1 Introduction

1.1 Why We Need a Normative Theory of ECJ Decision-Making

The ECJ is today one of the most powerful courts in the world. With the rise of the Court's power, normative assessments of its work have become an important part of EU scholarship. Contributions have primarily focussed on assessing the Court's judgments. Does the ECJ use the right methodology when interpreting EU law?[1] Does it remain faithful to the text of the EU Treaties?[2] Are its judgments coherent and predictable?[3] Are they just?[4]

The making of ECJ decisions, however, has remained a blind spot of normative analysis. Is it normatively warranted that a group of seven experts (the so-called 255 Panel) has taken a key role in selecting new ECJ members? Is it appropriate that the Member States have the right to participate in every ECJ case, while NGOs have no comparable right? And is the power of the ECJ president to decide which of the other judges drafts a judgment the best way to distribute the Court's work? Such questions and their ilk have, so far, remained a sideshow in the

[1] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012).
[2] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986); Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018).
[3] Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press 2014); Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013).
[4] Dorota Leczykiewicz, 'Constitutional Justice and Judicial Review of EU Legislative Acts' in Gráinne de Búrca, Dimitry Kochenov and Andrew Williams (eds), *Europe's Justice Deficit* (Hart 2015) 97.

normative debate on the ECJ.[5] Those who study the ECJ's procedural and organisational rules generally confine themselves to describing the law as it is.[6] Much of the literature is designed to serve the needs of practitioners.[7] The making of ECJ decisions, unless it is seen as threatening the procedural rights of litigants,[8] remains generally outside the purview of normative analysis.

This book aims to fill this void. It develops a normative theory of ECJ decision-making and assesses the genesis and current state of ECJ procedural and organisational law in its light. The book focusses on three key issues: the selection of ECJ members and the regulation of their conduct in office, the participation of external actors in the proceedings, and the process of deliberating and writing ECJ judgments.[9] One major argument is put forward: for a long time the ECJ's procedural and organisational law ideally fit the Court's role in the EU's political system, but this is no longer the case. Whereas the ECJ's mandate has developed and changed, the Court's model of decision-making has not entirely followed suit.

But first things first: why is a normative theory of ECJ decision-making needed at all? There are at least three reasons why we should ponder the

[5] For notable exceptions, see Síofra O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes* (Hart 2002) 25–62; Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (2014) 51 *Common Market Law Review* 97; Henri de Waele, 'Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union' in Michal Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 24.

[6] For instance, Viktor Luszcz, *European Court Procedure: A Practical Guide* (Hart 2020); René Barents, *Remedies and Procedures Before the EU Courts* (2nd ed., Kluwer 2020); Caroline Pellerin-Rugliano and Anna Czubinski, *Dictionnaire de la Cour de justice de l'Union européenne et de son contentieux: Définitions et schémas de procédure* (Larcier 2017); Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Oxford University Press 2014); Bertrand Wägenbaur, *Court of Justice of the European Union: Commentary on Statute and Rules of Procedure* (Beck 2012).

[7] See the foreword by Sir Slynn of Hadley in Karol P. E. Lasok, *The European Court of Justice: Practice and Procedure* (2nd ed., Butterworths 1994) v.

[8] Some procedural issues are discussed critically from the perspective of the right to a fair trial. Examples are the ECJ's system of case assignment (see Thomas Rönnau and Annemarie Hoffmann, 'Vertrauen ist gut, Kontrolle ist besser: Das Prinzip des gesetzlichen Richters am EuGH' (2018) 7–8 *Zeitschrift für internationale Strafrechtsdogmatik* 233) and the right of the parties to react to the Opinion of the Advocate General (see Tomasz Tadeusz Koncewicz, 'Procedural Friend or Foe? The Advocate General in the Court of Justice of the European Union Revisited' (2019) 42 *Gdańskie Studia Prawnicze* 385).

