

The Political Impact of the Case Law of the Court of Justice of the European Union

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Conceptual framework for understanding the degree and scope of the political impact of the case law of the Court of Justice of the European Union – Definition of ‘the political’ – Carl Schmitt’s concept of political realism – Chantal Mouffe’s agonistic theory of ‘the political’ – ‘The political’ in the light of three classical categories: (1) polity, (2) policy, and (3) politics – Framework for understanding polity as competing values, policy as conflicts over resources, politics as fights for power – Criteria of political significance and impact of the Court of Justice case law – Two illustrations: Case C-391/09 *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija* and Case C-192/18 *European Commission v Republic of Poland* set against the broader context of politically significant cases from the Court of Justice of the European Union.

‘Good political science cannot ignore legal constraints, just as lawyers must make sense of the politics of laws, i.e. the way in which legal arguments are used by a variety of actors to pursue their own interests.’¹

INTRODUCTION

On 15 May 2020, Viktor Orbán, the Prime Minister of Hungary, questioned the legitimacy of a ruling made by the European Court of Justice regarding the transit zone at the Serbian-Hungarian border, also stating that this was part of a ‘coordinated assault’ from the European Union (EU). On 28 May, the Hungarian

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¹R. Dehousse, ‘Law as Politics’, 3(1) *European Union Politics* (2002) p. 123.

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authorities announced they would comply with the judgment. Both reactions of the Hungarian authorities concerned the same legal issue, and both were considered politically motivated and politically significant.² How should these reactions be interpreted? What criteria should be applied to explore the political significance the judgment and the reasons behind it? Questions of this type are asked by columnists, journalists, and the general public, and are usually met with partial answers based on different interpretations of the term *political*.

This article accomplishes two things: (1) it conceptualises the term *the political* in relation to the rulings of the Court of Justice of the European Union (based on both the classical division of polity, policy, politics and on the author's original approach based on certain elements of the theory of Schmitt as modified somewhat by Mouffe) – surprisingly, this has not been done comprehensively before by any of the main researchers (only Rafał Mańko has referred to the concept of the political, also applying some aspects of the theories of Schmitt and Mouffe, however, his approach was based upon the reversed logic of the Court of Justice's adjudication, namely on its being a final intervention into a political conflict, albeit – according to him – few cases might be politically meaningful³); and (2) it operationalises this conceptual framework as a tool for understanding the political impact of the Court's decisions. Two examples are used, set against the broader context of politically meaningful Court of Justice rulings. Thus, the article makes a meaningful contribution to both European legal studies and political science by offering a theoretically well-founded understanding of *the political* in relation to Court of Justice decisions, and by enabling various stakeholders in such rulings to both analyse and understand the case law and to use that knowledge in their activities. This applies to advocates general when dealing with politically sensitive cases (particularly since they often refer to academic contributions in their opinions), and to lawyers, political scientists, representatives of civil society institutions, journalists and politicians interested in the Court's 'political jurisdiction' at the European and member state levels.

To date, numerous authors have analysed various aspects of the political significance of the Court's jurisprudence. Wayne Sandholtz and Anthony Arnall have mainly focused on the legal conditions and consequences of Court of Justice rulings for constitutional reforms of the EU and/or EU institutions and relations among Member States.⁴ Sabine Sarugger and Fabien Terpan have analysed the normative

²R. Uitz, 'Don't be fooled by its sudden compliance. Hungary is helping to unravel the EU's legal order', *euronews.com*, 28 May 2020, (www.euronews.com/2020/05/28/don-t-be-fooled-by-its-sudden-compliance-hungary-is-helping-to-unravel-the-eu-s-legal-orde), visited 6 April 2021.

³R. Mańko, 'Orzekanie w polu polityczności' [Adjudication in the field of 'the political'], 7(1) *Filozofia Publiczna i Edukacja Demokratyczna* (2018) p. 71.

⁴A. Arnall, *The European Union and Its Court of Justice* (Oxford University Press 2006) p. 612; A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000).

aspects of transformations within the EU political system.⁵ Susanne K. Schmidt, Daniel Kelemen, Michael Blauberger, Dorte S. Martinsen and Karen Alter have dealt with the importance of the Court of Justice in sectorial policies at the EU and member state levels, and with the questions of member state compliance and possible political constraints on legal integration within the EU.⁶ Dorte S. Martinsen, Małgorzata Gersdorf, Mateusz Pilich, Jan Barcz and Rafał Mańko have taken a philosophical approach to the notion of *the political* as an emanation of conflict in relation to the notion of 'the legal'; they conclude that the Court's jurisdiction influences the political struggles that take place at the level of EU institutions and of member states.⁷ Furthermore, Karen Alter and Laurence Helfer have explained how member state governments influence such rulings.⁸ A few scholars have examined the political determinants of decisions, including their political context, and their impact on EU and member state institutions, ad hoc political decisions, and both electoral campaigns and public preferences (to mention only Lisa Conant, Diane Panke, Michael Blauberger, Rachel Cichowski, Dorte Martinsen, Susanne Schmidt, Daniel Naurin, Clifford Carruba). However, they mainly focused on one or both of the following dimensions of 'political': (1) significance for European integration; and (2) compliance vs. non-compliance. Up to now, the biggest contribution to analysing the most important strains of research on the Court of Justice's impact on EU integration, policymaking and national legal orders has been by Alec Stone Sweet.⁹ None of the

⁵S. Saruggger and F. Terpan, *The Court of Justice of the European Union and The Politics of Law* (Palgrave Macmillan 2017); S. Saruggger and F. Terpan, 'Normative transformation in the European Union: on hardening and softening law', 44/2021 1 *West European Politics* (2020), <www.tandfonline.com/doi/full/10.1080/01402382.2020.1762440>, visited 6 April 2021.

⁶S.K. Schmidt, *The European Court of Justice & the Policy Process* (Oxford University Press 2018); D.S. Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015); S.K. Schmidt and D.R. Kelemen, *The Power of the European Court of Justice* (Routledge 2013); M. Blauberger and D.S. Martinsen, 'The Court of Justice in times of politicisation: "law as a mask and shield" revisited', 27(3) *Journal of European Public Policy* (2020) p. 382, <www.tandfonline.com/doi/full/10.1080/13501763.2020.1712460>, visited 6 April 2021.

⁷Martinsen, *supra* n. 6; M. Gersdorf and M. Pilich, 'Judges and Representatives of the People: a Polish Perspective', 16(3) *EuConst* (2020) p. 345; J. Barcz and A. Zawidzka-Łojek, *Sądowe mechanizmy ochrony praworządności w Polsce w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości UE* (Elipsa Warsaw 2018); A. Sulikowski et al. (eds.), *Legal Scholarship and the Political* (CH Beck 2020).

⁸K.J. Alter and L.R. Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice', 64(4) *International Organization* (2010) p. 563.

⁹A. Stone Sweet, 'The European Court of Justice and the judicialization of EU governance', *Living Reviews in EU Governance*, 10 April 2010, <papers.ssrn.com/sol3/papers.cfm?abstract_id=1583345&download=yes>, visited 6 April 2021.

above-mentioned authors has clearly elaborated the term *political* when writing about ‘political constraints’, ‘politically controversial’ rulings, ‘political concerns’ or ‘political implications’ in relation to the Court. Dorte Martinsen has defined the Court’s ‘influence’ based on the definition of ‘power’ in light of Dahl’s theory.¹⁰ For Martinsen, ‘influence’ is understood as the Court’s ‘impact on EU policy outputs’;¹¹ in this way she focuses on decision-making but barely addresses such issues as the Court of Justice’s jurisdiction relevance to civic society, public discourse, electoral fights at both the EU and member state levels, party political programmes, etc. Hence, there is a gap in both political theory and legal studies, which this article seeks to fill. In their recent research (2020), Martinsen and Michael Blauberger have challenged the neofunctionalist statement that the political face of the Court’s jurisdiction is hidden behind a legal mask. Joseph Weiler has focused on how the Court ‘transforms’ the treaty regime (he has used the phrase ‘authority’ in reference to EU law to point out that respect for the law determines its political significance),¹² whereas Wayne Sandholtz and Alec Stone Sweet (both neofunctionalists) have said that the Court exercises a ‘legalistic’ form of political governance by discreetly affecting policies and/or institutional changes in the EU;¹³ Ann-Marie Burley and Walter Mattli have referred to these theories as ‘law as a mask and shield’¹⁴ (meaning that, due to its technical-legal nature, the Court of Justice uses law as a ‘mask and shield’ to obscure the political substance of its rulings and protect them from political challenges); Martinsen and Blauberger¹⁵ have qualified them, and have provided evidence of certain inevitable and rather visible political constraints on the Court’s activities.¹⁶

THEORETICAL FRAMEWORK

Two paths are available for addressing the lack of a conceptual framework for analysing the political significance of the Court of Justice’s jurisdiction: redefining *the political*, and establishing analytical criteria for aspects related to the Court’s case law. The need to do so has been pointed out by an increasing number of

¹⁰Stone Sweet, *supra* n. 4, p. 75.

