

# The european court of justice role law european essay

Law



**ASSIGN  
BUSTER**

in the furthering of the process of the European Integration with special focus on the preliminary ruling procedure. Abstract This paper aims to analyse what role did the European Court of Justice play in the process of the European Integration, and In the Introduction, a brief overview will be presented on the unique and unprecedented character of the EU's legal system. The main part of the essay focuses on how the ECJ progressed toward the constitutionalising of the EU law. This paper identifies three main pillars in the constitutionalisation process: The doctrine of direct effect, The doctrine of supremacy, and The extensive case law that was built up by the preliminary ruling procedure. In the fourth part, we review shortly the critics expressed towards the judicial activism of the Court. Finally, a conclusion will be drawn, in an attempt to summarise the significance of the revolutionary role of the ECJ.

## II. Introduction

The unique character of the EU's legal system The European Union has a unique, supranational legal order, that is neither international, nor national, and this 'sans pareil' legal system is mainly and foremost the masterpiece of the European Court of Justice. In the Treaties the Member states handed over the right of the interpretation of the EU law to the European Court of Justice, which was a crucial point in the development of the legal dimension of the European Integration. It is via the interpretation of the Treaties that the ECJ sculptured the distinctive and exceptional legal order of the EU. This paper agrees with the scholars stating that the ECJ constitutionalized the EU legal order first by declaring its supremacy over the Member states' legal systems, and second by developing the principle of direct effect. The third main element of the constitutionalizing role of the ECJ is standing on the Article 267 of the Treaty

on the Functioning of the European Union, which authorise it to be exclusive interpreter of the EU law via the powerful tool of the preliminary ruling procedure. The Treaties are incomplete contracts, not drawn up to be exhaustive, they can not regulate every eventuality, and the interpretation of the Treaties is crucially important in the light of the development of the EU law. It was an unprecedented legal accomplishment that the ECJ managed to put flesh on the mere bones of Treaties, and has developed an extensive, overarching and complex *acquis communautaire*. [1] The aspect that is truly unique in the corpus of EU law is that its evolution is strongly rely on the 'judge-made law' [2] of the ECJ, a fact that is quite uncommon in the continental legal system, that most of the EU's members states are part of. Such an advanced level of legal integration could only achieved by the ECJ strong integration-favouring position. Its approach has always been that law must be interpreted to meet the objectives of the Treaties, and it has been progressively broadening its own competences towards the goal of the uniform and consistent interpretation of the EU law. Its standpoint was groundbreaking in the sense that it emphasises that a new legal order was born, and the Member States gave up a significant part of their sovereignty.' It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (see, inter alia, Case 26/62 *van Gend & Loos* [1963] ECR 1, 12 and Case 6/64 *Costa* [1964] ECR 585, 593). The essential characteristics of the European

Union legal order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (see Opinion 1/91 [1991] ECR I-6079, paragraph 21).<sup>[3]</sup> Through this case law that the ECJ has transformed itself ' the most influential international court in history.'<sup>[4]</sup> III. The ECJ progress toward the constitutionalising of the EU law

The Treaties establishing the ECJ included a clause authorising the national courts to refer cases to it, if a question of the interpretation of the Treaties arises in cases pending before them. This provision proved crucial in the constitutionalisation process of the EU law. Three pillars can be identified, that the constitutionalisation process is resting on.

3. 1 The principle of direct effect

The first pillar of the constitutionalisation of the Treaties was established in 1962, when the famous Van Gend en Loos case (ECJ 26/62 Van Gend en Loos) was referred to the ECJ. In its decision the Court claimed that EU law ' not only imposes obligations on individuals but also intended to confer upon them rights'.<sup>[5]</sup> This was the decisive step of the Court to transform the Treaties into constitution - like documents, bestowing rights on individuals that they can claim in court and demand a reference to the ECJ. Over the following years, the ECJ consistently extended the scope of the direct effect principle. Not only regulation but also directives can confer rights that individuals may claim before a court. While regulations have ' horizontal direct effect' - they create rights that can be claimed against public bodies and individuals as well, the rights the directives create can only be claimed against the state.