[9] This book is about the ECJ, although occasionally the EU General Court will be used for contrasting purposes.

design of the ECJ's procedural and organisational law. First, procedural and organisational rules matter for the outcome of ECJ decisions. This will sound trite to the political scientist. A whole strand of research in political science is concerned with understanding how court decisions are shaped by the interaction between judges and with the other participants in the judicial process.[10] For the legal scholar, the contested and contingent nature of procedural and organisational law is a given when taking a comparative perspective. As comparativists like Mirjan Damaška,[11] Mauro Cappelletti[12] or Mitchel Lasser[13] have shown, legal systems have adopted very different forms of court decision-making. From the selection of judges to the relationship between the bench and the parties to the modes of deliberation differences abound. They are not only due to idiosyncrasies or path dependencies. Rather, they reflect choices of a political community on the role of courts in society and how their power is justified and controlled.[14] By developing a normative theory and applying it to the ECJ, this book presents different models of court decision-making, explains the underlying understanding of the judicial function and discusses which one might best fit the Court.

Second, this book aims to provide a complementary approach to the dominant form of normative assessment of the ECJ. The majority of assessments of the ECJ's work have focussed on its methods of interpretation.[15] However, this approach has been subject to criticism for a long time. The conceptual difficulties it faces have already been articulated some thirty years ago by Joseph Weiler in his review of Hjalte Rasmussen's *On Law and Policy in the European Court of Justice*. Rasmussen had accused the ECJ of departing from the will of the Treaty makers and 'making choices between competing public policies

[10] See Howard Gillman and Cornell W. Clayton, 'Introduction: Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making' in Howard Gillman and Cornell W. Clayton (eds), *Supreme Court Decision-Making: New Institutionalist Approaches* (University of Chicago Press 1999) 1.

[11] Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986).

[12] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon 1989).

[13] Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009).

[14] Mauro Cappelletti and Bryant G. Garth, 'Introduction – Policies, Trends and Ideas in Civil Procedure' in Mauro Cappelletti (ed), *International Encyclopedia of Comparative Law*, vol 16 (Mohr Siebeck 2014 [1987]) 1.

[15] For a review of the literature, see Michal Bobek, 'Legal Reasoning of the Court of Justice of the EU' (2014) 39 *European Law Review* 418.

for which the available sources of law did not offer the Court judicially applicable guidelines'.[16] Weiler, in his review of the book, was not convinced. If we want to blame the Court for overstepping the line to the political, Weiler argued, we need to find an ideal yardstick that defines the 'right' legal methodology.[17] Such a yardstick, however, has not been defined (and is not likely to be found). Scholars who have followed Rasmussen's line of inquiry have faced similar problems and criticism.[18] Certainly, discussing the Court's legal methodology remains important for assessing the ECJ's work. But it should be complemented by institutional and procedural accounts. This claim finds support in legal and political theory. Many of the leading normative theories on adjudication focus on the judicial process rather than on legal methodology. How judges are selected, who participates in court proceedings, how a court bench is composed – such questions are considered to be at least as important for normative assessments as a court's methods of interpretation. Theories that are otherwise worlds apart, such as discourse theory and systems theory, share an approach to the judicial process that puts procedure before method.[19] This book therefore contributes to bringing the normative debate on the ECJ on a par with the state of legal and political theory.

Finally, this book is also motivated by a practical concern. While the quest for the 'right' legal methodology remains an essentially academic endeavour, the ECJ as an organisation, its procedures and its decision-making rules are in a state of constant reform. This does not only apply to major changes through Treaty amendment such as the introduction of the expert panel on selecting ECJ judges through the 2007 Treaty of Lisbon[20] or the creation of the Grand Chamber through the 2001 Treaty of Nice.[21] Different actors assess and discuss the Court's decision-making processes on a regular basis: from the ECJ's internal procedural law committee[22] to

[16] Rasmussen (n 2) 508.
[17] Joseph Weiler, 'The Court of Justice on Trial' (1987) 24 *Common Market Law Review* 555; with a similar critique, Mauro Cappelletti, 'Is the European Court of Justice "Running Wild"?' in *The Judicial Process in Comparative Perspective* (Clarendon 1989) 384.
[18] See Mark Dawson, 'How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice' (2014) 20 *European Law Journal* 423, 428–430; further Elise Muir, Mark Dawson and Bruno de Witte, 'Introduction: The European Court of Justice as a Political Actor' in Elise Muir, Mark Dawson and Bruno de Witte (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 1, 9.
[19] See Chapter 2.
[20] Article 255 TFEU.
[21] Article 251 TFEU.
[22] On this committee, see Jean-Claude Bonichot, 'Le métier de juge à la Cour de justice des Communautés européennes' (2007) 16 *Revue des affaires européennes* 531, 535.

the European Court of Auditors[23] to the budgetary committee and the committee on legal affairs at the European Parliament.[24] All of them reflect on the best institutional design for the Luxembourg Court. This book aims to offer a theoretical, historical and doctrinal foundation for these efforts.