¹¹Martinsen, *supra* n. 6.

¹²J. Weiler, ‘The Authority of European Law: Do We Still Believe in It?’, in W. Husel and J.-P. Rageade (eds.), *The Authority of EU Law. Do We Still Believe in It?* (Springer Berlin 2019) p. 3-5.

¹³G. de Búrca and J. Weiler (eds.), *The European Court of Justice* (Oxford University Press 2001); W. Sandholz and A. Stone Sweet, *European Integration and Supranational Governance* (Oxford University Press 1998); Stone Sweet, *supra* n. 9.

¹⁴A.-M. Burley and W. Mattli, ‘Europe before the Court: A Political Theory of Legal Integration’, 47(1) *International Organization* (1993) p. 41 at p. 43.

¹⁵Blauberger and Martinsen, *supra* n. 6, p. 382-392.

¹⁶Blauberger and Martinsen, *supra* n. 6.

researchers¹⁷ and by politicians, journalists and representatives of public opinion in EU member states.¹⁸

The scope of the present analysis involves two conceptual dimensions. The first draws on Carl Schmitt's antagonistic theory of *the political*, supported and re-interpreted by Chantal Mouffe's agonistic perspective as modified by the author. The second involves a division into polity, policy, and politics. Together, these two dimensions address the political context of the Court of Justice's jurisdiction by considering the political aspects of the subjects and processes brought to the Court, along with the political meanings of the Court's rulings for numerous political actors at different levels of the EU's political system. Combining the two dimensions into a single theoretical framework containing a set of political criteria is the author's original contribution to the existing research on the 'political jurisdiction' of the Court of Justice. That conceptual framework is then validated in an analysis of two politically sensitive cases, while remaining set against the broader context of politically significant EU case law.

The classical understanding of *the political* contains a multitude of problems regarding the scope and range of what can be considered as such. Classical is here understood as the use of power to rule a specific community, and stems from the political philosophy of Aristotle, Plato, Ockham, Machiavelli, Weber and numerous other classical authors.¹⁹ *Political* in the classical sense can be defined as the search for a way to rule a certain community. However, Carl Schmitt's theory of *the political* is a modern attempt to disambiguate the words 'ruling' and 'power', and to establish a paradigm for the exercise of power.²⁰ In the Schmittian concept of political realism, a *political* relationship is *antagonistic*, based on a division between 'friends' and 'enemies'.²¹ Chantal Mouffe²² elaborates on this in the context of legal theory, referring to 'confrontational approaches' rather than friends and enemies. This paper does not delve deeper into Mouffe's modifications of

¹⁷M. Blauburger, 'With Luxemburg in mind – the making of national policies in the face of the ECJ jurisprudence', 19(1) *Journal of European Public Policy* (2012) p. 109; K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014); Martinsen, *supra* n. 6.

¹⁸E. Siedlecka, 'Wyrok TSUE: polski Sądzie Najwyższy, radź sobie sam' [Court of Justice ruling: Polish Supreme Court, manage on your own], *Polityka*, 19 November 2019, (www.polityka.pl/tygodnikpolityka/kraj/1932492,1,wyrok-tsue-polski-sadzie-najwyzszy-radz-sobie-sam.read), visited 6 April 2021.

¹⁹M. Weber, *Politik als Beruf Gesammelte Politische Schriften* (Muenchen 1921) p. 396–450.

²⁰C. Schmitt, *The Concept of the Political* (Chicago, London 1996); J. Leca, 'L'état entre politics, policies et polity: ou peut-on sortir du triangle des Bermudes?', 1 *Gouvernement et Action Publique* (2012) p. 59.

²¹Schmitt, *supra* n. 20, p. 26; cf G. Sartori, 'The Essence of the Political in Carl Schmitt', 1(1) *Journal of Theoretical Politics* (1989) p. 63.

²²C. Mouffe, 'Democratic Politics and Conflict: An Agonistic Approach', 9 *Política Común* (2016).

Schmitt's theory. The author relies on the Schmittian approach, with some consideration given to Mouffe's notion of 'interests'. Thus, the author refers to Carl Schmitt when demonstrating clear political conflicts that emerge not only from the subject/substance of particular cases and the way the 'political jurisdiction' of the Court of Justice is understood, but also from rulings themselves (and from the way rulings are interpreted and placed in certain political narratives). In this context, Rafał Mańko interprets Mouffe's approach to mean that antagonisms (conflicts) in societies can be resolved only by decisions of a political nature, not by substantive law.²³ In contrast, the author understands antagonisms as conflicting needs and perceptions of who can be counted as a friend/ally (who also deserves resources) or an enemy (who does not deserve resources).

The category of 'interests' is necessary to distinguish the political from the juridical. Juridical refers mainly to legality and justice (understood in binary terms such as legal vs. illegal, just vs. unjust), while 'political' embraces situations in which the interests of political actors are satisfied gradually, since it is usually impossible to appease everyone at once. These interests are antagonistic, and are very often played out in a zero-sum game.²⁴ Moreover, it is also very difficult to obtain the resources needed to satisfy different players' political interests, and so the fight over resources naturally pits individuals, groups, societies and other entities against each other in antagonistic relationships.²⁵ Finally, one of the most obvious antagonistic aspects of *the political* is the struggle for the power to decide what and/or whose interests will be satisfied, and to what extent. This struggle is crucial to what is political, but of minimal importance to what is juridical. In its legal decisions, the Court of Justice may (and often does) point out what political interests should prevail, and what values do prevail in certain areas. An analysis of Court's rulings in this light can reveal 'the political landscape' of conflicts that are resolved or unresolved (or even deepened) by decisions of the court. Hence, while Mouffe understands jurisdiction as the result of a process in which conflicts not resolved through decision-making are transferred to the court, the Schmittian approach proves most relevant to identifying and describing political antagonisms, both in the reality taken into consideration by the Luxembourg judges, and in the reality that emerges after a Court of Justice ruling is made known to the public.

A synthesis of these concepts allowed the author to establish a framework for a detailed and elaborate understanding of *the political* as a tripartite entity composed of *polity*, *policy* and *politics*, a categorisation commonly used in political science as a starting point for evaluating political systems from a non-institutional

²³C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (University of Chicago Press 1985) p. 45-52.

²⁴Mańko, *supra* n. 3, p. 71.