3. 5 The doctrine of supremacy

The second pillar of the constitutionalisation of the EU law was the doctrine of supremacy. It

had an even more profound effect on the sovereignty on the member states, since the Court ruled in the Costa v ENEL case (ECJ 6/64 Costa v ENEL) that in case of collision, the EU law takes precedence over the national law. So in order to ensure legal certainty and coherence the ECJ clearly declared the hierarchy of legal norms. 'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of community law. In fact, the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.' [6] The supremacy principle means that when a national law contradicts the EU law before a national court, the national law shall not be applied, has to be disregarded by the national court, but it does not make the national law void. ECJ consistently argued that EU law has supremacy not only over national law, but national constitutions as well. The supremacy principle was a hard pillow to swallow to the national courts, especially constitutional courts, because it severely interfered with national sovereignty and national constitutions. The approach of the national constitutional courts to accept the supremacy of the EU law is mainly the 'Constitutional

tolerance' which means that basically they recognise the doctrine on the condition if it does not violate certain cornerstones of the national constitutional law.[7]By establishing the principle of supremacy of EU law, the ECJ assumed the position of a constitutional court, and appointed itself as the sole interpreter of the legal norms of the Community.[8]3. 6The preliminary ruling procedureThe third pillar of the constitutionalisation of the EU law is the preliminary ruling procedure and the impressive case law built up by using it. 3. 6. 1The significance of the procedureAccording to the Treaties, individuals (non-privileged applicants) have limited 'locus standi' to turn directly to the ECJ. The official channel for individuals to protect their rights under the EU law is through the national courts. The national courts have the right to refer cases to the ECJ concerning the validity and the interpretation of the EU law. The importance of the national courts in this development process cannot be emphasized enough: although it's the ECJ that ensure the consistency and a uniform interpretation of the EU law via the preliminary reference procedure, it is the national courts that have the power to decide which cases they refer to the ECJ for a ruling. The ECJ can only give a ruling if addressed. A limitation of the ECJ power is that it has to wait for litigants and national courts present it with cases. 3. 6. 2Determining when a reference should be madeAccording to the 267 (2) and 267 (3) of the TFEU, if the EU law is prerequisite to decide a case, the court against which decision there is no judicial remedy is obliged to refer, all the other courts may decide whether it deems it necessary. This Article wanted to ensure that at some point in every case, there shall be a possibility when individuals are in the position to demand a reference from the national court. A court

against which decision there is no judicial remedy may only refrain from referring if it declares the matter in hand so clear that no difficulty in the application of the EU law may be detected.[9]3. 6. 3Controversial referencing practiceThe ECJ adopted a very broad stance to decide which references it accepts in order to ensure unity in the interpretation of the EU law. It gave references in cases where the legal matter did not fall within the EU legal competence, but there was a reference to the EU law in it. The ECJ is not restricted by the questions formulated by the referring court. By analysing the factual background of the case, the ECJ feels free to ignore certain questions it deems unimportant, and give answers it judges relevant in its rulings. 3. 6. 4The relation of the national courts towards this procedureAlmost half of the workload of the ECJ is preliminary rulings, shows that the national courts accepted this procedure, and using this route increasingly to ensure the conformity of the interpretation of EU law in domestic disputes. This procedure is of vital importance in the process of constitutionalizing the EU law. A strong connection has been established between the ECJ and the national courts. It is through this connection that the crucially important constitutional questions concerning the relationship of the EU and national law have arisen. 3. 6. 5Binding effects of the ECJ's rulingsThe ECJ's ruling has a binding effect on the referring court, but originally it was not binding to the other courts in the EU, a discrepancy that would lead to a divergent interpretation. The EU law is not precedent law; it does not recognise the principle of stare decisis. Nonetheless it would seriously compromise the unity of the EU law, if the references adjudicated by the ECJ would not bound other courts as well. It causes severe concerns,

especially when the ECJ declares an act of an EU institution illegal. Even if it is not valid for the concerned parties, it would still remain binding to everyone else. A break-through decision was made in the ICC case, when the ECJ ruled that a judgement declaring an act of an EU institution void, it is binding to all national courts in the EU. So the ECJ gave an 'erga omnes' effect to a preliminary ruling that is normally binding only on the referring court. 'the main purpose of the powers accorded to the court by article 177 is to ensure that community law is applied uniformly by national courts . uniform application of community law is imperative not only when a national court is faced with a rule of community law the meaning and scope of which need to be defined ; it is just as imperative when the court is confronted by a dispute as to the validity of an act of the institutions . When the court is moved under article 177 to declare an act of one of the institutions to be void there are particularly imperative requirements concerning legal certainty in addition to those concerning the uniform application of community law. It follows from the very nature of such a declaration that a national court may not apply the act declared to be void without once more creating serious uncertainty as to the community law applicable.' [10] 3. 7 The decision making of the ECJ In order to analyse to the ECJ managed to accomplish this groundbreaking transformation, some uncommon features can be detected in the composition, procedures and attitude of the Court. A very important - and heavily criticised - momentum of decision making of the ECJ is its pursuit of a uniform interpretation of the EU law, and the effort to avoid political influences as much as possible. An important tool for this purpose is that the chambers of judges always deliver one, common



judgement, reached by majority decision, announced in public hearing. The possible different legal standpoints of the individual judges are strictly confidential. No minority report - dissenting opinion of one or more members of the decision making chamber - is attached to the judgement, to avoid the possibility of references to this contradicting view later, thus disrupting the common façade of the ruling.