1.2 The Argument: An Incomplete Transformation

At the centre of this book is a normative question: how should the ECJ's procedural and organisational law be designed? The book's claim is that the answer to this question depends on the Court's mandate – on its role in the EU's political system. It is well known that the ECJ's role has substantially changed during the last seventy years.[25] The Court has always provided judicial protection, enforced and further developed EU law. However, over the course of the Court's history, the focus of its mandate has shifted. This book will describe this development as a gradual transformation: from primarily providing judicial protection to focussing on guarding the effectiveness and uniformity of EU law to also aiming to interpret EU law in a manner that responds to the will of EU citizens. Each of these phases in the ECJ's evolution requires a different model of procedure and organisation. Yet, while the ECJ has since the 1960s adapted its procedures and organisation to the task of enhancing the effectiveness of EU law, the transformation to a democratic organ of the EU polity is still incomplete.

To develop this argument, Chapter 2 of this book will present three ideal models of court decision-making that correspond to the major roles the Court has played in European integration: a liberal model, a rule of law model and a democratic model. The three models provide the framework to then assess the ECJ's past and present roles as well as its procedural and organisational law in the following chapters of this book. To develop these models, I draw on the political and legal theories of three scholars who have conceptualised the role of courts in very

[23] European Court of Auditors, Performance Review of Case Management at the Court of Justice of the European Union, Special Report 14/2017.

[24] See Christoph Krenn, 'The European Court of Justice's Financial Accountability: How the European Parliament Incites and Monitors Judicial Reform through the Budgetary Process' (2017) 13 *European Constitutional Law Review* 453.

[25] See Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001) 5–8; Loïc Azoulai, 'Le rôle constitutionnel de la Cour de justice des Communautés européennes tel qu'il se dégage de sa jurisprudence' (2008) 44 *Revue trimestrielle de droit européen* 29.

different ways. Christoph Möllers has put forward a liberal theory. He sees the role of courts as protecting individual liberty. The litigants are at the centre and the judicial process is steered towards enabling them to feed their interests and convictions into a court's decision-making. The rule of law model, which I associate with Niklas Luhmann's theory of the judicial process, sees the role of courts not so much in serving the individual litigant but rather in ensuring that the legal system guarantees a stable normative framework that is a reliable foundation for members of a society to organise their lives. Luhmann sees the judicial process as instrumental for creating normative stability by inducing acceptance for court decisions as authoritative interpretations of the law. Finally, the democratic model, for which I rely on the theory of adjudication by Jürgen Habermas, conceptualises courts as democratic organs of a political community. As such, courts need to consider the interests and issues of a political community and aim for a procedure that embeds a court's work in the public sphere.

Chapters 3–5 apply the theoretical framework developed in Chapter 2 to the ECJ and analyse the historical development of its procedural and organisational law in light of the three models. In Chapter 3, I will first show how the ECJ originally had a classic liberal role and followed a liberal model of court decision-making. In 1952, the Court was set up with the main task of protecting the rights and interests of individual litigants, in particular the Member States. It was equipped with a procedural and organisational law borrowed from the ICJ, steered towards the equal representation of the Member States in the proceedings. When the Court's role was famously transformed in the 1960s to act as a guardian of the effectiveness and uniform application of EU law, its procedural and organisational law was adapted for it to effectively exercise this new role. In Chapter 4, I show in detail the vast transformation the Court's organisation and decision-making has undergone: the role of the ECJ judge was developed from state representative to neutral expert, an inner circle of ECJ participants gradually formed that plays a central role for the acceptance and dissemination of the Court's case law, and procedural mechanisms were devised that make ECJ decision-making more hierarchical to ensure consistency in the Court's case law. While the ECJ's rule of law model of procedural and organisational law has been an important element to the Court's institutional success, the ECJ's role in the EU's political system is today no longer limited to ensuring the rule of law. The Court is also a democratic organ of the EU polity that needs to be responsive to EU citizens. Such a democratic