²⁵This approach, although further elaborated as an emanation of the concept of policy, is closely related to Ralf Dahrendorf's theory of social conflicts. See R. Dahrendorf, 'Toward a Theory of Social Conflict', 2 *The Journal of Conflict Resolution* (1958) p. 170.

perspective.²⁶ *Polity* can be understood as the foundation upon which a political system is constructed. Hansen and Sørensen claim: 'The polity is perceived as the framework for governance processes rather than its outcome'.²⁷ This approach is deeply rooted in Aristotelian, Hobbesian, and Rousseauian deliberations on sources of power, and is also connected to the Weberian idea of legitimacy and the idea of political culture.²⁸ Questions of polity arise in discussions over the dominance or inferiority of certain values in a specific political community, and when deciding which values should be combated when creating a normative-institutional system of governance. Examples of antagonistic interests (needs and values) falling within the realm of polity include liberal vs. conservative, communitarian vs. individual, and democratic vs. authoritarian.²⁹ As to *politics* and *policy*, Mouffe understands politics classically, as a fight to gain and/or maintain power, and policies as thematic areas of practices that contribute to social order (e.g. economic policy, social policy).³⁰ Here the main axis of antagonisms runs from those who have power to those who want to gain it, whereas in policy the axis lies between those with 'less impact (and thus less expenditure)' or 'more impact (and thus more expenditure)' in a certain area. Policy can be placed into a general framework of any situation in which different entities and/or groups have different interests, but there are not enough resources³¹ to satisfy all of them. However, unlike Mouffe, the author perceives both areas in the Schmittian approach as battlefields of interests that are often mutually exclusive.³² In other words, when making a decision, a judge or a college of judges must decide not only how justice should be applied according to the legal norms, but also what political values and whose political interests will prevail. This choice occurs in courts, whether the judges are conscious of it or not. The smallest area occupied by the political in comparison with the juridical is that of the textual interpretations made by courts, while the largest area is teleological interpretation. 'This proposed shift towards

²⁶F. Varone et al., 'Polity, Politics and Policy Evaluation in Belgium', 11(3) *Evaluation* (2005) p. 253.

²⁷A. Dreyer Hansen and E. Sørensen, 'Polity as Politics: Studying the Shaping and Effects of Discursive Polities', in D. Howarth and J. Torfing, *Discourse Theory in European Politics Identity, Policy and Governance* (Palgrave Macmillan 2005) p. 93-94.

²⁸S. Everson (ed.), *Aristotle: The Politics and The Constitution of Athens* (Cambridge University Press 1996).

²⁹Cf. e.g. J. Benington and M.H. Moore, *Public Value: Theory and Practice* (Palgrave Macmillan 2011).

³⁰*Supra* n. 29.

³¹A. Zybała, 'Pojęcie zasobów w polityce publicznej – rola i znaczenie dla budowania potencjału do efektywnego działania publicznego' ['Notion of resources in public policy – role and meaning for building a potential for efficient public action'], in J. Gardawski and R. Towalski, *Świat pracy: instytucje i wartości* [*The World of Labour: Institutions and Values*] (Warsaw 2017) p. 73-93.

³²M. Szabó, 'Politics Versus the Political: Interpreting "das Politische" in Carl Schmitt', 7(1) *Distinction Journal of Social Theory* (2006) p. 27.

Table 1: The conceptual framework for the analysis of the selected rulings (author's own compilation)

Context	<p>Polity: Whether (and to what extent) the subject of the provisions/norms is related to European values.</p> <ol style="list-style-type: none"> 1. Whether the ruling indeed refers to the full scope and core of the problem or touches upon only a part of it. 2. Whether the judgment of the Opinion of the Advocate General contains the words: 'political', 'polity', 'politicisation' or similar. 3. Whether it is clear what the purpose of the provisions providing the basis for the case was. 4. Whether the ruling refers to constitutional values and principles and/or to the clash between them. <p>Policy: To what extent the subject of the provisions/norms satisfy specific social/ economic/security-related interests of individuals, groups or societies.</p> <ol style="list-style-type: none"> 1. Whether the judgment confirms the status quo in a certain policy field or changes its scope. 2. Whether the judgment clearly defines the addressees of certain policies. 3. Whether the interpretation of the norms affects sectorial policies in the member states and the EU. <p>Politics: Whether the subject of the provisions/norms has ever been used in a political conflict by any of the stakeholders.</p> <ol style="list-style-type: none"> 1. Whether the provisions providing the basis for the case were politically controversial or the subject of political campaigns. 2. Whether the timing of the procedure (and of the issuance of the ruling) had political significance. 3. Whether the Advocate General or the judges point out that the subject of the ruling has been or could be used in a political fight. 4. Whether the scope of the problem in the ruling is raised in a public debate by both the government and the opposition (in conflicting approaches).
Parties	<p>Polity: What parties are involved (e.g. states or individuals); what the political systems of the countries involved are; whether fundamental rights of the parties are involved.</p> <ol style="list-style-type: none"> 1. Whether the Advocate General or the judges refer to norms at the international, European or national level providing for the protection of certain individuals or groups. 2. Whether the type of court procedure is important (e.g. in a preliminary ruling procedure, there is a different scope of action for the Court of Justice than in procedures under Article 258 TFEU), and whether there are any allies (member states, institutions) supporting the parties/or clear signs of distrust towards the parties. <p>Policy: Whether any elements of the situation of the parties are related to sectorial policies; whether economic or social interests of the parties are involved.</p> <ol style="list-style-type: none"> 1. Whether the parties refer to unequal treatment in certain policy areas. 2. Whether the parties present their social or economic interests as representative of a larger group (or whether there were external supporters interested in certain aspects of sectorial policies). <p>Politics: Whether the parties are in the course of a political campaign or other type of conflict (constitutional responsibility-related procedures, etc).</p> <ol style="list-style-type: none"> 1. Whether any stakeholders formally support the parties of the case (e.g. other member states in the case of actions against member states) in order to clearly show political support for them. 2. Whether the parties are politically vulnerable in any way. 3. Whether the parties have strong or weak public support. 4. Whether there is a clear political pro- and anti-European division among the parties.

Table 1: (Continued)

Court	<p>Polity: Whether the issue was treated as important (Grand Chamber), whether the Advocate General addressed key philosophical issues.</p> <ol style="list-style-type: none"> 1. Whether the ruling is considered meaningful and elaborated by large number of judges. 2. Whether the Advocate General refers in his/her Opinion to value questions that are philosophical and/or significant for the EU and/or member states. 3. Whether the judges in their ruling or in any comments related to it refer to philosophical questions and/or significant questions for EU and/or member states values. <p>Policy: To what extent the judges and/or Advocate General are specialised in sectorial issues.</p> <ol style="list-style-type: none"> 1. Whether the Advocate General (or Court of Justice judge serving as an Advocate General) is a specialist in the sectorial issue or rather in more general questions of values. 2. Whether the Advocate General mainly refers to sectorial policies in the Opinion. <p>Politics: What arguments politicians of the member state raise towards the judges, the chamber or the Advocate(s) General.</p> <ol style="list-style-type: none"> 1. Whether the Court of Justice, its judges or Advocates General were accused in a public debate of being biased.
Procedure	<p>Polity: Whether the procedure was launched on the basis of a preliminary question or in any other way; whether the national procedure was exhausted.</p> <ol style="list-style-type: none"> 1. Whether the previous phases of the procedure included references to EU principles or values. 2. Whether the debate over the procedure included references to EU values and principles (e.g. the debate in the media or among institutions of the civil society or experts). <p>Policy: Whether the procedure was related to clarifying or applying sectorial policy/policies.</p> <ol style="list-style-type: none"> 1. Whether the procedure affected interests only regarding policy-related questions. 2. Whether the procedure was limited to economic, social or security questions, although it deserves broader elaboration. <p>Politics: Whether the procedure was influenced by political campaigns in any way.</p> <ol style="list-style-type: none"> 1. Whether the type of procedure (e.g. a preliminary ruling procedure) has political meaning. 2. Whether the procedure had been subject at previous levels to controversy in a public debate.
Implications	<p>Polity: Which values prevail and which are rejected; whether the international position of member states changes.</p> <ol style="list-style-type: none"> 1. Whether the case affects the question of states' security/reputation. 2. Whether the member state has implemented/intends to implement the ruling. 3. Whether government-EU relations have changed due to the ruling. 4. Whether the Court of Justice defines a new principle of EU law in the ruling. 5. Whether the EU and/or member state institutions change the patterns of their operations due to the ruling. <p>Policy: To what extent the case can influence the budget spending of the member states involved. To what extent the case can influence the budget of the EU. Whether there are any changes in sectorial policies in the EU or member states.</p> <ol style="list-style-type: none"> 1. Whether the judgment intervenes in the division of competences between institutions of the EU and of member states (or perhaps other levels of multi-level governance, e.g. regional) in a specific policy field. 2. Whether the judgment requires efforts on the part of the member state(s) to change its/their sectorial policies and/or increase budget spending. <p>Politics: Whether the ruling influences electoral campaign(s).</p> <ol style="list-style-type: none"> 1. Whether the ruling has been exploited politically by a member state government and/or opposition (mainly regarding the question of compliance). 2. Whether EU institutions and/or member state(s) are subject to political comments in the context of the ruling.

