The extent and manner of judicial activism of the European Court of Justice in the area of Justice and Home Affairs

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1. Introduction

A court exists to ensure that the law is being adhered to by both the governmental institutions and its citizens and to resolve disputes. In order to effectively carry out these tasks, the judiciary is expected to be as neutral as possible. Therefore the judiciary is considered to be a nonpolitical branch of the government, unlike the legislator or the executive. Despite these expectations of a judiciary, there have been cases where the judiciary has departed from their neutral position. In these cases, a court or a judge will interpret law based on their own preferences. Sometimes these interpretations can result in new laws. Cases such as these are often referred to as judicial activism. The US Supreme Court has often been cited as the prime example of a judicially activist court. Many have found that the European Court of Justice (ECJ) has exhibited similar behaviors to the US Supreme Court. Thus it has been said that the ECJ is also a judicially activist court (Kenney, 2000; Rosenfeld, 2006).

Judicial activism has been a topic that has been extensively studied by a variety of scholars (such as Stein, 1981; Alter, 1998; Weiler, 1991). However the primary focus of these authors have been on earlier activism of the European Court of Justice. The period between the 1960s and 1980s have been researched thoroughly, because most scholars on this topic wrote their papers in the 1990s and early 2000s. Justice and Home Affairs (JHA), as an EU competence, only came into formal existence when the Maastricht Treaty entered into force in 1993 (Nugent, 2010). Consequently, the area of JHA has had a limited focus from researchers (De Burca, 2013). Although there have been some articles written on this topic as will be further showcased in the literature review, the main bulk of research has been on earlier activism. Therefore it is important that judicial activism in JHA is studied more extensively. Especially as JHA is more sensitive topic to member states than the original European Communities (EC) competences since JHA involves topics such as border control and citizenship. Both of these topics are considered to be key sources of sovereignty to the member states (Dinan, 2004). Thus the goal of this research project is to add to the limited research on activism of the ECJ within the area of JHA.

In this paper, the guiding research question is: to what extent is the European Court of Justice a judicially activist court in the area of Justice and Home Affairs and how has it pursued activism in this area? In order to properly answer this question, a literature review will be given about the research done on this topic. Most of this literature is on judicial activism within the

original competences of the EU. However some literature on this topic has also been on activism within the JHA area. Additionally the literature will also showcase important arguments as to how many authors believe the ECJ passed its activist decisions without receiving a great amount of protest from the member states. Then, a research outline will be given which will include a definition of judicial activism and will lay out the hypotheses. Finally the analysis will be carried out and a brief conclusion will be given in the end. However in order to commence this research project, an overview of the literature will first be presented.

2. Literature Review

Literature on this topic can be traced back to the 1960s. Stein (1981) would later produce one of the more well-known articles on this topic concerning the question if the ECJ was following the Commission's integrational goals with its activism. However most literature on this topic was written during the 1990s and has significantly expanded in the following years (Mancini & Keeling, 1994). A great portion of this literature has argued that the European Court of Justice is an activist court (see Alter, 1998; Mancini & Keeling, 1994; Davies, 2012; Weiler, 1991). These scholars have pointed out that through its case law over the years it has increased its powers significantly in four cases: Van Gend en Loos,[1] Costa v ENEL[2], Cassis de Dijon[3] and Dassonville.[4] Van Gend en Loos increased the possible applicants to the ECJ through the introduction of direct effect. In Costa v ENEL, the ECJ asserted itself as the supreme court regarding EC matters. Cassis de Dijon and Dassonville broadened the scope of the Common Market provisions and consequently expanded the court's competences. Despite these views being the prevailing opinion on this subject, there have also been opposing views on this matter (Grimmel 2012). Although the overall consensus on this topic in literature has been that the ECJ is an activist court, in recent

[1] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1 (from now on will be referred to as "Van Gend en Loos")
[2] Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66 (from now on will be referred to "Costa v ENEL")
[3] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECLI:EU:C:1979:42 (from now on will be referred to as "Cassis de Dijon")
[4] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECLI:EU:C:1974:82 (from now on will be referred to as "Dassonville")

years some dissenting opinions have arisen. Thus in this first section, the question of if the ECJ is an activist court will be discussed before moving on to literature on the topic on the matter of how the ECJ increased its powers through judicial activism without the member states putting a halt to this process.

2.1 Judicial activism

Alter (1998) has been one of the most prominent researchers arguing that the ECJ is an activist court. The ECJ was created to ensure that the Commission and the Council of Ministers did not overstep their boundaries, fill in vague aspects of EC law and had a limited role in deciding on charges of non-compliance of member states. It was not designed to monitor infringements of EC law. Therefore she has argued that with the creation of direct effect, the ECJ gave itself the power to monitor infringements and thus the ECJ should be considered to be an activist court. However most of her articles and books (see Alter, 1998; Alter, 2003) have generally focused on how the ECJ gained its powers and why the member states accepted this expansion of power rather than arguing that it is an activist court. Other prominent scholars such as Mancini and Keeling (1994) on this topic also fall under this category.

Weiler (1994) also highlights examples of judicial activism. In his article he argues that legal scholars have not analyzed the ECJ's activist behavior in depth and expects that in the future more scholars will critically analyze the ECJ. He also gives clear reasons as to why the ECJ's actions cannot be explained by legal reasoning alone and why its activism should be analyzed more extensively. If the ECJ had based its decisions on the interpretation of the treaties, then it would not have created direct effect. As was mentioned earlier, the treaties did not give the ECJ the power to monitor infringements of EC law. Additionally, its decision to make EC law supreme was also not included in the original treaties. Therefore the conclusion of his article is that it must have some political prejudice in expanding its own powers. Weiler is one of the few authors who gives explicit reasons as to why the European Court of Justice should be analyzed through an activist lens.

Weiler has also been correct in the assumption that the literature on this topic would significantly expand. A good overview on all literature on this topic written during the 1990s is given by Mattli and Slaughter (1998). However this trend has continued onwards in the 2000s and

2010s. Most literature has focused on how the ECJ managed to be a judicial activist actor without the member states' putting a halt to this process (for examples see Carrubba, 2003; Carrubba, Gabel & Hankla, 2008). Like the literature producing during the 1990s, most accept that the ECJ is an activist court. Despite this being the prevailing opinion since the 1990s, there have been some critical voices about the ECJ's activism and expansions of powers. Some scholars even reject the idea of the ECJ being an activist judicial actor.

Davies (2012) acknowledges that the ECJ is not a neutral legal actor and has pursued some form of judicial activism. However due to the principle of proportionality and the preliminary reference procedure, the ECJ's power has significantly been limited and more power has been given to national courts. In the preliminary reference procedure, the ECJ solely explains and interprets EU law for the national courts. Generally the interpretation of the ECJ has favored ambiguity over clear straightforward explanations. This ambiguity leaves room for national courts to apply their favored interpretation within the recommended guidelines of the ECJ. Thus although the ECJ has been a judicially activist actor, this judicial activism has been limited because of the room for national courts to interpret EU law their way.

However there have been more critical voices than Davies. Wasserfallen (2010) also acknowledges the ECJ's activism, but believes that it has been somewhat exaggerated. According to Wasserfallen, the court's activism falls somewhere between neofunctionalism and intergovernmentalism. Neofunctionalism refers to a process where more competences fall under the European Union due to the spillover effect. The EU institutions, like the ECJ and the Commission, often play an important role in this process. Intergovernmentalism, on the other hand, refers to a situation where the national governments themselves choose what competences fall under the EU. Institutions are not relevant in this process (Dinan, 2004). Thus like Davies, Wasserfallen acknowledges the importance of national courts and goes even a bit further to acknowledge the role of the national governments. Nonetheless both of these articles argue that the ECJ is an activist court to a certain degree. Their main criticism is the overstatement of the ECJ's role in the expansion of its own powers. There are few scholars that would argue that the ECJ should not be considered to be an activist court. Grimmel is one of the few.

He has argued that the court is not a political actor, but is a rational legal actor. The ECJ's agreement with the movement towards integration is in line with the view of national governments. The national governments have generally been in favor of further integration as they believed that

this would improve their national situation. The ECJ followed this rationale as well. Furthermore he argues that it is shortsighted to analyze a court in the same way as a president or parliament. Even if a judge does have a political preference, they are still expected to look at the law first and uphold legal principles. Furthermore the EU is an unique legal order. In order for the ECJ to pass its judgements under the member states' scrutiny, it has to use strong legal reasoning. It is virtually impossible for the ECJ to pursue judicial activism and have the member states accept its rulings. The only reason why the ECJ sometimes is perceived to be an activist court is due to the way EU law is formulated. EU law favors integration. Thus the problem lies in the law of the European Union itself rather than the ECJ (Grimmel, 2012).