3. 8 ECJ - a composite court [11] The ECJ's judges sit in different formations to hear cases; mostly in chambers of three or five judges, rarely in a grand chamber, and in full court in truly exceptional cases (like the discharge of a Commission member). It poses as a challenge of managing that different chambers and judges get to know the others ruling and decisions, so the unified and consistent interpretation of the EU law can be maintained. The positive side of the composite court is that it allows a high level of specialisation to individual judges, furthering their expertise in certain fields, which leads to a surge in the quality of the judgements.

3. 9 The open - door policy of the ECJ To ensure its central role in the European legal system as the exclusive interpreter of EU law, the ECJ - despite its heavy workload follows an open - door policy, meaning that it only rarely refuse to hear a case referred to it by a national court. It works very hard on decreasing the waiting period for a case to be heard, thus encouraging national courts to turn to the ECJ if a question of the interpretation of the EU law arises.

3. 10 Challenging the authority of the ECJ

3. 10. 1 A controversial player in the European Integration The ever expanding judicial activism of the ECJ attracted harsh criticism, accused of being overly powerful, pushing judicial activism, and contributing to the EU's democratic deficit. It is often attacked because it decides upon crucially

important questions behind closed doors, avoiding democratic control, raising the question of democratic deficit. According to some scholars, the ECJ brings judicial activism too far by overruling decisions of democratically elected governments and exercise supreme legal authority over national courts[12]It is criticised being an independent court, meaning that there is no country or group that can control the composition of the court, which lessens the possibility of political influence. Despite these critics, national courts keep referring an increasing amount of cases for preliminary ruling, national governments reluctantly willing to accept the doctrines that limit their sovereignty, since theoretically they could changed the mandate of the Court, but they never did. 3. 10. 2Criticism from PolanyiOur very much liked author of Hungarian origin, would surely add to the critics listed above. The Court has always been in favour of the market liberalisation in the EU, and in its early rulings it went to great lengths to advance the building up of the internal market free of any restrictions. In the Great Transformation - a masterpiece that is highly relevant today - Polanyi formulated a sharp critique of market liberalism. He expressed his hostility towards market economy; he regarded a self-regulating market as an utopia with devastating consequences. For Polanyi, economic liberalisation is a process of making human society subservient to the laws of the market.' To allow the market mechanism to be the sole director of the fate of human beings and their natural environment ... would result in the demolition of society.'[13]IV. ConclusionThe European Court of Justice has definitely created an unprecedented new legal order in the past 50 years. Some scholars call it the Constitutional Court of the EU,[14]the institution that created a European

constitutional order, and intervened dramatically in the policy - making of the EU through litigation. It started the process of legal revolution in the 1960s, in an era when the legislative output was inadequate due to the Luxembourg Compromise.[15] However, the ECJ carried on the European integration by its groundbreaking rulings, methodically constitutionalising the EU law, and building up a substantive case law. The ECJ challenged even the constitutional frameworks of the EU Member states, in order to enforce the two main doctrines - the direct effect and the supremacy doctrines - that are the fundamentals of the EU legal order. The constitutionalisation process had a substantial impact on the powers and competences of the ECJ. Its workload increased dramatically over the years, mainly because an expanded circle of actors - via the preliminary ruling procedure - became empowered to contest national law before the ECJ. The ECJ made the national courts key figures in this new legal order, by empowering them with the prerogative of referring cases to it, to review national law vis - á - vis the EU law. It took long years for the ECJ to make the national judiciaries to accept its vision of European law, to establish a well - functioning cooperation with them and build support and trust to carry out its mission. The legal communities of the Member states have to come to terms with this new generation of supranational law, and that it became over the years an integrated part of their national law. Despite the often harsh criticism, the Court enjoys a quiet acceptance. We can agree on that the EU would not be on its current level of development without the ECJ judicial activism. As Alec Stone Sweet wrote, ' the significance of the ECJ's impact on its legal and political environment

rivals that of the world's most powerful national supreme, or constitutional, courts'.<sup>[16]</sup>