THE EUROPEAN COURT OF JUSTICE AS POLITICAL ACTOR IN INTERGOVERNMENTAL COORDINATION

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The European Court of Justice (ECJ) isn't a political actor, nonetheless, can play a role in solving political debates. ECJ makes rulings on political issues decided by EU bodies. Although ECJ has never elaborated a comprehensive political question doctrine, it did decide case-by-case whether a political problem is justiciable from the 1970's up to now. ECJ legally reviews the operation of the Executive on EU and national level. Besides, courts usually refrain from cases of directly political substance because they cannot take over the role of political actors. The aim of the research is to examine how ECJ has tried to balance between these requirements, and in which cases did it shape European intergovernmental relations. The analysis is mainly based on court cases and their political context. Main conclusion of the research is that ECJ can make a valuable contribution to Europe on becoming a real political community.

Key words: European Court of Justice; political question doctrine; conditionality mechanism; rule of law; judicialization.

1 INTRODUCTION

The European Court of Justice (ECJ) is not a direct political actor, but it can play a key role in solving political debates and policy issues within the European Union (between member states or between EU bodies or member states and EU bodies). This significant role may manifest itself when the court decides individual cases, interprets EU law and gives opinions on drafts of international treaties. As a result, the ECJ must make rulings on political - policy-related – issues decided by EU bodies, or issues with strong political overtones but which are legal ones. The ECJ has always been vigorously guarding its power of review, protecting its right to apply legal rules to political questions. Although the ECJ has never elaborated a comprehensive political question doctrine, it has had to decide on a case-by-case basis whether a political problem is justiciable. Doing so, the Court has stepped into the European political arena in several cases from the 1970's (e.g., the Lothar Mattheus-case) up to now (see the so-called conditionality mechanism later). The ECJ, as every court, must conduct the principle of rule of law and review the operation of the Executive including the

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EU bodies and the member states' governments from a legal point of view. On the other hand, courts usually refrain from cases of directly political substance which are not subject to clear legal standards, because if they did, they would take over the role of the political actors (see the critics of judicialization later). The aim of the research is to examine how the ECJ has tried to balance between these requirements, and in which cases did it shape European intergovernmental relations through its adjudicating powers.

2 METHODOLOGY

The paper, using jurisprudential method, analyses concrete court cases and their political context. It also covers the legal background and the theoretical-dogmatical foundations of governmental actions and their judicial control. In addition, the research examines the theoretical background of the variations of the political question doctrines in Europe from a comparative point of view. Moreover, the research uses the toolkit of institutional approach: it focuses on the relevant statutory regulation of the law of the European Union and the institutional framework of the EU. The paper first outlines the theoretical foundations of political question doctrine, and then discusses how the doctrine, which is essentially of American origin, has emerged in the main European legal systems (German-Austrian, French, and British). This is followed by an analysis of the relevant cases before the ECJ from the point of view of political question doctrine. In the Conclusions, I answer the question, whether and how the ECJ can contribute to the creation of a real European political community.

3 GOVERNMENTAL ACTS AND POLITICAL QUESTION DOCTRINE

Taking governmental actions or governing itself is a complex activity that is regulated by law but is a political activity in essence. There is a distinction between government and administration. Government essentially involves setting strategic goals related to leading the country and providing the necessary resources and means to achieve them. It is a political activity which typically involves choices between alternatives that express values (Marosi and Csink 2009, 115), so it is not neutral in an ideological sense. Its essence is taking discretionary actions with political content, setting priorities and oversee their implementation. Doing so, governing politicians are accountable to the people (Hague and Harrop 2004, 268). This is true even if we use the term governance instead of government due to the New Public Management approach, which emphasizes not the hierarchical but the network character of this activity (Pollitt and Bouckaert 2011, 21–23).

Implementing political programs is the main assignment of public administration, which is the 'engine room' of the state (Hague and Harrop 2004, 290; Moynihan and Soss 2014). This is a bureaucratic administrative apparatus described by Max Weber (Weber 1947, 329–341), which is far more strictly regulated by the law then the political sphere.