Grimmel is unique in his conclusions. Most scholars would disagree with this opinion. Although the judges should adhere to legal principles, it does not make it impossible for them to still pursue a judicially activist agenda. The US Supreme Court is a prime example of that fact (Rosenfeld, 2006). It is possible to interpret the law following legal principles in a way that favor the judges' political preferences. Additionally his argument based on the member states' acceptance is also disputable. On the one hand, it can be argued that the ECJ can only pass judgements if the member states accept them, so it is impossible for the court to be activist. However it can also be argued that the ECJ has acted in an activist way and has gained the member states' acceptance even if they were not the member states' initial preference. In fact most scholars (Weiler, 1994; Garrett, Kelemen & Schulz, 1998; Carrubba, Gabel & Hankla, 2008) have argued the latter. Moreover most would disagree with the notion that national governments favored more integration in the form of more power to the EU. Especially between the 1960s and 1980s, intergovernmentalism was preferred. In this time period, the most judicially activist decisions occurred (Stein, 1981; Alter, 1998; Weiler, 1991). Also scholars (Hatzopoulos, 2013; Dawson, 2013; Kaupa, 2013) who do agree with the notion that the ECJ's rulings favor more expansion due to the unique legal order of the European Union have still acknowledged that the ECJ is judicially activist. The ECJ ruling in favor of further expansion ultimately benefits them as well. Thus it is difficult to argue that there is not some form of judicial activism present.

In the next section, it will be discussed what the main ways the ECJ has used to expand its power according to the literature. This section has demonstrated that the prevailing opinion has been that the ECJ is an activist court and thus the main question is why member states have accepted this activism. Activism of the ECJ does infringe upon the sovereignty of member states.

Some member states have protested decisions of the ECJ. However it rarely occurs that a member state does not comply with a decision. Instead member states will choose to follow a narrow interpretation of a decision that they disagree with in order to soften the impact of an unfavorable decision (Bulterman & Wissels, 2013). Thus it is important to discuss how scholars believe that the ECJ has become a legitimate institution despite their activist decisions encroaching on the sovereignty of member states.

2.2 Three methods of ECJ expansion:

A. "National court argument"

One of the dominating arguments to explain how the ECJ expanded its powers will be referred to as the "national court argument." The basis of this argument can be found in Alter (1998; 2003). The European Court of Justice created some of its most important case law and principles during the 1960s and 1970s. These principles were then used by national courts when they reviewed law relating to the EU. By using these principles in their case law, the national courts legitimized these principles in the national setting. National governments are much less likely to go against their own courts than transnational courts as it would delegitimize a branch of national government. Alter (1998) has argued that these principles were used by national courts in their case law due to the notion of judicial neutrality. Judicial neutrality assumes that judges make their decisions in a neutral and uncontroversial manner. In order to pursue judicial neutrality, judges will often rely on previous case law. Therefore the national courts used precedent put forth by the ECJ in cases referring to EU law. Mancini and Keeling (1994) have argued in a similar manner by using the legal philosophy legal formalism which is highly similar to the notion of judicial neutrality.

Weiler (1994) has argued that the explanation of judicial neutrality is too simple. Another possible explanation put forth is that courts saw that other courts accepted these judgements and they followed their path. This explanation is known as the reciprocity principle. However this explanation is still not sufficient according to Weiler as to why national courts would accept these judgements. His main argument is that the preliminary reference procedure gave lower courts more power over higher courts. These lower courts were more likely to invoke EC law, since if the ECJ gave a preliminary reference ruling, the higher courts could not go against the judgement of the

lower courts due to the supremacy principle of EU law. Article 177 on the Treaty of the Functioning of the European Union (TFEU)[5] is of particular importance, since this article is what has allowed domestic courts to request preliminary reference rulings from the ECJ. Kenney (2000) has also highlighted the importance of article 177. However the focus of his research has been on the role of law clerks, known as référendaires in the EU legal system. He compares them to law clerks working for the US Supreme Court. His conclusion is that référendaires have allowed for the smooth functioning of the ECJ, since they promote consistency, efficiency and consensus. Due to these factors, domestic courts have been more likely to accept these decisions as they seem more legitimate. Efficiency has also been highlighted by Hatzopoulos (2013) as one of the reasons why judgements have been so easily accepted by member states.

Davies (2012) goes even further and argues that national courts played a more important role than the ECJ itself in the ECJ's judicial activism. The ECJ's advice in preliminary reference rulings have generally been ambiguous and allowed the national courts to adopt a range of interpretations. Additionally, national courts have the monopoly on preliminary reference rulings since they are the ones that send their cases to the ECJ for advice. Thus a national court can choose to not request a preliminary reference ruling if it expects the ECJ to advise against its desired outcome. National courts are also more likely to ask the ECJ for a preliminary reference ruling if they want to make a decision that goes against national law. It is easier for them to give the responsibility to an EU institution than make that controversial decision themselves. Therefore without the national court's use and acceptance of preliminary reference rulings, it would have been nearly impossible for the ECJ to act as an activist court.

The literature on the topic of the role of national courts is extensive and has brought many important contributions such as the role of référendaires and article 177 of the TFEU. Nonetheless the role of national courts alone is not sufficient to explain how the ECJ managed to expand its powers without much protest from the member states. There have also been examples of national courts trying to secure their own powers from further ECJ interference such as the German Bundesverfassungsgericht (De Visser, 2013). Thus there are other explanations that are also important to consider when analyzing how the ECJ expanded its power.

[5] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01

B. "EU citizen argument"

Another important factor to examine is the citizens of the European Union. If the ECJ is accepted by the EU citizens,[6] it would also be more difficult for the national governments to decrease the power of the ECJ or reject their decisions. Some scholars (Weiler, 1994; Mancini & Keeling, 1994) have therefore looked at the role of EU citizens in this process. The principles of direct effect and supremacy are of particular importance under this line of research. These principles gave more power to citizens of member states and allowed them to go the European Court of Justice to challenge national law. The initial treaties of the European Coal and Steel Community (ECSC) and the EC had not provided the citizens of the member states any voice in this community (Weiler, 1994; Nugent, 2010). Thus giving the EU citizens a greater voice makes them more likely to view the ECJ as a more positive and legitimate institution.

Other researchers (Mancini & Keeling, 1994) have looked at how the ECJ has improved democracy within the European Union. The EC was not set up to be a democratic institution, since creating a democratic supranational organization would lead to a loss of sovereignty among the member states. As the areas of jurisdiction of the EC increased and citizens' lives were more directly affected by decisions of the ECJ, there were more calls to create a more democratic EC during the 1970s. The ECJ was a crucial actor in giving more power to the European Parliament (EP), the only elected EU institution. They gave the EP the right of annulment, which is a form of suing power, even though this power was not stated in the treaties.[7] This right of annulment was laid out in the next treaty, the Maastricht Treaty. However along with promoting democracy, the ECJ also promoted human rights, or as the ECJ calls them, fundamental rights. They have always been advocates in protecting citizens from discrimination in the economic sphere. Moreover the ECJ was the first EU institution to acknowledge that EU citizens were protected by fundamental rights within the EU. This acknowledgement only increased its positive image towards EU citizens and indirectly also heightened the democratic legitimacy of the EU.

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[6] EU citizenship has only existed since 1993 with the entry of the Maastricht Treaty. However citizens of member states have always been effected by decisions of the institutions of the EC Communities since the creation of the European Coal and Steel Community in 1951 and thus their view of these decisions is important (Nugent, 2010). For the sake of ease, this argument will be called the "EU citizen argument" even though this notion has only existed since 1993.

[7] It should be noted that the ECJ initially did reject the right of annulment for the EP. Only after the so-called 'Chernobyl' decision in 1990, 20 months later after its initial rejection, did the ECJ give the EP this power (Mancini & Keeling, 1994). For more information on the 'Chernobyl' decision see Case C-62/88 *Hellenic Republic v Council of the European Communities* [1990] ECLI:EU:C:1990:153.