(Continued)

Table 1: (Continued)

Response	<p>Polity: What the narrative around the meaning of the ruling is in the national and international press and public opinion.</p> <ol style="list-style-type: none"> 1. Whether the ruling causes debate among representatives of civic society at the national, European or international levels. 2. Whether the ruling is discussed in the media at the national, European or international levels. 3. Whether the ruling's meaning is underlined in academic debate. <p>Policy: Whether there are any calls for changes in sectorial policies.</p> <ol style="list-style-type: none"> 1. Whether any political/societal/academic actors call for changes in sectorial policies. 2. Whether the media cover the ruling as mainly meaningful for the development of sectorial policies. <p>Politics: Whether the ruling is subject to comments in the media and in public debates.</p> <ol style="list-style-type: none"> 1. Whether public opinion (in the member state involved and in other member states) about the subject of the ruling or the ruling itself has changed in the short and long term. 2. Whether public opinion has changed regarding EU institutions or other member states in the context of the ruling. 3. Whether there is any/intense reaction to the ruling from academia, institutions of civic society and journalists.
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context does not entail a naïve or idealistic perspective on law as a world where interests can never prevail and where actors strive for justice and nothing but justice. Quite the contrary: interests have and have always had their place in law'.³³

The illustrations presented below serve as a validation of the framework. Certain aspects of the cases below will be cross-referenced to the criteria in the table above, in square brackets. Each of the criteria embraces an existing or potential antagonism (e.g. clashing values, use of limited resources, winning and losing political battles).

METHODOLOGY

The approach to and definition of European integration which the author has taken in this study is *multi-level governance*, with elements of intergovernmentalism. This approach is not typically applied in research on the Court of Justice, which is usually perceived through the lens of neo-functionalism.³⁴ However, it provides a better understanding of the antagonistic interests of member states and EU institutions regarding the jurisdiction of the Court, creating a suitable environment for analysis.

³³A. Grimmel, 'Integration and the Context of Law: Why the European Court of Justice is not a Political Actor', 3 *Les Cahiers européens de Sciences Po* (2011) p. 5.

³⁴To mention only the research of Alec Stone Sweet or Wayne Sandholtz.

The methods used in the research employ a mixed approach and include: a theoretical, conceptual study (on conceptualising the notion *the political*), a normative (legal) analysis (of references to the Treaties, EU secondary law and the texts of judgments), elements of a qualitative analysis (that addresses political interpretations of the Court's judgments), and the decision method (on the impact of certain decisions by judges and other stakeholders of the 'political jurisdiction' of the Court of Justice). At certain points, an effort is made to check whether there is causality in relations between certain variables (though not to test those variables, which would be beyond the scope of this study). This process tracing mainly involves relations between a certain 'political content' of rulings and the 'political reaction' of stakeholders. There may be also multiple reactions, and reactions to reactions (all within the frame of the process tracing). However, causality is used here only partially, and is definitely truncated, so it should not be considered a fully legitimate method applied in its usual complexity.

The aim of what follows is to operationalise the 'political impact/significance' of the Court of Justice by providing clear criteria based on the conceptual framework presented above, and to validate the framework using two examples of politically meaningful rulings by the Court in the broader context of other cases.

One could say that every ruling of the Court of Justice can be politically significant, but in fact certain categories of cases are much more 'politically sensitive' than others. Joseph Weiler has pointed to a growing populism and disrespect for EU law (inspired by populist politicians) in numerous member states as a reason for the increasingly intense debate on the political aspects of EU law.³⁵ He has underlined the significance of cases related to EU values, particularly in what he has called the 'inextricable triad' of democracy – human rights – rule of law,³⁶ and in this regard he has drawn attention to cases involving Poland, Hungary, Italy, Austria and Great Britain. Susanne Schmidt has stated that rulings within an area of 'legal uncertainty' raise the biggest political concerns, also referring to the rule of law and human rights.³⁷ Of course, one can see strong political constraints related to cases within much less 'politically controversial' fields such as free movement,³⁸ competition, austerity measures within the Eurozone during the crisis,³⁹ and others. The initial selection of cases for this analysis was conditioned by the above-mentioned approaches and by the author's subjective choice based upon her awareness of the public debates aroused by the cases selected.

The cases selected for the analysis are not representative of the specifics of the process of politicisation of the Court of Justice's jurisdiction (or the judicialisation

³⁵Weiler, *supra* n. 12, p. 3.

³⁶Weiler, *supra* n. 12, p. 9-11.

³⁷Schmidt, *supra* n. 6, p. 11-13.

³⁸Schmidt, *supra* n. 6, p. 14.

³⁹F. Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSP decision of 5 May 2020', 16(4) *EuConst* (2021) p. 733.

of politics in the EU, as some authors put it⁴⁰). For it is difficult to speak about ‘representative cases’ regarding the political significance of the Court’s jurisdiction, due to the fact that the variety of rulings having political relevance is large enough to embrace very different factors of ‘representativeness’. Furthermore, surprisingly, many potentially politically meaningful decisions of the Court of Justice never attract public attention,⁴¹ which makes it difficult for experts to unequivocally qualify them as politically significant. It is also necessary to mention that – while groundbreaking Court cases of political significance date as far back as the early 1960s and 1970s, in fact no one questions that the political significance of the Court’s jurisdiction increased after the enlargement of the EU in 2004 and the entry into force of the Treaty of Lisbon. The two cases used here for validating the criteria of the conceptual framework were chosen subjectively because of their political meaning for Lithuania, Poland, the citizens of those countries, and those of other EU member states, and because they were given wide coverage in the mass media and social media. Another important criterion was the presence of various aspects of *the political* within them, along with their context related to the spheres of polity, policy and politics. For example, these cases exhibit characteristics described by Dorte Martinsen in her statement: ‘the [member states] codify the case law mostly regarding technical issues; and they try to restrict the Luxembourg Court’s impact in more contested areas through “modification”’.⁴² The cases selected also relate to Member States that joined the EU during the ‘big enlargement’ in 2004, which has been part of the visible process of politicisation of the Court of Justice’s jurisdiction.⁴³ With the 2004 enlargement, the EU has grown to include states whose political culture differs from older EU members, particularly in areas in which the Court has recently been increasingly challenged.⁴⁴ This particularly concerns areas sanctioned in 2009 by the Charter of Fundamental Rights as elements of EU primary law, but also areas in the ‘new’ member states where awareness is being raised, such as workers’ rights, gender equality, EU citizenship and even fundamental rights and the rule of law.⁴⁵ The rulings chosen are explicit and easy to grasp. Finally, the author chose Polish and Lithuanian cases because she has acted as a researcher in those two countries

⁴⁰J. Dederke, ‘CJEU judgments in the news – capturing the public salience of decisions of the EU’s highest court’, 17 *Journal of European Public Policy* (2021).

⁴¹Ibid.

⁴²Martinsen, *supra* n. 6, p. 95-97; D.S. Martinsen, ‘Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union’, 48(12) *Comparative Political Studies* (2015) p. 1622.

⁴³Weiler, *supra* n. 12, p. 3-16.

⁴⁴Ibid., p. 10-16.

⁴⁵Blauberger and Martinsen, *supra* n. 6, p. 382-392.

and knows their languages, which gave her full access to the primary and secondary sources relevant to the research.

CASE ANALYSIS – CONTEXT

The author decided to categorise the elements of the landscape of the ‘political jurisdiction’ of the Court of Justice, and to set up a background for the two cases selected for an in-depth analysis. This was done in part based on Weiler’s triad of democracy, human rights, and the rule of law, as well as by modifying Martinsen and Blauberger’s rather convincing approach. Martinsen and Blauberger provide four constellations of cases with high political significance. They arrive at these by qualifying the ‘mask and shield’ theory of the Court’s activity, and by using rather ‘extreme’ cases for illustrative purposes,⁴⁶ cases from the early 1960s concerning integration, free movement, equal treatment (including gender equality), control over state aid, citizenship and migration, and fundamental rights. The author broadens this scope by focusing more on the level of political significance. In this regard, the analyses that follow rest on this assumption: a case can be considered politically significant if it fulfils at least one of the criteria in any of the categories outlined in the conceptual framework (the more criteria, the more significant). The logic applied is the reverse of that used by Weiler or Martinsen and Blauberger: here a case is analysed on the basis of the framework and then it is determined whether the case is of low, moderate or high political significance.