Despite the obvious differences, it is often difficult to distinguish between government and public administration because of the overlaps in organizational and personnel matters e.g., in ministries (Hustedt and Salomonsen, 2014; Körösényi 1996). But why is it important to distinguish between the spheres? The importance of distinction lies in being able to decide which decisions can be challenged before a court and which cannot. If a decision concerns longer-term

issues of political significance, then it is called government, done by politicians, and controlled only by politicians (e.g., Parliament). But if it concerns the management of daily "business" done by the legally bound public administration, then control shall be carried out by those who themselves carry out this activity or are otherwise professionally qualified to do so, e.g., public administrative bodies or the courts (Ereky 1939, 120–123, 180).

Governmental actions have two conceptual elements: (1) their primarily political character and (2) the broad discretionary powers (free deliberation) performed by the decision-makers.

Political question doctrine is a theoretical framework which describes the connection between governmental actions and law. Namely, it defines whether an act of government may be challenged before the court. It is a substantial problem in the era of globalisation, when resilience and flexibility of governmental and administrative systems are common themes (Hoffman and Fazekas 2019, 286–297). To maintain resilience, modern legal systems provide agencies with broad deliberation, even discretionary powers, as the absence of detailed decision-making criteria and constraints laid down in legislation can enable administrations to respond quickly and effectively to continuously changing challenges (Warren 2003, 35–38). On the other hand, to maintain effectiveness, governments also need constant feedback on the quality of their work, both in legal and political terms, and to be subject to external scrutiny in the system of democratic checks and balances. In fact, the Anglo-Saxon doctrine of political questions is nothing other than a theoretical framework for the resolution of the conflict between these two opposing demands, the conflict between broad political discretion and accountability (and, within this, legality).

Government decisions on political questions have a special relationship with the body of law. They are usually governed by constitutional law or administrative law, but sometimes they have essentially no clearly identifiable legal basis. By their very nature, they are adopted on political questions, and it is not unprecedented that they have no legal effect (Barabás 2018, 86–90). Consequently, governmental actions cannot be challenged in court, since judges may only adjudicate legal disputes but not political disputes, they cannot assume governmental responsibility, since they have not been empowered by the sovereign people to govern. On the other hand, governmental actions may not violate the principle of the separation of powers (Fazekas 2019, 811). In other words, the doctrine of political questions is a tool in the hands of the court to prevent itself from deciding on the merits of issues where it would be imprudent to do so (Tushnet 2002, 1204).

The roots of the political question doctrine stems from American public law. The United States Supreme Court laid down the criteria for political issues and thus governmental actions in the famous Baker v. Carr landmark decision, in which the Court ruled on a case involving the boundaries of a constituency. In its decision, the Supreme Court set out the alternative criteria for a case to be considered a political question, which cannot be decided by the court: e.g., a 'lack of judicially discoverable and manageable standards for resolving it' or the 'impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion'. The Supreme Court or other courts, invoking the political question doctrine, are often reluctant to take part in deciding such political questions, e.g., when the President and the Congress clash over the exercise of wartime authority (Porčnik 2019, 72).

Since governmental actions are not legally bound, decisions-makers, as I mentioned before, enjoy broad competence of deliberation or discretionary power regarding the political content of the decision. This free deliberation is a mandate for a political actor to act in a specific case in accordance with the objectives of government, within the general framework of the law. Discretion in this context means that statutory law provides a wide array of possibilities how a state body will decide. The legislator leaves it to the agency to determine the content of that decision. However, with the rise of civil constitutionalism, the principle of public administration being bound by law has become emphasised. This means that the administration cannot act in the absence of a legal mandate and that the law must also determine the content of the action (Rozsnyai 2017, 132). As a result, free deliberation seems to be problematic regarding the rule of law principle. That's why the relationship between free deliberation and legality has become a fundamental issue in European and American jurisprudence (McHarg 2017; Sowa and Selden 2003).