Although the ECJ has created some benefits for the EU citizens, there have also been drawbacks for EU citizens and critical voices to this theory. Wasserfallen (2010) rightfully points out that most decisions made by the ECJ do not directly affect the daily lives of EU citizens and thus many citizens are unaware of the rights that the ECJ has bestowed upon them. Some are not even aware that the ECJ exists. Furthermore there are limits to what cases citizens can bring to the ECJ. For example, EU citizens cannot challenge regulations that do not target the individual specifically. Thus if a regulation does have negative effects for a citizen indirectly, this citizen would be unable to challenge it in front of the ECJ (Mancini & Keeling, 1994).

There have also been harsher criticisms on the role the ECJ has had on EU citizens. Defeis (2007) has argued that the court's decision to include fundamental rights under its domain has negatively affected citizens. Defeis wrote when there was no clear bill of rights enshrined within the EU. Thus he argued that the ECJ can continue to hold up its own standards which has sometimes negatively affected the fundamental rights of individuals. Spaventa (2015) has agreed with this assessment, even when the Charter of Fundamental Rights officially became part of EU law in 2009. The ECJ has generally been more interested in protecting its own powers than fundamental rights and it has led to a decrease of fundamental rights in many cases according to these scholars.

On the topic of the benefits and drawbacks for EU citizens, there are a wide range of opinions. Most would agree that the ECJ has created more avenues for citizens to question if their national law follows EU law. Furthermore they have played an important role in increasing the power of the EP. However some scholars focused on the ECJ and its role on fundamental rights would argue that the ECJ has often negatively affected fundamental rights and has even lowered fundamental rights' standards within the EU. Perhaps it can be claimed that most would agree that the ECJ has been successful in paving rights for citizens in the economic area of the EU, the original competences of the EC. However there is more disagreement about whether the ECJ has been successful in regards to the area of JHA. Nonetheless this argument has been important in explaining how the ECJ expanded its powers without protest from the member states.

C. The role of the ECJ as a strategic actor

A final argument put forth by the literature involves the ECJ itself. In these arguments, the ECJ is often described as a strategic actor that is an active participant in the expansion of its own powers. Alter (1998) describes the process of how the ECJ expanded its powers during the 1960s and 1970s. These two decades were the height of intergovernmentalism. Member states, especially France under the leadership of De Gaulle, made decisions that would give the member states their power back from the EC. The Luxembourg Compromise, where unanimity was instituted as the primary way of decision-making, is the prime example of this intergovernmentalism. Therefore one of the main questions Alter addressed was how did the ECJ expand its power in a period where member states were very reluctant to give power to supranational institutions.

Her explanation is that member states were unaware of this power increase, since the ECJ took these decisions in rather insignificant cases. In addition, groundbreaking decisions such as Van Gend en Loos, Costa v. ENEL and Cassis de Dijon were spread out over the years. Supremacy and direct effect were not decided in a single case. Instead with each case, the ECJ gained more power by instituting one activist decision. Since judges are in their position for a long time, they are able to see the long term consequences of their actions. Politicians are focused on re-election, so they look at the short term consequences and are often unable to see the long term impact of judicial decisions. There were a few French politicians who protested some of the decisions, especially Cassis de Dijon. However the overall opinion of politicians, including French ones, was that the ECJ was a favorable institution. Once the ECJ had gained its power, it was difficult for politicians go against these decisions, since it would have undermined the ECJ and the EU as a whole (Alter, 1998).

Another theory is put forth by Weiler (1994). Like Alter, he argues that during the 1960s intergovernmentalism had prevailed over supranationalism. Member states had taken back their power and had regained control over the decision-making process. Since they believed that they had the final say in the decision-making process, they were more willing to accept these decisions from the ECJ as they believed that they would be able to reverse the decisions if needed. Once the foundations had been laid out during the 1960s, it became easier for the ECJ to expand its power. During the 1970s, the member states further expanded the competences of the EC through the

creation of article 235.[8] Article 235 allowed the Community to add new competences if it was deemed necessary for the functioning of the Common Market. With this expansion, the ECJ also gained more competences. As a result of the precedent it laid out in the 1960s, it could also use this case law in these new areas. Like Alter, this argument's underlying assumption is that judges have a long-term outlook on its decisions, while politicians only take into consideration the short term. Furthermore it also highlights the importance of precedent.

Garrett, Kelemen and Schulz (1998) have added to this argument by using a rational choice based model. According to this model, member states are more likely to comply to the decisions of ECJ when they are viewed as insignificant, uncontroversial or small. They also use the precedent argument. It is more likely that member states will comply to a decision from the ECJ if there is precedent. Precedent gives more legitimacy to a decision. Thus the ECJ can still make a controversial or unfavorable decision if there is precedent. Garrett (1992) also acknowledges that the ECJ is aware of sensitivities within member states and takes these sensitivities into consideration when making a decision. The ECJ especially takes into consideration the desires of France and Germany as these states have the most power within the EU, especially in the past. These states have often been content with the decisions of the ECJ. Since most member states look to France and Germany as leaders, they have generally also been fine with its decisions. Carrubba, Gabel and Hankla (2008) have added to this argument. In their quantitative study, they determined that the ECJ is more likely to take decisions in favor of member states when influential member states are involved and the issues are deemed of particularly sensitive nature.

There is one final reason brought up by the literature as to why member states have not halted the expansion of power of the ECJ. Treaty revision is the main way member states would be able to force the ECJ to change its activist interpretation of EU law. However treaty revision is a lengthy and difficult process that most member states would rather not embark on. Thus if the ECJ continues to carry on making its activist decisions in uncontroversial cases and the member states remain content with these decisions overall, there is no push for member states to start this process (Carrubba, 2003). Also treaty revision requires unanimity from member states. Unanimity is difficult to obtain so member states tend to avoid treaty revision. Even secondary law revision often requires unanimity in the cases that the ECJ decides upon (Höreth, 2013). Wasserfallen (2010) has provided an additional argument to this reasoning. Since citizens are generally

[8] Treaty Establishing the European Economic Community [1957] 298 U.N.T.S. 11

unaffected by these decisions in their daily lives, they are not likely to protest the decisions. As long as the citizens are not affected, the governments do not feel the need to commence the process of treaty revision. Thus it is unlikely that the ECJ will be forced to change its decisions anytime soon.

2.3 Judicial activism in Justice and Home Affairs

The literature has primarily been focused on analyzing judicially activist cases involving the internal market of the European Union. The EU was created based on economic cooperation in the coal and steel sector in the hope that this cooperation would lead to peace among the European states. However during the 1970s, Justice and Home Affairs became part of the EU's agenda through the TREVI meeting in 1975. This area is more sensitive to the member states as it involves control over their borders and security which is often viewed to be the primary source of sovereignty for national governments (Dinan, 2004). Therefore initially it was solely an intergovernmental area within the EU. However in the 1990s a large portion became part of the community method. In the community method, decisions are no longer made on an intergovernmental basis and thus it is often described as a supranational decision-making method (Nugent, 2010). Fundamental rights, an area closely linked to JHA, officially became part of the jurisdiction of the ECJ in 2009. The European Court of Justice has not been as likely expand its own powers in the area of JHA due to its sensitive nature. However in recent court cases, the ECJ has made some crucial decisions in this area and has expanded both the EU's power and its own powers (De Burca, 2013). Scholarship on this topic has been scarce and most cases have not been analyzed to such a degree as Cassis de Dijon and Costa v ENEL have been. Nevertheless there has been some research on this topic.

Defeis (2007) is one of the earlier scholars on this topic, specifically focused on fundamental rights. Although this article does not explicitly state that the ECJ is a judicially activist court, it is implied. Defeis argues that the ECJ introduced fundamental rights to the EU through its case law. From its conception onwards, the ECJ has always dealt with fundamental rights, especially in the form of discrimination occurring within the internal market. However it only recently considered cases covering other fundamental rights' issues. The ECJ was the first EU institution to declare that fundamental rights were institutionalized within the EU through a series

of cases.[9] Some have gone as far to argue that the ECJ brought fundamental rights under its jurisdiction to expand its powers.[10] Defeis says that this argument cannot be proven, but it should be acknowledged that there is some degree of activism in this declaration. The ECJ significantly expanded its scope and jurisdiction with this decision. Especially when it is considered that this declaration was made before the Charter of Fundamental Rights was an official part of EU law.

