

The Role of the European Court of Justice in the Process of European Integration

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Introduction

The process of European Integration, which began more than fifty years ago, is still developing and expanding. In this changing and developing process, the European Court of Justice (ECJ) is playing considerable role in the European Integration. In other words, the role of the ECJ has been central in the broader process of European Integration. While the ECJ makes binding decisions on disputes over Treaty provisions or secondary legislation and thus it has gained expanding power and role in the European Union (EU), it has been accused of generally ruling in favour of integrationist solutions to disputes. Moreover decisions of the ECJ, which have direct effect on national jurisdiction and supremacy over conflicting domestic laws, have caused considerable debate on the dynamics of the sovereignty and reduction in the authority of national governments.

The aim of this article is to examine the role of the ECJ in the process of European Integration. For this purpose first, direct effect and supremacy doctrines which are two central elements in the EU legal architecture¹ will be examined. Second, preliminary ruling which shaped the relationship between the Community law and the national law of the member states² will be analysed with its implication in respect of the

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¹ **Dehousse**, Renaud, *The European Court of Justice: The Politics of Judicial Integration*, St. Martin's Press, New York 1998, p. 46.

² **Kapsis**, Ilias, *The Courts of the European Union*. In Cini, Michelle, *European Union*

integration process. Third, two approaches, legalism which is based on neo-functional case and the political approach based on the intergovernmental case, will be considered to examine the role of the ECJ in the integration process.

I. The Role of Direct Effect and Supremacy Doctrines in the Process of European Integration

A. Direct Effect Doctrine

Let us now first consider direct effect doctrine. The ECJ was created in 1951 as part of European Coal and Steel Community (ECSC) by the treaty of Paris. It established the ECJ as a supranational court which had compulsory jurisdiction covering areas falling in the scope of the Treaties. The ECJ also is responsible of interpretation of the EU law and determination of rights and obligations. So the ECJ has had to use its creative capabilities in order to reach a satisfactory interpretation and application of the EU law³.

Although Treaties have given the ECJ limited jurisdiction to perform specific areas, the ECJ has used the gaps and vagueness of the Treaties and it has expanded its power to promote European Integration. In this respect, the ECJ's judicial interpretation led to development of the doctrine of direct effect⁴.

Generally international treaties are binding upon the member states but their effect in national legal order is mainly determined by the constitutional rules of the each member states. In countries following a dualist approach, for instance the United Kingdom, international treaties do not have direct effect on their legal systems unless these countries adopt them. However, in other countries following a monist approach, for in-

Politics (pp. 189-201), 2nd Edition, Oxford University Press, Oxford 2007, p. 192.

³ **Sweet**, Alec Stone, *The Judicial Construction of Europe*, Oxford University Press, Oxford 2004, p. 25.

⁴ **Kapsis**, p. 198.

stance Benelux Countries generally accept the automatic application of international treaties in their national boundaries⁵.

The direct effect of Treaty provisions was developed by the ECJ in 1963 at the *van Gend en Loos v. Nederlandse Administratie der Belastingen Case* (26/62). In that case a Dutch company which imported a chemical substance from Germany into Netherlands claimed that customs duty on imported goods was contrary to Article 12 of the Treaty. The Dutch Court made a preliminary reference to the ECJ, asking whether Article 12 conferred rights which the national courts had to protect⁶. The ECJ concluded that “*according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect*”.

The importance of the decision lies in the fact that the ECJ set up *the doctrine of direct effect* that if the treaty is clear, unconditional, containing no reservation on the part of the member states and not dependent on any national implementing measure, not only treaty provisions but also secondary legal norms adopted by the EU’s institutions, could be directly effective in the legal orders of the each member states. As a result of this important decision, the ECJ prevented national courts from declaring invalidity of the EU law⁷. The ECJ, in serious of judgments, has gradually extended the scope of the direct effect doctrine. For instance in its *Flaminio Costa v. ENEL Case* (6/64), the year after *Van Gend en Loos*, the ECJ held that EU law whether it is a Treaty or Directive, due to its special character, could not be ignored and undermined⁸.

It is clear from these decisions that the doctrine of direct effect brought a number of innovative elements. First of all, *direct effect doctrine* affected the national governments sovereignty negatively. Because, the ECJ imposed a uniform interpretation while extending power, it has

⁵ Kapsis, p. 197.

⁶ Dehousse, pp. 37-38.

⁷ Carrubba, Clifford J. – Murray, Lacey, Legal Integration and Use of the Preliminary Ruling Process in the European Union, International Organization, vol. 59, issue 2, April 2005, p. 401.