4 POLITICAL QUESTION DOCTRINE IN EUROPE

In European legal systems, political question doctrine cannot be found either in theory or in judicial practice in the form in which it surfaced in the United States. Constitutional courts in Europe are generally not part of the ordinary court system and are much more likely to be regarded as political bodies than the US Supreme Court. In Europe, the separation between law and politics is less strict. Consequently, while in the US the Supreme Court only rules on the specific issue of law that it is presented with (see the famous case or controversy clause), a European constitutional court examines the legal issue in a broader context, when, for example, it reviews a statutory law instrument abstractly in the light of the Constitution (Paczolay 1995, 22).

Nevertheless, political question doctrine has its own European antecedents and versions. The first theoretical doctrine to associate it with is the reason of state (raison d'état), with the pivotal thought that the interest of the state is more important than the legality of a state act (Miller 1980, 587; Vatter 2008).

In the German-Austrian jurisprudence governmental acts (Regierunksakt) are decisions of the state on matters of fundamental importance (e.g., in the field of foreign affairs and defence) and therefore subject to limited review of legality. The government must be given wide discretion in making decisions in these areas, as they are influenced by several external factors that are not dependent on the will of the government. In many of these matters, government must be able to respond to changing circumstances in the most flexible way, especially when risks associated with decisions are difficult to assess. (Schmidt-Aßmann 2019, 81-83).

The German Federal Constitutional Court (Bundesverfassungsgericht) made important decisions in some landmark cases as the Pershing case (1983) and the CERN case (2010). In both cases it ruled the constitutional complaints non-justiciable, because deciding on the merits the Court would have overruled the Government's political considerations (Barabás 2018, 88; Blumenwitz 2002, 103; Quint 2007).

The French jurisprudence, when dealing with the concept of *acte de gouvernement*, does not draw a sharp distinction between governmental and

administrative actions in terms of judicial review. As a rule, the court may review all decisions of the executive branch, with the exception of acts of government, for which there is no general definition. It soon became clear, however, that institutionalised control mechanisms were needed to ensure the legitimacy of public power. The Council of State (Conseil d´État) has emerged as an instrument for this purpose, initially acting as an advisory body to the government. Only later, while retaining its original function, became the guardian of the legality of government action, due to the principles of the Enlightenment. In the practice of the Council of State, the requirement of a constitutional state became increasingly important: the Executive must act in subordination to the law and the Constitution. However, there have been non-justiciable cases with direct political substance, e.g., initiating legislative proceedings or a government decision on the position to be taken by a French minister in the European Union's decision-making body, the Council. Nevertheless, the concept of *acte détachable* has helped to extent the scope of judicial review when detaching justiciable acts from non-justiciable ones. E.g., when the French state authorises another state to open an embassy in France, this constitutes an act of government which is not subject to judicial review. On the other hand, granting of a building permit for the construction of an embassy building is not a governmental act, but an administrative act of public authority, which is subject to judicial review (Marosi and Csink 2009, 118-123; Barabás 2018, 86).

In the common law of the United Kingdom, we find another historical precedent, the institution of the royal prerogative. These prerogatives have traditionally played a role in foreign policy, declarations of war and military affairs, and their importance has of course declined sharply under the parliamentary form of government. Decisions taken under the royal prerogative are treated in theory and practice as acts of state that cannot be challenged in court but are governed by statutory law (Bradley and Ewing 2011, 250-251; Mello 2017). From the 17th century onwards, however, there were also cases of disputes between Parliament and the King in areas, such as economic policy, concerning the content of a royal prerogative. Such issues included whether the King could impose duties without the approval of the legislature, thereby raising extra revenue, or whether he could prohibit certain building works in London. The latter was the subject of the famous Case of Proclamations (1611). The decisions in later cases such as Entick v Carrington (1765), Attorney General v De Keyser's Royal Hotel Ltd (1920) and Fire Brigades Union (1995), if not explicitly political, have also established that decisions of the legislature clearly constraint the exercise of royal prerogative.