De Burca (2013) also agrees with this assessment. This article was written after the Charter formally became part of EU law. De Burca determined that there has been a significant increase in cases involving fundamental rights since 2009 and interpreting fundamental rights have become one of the main tasks of the ECJ. The extension of the preliminary reference procedure to JHA has increased the amount of fundamental rights cases. Like Defeis, De Burca argues that the ECJ has generally set its own standards and has been very unlikely to reference outside sources such as the European Court of Human Rights (ECtHR) or even case law from its own member states. Although it has its reasons for these actions, it has caused the ECJ to set its own fundamental right standards in most cases. The conclusion of this article is that the ECJ should use more supportive case law from other courts like the Advocate General has done in his opinions in the future.

Overall literature on this topic has been limited and requires more research. Most research has either been focused on general fundamental rights or on the role of the Commission in creating a more supranational JHA. Uçarer (2001), for example, has argued that the Commission was one of the most important actors involved in placing the JHA under its own jurisdiction and thus ensuring that JHA became part of the Community method. Although there has been limited research on this topic, the research done on this topic has concluded that the ECJ has been an activist court to at least a small degree. Therefore this paper will be focused on this area as other cases involving the economic expansion of the ECJ have already been discussed in length (for examples see Mancini & Keeling, 1994; Davies, 2012). In the next section, the conduct of research will be explained.

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[9] The most prominent cases are Case C-29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECLI:EU:C:1969:57 and Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114. In Stauder, the ECJ decided that fundamental rights were enshrined within the Community law. In Internationale Handelsgesellschaft, the ECJ added that these fundamental rights were inspired by the traditions of the member states.

[10] Weiler (1991; 1994) has been one of the more prominent voices making this claim.

3. Research Outline

3.1 Research area and time period

The ultimate goal of this research project is to determine to what extent the ECJ is an activist court in the area of JHA and how it has pursued this activism without triggering a great amount of protest among the member states. The activism of the ECJ in other areas has been studied extensively. However its activism in JHA has not been as thoroughly analyzed although most scholars (Spaventa, 2015; De Burca, 2013; Defeis, 2007) would agree that some form of activism has taken place. Nonetheless judicial activism should not be assumed. Therefore a great portion of the analysis will be focused on this question. The final part of the analysis will determine how the ECJ expanded its powers in JHA, a sensitive area to member states, based on the three common ways mentioned in the literature.

The time period for this research starts when JHA became part of the ECJ's jurisdiction. JHA formally became part of its jurisdiction in 1993 when portions of this area became subject to supranational decision-making. Fundamental rights date back even further and it can be argued that it has always been part of its jurisdiction in some form, especially fundamental rights concerning the internal market. The ECJ itself announced in the 1970s that fundamental rights were an integral part of the EC (Defeis, 2007). However fundamental rights formally became part of the ECJ's jurisdiction in 2009 when the Lisbon Treaty came into force and the Charter of Fundamental Rights officially became part of EU law. Since the official introduction of fundamental rights into EU law, the ECJ has had a significant increase of JHA-related cases. Furthermore the ECJ has been more willing to take an activist stance in these cases around this time period (De Burca, 2013). Thus although the time period for this research is from 1993 onwards, most cases will come from the last decade.

3.2 The three cases

The three cases (Metock, Melloni and Opinion 2/13) were chosen since they represent a variety of different JHA cases and on the surface they exhibit some form of judicial activism. These cases cover fundamental rights' issues, migration and citizenship matters. In the limited

literature on this topic,[11] these cases are often cited as they are the ones where the ECJ made the most controversial decisions. A brief description of the cases will be given below.

The first case that will be analyzed is Metock.[12] Metock was decided in 2008 and involved a denied request for EU residency of a third country national married to an EU citizen in Ireland. This case was particularly sensitive to the Netherlands who was not directly involved in this case. Nonetheless the ECJ ruled against the favored outcome of both the Netherlands and Ireland. Thus this case is useful to analyze due to the high sensitivity for member states of the case. Furthermore this case has been often cited by scholars (Fahey, 2009; Peers, 2009; Hatzopoulos, 2013) to be a clear example of activism. Therefore this case is useful to test to determine if activism has taken place and if it did, how it managed to push through this decision when some countries were firmly against it.

The next case is Melloni.[13] Melloni was decided in 2013 and involved whether or not an European Arrest Warrant (EAW) should be carried out in the face of fundamental rights' violations written down in the Spanish constitution. This case has not often been cited as a case of judicial activism. However it can be considered one due to the nature of this case. The ECJ ruled that EU law was above the Spanish constitution and its fundamental rights. Essentially it expanded the primacy principle determined in Costa v ENEL to the EAW and implicitly to Justice and Home Affairs. Furthermore this case has been viewed to be highly sensitive by scholars (Pérez, 2014) since it involves fundamental rights of the accused. Thus this case is also an important one to include in this analysis.

The final case is Opinion 2/13, decided in 2014.[14] Unlike the other cases, this case involves an opinion of the ECJ. The Commission asked the ECJ for its opinion about compatibility of the accession treaty of the EU to the European Convention of Human Rights (ECHR) with EU law. The ECJ had earlier rejected this accession[15] since an accession to the ECHR would have had

[11] Hatzopoulos (2013) gives a more general overview of cases involving JHA and fundamental rights. Peers (2009) and Fahey (2009) look into Metock specifically. Pérez (2014) and Spaventa (2015) analyze Melloni and Opinion 2/13 respectively.
[12] Case C-127/08 *Metock & Others v Minister for Justice, Equality and Law* [2008] ECLI:EU:C:2008:449 (from now on will be referred to as "Metock")
[13] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107 (from now on will be referred to as "Melloni")
[14] Opinion 2/13 of the Court of 18 December 2014 [2014] ECLI:EU:C:2014:2454 (from now on will be referred to as "Opinion 2/13")
[15] See Opinion 2/94 of the Court of 28 March 1996 [1996] ECLI:EU:C:1996:140

fundamental institutional implications for the Community and such a constitutional change had no legal basis in the treaties. This basis was then laid down in the Lisbon Treaty, so most assumed that the ECJ would agree. There were a few critical voices of the accession treaty (Lock, 2011), but even they believed that these problems should not hinder a potential accession. However to the surprise of many, the ECJ rejected the accession once again. Many scholars (Spaventa, 2015; Johansen, 2015) have criticized the court's decision. They have argued that the court's reasoning was more focused on protecting their own competences rather than adhering to legal reasoning. Thus this case is also useful to test if the ECJ is a judicially activist court in JHA.

3.3 Definition of judicial activism

Judicial activism has been used in a variety of studies. These scholars all have different interpretations of what judicial activism is. Most do not adhere to the definition that is often utilized in mainstream media. Here the term is generally used in a negative light and is often associated with the legitimacy of the ECJ. Sometimes it will be implicitly associated with the legitimacy of the EU as a whole. However judicial activism is not a reflection of the trust that people have in an institution (De Visser, 2013). Furthermore judicial activism can both have positive and negative consequences. Although definitions of judicial activism often have a negative bias, it should be noted that judicial activism is a neutral term (Arnull, 2013). The definition that will be used in this research project, is that judicial activism is when a court makes a decision out of the court's legal jurisdiction as stated in the treaties or the constitution that is favorable to the court. In general, these decisions involve a court expanding its own competences.

This definition is one that is most often used in the literature. Many have described activism as a judge pursuing its own personal interests (Kaupa, 2013). However as Arnull (2013) rightfully points out, it is extremely difficult to judge the personal interests of an individual especially in the European Court of Justice where dissenting or individual opinions are not released. Instead it is easier to judge what the court would want instead of the judges' personal preferences. The theory of institutionalism is a great tool in determining what a court's preferences are. There are a variety of forms of institutionalism, but most forms would agree that institutions create values and norms that will be followed by individuals within those institutions. Rational-choice based institutionalism argues that an institution seeks to maximize its own utility. Therefore an institution

would try to expand its powers and influence (Lowndes, 2010). Although this theory is often not used to describe the behavior of courts since they are not viewed as political actors, most scholars (Alter, 1998; Carrubba, 2003; Rosenfeld, 2006) would agree that the ECJ and most courts are political actors to a certain degree. Furthermore institutionalists would argue that politics are irrelevant in regards to institutions as institutions are based on shared norms, values and a culture (Lowndes, 2010). The ECJ falls under that category. Based on this theory, it should be assumed that a court's preference would be in expanding its own powers. Therefore judicial activism often times involves a court expanding its own powers.

