU has had to decide several times on a case-by-case basis whether a politically sensitive case is justiciable, since courts usually refrain from cases of directly political substance which are not subject to clear legal standards. In other words, judges address problems from a legal and not a political point of view. If they did, they would take over the role of the political actors ([see the critics of judicialization](#)). However, contrary to the US Supreme Court, the CJEU has never elaborated a comprehensive political question doctrine. None of them are legally obliged to do so, but the separation of powers is stricter in the USA than in Europe, so the US Supreme Court must refrain from the political affairs of the legislative and the executive branch more consistently than European courts. Maybe the CJEU wanted to protect its right to apply legal rules to political questions, and therefore to remain able to carry out the principle of rule of law and hold EU bodies and the member states' governments to account.

2. Towards a more political CJEU?

The aim of my research is to examine how the CJEU has tried to balance between its two main

functions: adjudication on legally decidable matters and therefore delivering justice to the European citizens on one side and settling politically and socially sensitive issues on the other. These two functions are at odds with one another at first sight, because if a court steps into the political thicket, it invades the territory of the political branches of government (the legislation and the executive) without clear democratic mandate from the electorate to decide policy issues. The main hypothesis of the research is that since the cohesion of the European Union as a political community has been getting stronger and stronger (partly because of the threat posed by the Russian invasion against Ukraine), the political dispute-settler function of the CJEU will become more important, because a growing number of politically and socially sensitive case will be brought to the court (eg. regarding problems such as climate change or rule of law). It seems sensible to examine the practice of the CJEU from this point of view.

The analysis is mainly based on concrete court cases and their political context, examined with the so-called black letter methodology: the texts of the court decisions, their statutory law background and the reflections made by legal and political (social) theory.

3. The conditionality mechanism

Settling politically and socially sensitive conflicts by the highest court of the European Union has become a key function of the judiciary on the European level. One of the most interesting examples of this development from a Central and Eastern European point of view is the so-called [conditionality \(or rule of law\) mechanism](#) (and the before mentioned [Hungarian](#) and [Polish](#) cases before the Court). The [conditionality mechanism](#) is a legal process which empowers the EU to take action against a member state if its action is against the principle of rule of law and also affects or seriously risks the sound financial management of the budget or the protection of the financial interests of the Union. Hungary and Poland brought legal action against the European Parliament and the Council of the European Union, seeking the annulment of the EU [regulation](#) on the mechanism. But the Court dismissed the actions in February 2022 and found the legal basis for the mechanism is appropriate (consequently, the European Commission triggered the mechanism against Hungary in April 2022). The Court therefore found the legal actions justiciable. In other words, while deciding in the merits of the case the Court has relocated the case from its original place, the political arena to the sphere of law. The same rationale might be applicable to other politically sensitive Hungarian rule of law cases before the CJEU regarding [LGBT rights](#) and [asylum](#).

Following some kind of [prudential theory of political question doctrine](#) the Court can serve as a quite special and hopefully effective forum of resolving these very sensitive political conflicts, and – leaning on the authority of law – it can calm the tempers and make a final decision. (That's why attacks on judicial independence are so sinister because they put this very important function into danger.) The CJEU as the highest court of the EU can serve this purpose on the European level and doing so can help to make the European political community stronger.

Dr. János Fazekas, associate professor, [Eötvös Loránd University](#), Faculty of Law, Department of Administrative Law (Budapest, Hungary), email: fazekas.janos@ajk.elte.hu. His research project 'Can the courts decide political disputes in the European Union? From the Lothar Matthäus case to the rule of law mechanism' is funded by by the MTA János Bolyai Research Scholarship and the ÚNKP-22-5 New National Excellence Program of the Ministry for Culture and Innovation from the source of the National Research, Development and Innovation Fund. He will present his research at the 2023 COI conference '[Towards just institutional approaches to conflict prevention and resolution](#)'.