5 POLITICAL ISSUES IN THE CASE LAW OF THE ECJ

The jurisprudence of ECJ, unlike that of the US Supreme Court, has not developed a clear set of criteria for dealing with cases of political nature. Therefore, it is not possible to speak of a uniform political question doctrine in this context (Butler 2018). In addition to the theoretic and historic specificities we have seen, it is because the law of the European Union was originally developed to promote economic integration rather than to enforce broader constitutional considerations or values. On the other hand, one of the key issues of EU law is to promote effective judicial review and legal protection, so only a narrow limitation of this is conceivable. According to Article 19(1) of the Treaty on European Union (TEU) the Court of Justice of the European Union ensures that the law is respected in the interpretation and application of the Treaties. The

interpretation of this provision is a matter for the Court of Justice, which in essence defines the limits of its jurisdiction.

Therefore, the Court of Justice's power of review should extend not only to the narrow legal issues but also to the relevant facts beyond those issues, including the political circumstances, if necessary for the assessment of the case. The Court of Justice also plays a wide range of roles: it exercises jurisdiction at first and second instance, interprets EU law for national courts and gives opinions on draft international treaties. It therefore must give its legal opinion on a very wide range of issues, including political decisions made by EU bodies, or on essentially legal questions with strong political overtones. In doing so, the Court has always been jealously guarding its power of review, protecting its right to apply legal rules to non-legal questions, which leaves room for the application of a kind of political question doctrine, since it must be able to decide which cases it can and cannot rule on (Butler 2018, 334).

However, there are also views that the Court of Justice should exercise restraint in cases where decisions of the EU institutions on policy issues are challenged before it. However, the Court of Justice has ruled on a few such cases, even when the position of these institutions was unanimous. For example, in its Opinion No 2/13, it expressed reservations about the EU's accession to the European Convention on Human Rights, even though it was supported by most of the EU institutions and the Member States. Or, for example, in Opinion 1/60, the court took the view that the proposed amendment to the Treaty establishing the European Coal and Steel Community was a political and not a legal issue, as it could lead to additional costs and hence tax increases - again showing that it was aware of the seriousness of the issue and the danger of bringing political disputes into the judicial arena (Butler 2018, 335). However, in the context of the 1995 Intergovernmental Conference, the court made it clear that disputes that could be satisfactorily resolved at the political level should be resolved there and not brought before the Court of Justice (Butler 2018, 336).

Of course, there are also contrary approaches in the Court's practice, pointing towards a kind of specific political question doctrine. Thus, relatively early on, in Lothar Mattheus v Doego Fruchtimport und Tiefkühlkost, 1978 (Butler 2018, 336), the Advocate General explained that the Court's decision depended on the amendment of primary EU law, which was itself the subject of hard political bargaining, and therefore recommended that the Court should reject the application for lack of jurisdiction. The Court did so, stating that 'the question raised was not of a judicial nature', thus in a way acknowledging the existence of the political question doctrine (ibid., 336-337).

Following Butler, it is worth briefly examining the legal regulation of the European Union's external relations and how the Court of Justice deals with political questions in cases of this nature. The question is also of great interest because of the growing importance of the European Union as a global political actor and the growing importance of its external relations, which is reflected in the increasing number of cases brought before the Court of Justice. Several EU bodies have competences in this area, and as a result, there are disputes of jurisdiction which must be decided by the Court of Justice. Consequently, the scope of judicial review and the limits of jurisdiction are more in focus than ever (ibid., 337-345).

Along these lines is the case of the Commission of the European Communities v Hellenic Republic, 1995, (ibid., 338-339), which concerned the embargo imposed by a Member State on Macedonia. The Advocate General's Opinion explained that

certain aspects of the case were political and not specifically legal issues, and that the application of the relevant legal rules was therefore not a simple task. At the same time, the court added that the Court of Justice cannot be seen as entirely subordinate to the political power of the Member States, since it must ensure that Member States do not exercise their wide margin of discretion in the field of security policy in a careless manner. In Butler's interpretation, the Advocate General has in fact given a kind of extract from the political question doctrine in EU law.