Since the European Union is an unique transnational legal order, the consequences of judicial activism by the ECJ are different than when they are carried out by national courts. When national courts make decisions that are out of their jurisdiction, they do not affect the sovereignty of other member states, solely the institutions within the country. If the ECJ expands its powers, it also leads to a loss of sovereignty of the member states' competences. This consequence of judicial activism has often been said to be the defining feature of judicial activism (Dawson, 2013). Although this consequence often does happen in the EU, it is not the defining feature of judicial activism. Judicial activism solely is a court pursuing its own interests. Nonetheless this consequence will be taken into account and will be discussed further in the next section.

3.4 Hypotheses

In order to test the research question, the hypotheses need to be laid out. The first part of this research is to determine if the ECJ did pursue judicial activism in its decisions. Based on the literature, the likelihood is high that the ECJ is an activist judiciary in the area of JHA. There is only one voice that has claimed that the judiciary has not acted in activist way. Furthermore the few scholars on the topic of JHA have also concluded that the ECJ has been involved with expanding its powers in the area of JHA. Therefore the first hypothesis is that the European Court of Justice made judicially activist decisions in the area of JHA. This hypothesis will be tested by looking at the case itself. Literature will be used to support the evidence.

However there is more to look at than solely the European Court of Justice. The member states are also important actors in this equation. One of the consequences of judicial activism is that the member states lose some of their sovereignty. Literature on this subject has presumed that member states did not accept this increase power of the ECJ. In fact, it even has been argued that

most member states were not in favor of more supranational integration (Stein, 1981). These assumptions result in the next two hypotheses. The second hypothesis is that the member states did not accept the increase of power of the European Court of Justice. This hypothesis concerns the reactions of the member states to the decision of the ECJ and their agreement with this decision, specifically the increase of power of the ECJ. The third hypothesis is similar to the second but looks at a different aspect. This hypothesis states that the member states did not give their explicit written consent to this increase of power. Written consent in its most simple form means the treaties. However it can also be interpreted in other ways such as secondary EU legislation or formal actions made by the member states in response to this judgement. Also no response to this decision does not equate to consent. Scholars (Alter, 1998) assumed that the reason the ECJ has been able to pursue its activist policies is because of the unawareness and short-terming thinking of the member states. Thus unawareness does not equal explicit written consent. These hypotheses will be tested by both outside documents and the cases since the member states' views are involved and these are often not stated in the cases itself.

Since the assumption is that the member states did not agree with the expansion of power of the ECJ as it often leads to a loss in sovereignty over crucial national matters such as border control and questions of residency, the question still remains as to how the ECJ expanded its power and was allowed to pursue its judicially activist decisions. This question can be answered by the following three hypotheses which have their basis in the literature discussed above:

- The European Court of Justice expanded its power through national courts legitimizing its decisions.
- The European Court of Justice expanded its power through improving the rights of EU citizens and giving them more opportunities to participate.
- The European Court of Justice expanded its power through strategic action.

However it is possible that the ECJ only pursued one of these policies in each case. Therefore in the end, it will be analyzed if certain methods were preferred over others. These last three hypotheses will mainly be answered by accompanying documents and literature, since the cases themselves alone often are incapable of answering this question. However the cases do give some answers.

In summary there are six hypotheses:

1. The European Court of Justice made judicially activist decisions in the area of Justice and Home Affairs.
2. The member state did not agree to the increase of power of the European Court of Justice.
3. The member states did not give their explicit written consent to the increase of power of the European Court of Justice.
4. The European Court of Justice expanded its power through national courts legitimizing its decisions.
5. The European Court of Justice expanded its power through improving the rights of EU citizens and giving them more opportunities to participate.
6. The European Court of Justice expanded its power through strategic action.

With all the hypotheses laid out, the analysis can be conducted.

4. Analysis

The analysis will be carried out by analyzing each case separately, starting off with Metock. At the end of this section, a brief summary and comparison of the results will be held to determine if the ECJ acted in a similar manner in all cases or if it used different tactics in each of the three cases.

4.1 Metock

Metock involved four cases that were quite similar in nature. The case was named after Metock, so his case will be summarized to gather an overall idea of the nature of this case. Metock, a Cameroonian national, applied for EU residency on the grounds that his spouse had gained UK citizenship and now resided in Ireland. His application was rejected, because his prior residence in Ireland had been illegal. He had applied for asylum before and his application was rejected. During this process, he had married his wife with whom he had two children. Ireland had rejected

his application based on an EU directive[16] that Ireland had implemented into national law. This directive laid out the grounds on which a third national, a family member of an EU resident, could be refused residency. Ireland had interpreted that prior lawful residence in an EU member state was one of those grounds based on previous case law of the ECJ. Two questions arose. The first question was if prior lawful residence was one of the requirements and the second question concerned the scope of this directive, particularly what type of marriages fell under this directive. The ECJ concluded that prior lawful residence was not one of the requirements for EU residency and also argued that the scope of this directive should be interpreted broadly. Therefore it does not matter when and where they were married in order for a third country national to gain residency.

At first glance, this case does not appear to be a case of ECJ activism. It simply seems like a matter of clarification by the ECJ on an EU directive. However there are some important elements as to why scholars have considered this case to be a case of ECJ activism. The first reason is because freedom of movement of persons is hailed to be supreme over member state law. The ECJ clearly states in Metock that the freedom of movement of persons needs to be protected as much as possible in paragraphs 63 to 68 of the judgement and all restrictions should be limited and based on justified grounds such as if the person in question forms a threat to society in paragraph 74 of the judgement. Although this principle is not new to EU law, it is a form of activism, since it places EU law above member state law and broadens the power of the ECJ. Furthermore this principle is reaffirmed in the area of JHA, one of the most sensitive areas for member states, as this area involves border control. Border control is one of the key elements of sovereignty to member states (Dinan, 2004). Placing EU principles above national immigration law is a significant breach on national sovereignty, one of the consequences of ECJ activism.

Another interesting portion of this case is that it overturned a previous decision of the ECJ. In Akrich[17], the ECJ determined that illegal entry into a member state could be used as a grounds of rejection for the residency of a third country national. Furthermore it also argued that marriages of convenience were viewed to be an abuse of this directive and could be used as a ground for rejection of residency. Prior to this decision, the directive involving residency had to be interpreted broadly much like the ECJ would determine in Metock. Scholars (Peers, 2009) have disagreed

[16] Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 159/04

[17] Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECLI:EU:C:2003:491 (from now on will be referred to as "Akrich").

with Akrich, arguing that it did not make sense based on previous ECJ case law on this matter. In later years, the ECJ tried to clarify its decision and narrowed this exception down in Jia.[18] However in Metock, the court acknowledged that it had made a mistake in Akrich and formally overturned it. These actions might not seem to be related to activism, as they only fix a mistake the court made earlier. However Ireland had followed the ECJ's interpretation of Akrich when it implemented the directive. The ECJ then changed its mind. Ireland had to comply to this change of heart and change its national law based on this interpretation. Thus although the member states had created the directive, the ECJ had significant influence on how this directive had to be interpreted and implemented. It had essentially interpreted and created law based on its preferences, which is the definition of an activist court. Thus based on this analysis, it can be determined that the ECJ was a judicially activist court in Metock.

The next part of the analysis is to determine if the member states agreed with the decision of the ECJ. Ireland seemed to agree with the decision based on its actions. It amended its legislation only four days after the judgement was made. Other member states[19] also agreed as they also amended their legislation willingly based on this decision. Even Denmark changed its administrative practices and regulations. Denmark enjoys many opt-outs in the area of JHA, but citizenship is not one of them. Although Denmark was obliged to make changes, it is still surprising that it followed through as the JHA has been one of the most sensitive areas for Denmark (Fernhout & Wever, 2011). Despite many member states being in favor of this decision, there are also clear signs that member states did not agree with this decision.

The Netherlands has been the most prominent voice against this decision. The Netherlands has been particularly concerned about the possibility of abuse and fraud with the broadened interpretation of this directive. Although Denmark, France, Hungary, Ireland, Lithuania and Sweden have also all been concerned with this possibility, the Netherlands has taken the greatest amount of action in response. In 2012, the Raad van State, a Dutch legal advisory body, asked for a preliminary reference ruling from the ECJ for further clarification about the so-called 'Europe route.'[20] The 'Europe route' concerns a situation where an EU national will move to another EU

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[18] Case C-1/05 *Yunying Jia v Migrationsverket* [2007] ECLI:EU:C:2007:1

[19] These member states were Austria, Cyprus, the Czech Republic, Germany, Finland, France, Italy, Lithuania and the United Kingdom.