⁸ Kapsis, p. 197.

relatively paid little attention to the intention and legal structure of the member states. Secondly, *direct effect doctrine* opened the judicial gate to individuals who wished to challenge breaches of the EU law. The doctrine of direct effect changed the dynamics of the integration process. The ECJ promoted the status of the individuals as guardians of the integrity of the EU system⁹.

It must be noted that while the ECJ was extending its power using direct effect doctrine, it paid more attention to the spirit of the Treaty than to its language. It also transformed basic principles into basic rights that individuals can invoke before courts. For example a woman can claim a right to equal treatment or workers and providers of services can claim a right to free movement. These rights, *inter alia*, based interpretation actually has increased the effectiveness of the EU law and integration process because such rights fostered a kind of alliance between private litigants and pro-integration forces. Thus the EU Treaties have come to effect through individual plaintiffs. For instance by bringing the case before the ECJ, a Belgian air hostess obtained the recognition of a right to equal treatment with her male colleague, which was not recognized by the Belgium national law (*Gabrielle Defrenne v. Sabena Case (43/75)*). At the expiry of their contracts, the transfer of the football players to another team without financial restriction was recognized (*Jean Marc Bosman v. Royal Club Liégeois Case (415/93)*). It is clear that if the ECJ had stayed in the classical concept of the direct effect, the integration and protection of individual rights could not go further¹⁰.

B. Supremacy Doctrine

The direct effect doctrine is not solely effective to guarantee the effective application of the EU law. On the other hand, the doctrine of supremacy enhanced the potential effectiveness of the EU law within the Member States¹¹. It is surprisingly the fact that there is no explicit refer-

⁹ Dehousse, p. 41.

¹⁰ Dehousse, pp. 47-48.

¹¹ Sweet, p. 21.

ence in the EU law related to the supremacy of EU law over national laws. But the ECJ's statement on supremacy in *Simmenthal SpA v. Commission of the European Communities Case* (106/77) concluded that "every national government must, in a case within its jurisdiction, apply Community Law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule"¹².

As we seen above, *Flaminio Costa v. ENEL* case is also good example of the supremacy of the EU law over national laws. In that case the issue is whether an act of the Italian Parliament which passed later than the EU Directive took precedence over the earlier EU law. An Italian court referred the case to the ECJ, but issue also related to the United Kingdom, because the Italian Constitution was originally modelled on British principles. Under Italian and British law, statute law takes precedence over all other forms of law. If statute law conflict with each other, then the principle "later law overrides the earlier" comes into effect. The ECJ ruled that the EU law could not be subject to interpretation of the each member states¹³. With this principle the EU law enjoyed absolute supremacy over national laws, even if they have a constitutional nature.

Although there is no explicit legal basis in the treaty, the principle of supremacy has been accepted by the courts of the member states. So its actual effectiveness within the EU law depends on the attitude of the national courts¹⁴. National courts, especially higher courts refrain themselves from referral to the ECJ. Because high court judges have admitted that the ECJ has been a threat to their authorities, they have tried to stop lower courts from making referral to the ECJ. But in general the ability of higher courts to stop lower courts from referral has been limited¹⁵. Lower courts often have ignored the higher courts ruling and made referrals

¹² **Nugent**, Neill, *The Government and Politics of the European Union*, 6th Edition, Palgrave Macmillan New York 2006, p. 292.

¹³ **Bache**, Ian – **George**, Stephen, *Politics in the European Union*, 2nd Edition, Oxford University Press, Oxford 2006, p. 322.

¹⁴ **Dehousse**, p. 43.

¹⁵ **Alter**, Karen J, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford 2001, p. 54-55.

to the ECJ. Lower court judges also saw it as an opportunity to escape from established national jurisprudence and to obtain new legal interpretations. At the same time the ECJ for its part encouraged competitive dynamic between high and low courts. In this respect, *Alter* argues that lower courts have been the motors of the EU legal integration. Because of the action of lower courts, EU law expanded into new areas and gained huge effect over national laws. The influence of EU law spread in areas that national politicians have not ever envisaged¹⁶. Competition between low courts and high courts has continued to influence on the European legal integration¹⁷.