The Court of Justice also applied a not comprehensively developed political question doctrine in NF and Others v. Council of the European Union, 2017 (ibid., 339). In this case, the Court had to examine a joint declaration by the European Union and Turkey, but in its view, it was a political declaration and, even if it could have legal effects and be binding, it could not be considered as an act adopted by the European Council or another EU body.

A separate category of cases is those in which the Court of Justice has had to answer the question of the margin of manoeuvre of the Member States in ensuring their own external and internal security, maintaining their armed forces, choosing their personnel and organising their structures (Angela Maria Sirdar v The Army Board and Secretary of State for Defence, Tanja Kreil v Bundesrepublik Deutschland, Alexander Dory v Bundesrepublik Deutschland, Alfredo Albore, see Butler 2018, 339-340). The Court has concluded in these cases that it is essentially for the Member States to answer these questions, in line with EU law. In the Alfredo Albore case, the Court also stated that national discretion cannot be uncontrolled, so that entire national sectoral policies may not be outside the scope of judicial review. However, the Court did not set out any generally applicable criteria to be able to draw the line between justiciable and non-justiciable issues in the future.

Political questions are also raised in the context of the EU's Common Foreign and Security Policy, CFSP (Butler 2018, 341-348). This is another area where political discretion has traditionally played a significant role in decision-making. In essence, the Treaties themselves, e.g., the Art. 24 and 40 of Treaty on European Union (TEU) and Art. 275 of Treaty on the Functioning of the European Union (TFEU), provide basis for a kind of political question doctrine by exempting decisions taken in the CFSP from judicial review. Nevertheless, the Court of Justice tries to act whenever possible, taking advantage of borderline situations in the context of its own jurisdiction. However, it finds it more difficult to make a sufficient case on substantive issues than on procedural issues, the former being more political in nature and therefore more likely to be rejected based on some sort of political question doctrine argument. Thus, in many cases, the Court's main task is to distinguish between substantive and procedural issues (ibid., 343).

On a substantive issue, the Court of Justice ruled on a violation of fundamental rights in the Kadi case (2008), which concerned the implementation by the Commission and the Council of a UN Security Council resolution. The Advocate General's Opinion underlined that the fact that a measure is necessary to maintain international peace and security, e.g., to achieve an essentially political objective, does not mean that general principles of law need not be respected and that individuals may be deprived of their rights. Thus, even here the Court has not elaborated a coherent set of criteria for cases with a political content but has referred to their dual nature (ibid., 339-345).

On a different matter altogether, the case of Lukáš Wagenknecht v. European Council (2020) (Brusenbauch Meislová and Marek 2023) was brought by Lukáš

Wagenknecht, a member of the Senate of the Czech Parliament. The claimant had previously asked the European Council to exclude then-Prime Minister Andrej Babiš of the Czech Republic from the European Council meeting of 20 June 2019 and from future discussions on the negotiations on the Multiannual Financial Framework for the period 2021-2027. The request was based on the grounds that the Prime Minister Babiš had, personally and through his family, several interests in the food industry, which gave rise to a conflict of interest. The Council rejected the request, arguing that its composition is laid down in Art. 15(2) of the TEU, from which no derogation is possible. The question as to who represents a Member State at a Council meeting is a matter for the national constitutional law of that Member State, and the European Council or its President has no discretion in this area.

Wagenknecht then sued the European Council before the Court of Justice, asking the Court to declare that the European Council had unlawfully rejected her application (Lukáš Wagenknecht v European Council). The Court of Justice, however, dismissed the action as non-justiciable and manifestly lacking any foundation in law, essentially accepting the reasoning of the European Council. It explained that, in addition to the fact that it is for the Member State to decide whether it is represented in the European Council by the Head of State or Government, it is also for the Member State to decide whether it should regulate the cases in which that person may not represent it at European Council meetings.