[20] See RVS 5 October 2012, ECLI:NL:RVS:2012:BX9567 for more information

member state in order to circumvent national regulations.[21] The ECJ upheld their decision in Metock and also stated that national restrictions on residence should, in principle, not be more strict than the EU directive.[22] Since it has been unable to change the ECJ's opinion on restrictions regarding family reunification, the Netherlands has tried to get others on board to change the EU directive. Although the Netherlands has been the most prominent voice, other countries have been also interested in an amendment of this directive. Despite changing its legislation because of the court's decision, Ireland was the first one to start a campaign to amend the directive. Denmark has also joined it in its efforts (Fernhout & Wever, 2011). Thus based on all of this this information, most countries seemed to have agreed with this decision based on their actions. Furthermore even countries against the directive have implemented the changes, solidifying that the ECJ is a legitimate institution. However there have been calls from countries to amend the directive and narrow down the scope of this directive. Therefore it should be concluded that there has been a partial acceptance of the decision of the ECJ from the member states.

The question of explicit written consent of the member states has two answers. On the one hand, the member states did agree to this decision. They were the ones who created this directive and should have been aware that any ambiguities would have been clarified by the European Court of Justice. The European Court of Justice is tasked with interpreting EU law according to the treaties (Kaupa, 2013; Davies, 2012). Thus the member states could have expected that there was high likelihood that the ECJ would also interpret this directive according to EU law. If their intentions were to limit abuses and consider prior illegal residency in the EU as a ground for refusal, then it should have been clarified in the directive. This interpretation has also been followed by scholars such as Peers (2012). However there were some members states that disagreed with this reasoning, arguing that it was not how they intended this directive to be interpreted (Fernhout & Wever, 2011). Thus although there is some form of written consent, it is still difficult to argue that there was full explicit written consent given by the member states in this specific instance. Especially as the Netherlands has taken formal action to make changes to this directive. Therefore like the second hypothesis, this hypothesis is partially rejected.

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[21] This request of the Council of State was not a solely a response to Metock, but also a response to Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECLI:EU:C:1992:296 and Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind* [2007] ECLI:EU:C:2007:771.

[22] Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* [2014] ECLI:EU:C:2014:135

Since activism has been determined, the question arises as to how the ECJ pushed through this decision without member states refusing to adhere to it. As stated above, this decision was controversial, yet most member states, even the ones that disagreed with this decision, implemented this decision into their national law. Thus the question remains how the ECJ legitimized this decision. National courts did play a slight role as the Irish court did ask for a preliminary reference ruling. However national law-making and -implementing bodies played a more important role in the overall acceptance of this decision. In many countries, these bodies were quick to make changes in their procedures regarding residency applications based on this decision (Fernhout & Wever, 2011). Thus there is partial rejection of the fourth hypothesis.

Improving the rights of EU citizens' was also an important source for legitimization of this decision. This case involved family rights, which are considered to be fundamental rights according to the Charter of the Fundamental Rights of the European Union. In the decision itself, the ECJ acknowledges the importance of these rights and that these rights should protected as much as possible. Therefore it argued that the amount of restrictions placed on obtaining residency for third national family members of EU citizens should be as limited as possible. Overall this decision highly improved standards for EU citizens moving within the EU with their third national family (Peers, 2009). The fifth hypothesis is thus confirmed.

The final way, the ECJ has been able to pass decisions such as these, is through strategy. The ECJ did not rely on precedent as it overturned a previous decision. Furthermore this case could not be considered to be uncontroversial. Control of citizenship and residency is one of the most important sources of sovereignty for a member state. Therefore it is not surprising that the Netherlands has attempted to change the directive in question to overturn the decision. However this case mostly upset smaller member states such as Denmark and Ireland. The Netherlands is often times considered to be an in-between member state in terms of size and influence (Nugent, 2010). It did not upset states like Germany, France or the UK. The UK, Germany and France all implemented changes in their residency policy based on this decision. The main strategy involved was the difficulty of changing secondary legislation. The Netherlands along with Ireland and Denmark have been attempting to change this legislation. Since these countries are in the minority and a qualified majority is needed to amend this legislation, it has been impossible for them to amend this legislation. Thus in this case, the ECJ relied on national law-making and -implementing

bodies, improving family rights for EU citizens and the difficulty of modifying EU law with a minority to push through this decision.

4.2 Melloni

Melloni involves Stefano Melloni who was accused of fraud in Italy and was arrested. After he posted bail, he fled to Spain. He was told that he would be tried in absence by the Italian authorities if he did not return, but he remained in Spain during his trial. Italy determined him to be guilty and executed an European Arrest Warrant (EAW) to Spain for his extradition. Being tried in absence is illegal and is considered to be a fundamental right according to the Spanish constitution. The Spanish Constitutional Court questioned if they should surrender Melloni to Spain, since they would be violating their constitution and a fundamental right. Therefore it was sent to the ECJ for a preliminary reference ruling. Three questions arose from this case, but the final question is the most relevant to this analysis. The final question asks if a member state can prioritize adhering to fundamental rights' standards higher than specified in the Charter over EU law. The conclusion of the ECJ was that primacy of EU law needs to be adhered to. Thus a member state is not allowed to prioritize fundamental rights' standards over EU law. If they did, it would undermine mutual recognition and mutual trust between member states as it would allow member states to review legislation of other member states.

This decision can be considered activist for the following reasons. The principle of primacy of EU law is affirmed in the area of JHA in this decision in paragraphs 58 to 60 of the judgeent. The ECJ declares that EU law stands above fundamental rights standards higher than specified than in the Charter. It also declares that it is above the Spanish constitution. Fundamental rights and the national constitutions are key sources of sovereignty for a country. The ECJ actively undermines this sovereignty and places itself above all Spanish institutions. Additionally, it argues that the EAW, a piece of secondary EU legislation, is above primary Spanish legislation, the constitution. It is rather difficult to argue that this decision was not an activist one as it does significantly expand the ECJ's jurisdiction in both fundamental rights and JHA. The literature on this case also has agreed with this assessment. A large portion of scholars have viewed this decision as the ECJ declaring itself supreme over the Spanish constitution and as the supreme judge in fundamental rights' cases (Pérez, 2014). Creating a position of supreme judge in fundamental

rights had not been part of the original jurisdiction of the ECJ. Based on this information, it can be concluded that this decision is an activist decision of the ECJ.

The next two hypotheses concern the consent of the member states. The Spanish Constitutional Court asked for a preliminary reference ruling. Therefore they gave consent to the ECJ to make a decision on this matter for them. Furthermore the Spanish Constitutional Court has changed its own case law in response to the decision of the ECJ. In a decision known as STC 26/2014, the Spanish Constitutional Court has stated that it agreed to lower the degree of protection guaranteed by the Spanish constitution to the level of EU law (Garcia, 2014). Thus this case does reject the second hypothesis, as the Spanish Constitutional Court gave consent to these decisions and there was no protest from the member states. The third hypothesis is also rejected as there was clear explicit written consent by the Spanish Constitutional Court. The Spanish Constitutional Court requested a preliminary reference ruling and formally changed their case law. Other member states did not give their reactions to this decision as they were not involved in this case. However they did create the EAW and allowed the ECJ to rule on uncertainties in EU case law. Thus the third hypothesis is also rejected.

The next three hypotheses concern how the ECJ gained Spain's consent. Since the Spanish Constitutional Court was the main actor that consented to the ECJ's activism, it is clear that national courts played a key role in legitimizing the activist decision of the ECJ. However Spain was the only court that changed their case law based on this decision. Other national courts did not change their case law. Also other member states did not even change their legislation or methods of implementing their laws based on this legislation. Unlike in Metock, this case only affected Spain and the Spanish Constitutional Court was the main player that changed its case law willingly. It wanted dialogue with the ECJ and wanted an answer to this question (Pérez, 2014). The national court hypothesis is confirmed.