responsiveness, however, requires further developments of the ECJ's procedural and organisational law. With this in mind, Chapter 5 outlines concrete proposals for reform by applying the Treaty on European Union's democratic principles (Articles 9 to 12 TEU) to the Court. I make suggestions aimed at better reflecting the concern for the ECJ's democratic responsiveness by discussing among other things the role of the European Parliament in selecting ECJ members, the place of NGOs and civil society in ECJ proceedings, the interaction between Advocates General and the judges, the composition of the ECJ's chambers and the mechanisms for case assignment.

1.3 The Method: How to Research a Black Box

For a researcher analysing ECJ judgments, the question of access to sources does not really arise: the judgments are published in the EU's Official Journal. This source is immediately accessible to the scholar. The situation is different when it comes to the Court's decision-making processes. The Court's Statute and its Rules of Procedure give a basic idea of how the Court is organised and how it conducts its proceedings. However, to appreciate how ECJ decisions come about, it is not enough to study the 50 Articles of the Court's Statute[26] and the 210 Articles of the ECJ's Rules of Procedure. We need to understand how the rules are applied in practice.

Access to the Court's inner workings, however, is highly restricted. Methods employed in researching other courts are not available at the ECJ. There are no diaries of former judges.[27] Given the importance assigned to the secrecy of deliberation,[28] a study relying on participant observation, such as Bruno Latour's famous work on the French *Conseil d'État*,[29] is hardly imaginable for the Luxembourg Court.[30] The Court's

[26] Articles 1 to 46 and Articles 63 to 64. Articles 47 to 62b concern the General Court, Article 62c specialised courts under Article 257 TFEU.

[27] But see the account by acting judge Jean-Claude Bonichot, *La Cour de justice de l'Union européenne* (Dalloz 2021).

[28] Article 35 of the Court's Statute: 'The deliberations of the Court of Justice shall be and shall remain secret'.

[29] Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État* (translated by Marina Brilman and Alain Pottage, Wiley 2009).

[30] See the limits imposed by the ECJ on the European Court of Auditors when it sought to assess the Court's case management procedures during a performance review in 2017. Due to the secrecy of deliberation the Court did not grant access to several internal documents; see European Court of Auditors, ECJ Performance Review (n 23) 16.

archives have been opened to the public, but – due to the thirty-year waiting period and the exclusion of many documents that are related to the deliberations between judges – remain of limited value to understanding the ECJ's decision-making practice.[31]

In recent years, scholars, in particular social scientists, have nevertheless made progress, through various means, in investigating the Court as an institution.[32] This book integrates these insights into its normative analysis. But it also enters new empirical ground by focussing specifically on the legal rules that structure the ECJ's decision-making. First, I rely on documents that help to understand how the Court's Statute and its Rules of Procedure are applied and that give a more vivid picture of ECJ decision-making. This includes so-called *guides pratiques*, activity reports, management reports and internal rules of procedure. Many of these documents are publicly available but have not been studied in depth. Other documents are not directly accessible but can be obtained through requests of access to documents. Since 2009, the ECJ is under the legal obligation to grant access to documents held in the exercise of its administrative functions.[33] The documents received through such request are concerned with the Court's administration and not with the making of ECJ decisions in a strict sense. However, some of them allow better understanding of the work environment of ECJ judges, for instance the role of the Court's supporting departments, the making of the Court's press releases or how ECJ judges and Advocates General are involved in managing the Court. These documents do not unveil any hidden secrets. The *Guide pratique relatif au traitement des affaires*, for instance, is a thirty-nine-page document that explains the course of the Court's internal decision-making. For a researcher, its most interesting feature is its description of what the Court internally perceives as the most important steps and

[31] See Fernanda G. Nicola, 'Waiting for the Barbarians: Inside the Archives of the European Court of Justice' in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice* (Oxford University Press 2020) 62.

[32] See notably Pascal Mbongo and Antoine Vauchez (eds), *Dans la fabrique du droit européen: Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Bruylant 2009); Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017); Mikael Madsen, Fernanda Nicola and Antoine Vauchez (eds), *Researching the European Court of Justice: New Methodologies and Law's Embeddedness* (Cambridge University Press 2022).