Low-moderately politically significant cases usually involve sectorial policies, but their application is explained by the court (and/or by the Advocate General) as requiring a certain political effort at some level of the multi-level governance of the EU. They might be considered as cases confirming the ‘expansive Court of Justice jurisdiction’, as their main political significance is that the judges extend the scope of (mainly substantial) EU law into areas such as citizenship or fundamental rights. These cases mainly fulfil the criteria within the category of ‘policy’. For example, in Case C-93/18, *Barjratari – Unlawful Employment and the Right to Free Movement*, the Court of Justice decided about some conditions of lawful employment and – more generally – conditions of the right to free movement, which required certain resources from member states regarding the protection of the rights of third country citizens within the EU. However, despite the ensuing legal discussion about the case in some member states (particularly in the UK) and a limited academic debate, the case did not have a broad political resonance. In another case of similar political significance, Case C-268/99, *Aldona Malgorzata Jany*, although the Court did not exceed the scope of the legal provisions of the subject of the ruling at all, it still did not avoid political involvement.

⁴⁶Blauberger and Martinsen, *supra* n. 6, p. 383-390.

When addressing the issue of the free movement of workers, the Luxembourg judges had to deal with the problem of human trafficking and prostitution (whether they wanted to or not – rather the latter).⁴⁷ Despite this involvement of fundamental rights and EU values, the *Jany* case fulfilled only a small number of the criteria of political significance. The ruling was politically noticed, though mainly in the area of policy and, to a limited extent, polity. If the majority of Court of Justice cases are mainly technical and the conflict they address does not exceed the parties involved,⁴⁸ then the majority of politically meaningful cases are those of low or moderate importance, and only a small number of them touch upon important aspects of *polity* and *politics*. These are usually related not only to the subject of a given case, but also to its context. Such cases involve the EU values listed in Article 2 TEU, for they contain a broad interpretation of how those values are applied. In terms of *the political*, the political significance is based on political conflict and the ‘friends-enemies’ dichotomy (supporters and opponents of certain values). Therefore, the most politically significant are those whose context is already marked by a political conflict. They usually concern: the rule of law (mainly judicial independence) (e.g. Case C-286/12, *Commission v Hungary* concerning a scheme requiring the compulsory retirement of judges reaching the age of 62); minority rights (e.g. Case C-673/16, *Coman and Others v Romania* concerning the definition of marriage as a marriage of same-sex couples in the EU); the protection of politically vulnerable groups and individuals (e.g. Case C-43/75, *Defrenne v Sabena* concerning equal rights of women and men and strengthening the principle of the direct effect of EU law, or the more recent Case C-465/07, *Elgafaji v Staatssecretaris Van Justitie* concerning the subsidiary protection of individuals in a serious threat due to internal or international armed conflict; the previously mentioned Cases C-924/19 PPU and C-925/19 PPU concerning the unlawful character of placing asylum-seekers in a transit zone at the Hungarian-Serbian border); and trust and loyalty among the EU member states (Case C-216/18, *L.M.* concerning the trust of an Irish judge towards the Polish judicial system). The debate over the political significance of certain Court of Justice rulings has at times even overshadowed the debate over the ruling itself. One example of this is the political ramifications of a decision by the German Constitutional Court in 2 BVR 197/83 *Solange II*, which sparked an enormous political debate over the question of the Court of Justice’s competences, the EU member states’ division of powers, Germany’s role in the EU, the sovereignty of the member states within the EU, elements of EU federalisation – the list goes on. This political significance is high because

⁴⁷F. Foret and L. Rubio Grundell, ‘European Morality Politics in the European Union: the Case of Prostitution’, 24(3) *Sexuality & Culture* (2020); M. French, ‘Plying the Trade Freely: Prostitution and European Union Trade Agreements in the Case of Aldona Malgorzata Jany and Others’, 45(2) *Alberta Law Review* (2007).

⁴⁸Blauberger and Martinsen, *supra* n. 6, p. 384.

the context of the jurisdiction fits numerous criteria of *the political* in the conceptual framework, not because of the subject or scope of the case.

The two cases selected for validating and exemplifying the conceptual framework are ideal-typical cases that fulfil all (or nearly all) the political significance criteria.

CASE C-391/09 *RUNEVIČ-VARDYN*

Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* is one of the few Lithuanian cases that have been politically very significant. When Koen Lenaerts, President of the Court of Justice of the European Union, visited Lithuania in 2017, he indicated that the *Runevič-Vardyn* case was one of the three most important cases for Lithuania [Court(p'ty)3]. At that time, Lenaerts noted *expressis verbis* that this was so because of the case's 'essential constitutional meaning', [Context(p'ty)4] and its rootedness in the question of national identity [Context(p'ty)2].⁴⁹

The case is based on a request for a preliminary ruling⁵⁰ concerning an interpretation of Article 18 TFEU ('Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'), Article 21 TFEU ('Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'), and Article 2(2)(b) of Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The fact that the case was based upon a preliminary question is meaningful, because the Court of Justice was able to take a wider range of issues into account in its judgment than if it had been limited by a lawsuit involving the Commission or a Member State [Parties(p'ty)2].⁵¹

⁴⁹Teisingumo Teismo pirmininkas: bylos prieš Lietuvą svarbios visai Europai', *diena.lt*, 16 January 2017, (m.diena.lt/naujienos/lietuva/salies-pulsas/teisingumo-teismo-pirmininkas-bylos-pries-lietuva-svarbios-visai-europai-792124), visited 6 April 2021.

⁵⁰It is worth mentioning that the preliminary ruling procedure is less adversarial and provides more space for the Court of Justice to leave certain aspects of the decision to the national courts. From this point of view, Schmitt's antagonistic approach is less relevant due to the very nature of the case.

⁵¹As Bogdanowicz and Taborowski point out in their study, the Commission sometimes makes the mistake of limiting the scope of its objection in cases that in fact relate to meaningful systemic infringements, with the result that such judgments do little or nothing to rectify the systemic problem. Case C-286/12, *Commission v Hungary* concerning the independence of Hungarian courts, is an example of such a mistake. P. Bogdanowicz and M. Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, *European Commission v Republic of Poland*', 16(2) *EuConst* (2020) p. 306.

Polity

The *Runevič-Vardyn* case touches upon the core of the antagonism between the fundamental rights of ethnic/national minorities and the maintenance of national identity [Context(p'ty)4]. The conflict is rooted in the protection of national identity through language, and is significantly important to small states such as Lithuania. Moreover, the case addresses a philosophical question regarding the openness of society within an EU member state and the level of protection provided to the fundamental rights of its citizens [Parties(p'ty)1]. This question is also relevant to national security and international aspects of the situation of ethnic/national minorities in Lithuania [Implic(p'ty)1]. In this regard, observations were submitted by the governments of several member states, including the Czech Republic, Estonia, Latvia, Poland, Portugal, and Slovakia, as well as by the European Commission [Parties(p'ty)2]. Advocate General Jääskinen presented his Opinion, in which he clarified the political aspects of the context of the case [Context(p'ty)2].⁵² He mentioned antagonisms within the sphere of polity at the intersection of history and geopolitics. If the question is also a conflict between two EU member states over history that affects the situation of minorities [Parties(p'ty)1] (which is therefore also of interest to Slovakia, the Czech Republic and Latvia [Context(p'ty)3]), the political aspect of the Court's ruling was to consider and/or even decide (albeit indirectly) which paradigm of protection is most important to citizens [Context(p'ty)4]. Although the ruling addressed the issue of minorities only indirectly (the Court of Justice supported the position of the Lithuanian government and other countries addressing the problem of satisfying ethnic and national minority needs [Implic(p'ty)4; Implic(p'ty)5]), it is interesting to consider alternate possibilities. What if the Court had made a different ruling? The antagonism between minority rights supported by Poland vs. national identity through minority language protection supported by Lithuania or the Czech Republic, if established as a precedent to be used by courts across Europe, could lead to an antagonism between small states with large minorities and larger states such Poland, or even the EU itself [Implic(p'ty)4; Implic(p'ty)1]. Furthermore, the Court could have considered aspects such as the rights of other minorities in small member states, e.g. Russians, who could seek protection of their rights and the use of the Cyrillic alphabet in their names [Resp(p'ty)1; Resp(p'ty)3]. This aspect could also have an impact on international relations between EU member states and Russia.