Basically, the implication of the supremacy of EU law is that Member States which have enacted laws and policies contradicting European legal order are forced by the ECJ to enforce European law within the national boundaries¹⁸. The other important implication is that, EU law has given to domestic actors a powerful tool to influence the national governments. Domestic actors have benefited from the interpretation of the ECJ and set forth their arguments before national courts. These challenges may be referred by national judges to the ECJ, which instructs national courts either to apply the EU law instead of national law, or to interpret national law in a way compatible with the EU law¹⁹. For instance many business firms, particularly those active in international trade, used the EU law at national level as opportunity to secure the company's trading. This created an imbalance between market integration and policy integration. While market integration has been pushed forward by the ECJ's interpretation requiring states refrain from interfering with free trade and free movement of person, policy integration required the active involvement of the political institutions of the Community. Nevertheless, today, that

¹⁶ *Alter*, Karen J, *The European Court's Political Power*, *West European Politics*, vol. 19, issue 3, 1996, pp. 467-468.

¹⁷ *Alter*, 1996, p. 471.

¹⁸ *Bengoetxea*, Joxerramon – *MacCormick*, Neil – *Soriano*, Leonor Moral, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*. In de Búrca, Gráinne & Weiler, J.H.H. (Eds.), *The European Court of Justice* (pp. 43-85), Oxford University Press, Oxford 2001, pp. 82-83.

¹⁹ *Alter*, Karen J, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, *International Organization*, vol. 54, issue 3, August 2000, p. 489.

imbalance is no longer obvious. Once policy integration is put into place in a certain field, then supremacy and direct effect will make it stick²⁰.

Also, supremacy gives to litigants that they can use their victory gained from courts to pressure the government to change public policy. One of the well known examples is that equal opportunity groups used the EU legal system to force a Conservative British government to make considerable reforms into British equality policy²¹. A further consequence of the supremacy of EU law is that “the more weakly legitimated law is supposed to overrule the better legitimated one”. Even the increasing role of the European Parliament has not cured this weakness. All binding acts of the EU, whether the European played a role in their adoption or not, come into effect with the supremacy doctrine. The paradoxical result is that rules may be imposed upon those who did not participate, through their elected representatives, in the making of rules²². In this respect *Rasmussen* who always criticizes the ECJ, argued that it is “a dangerous social evil” and courts excessive activism is threatening its legitimacy and authority²³.

II. The Role of the Preliminary Ruling in the Process of European Integration

Turning now to our second point of discussion, preliminary ruling will be analysed with its implication in respect of the integration process. Direct effect and supremacy doctrines have both transformed the preliminary ruling procedure²⁴. Article 234 EC, which contains the preliminary ruling process can be seen as “the jewel in the Crown of the ECJ’s jurisdiction”²⁵.

²⁰ **de Witte**, Bruno, Direct Effect, Supremacy, and the Nature of the Legal Order. In Craig, Paul & In de Búrca, Gráinne (Eds.), *The Evolution of EU Law* (pp. 177-213), Oxford University Press, Oxford 1999, p. 207.

²¹ **Alter**, 2000, p. 489.

²² **de Witte**, p. 208.

²³ As cited **Kapsis**, p. 198.

²⁴ **Carrubba – Murray**, p. 400.

²⁵ **Craig, Paul – de Búrca**, Gráinne, *EU Law Text, Cases, and Materials*, 4th Edition, Ox-

Preliminary references may arise when a private litigant brings a case to his or her national court. Then national courts can refer the issue to the ECJ for interpretation of EU law. The ECJ rules on referred issues and sends them back. Once the ECJ's interpretation is passed back down to the national courts, the national court makes a final ruling on the facts of the case²⁶. The ECJ's rulings are "interlocutory" which constitute only intermediate stages in the process. The national court has no obligation to apply the EU law in the case, but if it applies the ruling, then the court is bound by the ECJ ruling²⁷.

The relationship between national courts and the ECJ basically is reference based system, not an appellate system. *Alter* argues that together with supremacy or direct effect the EU's preliminary ruling allows the individual to invoke the EU law in the national courts to challenge national laws. So, the preliminary ruling has increased the member states obligations under the EU law and thus the ECJ has played an important role in increasing legalization in Europe²⁸. Moreover, the Maastricht Treaty gave the ECJ power to impose fines on disobedient member states. In the famous *Francovich and Bonifaci v. Italy Case* (6&9/90), which was examined under the preliminary ruling procedures, the ECJ held that a member state is liable to compensate individuals if they suffered as a result of breach of community law²⁹. The other important case is *Maria Pupino Case* (105/03) which was also examined under preliminary ruling procedures. In this case, Pupino was a nursery school teacher who was accused of assaulting children in her care. Public Prosecutor asked the judge whether it can be possible to take the testimony of eight children, who were witnesses and victims, before the trial and in accordance with a special procedure. But, Italian criminal procedure consisted of two stages and the general rule was that evidence would only be taken at the second stage. The Italian Court acknowledged that it could not accept the Public Prosecutor's application, since it did not come within the exemptions

ford University Press, Oxford 2008, p. 460.