6 CONCLUSIONS

It is striking that the Wagenknecht case did not arise in the usual foreign and security policy area but relates to the internal functioning of the EU's organisational system and the participation of Member States in the EU's decision-making mechanisms. The Court does not refer to any overarching doctrine here either, merely stating that the issue falls within the broad discretion of the Member State and is therefore, it may be added, not a problem of European Union law on its merits. If it is a legal question at all, it is a question of national (Member State) law. Consequently, from the EU's point of view, it is practically a political issue. Hence, this case is political, therefore non-justiciable by the Court of Justice, because it falls within the jurisdiction of another legal system or legal dimension, that of national law.

From this point of view, Graham Butler's observation is interesting: the significance of the political question doctrine in the case law of the Court of Justice is whether the Union's institutions or the Member States can be left to control themselves, or whether the Court of Justice can do so. If the Court of Justice cannot exercise judicial control due to the political question doctrine, it would result in contradiction to the principle of the rule of law. And if Member States are completely free to enter contracts with third parties, this would completely undermine the single internal market and EU law itself (Butler 2018, 347-348). In fact, that is the significance of the Wagenknecht case: by refusing to rule on the merits of the case, the Court of Justice has effectively left one Member State without legal control over a key aspect of the functioning of one of the Union's main decision-making bodies, the European Council, namely who is entitled to represent a Member State at its meetings and under what rules. That is, of course, a matter for the Member State to decide on the political content, but the decision-making process and the merit of the decision itself depend mostly on whether the rules on conflicts of interest and exclusion exist and how they function. It is clear from this case that the Union itself could not, and did not wish

to, influence the internal functioning of one of the Union's supreme bodies on a matter of major importance for the rule of law. Only the Member State, which does not necessarily have a direct interest in the effectiveness of this control, could do so.

However, the case also raises the issue of national sovereignty. It depends on the form of government and the division of powers between the constitutional bodies of the Member State concerned who is entitled to represent the Member State at European Council meetings, the head of state or the head of government, and on the rules of that very representation. From this point of view, it is logical that the rules for this, including the provisions on conflicts of interest and disqualification, and possibly substitution, should not be laid down by the European Union but by the Member State itself in its national constitutional law and implemented by it. From another point of view, this does not solve the problem that the European Council is after all one of the main decision-making bodies of the European Union, and that the sovereignty of the Member States therefore deprives the Union of the possibility of controlling the decision-making process in its own body, free from influence.

There would therefore seem to be a strong case for the Court of Justice to develop and, of course, apply its own coherent political question doctrine, as this would draw a clear line between what is and is not justiciable on the borderline between law and politics. There is, however, a view that this may not be so desirable. A recent study by Alexandra Mercescu and Sorina Doroga, examining the practice of the Court of Justice, concludes that in the Court's practice, doctrine is used at most as a rhetorical element in certain decisions, and that its content varies from case to case. In their opinion, the development of a coherent doctrine would be neither possible nor desirable, given the complexity of the Union's legal system. Furthermore, the Court's practice is based on several doctrines and case-law strategies, and it would not be appropriate to add a system of principles with uncertain content to them (Mercescu and Doroga 2021, 28).

Whatever the fate of the doctrine in the Court's practice, politically sensitive issues will not be avoided in the future. One need only think of the procedure concerning the so-called rule of law or conditionality mechanism, which affects both Hungary and Poland. The purpose of this procedure is to enable the EU to ensure, or even to enforce, the rule of law in the Member States and scrutiny the usage of the EU’s financial sources. The EU is walking on the borderline between law and politics since the application of these values depends on the political decisions of the governments of the Member States. It was clear from the outset that the Court of Justice would have to intervene in this matter at some point, as it was also suggested that the European Parliament could even take the European Commission to court if it did not initiate proceedings against Hungary and Poland (HVG 2021; Holesch and Kyriazi 2022).