The EU citizen hypothesis is rejected. In fact, most scholars and commentators (Pérez, 2014; Franssen, 2014) would even go as far to argue that this decision has negatively affected the fundamental rights of EU citizens. The ECJ rejects member states adhering to higher fundamental rights' standards than stated in the Charter of Fundamental Rights of the EU in paragraphs 62 and 63 of the judgement. Essentially it places the principle of mutual recognition above fundamental rights' standards. Pérez (2014) has argued that the interpretation of a fair trial is significantly weakened according to the definition of the ECJ. Franssen (2014) has argued that in the case of

Melloni this weaker interpretation does not necessarily matter as Melloni had been repeatedly told of his rights. However she does admit that in future cases this interpretation could significantly harm the rights of EU citizens. EU citizens' rights were not improved and perhaps were even worsened, so this hypothesis is rejected.

The final way, the ECJ can push activist decisions through, is through strategic action. Precedent was important in this case. The principle of primacy had first been established in Costa v ENEL and has been reaffirmed in future cases[23]. Thus this case only reaffirms that the principle of primacy of EU law also exists in the area of fundamental rights. Additionally, this case does not involve one of the bigger member states. Although size-wise Spain is one of the bigger member states, it is not often viewed to be one in terms of influence (Nugent, 2010). If this case had taken place in Germany, it could have led to more protest. The German Federal Constitutional Court has been known to go against decisions that state that the ECJ is above the German constitution (De Visser, 2013). Also the Spanish Constitutional Court was very curious to know what the answers were and were very willing to engage with the ECJ. Thus for them, this case was not deemed to be of particular sensitive nature even though it dealt with the supremacy of their constitution and fundamental rights (Pérez, 2014). The willingness of the Spanish Constitutional Court to listen to the ECJ and change their case law based on their decision was the main reason as to why the ECJ successfully gained Spain's consent. Deciding that all EU law, including secondary law such as the EAW, is above the Spanish constitution and Spanish fundamental rights is an arguably controversial and sensitive decision. Thus the willingness of Spain to accept this decision was extremely important for this decision to pass without any member state attempting to reverse this decision. Precedent also played an important role as primacy of EU law has existed since Costa v ENEL and therefore this principle has been accepted by most national courts.

4.3 Opinion 2/13

The EU had wanted to join the European Convention on Human Rights for a while. There had been many cases that the ECtHR had to preside over that involved EU law. The ECtHR had decided in Bosphorus[24] that since it could not judge EU law as it was not a member of the

[23] Case 106-77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECLI:EU:C:1978:49. In this case, the implications of the supremacy principle became fully apparent to the member states. This case is a classic example of the court's use of precedent (Stein, 1981).
[24] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* (2005) 42 EHRR 1

convention, it would solely judge the areas of discretion that member states had within the implementation of EU legislation. To solve the tricky legal relationship between the two organizations, the EU decided to join the ECtHR. The first attempt of the EU to join failed because the ECJ argued that there was no legal basis in the treaties for joining such an institution. The member states created a legal basis in Article 6(2) of the Treaty on the European Union (TEU). The EU and the Council of Europe then created an accession treaty for the EU. The European Commission asked the ECJ for an opinion, expecting that they would agree to this accession as there was a legal basis. To their surprise and the surprise of many scholars, the EU rejected this accession based on five reasons (Johansen, 2015).

The first reason was that it did not take into consideration the special nature of the EU. Thus the ECtHR could oblige EU member states to uphold higher fundamental rights standards than stated in the Charter of Fundamental Rights of the EU which would violate mutual trust between member states as was decided in Melloni. Also, there was a chance that the preliminary reference procedure would be circumvented, meaning that the ECtHR would rule on EU matters before the ECJ had the chance. The second reason was that it violated article 344 of the Treaty on the Functioning of the European Union (TFEU). This article states that the ECJ is the only body that is allowed to settle disputes between member states based on EU law. The third reason was that this accession treaty created the co-respondent mechanism. This mechanism could result in the ECtHR interpreting EU law and the ECJ is the only institution allowed to interpret EU law. The fourth reason was that there was no mechanism that ensured that the ECJ could ensure that cases involving EU law fell under its jurisdiction. Additionally, there was a chance that the ECtHR would review case law of the ECJ. The final reason was that since the ECJ is not allowed to review the Common Foreign and Security Policy (CFSP), there was a chance that the ECtHR would fill that gap. Thus the ECtHR would become the judicial review of EU law in this area and the EU is the only body allowed to review EU law.

Even though most scholars have been highly critical of this decision, most (Spaventa, 2015) have acknowledged that the legal reasoning behind this judgement is extremely complex and not per se legally inaccurate. However most have argued that the grounds for rejection made by the ECJ could have easily been solved and therefore the conclusion has been that this opinion was an activist one. This reasoning will be further explained in the next couple of paragraphs. Before the judgement is delivered, the ECJ clarifies multiple times in Opinion 2/13 that the ECJ would lose

power and competences if this accession treaty occurred. It repeats this sentiment through sections I through VIII. The ECJ does acknowledge that the Commission stated that the ECJ's power would not be affected as stated in paragraph 101 of the judgement: In the next few lines, the ECJ acknowledges that although the Commission did try to minimize the impact this treaty would have on the ECJ, its power would nonetheless still be affected. In section VII, the ECJ once again reiterates that its power would be affected even though the member states do not acknowledge its loss of power in paragraph 129. Based on these paragraphs, it is clear that the ECJ is acutely aware that this accession treaty would pose limitations on its power. However the ECJ cannot reject a treaty based on these grounds.

In section VIII, it delivers the reasons as to why it concludes that the accession treaty would violate the treaties and legal principles of the EU. These reasons were laid out earlier. Although these reasons do not explicitly state that the ECJ views the accession treaty to be incompatible with EU law because it would limit the power of the ECJ, it does implicitly state that it would occur. Most of the reasons imply that the ECJ wants to be the sole reviewer of EU law. The ECtHR should not be involved in reviewing EU law and furthermore should not be able to review the actions of the ECJ. However in its opinion, it does not state that the ECJ should be the single reviewer of EU law because it would limit the powers of the ECJ. Instead it relies on reasons such as violating mutual trust between member states and violating article 344 of the TFEU. These reasons are all valid reasons and could be the reason as to why the ECJ rejected the accession treaty. However it does not take away from the fact that the ECJ also rejected the accession treaty implicitly because it would take power from the ECJ. Furthermore Spaventa (2015) has argued that some of the problems brought up by the ECJ could easily be resolved. For example, the ECJ argues that mutual trust would be violated since it would require member states to set higher fundamental rights standards than stated in the EU treaties. However in the EU treaties, it is already acknowledged that the ECHR is a baseline for fundamental rights, so this reason should not have posed a problem.[25] Based on all these reasons, it should be concluded that the ECJ did act in activist way. It might not have been their goal to act in an activist way, but all the reasons and the end result point to judicial activism. Furthermore the goal of this accession treaty was so that the ECtHR could review EU law to see if it held up to fundamental rights' standards. The ECJ made

[25] Article 6(2) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01

this impossible in their opinion and did not leave the ECtHR much room to pursue its job based on their new conditions.

The next hypotheses involve the member states' acceptance. In the opinion itself in section VIII, it is acknowledged that the member states do not view this accession treaty to violate EU treaties and or impose a problem on the work of the ECJ. In fact, they argued that the ECJ's competences should be interpreted in a more narrow interpretation in paragraphs 130 to 140. The French and UK governments, for example, argue in paragraph 130 that the ECJ should not be able to interpret its possible areas of jurisdictions in regards to preliminary reference rulings. This section affirms that the member states were in favor of this accession treaty and even upheld a stricter interpretation of the ECJ's competences. However more information on their views is not given during the case. The literature on this topic generally does not include the member states' reactions to the decision. The UK is an exception as they did not want to the ECJ to join the ECHR as they feared it would give the EU more power as this move would legitimize the EU further (Spaventa, 2015). Based on this information, it is clear that most member states were in favor of joining the ECJ and most believed the ECJ should have a more narrowed scope in certain areas. However it is unclear if they agree with the ECJ's judgement. The second hypothesis is thus mostly confirmed.