²⁶ Carrubba – Murray, p. 400.

²⁷ Kapsis, p. 195.

²⁸ Alter, 2000, pp. 491-492.

²⁹ Kapsis, p. 193.

provided for in Italian law. The Italian Court made a preliminary ruling to ask whether the national court should interpret Italian law in the light of community law. The ECJ emphasised that in applying national law, the Italian Court was required to interpret it as far as possible in a way that conforms with the purpose of the Framework Decision. As a result, the Court declared that the national court must be able to authorise young children to take their testimony in guaranteed an appropriate level of protection, for instance outside the trial and before it is held. A number of member states argued that the duty to interpret national law fits EC law did not apply to the third pillar. The ECJ exceeded its power in favour of integrationist approach³⁰.

Preliminary rulings serve as a legal integration tool in the EU law. It has three implications for individuals and the member states. First the ECJ helps the national courts to make legally correct judgements. Second, the ECJ promotes the uniform interpretation and application of EU law within the member states. Third, preliminary rulings provide both natural and legal persons, who cannot directly appeal to the ECJ, access to the Court³¹ because, procedurally and institutionally, the ECJ is not a Federal Supreme Court as before. Persons have no right of appeal to the Court³². In short, it can be said that the evidence mentioned above shows that the ECJ has affected economic and social integration considerably³³.

III. Evaluation of the ECJ's Role in European Integration in the light of Legalism and Political Approach

In this part of the article, two sets of approaches, legalism and the political approach will be examined to understand the role of the ECJ in European integration. First, legalism based on neofunctionalist approach will be examined. Legal scholarship on European integration has

³⁰ Craig – de Búrca, p. 252.

³¹ Nugent, p. 305.

³² Craig – de Búrca, p. 500.

³³ Alter, 1996, pp. 458-471.

largely focused on the role of law within integration process. Not only does it include integration of different national laws across the EU, but also includes the role of law in the process of political integration more generally³⁴. Its assessment about the role of the ECJ to European integration is positive. The legal perspective argues that the ECJ could force its European integration agenda against the wishes of the member states. But it is essential to question why, if the member states did not like the activism of the ECJ, they did not stop it, either by non-compliance with the ruling or amendment of the treaties³⁵.

According to this perspective, first, national governments did not pay sufficient attention to the Court's behaviour during the 1960's and 1970's when the Court developed a powerful set of doctrines, such as direct effect and supremacy doctrines, and the Court established a co-operation between national courts. By the time member states realized the power of the ECJ in the 1980's, it had become very difficult to regain their sovereignty³⁶. According to *Bache & George*, the ECJ had used European law as a "mask" to cover its integrationist agenda and also used it as a "shield" to protect itself from political pressure coming from member states³⁷. Second, member states do not approve the ECJ's activist approach, but they have not been able to change the system in accordance with their preferences³⁸.

Since the amendment of the Treaties requires the unanimous consent of all member states *Scharpf* points out that a "joint decision trap" emerges. When the decision making of the EU is directly dependent on the agreement of all member states then the status quo policy continues because it is difficult to create a reform, which every member state sup-

³⁴ **de Búrca**, Gráinne, Rethinking Law in Neofunctionalist Theory, *Journal of European Public Policy*, vol. 12, issue 2, 2005, p. 313.

³⁵ **Bache – George**, pp. 327-328.

³⁶ **Garrett**, Geoffrey – **Kelemen**, Daniel R. – **Schulz**, Heiner, The European Court of Justice, National Governments, and Legal Integration in the European Union, *International Organization*, vol. 52, issue 1, January 1998, p. 150.

³⁷ **Bache – George**, p. 326.

³⁸ **Garrett**, Geoffrey, The Politics of Legal Integration in the European Union, *International Organization*, vol. 49, issue 1, Winter 1995, p. 174.

ports³⁹. For instance, to limit of this excessive power of the ECJ, British Government suggested a treaty amendment in 1995 but British proposal was rejected by other member states⁴⁰. *Scharpf's* analysis helps us to understand the reason why the member states have failed to stop the ECJ's expanded judicial role⁴¹. To sum up, legalism has accepted the Court as a great boon to European integration. On that account, the Court dutifully intervenes and temporarily behaves as a political actor to prevent the erosion of the European Community⁴².