In the end, the two Member States concerned, Hungary and Poland, brought legal action against the European Parliament and the Council of the European Union, seeking the annulment of the EU legislation governing the rule of law mechanism (Regulation (EU, EURATOM) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget). The Advocate General's Opinion, presented in December 2021, proposed to dismiss the actions. And the Court did so in February 2022: in judgments C-156/21 Hungary v Parliament and Council and C-157/21 Poland v Parliament and Council dismissed the actions and stipulated that the legal basis for the mechanism is appropriate, and it is compatible with the procedure laid down in Art. 7 of the TEU and respects the limits of the powers

conferred on the EU and the principle of legal certainty. As a result, the European Commission triggered the mechanism against Hungary in April 2022 (Bayer 2022).

The Court ruled the legal actions justiciable and did not consider the conditionality mechanism case to fall under the scope of the political question doctrine. Consequently, the Court has decided on the merits of the case. It is fully understandable because the case had clear legal basis in EU law, so the Court had to carry out its adjudicative power.

If the Court continues down this path, it seems that will follow some kind of prudential theory of political questions (Birkey 1999). This means that the Court carefully considers whether a politically sensitive case is justiciable and draws as narrowly as possible the boundaries of the political question doctrine and seeks to ensure that as many acts of the Executive as possible are subject to judicial review, provided, of course, that the legal (constitutional) conditions for doing so are met. It is highly desirable, especially in view of the recent trends on limiting judicial power throughout Europe and the whole world. A theoretical (Hirschl 2013) analysis of the process of judicialization (judges taking over the role of elected politicians when deciding on political matters) provides the theoretical basis for this displacement. Furthermore, certain political moves tend to limit the scope of judicial review. For instance, in Hungary with the amendments to the Fundamental Law overruling certain decisions of the Constitutional Court (CC), the CC has less and less power to interfere in the decision of cases that the legislature and the constitutional branches want to keep to themselves (Fazekas 2022, 17-20; Sonnevend 2021, 175). In the United Kingdom, several government officials, including then-Prime Minister Boris Johnson said regarding the Miller/Cherry case in connection with Brexit that the courts got involved in politics, which is a matter for ministers and Parliament (BBC News 2020). If the political cohesion within the European Union is going to get stronger, it is vital that the Court as the main body of the European judiciary can rule on politically sensitive cases. The judiciary can namely take the case out of the current political context, which means that the impact of the decision will go beyond the specific case. In this way, the Court can decide issues on which it is very difficult or impossible to reach political consensus, or even cool the heat of political conflict (Sólyom 2006, 334). Doing so, the Court could help Europe to become a cohesive and organic political community. And maybe decide on the merits of disputes like the Wagenknecht case in the future.

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EVROPSKO SODIŠČE KOT POLITIČNI AKTER V PROCESU MEDVLADNEGA USKLAJEVANJA

Evropsko sodišče ni politični akter, kljub temu pa lahko igra vlogo pri reševanju političnih problemov. Evropsko sodišče odloča o političnih vprašanjih, o katerih odločajo organi Unije. Čeprav Evropsko sodišče nikoli ni razvilo celovite doktrine o političnem vprašanju, je od 70. let prejšnjega stoletja do danes odločalo od primera do primera glede vprašanja, ali je nek politični problem sploh mogoče obravnavati. Evropsko sodišče pravno preglejuje delovanje izvršilne oblasti na ravni EU in nacionalni ravni. Poleg tega se sodišča običajno vzdržijo primerov neposredno politične vsebine, ker ne morejo prevzeti vloge političnih akterjev. Cilj prispevka je preučiti, kako je Evropsko sodišče poskušalo uravnotežiti med temi zahtevami in v katerih primerih je aktivno sodelovalo v oblikovanju evropskih medvladnih odnosov. Analiza temelji predvsem na sodnih primerih in njihovem političnem kontekstu. Glavna ugotovitev je, da lahko Evropsko sodišče pomembno prispeva k temu, da Evropa postane prava politična skupnost.

Ključne besede: Evropsko sodišče; doktrina političnega vprašanja; mehanizem pogojevanja; pravilo zakona; judicializacija.