[33] See Article 15 para 3 TFEU and the Decision of the Court of Justice of the European Union of 26 November 2019 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions, O.J. 2020, C 45/02.

concepts of ECJ decision-making. This gives a different perspective than insider accounts on ECJ decision-making gathered through interviews.

Alongside the examination of documents, I have used statistical analysis in this book that provides a novel perspective on the ECJ's practice regarding key procedural rules. A first dataset contains all case assignments to reporting judges between 2003 and 2021. This provides an entry point to analyse the division of labour between ECJ judges, the Court's internal hierarchy and the power of the Court president.[34] The second dataset contains the 789 Grand Chamber judgments decided by the Court between the establishment of the Grand Chamber in 2004 and December 2020. It serves to examine who participated in the ECJ's most important cases in the last years and allows to appreciate repeat players and outsiders in the participation in ECJ proceedings.[35]

1.4 The Course of the Book

The book proceeds in two big strides. In Chapter 2, I will develop a normative framework to assess the ECJ's procedural and organisational law. For that purpose, I will present three legal theories that assign different roles to courts and accordingly develop different ideal-type models of procedure and organisation. Chapters 3–5 apply this theoretical framework to the ECJ. Chapter 3 sets the stage. It describes how the ECJ's predecessor, the Court of the European Coal and Steel Community, essentially followed, both in its mandate and in its procedural and organisational law, the model of an international court. Chapter 4 explains how the ECJ's mandate was redefined during the 1960s as the guardian of a European rule of law and how the Court's procedural and organisational law has been adapted to support this new role. Chapter 5, finally, looks at the present and the future. It analyses the ECJ's mandate with regard to the current state of EU law and makes proposals on how its procedural and organisational law could be adapted to better reflect its role as a democratic organ of the EU polity.

[34] See Chapter 4, Section 4.4.2.
[35] See Chapter 4, Section 4.3.1.

2 What Courts Do

A Normative Theory of Court Decision-Making

2.1 The Right to a Fair Trial as a Minimum Standard

This chapter develops a normative framework to assess the development and current state of the ECJ's procedural and organisational law. How should such a framework be devised? A classic starting point would be the right to a fair trial. The ECJ must respect this right as it is laid down in Article 47 paragraph 2 of the EU Charter of Fundamental Rights. In the existing literature on the ECJ it has so far been the most important normative angle of analysis.[1]

However, for two reasons the right to a fair trial will not be the lens through which this book will view the ECJ's procedural and organisational law. First, although some weak spots in the Court's institutional design have been identified,[2] it is widely accepted that, by and large, the ECJ's procedural and organisational law is in conformity with Article 47 of the Charter.[3] Second, also due to conceptual reasons, the right to a fair trial can offer only limited normative guidance

[1] See for instance René Barents, 'EU Procedural Law and Effective Legal Protection' (2014) 51 *Common Market Law Review* 1437; Alan Rosas, 'Oral Hearings before the European Court of Justice' (2014) 21 *Maastricht Journal of European and Comparative Law* 596; Jörg Gundel, 'Gemeinschaftsrichter und Generalanwälte als Akteure des Rechtsschutzes im Lichte des gemeinschaftsrechtlichen Rechtsstaatsprinzips' in Peter-Christian Müller-Graff and Dieter H. Scheuing (eds), *Gemeinschaftsgerichtsbarkeit und Rechtsstaatlichkeit* (Nomos 2008) 23.

[2] On the ECJ's system of case assignment, see Thomas Rönnau and Annemarie Hoffmann, 'Vertrauen ist gut, Kontrolle ist besser: Das Prinzip des gesetzlichen Richters am EuGH' (2018) 7–8 *Zeitschrift für Internationale Strafrechtsdogmatik* 233; on the right of the parties to react to the Opinion of the Advocate General, see Tomasz Tadeusz Koncewicz, 'Procedural Friend or Foe? The Advocate General in the Court of Justice of the European Union Revisited' (2019) 42 *Gdańskie Studia Prawnicze* 385.

[3] See Barents (n 1) 1444.