⁵²ECJ 16 December 2010, Opinion of AG Jääskinen, EU:C:2010:784.

Policy

In the *Runevič-Vardyn* case, ‘access to and supply of goods and services which are available to the public’⁵³ was considered substantive EU law (containing norms within the sphere of polity) [Context(p’cy)1; Parties(p’cy)2] and was described by both the Advocate General and the court as embracing ‘a large number of areas of social life’ [Court(p’cy)2].⁵⁴ The antagonism in this field lies between citizens’ willingness to feel secure about their access to public goods and services provided by states other than Lithuania and the state’s effort to provide for constitutionally grounded and technically proper conditions enabling a unified identification of citizens and their self-recognition as Lithuanians to exist in as many areas as possible [Implic(p’cy)2]. These aspects are reflected in state policy in areas such as home affairs, migration policy, foreign policy, and the technical solutions employed in public administration. The Court of Justice, at the suggestion of the Advocate General, had to analyse the political aspects resulting from the adoption of Directive 2000/43, specifically that the unanimous vote in the Council of the EU occurred only after the dismissal of an amendment proposed by the European Parliament whereby ‘the exercise by any public body, including the police, immigration, criminal and civil justice authorities, of its functions’ would be included in the list of activities listed in Article 3(1) of that Directive⁵⁵ [Court(p’cy)2; Proced(p’cy)1]. This indicates the unwillingness of the state to embrace ‘sensitive’ areas within the scope of the Directive, thereby opening the way for closer integration in this respect [Parties(p’cy)2]. Judicial activism would mean here not only disrespect for the will of the member state but also a risk of non-compliance and allegations raised by the member state towards the Court of Justice. This argument is even stronger considering that a number of states supported Lithuania in this case. Interestingly, some comments in the press appeared to support the Polish minority in Lithuania. The argument was that Lithuania was one of the very few states limiting such rights of ethnic and national minorities⁵⁶ [Parties(p’cy)1; Parties(p’cy)2].

The case is also relevant to the political aspects of policy, since any systemic change regarding the way the names are written in Lithuania would require technical changes and budget spending [Implic(p’cy)2].

⁵³Art. 3(1)(h), Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

⁵⁴ECJ 12 May 2011, Case C-391/09, *Malgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (Reference for a preliminary ruling from the Vilniaus miesto 1 apylinkės teismas), para. 38.

⁵⁵Ibid., para. 45.

⁵⁶S. Tarasiewicz, ‘Runiewicz-Wardyn wciąż bez prawa do swojego nazwiska’ [Runiewicz-Wardyn with no right to name], *Kurier Wileński*, 9 October 2013, (kurierwilenski.lt/2013/10/09/runiewicz-wardyn-wciaz-bez-prawa-do-swego-nazwiska/), visited 6 April 2021.

Runiewicz-Wardyn lost most cases in the Lithuanian courts, as the Vilnius District Court admitted that international law should be considered only in 2019 (there had also been technical obstacles to the use of the Lithuanian version of the name presented during the course of the lawsuit)⁵⁷ and Runiewicz-Wardyn won this case [Proced(p'cy)1; Proced(p'cy)2]. However, it should be mentioned that since 2011 Runiewicz-Wardyn has changed her country of residence several times, and in none of the countries in which she has lived (such as Belgium and Poland) has she experienced serious social problems over the inscription of her name. This confirms the rationale of the ruling of the Court of Justice in the *Runevič-Vardyn* case.

Politics

The *Runevič-Vardyn* case has been relevant politically. The context and timing of the case were inherently political [Context(p'ics)2]. During the course of the lawsuit, Małgorzata Runiewicz-Wardyn was a director of the European Foundation of Human Rights, actively cooperating with representatives of the Polish minority in Lithuania, and even in the Lithuanian government. The European Foundation of Human Rights took actions (e.g. notifications to the prosecutor's office) against Lithuanian politicians, accusing them of 'national hostility', or hostility on national and ethnic grounds⁵⁸ [Parties(p'ics)1; Parties(p'ics)3]. Furthermore, in 2011 and 2012, there were local and parliamentary elections conducted in Lithuania which may have brought changes to the administrative procedure for name changes, thus affecting the court cases of Ms Runiewicz-Wardyn. The axis of antagonism for the Runiewicz-Wardyn-related environment is: 'us' (the minority, represented politically by the Electoral Action of Poles in Lithuania and other sympathising politicians) vs. 'them' (some of whom, such as Gintaras Steponavičius – a minister of Education and Science, were even *expressis verbis* called 'enemies' by representatives of the Polish minority⁵⁹) vs. the nationalistically-oriented Lithuanian state and politicians depriving ethnic and national minorities of their fundamental rights [Context(p'ics)4; Implic(p'ics)1]. Of course, the Lithuanian state views the last axis as: 'us', those who properly protect the

⁵⁷Framework Convention for the Protection of National Minorities adopted by the Committee of Ministers of the Council of Europe on 10 November 1994 and opened for signature by the member states of the Council of Europe on 1 February 1995.

⁵⁸Gintaras Steponavičius oskaržony o wrogość narodową i niezgodne z prawem użycie danych osobowych', *EFHR*, 28 September 2011, (<www.efhr.eu/2011/09/28/gintaras-steponavicius-oskarzony-o-wrogosc-narodowa-i-niezgodne-z-prawem-uzycie-danych-osobowych/>), visited 6 April 2021.

⁵⁹Ibid.

Lithuanian language and national identity from efforts to create a precedent that would open the door to political influence being exercised by non-Lithuanians and the problem being exported to other EU countries [Parties(p'ics)1; Parties(p'ics)4]. Paradoxically, in the 2012 electoral campaign to the Seimas, the judgment of the Court of Justice was mentioned as meaningful by both those who claimed that they would support systemic solutions regarding the way the names of representatives of ethnic and national minorities are written, as well as those who were against them [Context(p'ics)1; Context(p'ics)4; Implic(p'ics)1]. This indicates that, regarding 'politics', the Court of Justice managed not to side with either of the opposing parties.

In the area of 'politics', the case of *Runiewicz-Wardyn* was exploited politically in the 2012 campaign to the Lithuanian parliament, when political representatives of the Polish minority and allied Lithuanian politicians claimed that the Court of Justice had enabled Lithuania to save face in an uncomfortable situation,⁶⁰ but that the court was wrong [Implic(p'ics)2; Resp(p'ics)1]. Meanwhile, Lithuanian politicians praised the judgment⁶¹ [Implic(p'ics)1].

According to numerous analyses, the issue of how the names of members of the Polish minority should be spelt has been one of the core issues in all Lithuanian electoral campaigns, including those to the European Parliament⁶² [Proced(p'ics)2]. Had the Court of Justice issued a clear verdict about winners and losers, this would have been a definite encroachment into politics, one with the potential to strongly shift public opinion one way or the other [Context(p'ics)4]. But the Court stood by the Advocate General, thereby managing to avoid any political involvement [Context(p'ics)3].

This case study can be summed up in the words of a Polish politician in Lithuania, Michał Mackiewicz of the Union of Poles in Lithuania, who commented on the ruling thus: 'I believe that this is not a legal but a political matter. I believe that sooner or later, Lithuania will have the political will to settle it, because you cannot defy the expectations of such a large group of your citizens'.⁶³ It seems that these words mirror the political spirit accompanying the Court of Justice's ruling [Resp(p'ics)3].

⁶⁰S. Tarasiewicz, 'Zabrakło sprawiedliwości dla polskich nazwisk' [No justice for Polish names], *Kurier Wileński*, 12 May 2011, (kurierwilenski.lt/2011/05/12/zabraklo-sprawiedliwosci-dla-polskich-nazwisk/), visited 6 April 2021.