Explicit written consent also faces this difficulty. The member states did give the ECJ the power to give opinions on treaties to determine if they would violate EU law. This precaution is necessary as it is much easier to change a treaty to conform to EU law before the treaty is signed than afterwards. Based on this reasoning, it can be said that member states did give it explicitly written consent. Furthermore the member states did not protest this decision nor did any of the other EU institutions. In fact, it is impossible to determine if the member states agreed or disagreed with this opinion. Legal scholars have been vocal in their criticism, but the governments nor the national courts have made their views known (Johansen, 2015). In the case itself, documents were admitted for the court to consider that showed that member states were in favor of the decision. However they did not protest or voice criticisms against the decision once it was given even though it was not what most had wanted. Therefore the third hypothesis is partially rejected, since there is a legal basis in the treaties. Nonetheless it is unclear if the member states consented with this specific decision.

The next hypotheses that need to be tested are the ones that determine how the ECJ managed to push this decision through without protest from the member states. The member state did a prefer a more narrowed scope of the ECJ in their opinions. Thus it is unusual that they did not have any strong reactions against this decision. The fourth hypothesis does not seem to play a role here. National courts were not involved in this process as this decision was solely an opinion. Other national institutions were also not involved to legitimize this opinion. The only role national institutions had was to give the court their opinions as to how they should rule on this opinion. In these documents, it is clear that they were all in favor of the decision and therefore should not agree with the court's decision. Thus the fourth hypothesis is rejected.

The citizen hypothesis is also rejected. In fact like Melloni, this opinion negatively affects the lives of citizens. The goal of this treaty was to give the ECtHR the residual protection to fundamental rights within the EU. The ECtHR would not have been the institution giving primary protection instead it would act as a safeguard for fundamental rights. Currently the ECJ has nobody overseeing its decisions and potential shortcomings it can make in the area of fundamental rights. Furthermore this accession would have solved the double standard that the EU has created in the area of fundamental rights. Currently the member states are required to adhere to fundamental rights' standards but the EU is not (Spaventa, 2015). Thus the ECJ's decision to protect its powers negatively affected citizens, since there is no additional safeguard that protects them from fundamental rights' violations in EU legislation.

The final hypothesis involves strategic action. Overall the member states did not have strong reactions to its decisions, even though most with the exception of the UK would have preferred an accession treaty. Thus it seems that for the member states this was not highly sensitive to their interests overall. One of the most important strategic aspects is the difficulty of treaty revision. The ECJ did not reject the treaty. It only stated that it needed to be improved in order to be compatible with EU law. However in order to make these changes, it would not only require the agreement of all EU member states but also the agreement of the ECHR member states. Creating the initial accession treaty had already faced difficulty and introducing these changes would make it virtually impossible (Johansen, 2015). Thus in this case, it seems like the difficulty of treaty revision is one of the main strategies the ECJ relied on. Precedent also plays a role. The ECJ relies on principles such as mutual recognition and the primacy of EU law that have been established in previous cases. Melloni was one of the cases used as it established why mutual

recognition should be adhered to in the area of fundamental rights. Based on this analysis, the main ways the ECJ was capable of creating Opinion 2/13 were through the disinterest of the member states, the difficulty of treaty revision and the use of precedent.

4.4 Summary of results

The results of the three analyses are laid below out in tables 1 and 2. In all of these cases, judicial activism took place. In Metock and Melloni, the ECJ both increased its powers and infringed upon the sovereignty of other member states, while in Opinion 2/13, the ECJ secured its power and ensured that it would not be taken away by another transnational court. On the topic of consent, the results vary. Melloni was the only case where there was both agreement to the judgement and explicit written consent. In the two other cases, it was difficult to determine if member states agreed to the decision. In Metock, only a minority disagreed with the judgement while the majority implemented the changes. In Opinion 2/13, there was no clear reaction to the decision. However most member states had been in favor of accession. The results for explicit written consent were also similar in these two cases. Although the task of the ECJ to interpret EU law, the preliminary reference procedure and the ECJ giving opinions about treaties have been laid out in the treaties, it was often unclear if the member states had given explicit written consent to certain parts of the decision.

The ways the ECJ pushed its activist ways also differ per case. In Metock, improving fundamental rights' was an important method to push the decision through. However in both Melloni and Opinion 2/13, the fundamental rights standards' of citizens were lowered. This behavior has generally been observed by other scholars of the ECJ in the area of Justice and Home Affairs and has been often been one of the main criticisms of the ECJ's involvement in both JHA and fundamental rights (see Defeis, 2007; Franssen, 2014; Pérez, 2014; Spaventa, 2015). The ECJ mainly relies on itself and its own case law to determine fundamental rights' standards which can have positive consequences like in the case of Metock but can also have negative consequences as occurred in Melloni and Opinion 2/13 (De Burca, 2013).

Some form of strategy was used in all of three cases and was thus the most used. In two of the three cases, decisions were pushed in smaller member states. Precedent was used in two of the three cases. Difficulty of treaty revision and changing the law was used in Opinion 2/13 and in

Metock. Also, the importance of long term strategy was present in all of the cases in some form of another. The ECJ has gained a great amount of legitimacy over the years. It is much more difficult for member states to make changes to an institution that has existed over fifty years. In Metock, the Netherlands has faced enormous difficulty to convince other member to change a directive after the decision made by the ECJ (Fernhout & Wever, 2011). Most of the member states view the ECJ to be a legitimate judicial actor whose opinion should be respected. This trust that the ECJ has gained over the years is one of the most important factors as to why it has been able to assert its power in JHA, an extremely sensitive area to member states

National courts were mainly relevant in Melloni and to a lesser degree in Metock. The Spanish Constitutional Court played a major role in justifying the decision of Melloni, going as far to change their own constitutional case law (Garcia, 2014). Once again, this decision shows the amount of trust that the national courts have in the ECJ. The Spanish Constitutional Court was very willing go into dialogue with the ECJ and wanted to hear the opinion of the ECJ on this matter. Thus not only was a national court willing to implement the decision of the ECJ, but it also wanted the opinion of the ECJ. This willingness of the highest Spanish national court to cooperate does go against one theory that especially lower national courts asked for preliminary reference rulings for the ECJ to gain an upper hand over higher courts (Weiler, 1994). Even when a national legal body disagrees, it is still willing to go into dialogue with the ECJ. One of the ways that the Netherlands tried to change the court's opinion about grounds for rejection for residency of third country nationals was also through dialogue with the court.

Based on the three analyses, it is unclear what method has most often been used to push these decisions through. These three cases show that a different method is used in each case. The citizen method is perhaps the most controversial in terms of success especially in the case of JHA, since it has negatively affected citizens in two of the three cases. However overall all three methods have been used to gain acceptance for a decision. Thus it make sense that all of the three methods have been used in the literature to explain how the activist decision of the JHA have been accepted by the member states.

Table 1

Confirmation of First Two Hypotheses

	1. Act of Judicial Activism	**2. Member State Rejection**	**3. No Written Consent of Member States**
Metock	Yes	Partially	Partially
Melloni	Yes	No	No
Opinion 2/13	Yes	Mostly	Partially

Table 2

Confirmation of Last Three Hypotheses

	4. National Courts	**5. Citizens/ Democracy**	**6. Strategic ECJ**
Metock	Partially	Yes	Yes
Melloni	Yes	No	Yes
Opinion 2/13	No	No	Yes

5. Conclusion

Based on these three cases, it can be determined that the ECJ is an activist court in the area of Justice and Home Affairs. Although it might not pursue activism in all JHA cases, these cases demonstrate that activism in JHA does exist. Initially the ECJ might have been more hesitant to expand its powers in this area, but this last decade it has proven that it is not afraid to solidify itself as the supreme court in the EU on all matters concerning JHA and fundamental rights.

The member states have generally accepted this increase of power. In the case of Melloni, Spain was in full agreement with the decision. Even when states disagree with a decision, they will not choose to refuse to ignore a decision. Instead they will find other legal ways to reverse the decision or limit its impact. This behavior shows that the ECJ is fully legitimized and respected institution by the member states. The ECJ has gained this legitimization over the years, even though its activism has infringed upon the national sovereignty of EU member states. Through

strategy, national courts implementing their case and improving the rights of EU citizens the ECJ has been able to create this legitimization for these activist decisions.

It is likely that the ECJ will continue to expand its powers in the area of JHA and fundamental rights since it has the legitimization to do so. The question remains if this activism will be beneficial. In the case of Metock activism has improved family rights, however in both Opinion 2/13 and Melloni it has arguably lowered fundamental rights' standards. Thus the future of activism in JHA can go both ways. Perhaps with the more experience the ECJ gains in this area, the more beneficial its activist decisions will be. However it is highly likely that its activism will continue despite what the consequences will be.

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