On the other hand, although member states do not like some decisions of the ECJ, they will abide by the decisions of the Court so as not to collapse the system from which they benefit generally. *Burley* and *Mattli* used the famous *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein Case* (120/78), known as the *Cassis de Dijon case*, to illustrate legalism argument. In this case, where the Court reached a ruling consistent with Germany's export interest, the German Government argued strongly against the Court's decision. However, after some time the German Government had to accept it because the maintenance of the community legal system is "consistent with the interest of member states". Member states benefits from the internal market with continuing collaboration within the EU law and the Court's decision⁴³.

In contrast a political approach based on the intergovernmental approach, argues that the ECJ could force European integration, but only to the degree that national governments wish. National governments have not been passive supporters of the European legal integration because member states support the effectiveness of the ECJ to increase the best application of the incomplete treaty provisions⁴⁴. *Garrett* points out that while there are incentives for national governments to argue against the Court's decision which declare national practices illegal, this does not

³⁹ As cited *Alter*, 1996, p. 477.

⁴⁰ *Alter*, 2001, p. 197.

⁴¹ As cited *Alter*, 1996, p. 477.

⁴² *Burley*, Anne-Marie – *Mattli*, Walter, Europe Before the Court: A Political Theory of Legal Integration, International Organization, vol. 47, issue 1, December 1993, p. 46.

⁴³ *Burley* – *Mattli*, pp. 50-51.

⁴⁴ *Garrett* – *Kelemen* – *Schulz*, p. 150.

mean that governments always want to ignore ECJ ruling when they have made decision against their interest. Governments must compare the cost of accepting the Court's decision to the benefits obtained having an effective legal system in the EU⁴⁵. On the other hand, while *Burley* and *Mattli* claim that the *Cassis de Dijon* case is an important example of the inadequacies of the rational government perspective, *Garrett* argues that, "German Government's behaviour can easily be explained in terms of its rational self-interest"⁴⁶.

In respect to political approach, the ECJ is also a strategic actor. The Court's main aim is to extend the European law and their authority to interpret it. However, the ECJ realizes that their power ultimately depends on the acceptance of the member states and hence the Court is restrained from making decisions of which governments disapprove. As a result, the Court's judicial activism is constrained by the reactions they anticipate from member states to their decisions. In terms of this view, one should not expect cases similar to *Cassis* to be common, because the ECJ is aware of that its legitimacy depends on the behaviour of the member states. If the governments do not respect its decisions, its legitimacy can be seriously damaged⁴⁷. The Court is less likely to take decisions that some member states would not follow⁴⁸. For instance in *Paola Faccini Dori v. Recreb Srl Case* (91/92), the Court refused to give horizontal direct effect to directives not to expand further its power in the national law. It also shows that the Court respects to some extent certain politically sensitive issues⁴⁹.

Conclusion

In conclusion, the ECJ has played a leading role in the European integration. Although it has limited jurisdiction according to the EU Treaty

⁴⁵ *Garrett*, p. 172.

⁴⁶ *Garrett*, pp. 174-175.

⁴⁷ *Bache – George*, p. 327.

⁴⁸ *Garrett*, p. 173.

⁴⁹ *Arnall*, Anthony, *The European Union and Its Court of Justice*, Oxford University Press, Oxford 1999, p. 564.

and faces negative reactions by Member States, it has transformed the nature of the EU and its relations with national legal orders⁵⁰. In respect of European integration, it has successfully fulfilled the task of ensuring uniform application of the EU law with supremacy and direct effect doctrines. Furthermore, preliminary rulings have been used by it as legal integration tool to promote the effectiveness of the EU law. Also relying on EU Law has opened the doors of the national court room to private plaintiffs. Individuals have played an important role in the integration process. They have used it to change government policy and to increase its role in the domestic policy. So, it can be said that legal integration has led political integration.

To analyze the role of the ECJ in the integration process, political and legal approaches are very helpful to understand to this process. While the legal approach sees the Court as the main actor pushing integration against the member states, the political approach sees the Court as a strategic actor in the integration process that is restrained by the member states desires. So it avoids unnecessary clashes with member states interests. However, the process of integration is still developing and the Court's role in this process has still not been determined clearly. So there is a need for a supranational judicial system to improve the efficiency of the EU legal system and the better application of the EU law. Member States should therefore make decisions about the future role of the Court immediately.

⁵⁰ **Dehousse**, p. 177.

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