⁶¹The Lithuanian minister of justice stated that: 'The Tribunal has recognized Lithuania's arguments that the spelling of names is an internal matter of the state and does not automatically infringe the right to free travel': Tarasiewicz, *supra* n. 60.

⁶²A. Šuminas, 'Lenkų tautinės mažumos problemika internetinėje Lietuvos Žiniasklaidoje', 2 *Agora Komunikacijų studijos* (2013) p. 87-90.

⁶³*Ibid.*

CASE C-192/18 *EUROPEAN COMMISSION V REPUBLIC OF POLAND*

Case C-192/18, *European Commission v Republic of Poland*, has been one of the most politically exploited cases of the Court of Justice in Poland since 2015, when Law and Justice, a conservative party, came to power and initiated reforms of the Polish judiciary. Case C-192/18 is one of several cases against the Polish government regarding infringements on the rule of law. It has also been addressed in parallel to the procedure under Article 7 TUE⁶⁴ [Proced(p'ty)1]. This case refers to a law of July 2017, the only law signed by the Polish President despite a general appeal not to sign any of three laws regarding the judiciary that had been passed by the parliament⁶⁵ [Proced(p'ics)2]. The judgment was published when the subject, the law of July 2017, had already been changed by the Polish parliament. Despite this fact, the Court of Justice still decided that the ruling was necessary and important⁶⁶ [Court(p'ty)1].

Polity

Case C-192/18 addresses key issues of democratic political systems, such as the rule of law, as it involves the both independence of judges and the predictability and stability of the functioning of the judiciary [Context(p'ty)1; Context(p'ty)2]. The case reaches to the heart of all democratic political systems: the tripartite division of powers as delineated by Charles Montesquieu. It also relates to gender equality, although from a polity perspective this aspect is politically subordinate to the question of the rule of law⁶⁷ [Context(p'ty)4].

This case lies at the very core of the antagonism between democracy and autocracy (some experts claim it reflects a clash between majoritarian democracy and liberal democracy).⁶⁸ Another antagonism is that between the European values

⁶⁴COM (2017) 835 final, 20 December 2017.

⁶⁵Poland's President Duda vetoes judicial reforms after protests', *bbc.com*, 24 July 2017, (<www.bbc.com/news/world-europe-40703909>), visited 6 April 2021.

⁶⁶Indeed, on 23 May 2018, the *ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych, ustawy o Krajowej Radzie Sądownictwa oraz ustawy o Sądzie Najwyższym* (Law amending the [Law on the ordinary courts], the Law on the National Council of the Judiciary and the [Law of 8 December 2017] of 12 April 2018 (Dz. U. 2018, item 848, 'the Law of 12 April 2018') entered into force. The law changed some of the provisions questioned by the European Commission.

⁶⁷J. Barcz and A. Zawidzka-Łojek, *Sądowe mechanizmy ochrony praworządności w Polsce w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości UE* [Judicial mechanisms of protection of the rule of law in Poland in the light of the latest jurisprudence of the Court of Justice of the European Union] (Elipsa Warsaw 2019).

⁶⁸*Cf* S. Suteu, 'The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy a Part of the Solution?', 15(2) *EuConst* (2019) p. 488; J. Lepiarz, "'Der Spiegel" o kryzysie

laid down in Article 2 TEU and those arising from the majority paradigm, that whoever wins an election can impose their values on the whole of society [Context(p'ty)3; Context(p'ty)4]. Finally, there is a clash between liberal values being protected by a willingness to establish a consensus and agency and power aimed at building a strong state based on traditional Christian foundations, historical resentments, and nationalist revisionism.⁶⁹ The latter appear in speeches by Jarosław Kaczyński (the leader of Law and Justice), in statements by other representatives of the governing party (including two smaller coalition parties), and, finally in the programme of Law and Justice⁷⁰ [Parties(p'ty)1]. In 2015, Law and Justice did not win a constitutional majority (unlike Victor Orban's FIDESZ in Hungary), and so it could not impose state bye-laws that the courts might deem unconstitutional. The subordination of Polish courts to the political will of the ruling party became a critical goal for Kaczyński [Implic(p'ty)1]. According to a Freedom House analysis, 'Poland's ruling Law and Justice party is often described as a 'conservative' party committed to upholding 'traditional values'. Such labels miss the point: Law and Justice is first and foremost a political movement devoted to overturning Poland's existing constitutional order and the democratic principles that underpin it'⁷¹ [Resp(p'ty)3].

The case was also meaningful in the international context, for it affected the Court of Justice's jurisdiction in similar cases [Implic(p'ty)4; Implic(p'ty)5]. First of all, it was addressed after the Court had issued judgments in the Portuguese judge case⁷² and the *PPU LM*⁷³ case, the latter of which was directly related to the Polish judicial reforms. This strengthened the Court of Justice's position in the antagonism between more or less control of the executive over the judiciary at the national level [Court(p'ty)3], that there should be less control and more judicial independence. The *PPU LM* case demonstrated there was a lack of trust

demokracji. Dużo o polityce Jarosława Kaczyńskiego' ['Der Spiegel' about democracy. A lot about Jarosław Kaczyński politics], *Deutsche Welle*, 11 June 2018, <www.dw.com/pl/der-spiegel-o-kryzysie-demokracji-du%C5%BCo-o-polityce-jaros%C5%82awa-kaczy%C5%84skiego/a-44150814>, visited 6 April 2021; cf also J. Tokarski, 'Koniec demokracji czy koniec liberalizmu' [End of democracy or end of liberalism], *Kultura Liberalna*, 4 December 2015, <kulturaliberalna.pl/2015/12/04/tokarski-pis-demokracja-komentarz/>, visited 6 April 2021.

⁶⁹Poland's ruling Law and Justice party is doing lasting damage', *The Economist*, 21 April 2018, <www.economist.com/europe/2018/04/21/polands-ruling-law-and-justice-party-is-doing-lasting-damage>, visited 6 April 2021.

⁷⁰J. Harper, *Nieliberalna rewolucja w Polsce* (Scholar Warsaw 2020).

⁷¹C. Davies, *Hostile Takeover. How Law and Justice Captured Poland's Courts* (Freedom House Analytical Brief 2018), <freedomhouse.org/report/analytical-brief/2018/hostile-takeover-how-law-and-justice-captured-polands-courts>, visited 6 April 2021.

⁷²ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*.

⁷³ECJ 25 July 2018, Case C-216/18, *PPU LM*.

among judges in other EU states (in this case, Ireland) towards the Polish judiciary after Law and Justice's reforms [Parties(p'ty)2]. On the other hand, the Polish reforms were supported by the Hungarian government (officially, through the support of Poland in the Court),⁷⁴ which created a European-wide antagonism: from the Polish government's perspective between us, the member state opting for freedom to decide on the organisation of the judiciary, versus them, EU institutions and states that do not respect this. The Polish and Hungarian governments attacked the European Commission and Frans Timmermans,⁷⁵ and accused Germany of having a strongly politicised judiciary while hypocritically criticising Poland⁷⁶ [Implic(p'ics)2; Proced(p'ty)2; Courts(p'ics)1].

Policy

The case is relevant politically in a number of ways, one of those being gender equality in the field of pension law [Proced(p'cy)1; Implic(p'cy)2]. Some analysts⁷⁷ have claimed that, in this particular case, the question of the retirement age of men and women was politically less important than other aspects of the case such as the right of the minister of justice to decide whether to authorise an extension of a judge's active term [Proced(p'cy)2]. However, a key antagonism from the 'policy' sphere emerges here, since the case directly addresses policy areas in which budgetary funds are distributed, such as social and equality policies, and the antagonism between the governing party's use of social policy instruments for political battles (in the suppression and replacement of judges inhibiting the Law and Justice party) and those who perceive social policy as an instrument for resolving social problems [Context(p'cy)2; Context(p'cy)3]. Another antagonism appears in gender equality policy, on the axis between maintaining a traditional approach towards women's and men's pension standards (and traditionally perceived gender roles) and opting for full equality of women and men in social policy [Parties(p'cy)1; Parties(p'cy)2]. The Court of Justice referred to this issue clearly and extensively when explaining how these issues should be interpreted

⁷⁴Poland court reforms: Hungary vows 'solidarity' as bill approved', *bbc.com*, 22 July 2017, <www.bbc.com/news/world-europe-40692318>, visited 6 April 2021.

⁷⁵SJ, TM, 'Timmermans nie widzi podwójnych standardów. "Francja jest krajem, który przestrzega prawa"', *tvp.info*, 14 December 2018, <www.tvp.info/40428517/timmermans-nie-widzi-podwojnych-standardow-francja-jest-krajem-ktory-przestrzega-prawa>, visited 6 April 2021.

⁷⁶B. Kocejko, 'Bochenek: W polskich sądach będzie jak w europejskich. Rzecznik rządu manipuluje', *oko.press*, 27 July 2017, <oko.press/bochenek-polskich-sadach-bedzie-europejskich-rzecznik-rzadu-manipuluje/>, visited 6 April 2021.

⁷⁷E. Siedlecka, 'Sędziowie mogą dostać broń', *Blog Konserwatywny*, 11 April 2019, <siedlecka.blog.polityka.pl/2019/04/11/sedziowie-moga-dostac-bron/>, visited 6 April 2021.

according to European law. In fact, the Court of Justice has stressed that sectorial policy, i.e. social policy that addresses the issue of equality between women and men, regardless of how the retirement age and benefits are technically regulated, lies within the competence of the member states [Implic(p'cy)1; Implic(p'cy)2]. The Court of Justice devoted a significant part of its judgment to the question of the retirement age of judges from an equality policy perspective. The judgment was issued by the Grand Chamber of the Court, a sign of the importance attributed to this question not only with regard to this particular case, but to all cases concerning the equality of women and men [Court(p'ty)1; Court(p'cy)2].

Interestingly, the explanations of the Polish government regarding the question of pension age and equality between women and men, which referred to 'authorised positive action' under Article 157(4) TFEU and Article 3 of Directive 2006/54 (equal opportunities for men and women), were dismissed by the Court of Justice. In this context, it should be stated that the Court did intervene in Poland's national pension scheme and supported those who were arguing for a traditional differentiation in the retirement ages of women and men on the grounds of a traditional perception of gender differences [Implic(p'cy)1].

Politics

The lens of politics provides a complex view of the context of this case. There are two parallel axes of antagonisms which emerge, one of them visible (and presented to the public within the narrative of the governing party) and the other hidden (although it would appear to reflect reality): the governing party using its power to finally 'clean up' the judicial system (particularly by getting rid of post-communist judges) and fulfil its promises to eliminate communist, 'rotten' elements of the judiciary [Context(p'ics)4]. These were confronted by the opposition in Poland, which defended the post-communist judges and sought a return to the situation from before 2015. The actual axis, then, would be: the governing party using judicial reform as an important argument in a political campaign to eliminate any potential legal obstacles to radical and unconstitutional reforms vs. the opposition and a large part of society fighting against the ruling party to winning the election in 2019 [Context(p'ics)3; Parties(p'ics)3]. The case selected for this analysis is also important in that it refers to provisions of the only one of three laws adopted by the Polish parliament that President Andrzej Duda did not veto after popular protests across Poland [Context(p'ics)1; Context(p'ics)4]. The vetoes served to create the impression that the President was independent, since both laws, even with revisions, contained provisions questioned by the Polish courts and by the Court of Justice in other rulings.

It is significant that the Luxembourg Court passed its judgment only after the parliamentary elections in Poland,⁷⁸ although the Opinion of Advocate General Tanchev was used early in the political struggle by opposition circles and publicists critical of Law and Justice⁷⁹ [Context(p'ics)2; Context(p'ics)3; Resp(p'ics)1]. The question of whether the ruling was adopted after the elections on purpose to prevent the parties from using the Court of Justice as a weapon in the election campaign remains unresolved.

Political conflict also occurred in April 2018, when the Act constituting the subject of the case before the Court was amended and 219 judges requested an extension of the period of adjudication from the Minister of Justice, Zbigniew Ziobro, who approved only 130 of them [Parties(p'ics)4]. Due to the nature of the trial and the ruling, these judges have the right to demand reinstatement or compensation, irrespective of any amendments to the law, but the process may be a long one. Moreover, such judges could be repressed by the disciplinary chamber of the Supreme Court, whose legality has also been questioned by the Court of Justice [Parties(p'ics)2]. Meanwhile, those judges the governing party deemed 'inconvenient' did not pass judgments in the most important period for Law and Justice, the period of the European parliamentary and Polish parliamentary and presidential elections. Here there was a visible antagonism between the ruling party, which sought to subordinate the judiciary politically, and the opposition, which depended on the courts to exercise supervision over the integrity of the electoral process [Implic(p'ics)1; Implic(p'ics)2]. This antagonism was important from a social perspective (evidenced by numerous public protests in defence of the judiciary⁸⁰) and as a political conflict.

Case C-192/18 has had multi-faceted political significance. The purpose of this analysis, though, is to outline certain political aspects of this according to the criteria established in the first part of the article. A more thorough analysis of all the contexts of this case demands further research.

CONCLUSIONS

Why, how and the extent to which the Court of Justice's jurisdiction can be described as political are relevant questions in both legal and political research. Judgments are used not only by lawyers, but also by politicians, experts and the broader public, and they are used in analyses and when political decisions are being taken. However, in order to

⁷⁸The elections took place on 1 October 2019; the judgment is dated 5 November 2019.

⁷⁹A. Wójcik, 'Ustawa o sądach powszechnych sprzeczna z prawem UE. Rzecznik generalny Trybunału Sprawiedliwości wydaje kluczową opinię' *oko.press*, 20 June 2019, (oko.press/rzecznik-generalny-trybunalu-sprawiedliwosci-w-kluczowej-opinii-ustawa-o-sadach-sprzeczna-z-prawem-ue/), visited 6 April 2021.

⁸⁰'Thousands protest in Poland against government judicial changes', *Euronews*, 17 July 2017, (www.euronews.com/2017/07/16/thousands-protest-in-poland-against-government-judicial-changes/), visited 6 April 2021.

understand whether and what kind of political significance a certain case has, it is necessary to conceptualise the notion of *the political* and to provide convincing, reliable criteria concerning political significance. This is what this study aims to contribute to. Moreover, the article has validated the conceptual framework for the political significance of the Court of Justice's jurisdiction by using those criteria for verification in two selected cases. The Schmittian approach towards *the political* based on antagonisms, together with Mouffe's aspects of diversified interests determining political tensions, as modified by the author towards an elaboration of main axes of political conflicts in the areas of *polity*, *policy* and *politics*, served well as a basis for setting up the 48 criteria for judging the political significance of the Court's rulings. Those criteria have been used to conduct a thorough analysis of two actual cases, on the basis of which it can be stated that the cases of greatest political significance are not those which involve politically controversial legal norms, but those which raise political awareness, reverberate publicly and change the political landscape by heightening/exacerbating existing political conflicts/antagonisms.

Many cases could be analysed with the use of the framework elaborated above, such as the Irish abortion cases, the case of the Portuguese judges, and the cases over the anti-crisis measures taken by the European Central Bank questioned by the German Constitutional Tribunal. Presumably, apart from rulings in solely technical matters, all Court cases contain political aspects. Further research could elaborate on these topics, as it is obviously impossible to consider all of them within the limitations of a single article. However, to return to the case where the Court of Justice made a decision regarding the transit zone at the Serbian-Hungarian border, we can clearly see how much of an ado one ruling of the Luxembourg court can raise, what different reactions it can provoke, not only by different stakeholders but also by the same political actor, and how important it is for the parties involved to address Court of Justice rulings when pursuing of their political interests and fighting a political fight. On the other hand, awareness of the main axes of the political antagonisms involved in other cases could be useful to advocates general and judges when analysing the potential consequences of their rulings. It should be noted that, according to Schmittian theory, a political decision should resolve the conflict established by the antagonism of 'us/our friends vs. them (our enemies)'. The Court of Justice rarely provides resolutions to such conflicts, though it can indicate the direction in which the front line may shift. The Court also provides argumentative weapons to the parties involved in a given case, though usually just to one side. From this perspective as well, it is undeniable that the Court of Justice is involved politically, which leaves open a number of avenues for further theoretical and empirical research.

