

European Integration and the ECJ

The role of the European Court of Justice in the integration of
the European Community

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Abstract

The European Court of Justice was established in 1951, with the purpose of interpreting the Treaty of Rome. Since then, the Court has constantly refined and expanded its parameters, thereby becoming an important catalyst for the integrational process of the European Community, expanding and pushing integration forward in every field of Community life. The Court's case law is a manifestation of its creative and extensive interpretation of the Treaty of Rome and has created two of the most influential legal concepts within the history of the Community, the doctrine of direct effect and the notion of supremacy. It is a fact that without these two tools the integrational process of the Community would not have developed into what it is today.

This paper examines the progressive and influential work of the Court, and the effects of this work as part of the ongoing process of European integration. It describes the structure of the Court, and the role and purpose of the Court as an actor within the Community, defines the concepts of integration and integration through law in an European context, and finally points out some of the most important decisions of the Court and what these decisions have done for the integrational process of the European Community.

Key words: European Court of Justice, European integration, direct effect, supremacy, integration through law

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1 Introduction

The European Union is a regional cooperation between sovereign states. Just like a parliamentary nation-state it has a legislative, an executive and a judicial body, all according to Montesquieu's theory of separation of power. The European Court of Justice is the judicial body of the EU.

The EU has three golden rules of law for its members to follow. These are the rules of direct effect, supremacy and preliminary ruling¹. These rules are the most important rules of the EU law structure and they make the European Court of Justice one of the most influential institutions of the Union, despite the fact that it is a non-political institution. Without these sets of rules the Union and the work it performs would not be possible. There would be no meaning in proclaiming common rules and directives if the member states did not have the incentive to comply to the rules proclaimed. The Court has done much for European integration, despite the fact that it has been argued that the integration of Europe is a political and economical process, instigated and driven by political and economical institutions². Contrary to this theory, it is my opinion that the Community uses law as a promotion for integration on many levels. Law is the tool in the process of creating the internal market, the Euro-zone, the deregulation of different markets such as electricity and telecommunication, and it is used to create one system of rules for all the member states with the purpose of creating equal opportunities for the citizens of the Union.

The European Court of Justice can, and should, be seen as a catalyst for the integrational project of the Community. The Court's work throughout the years has been significant and played an important role in pushing the European integration forward to what we see and consider as self-evident today.

I intend to argue that the integrational process of the Union would not have been the same without the extensive interpretations of the Treaty by the Court, and its controversial but yet accepted judgements. I will not stretch the argument as far as to say that the European integrational process would not have been at all without the Court, but I would like to point out that it would not have reached into all the different spheres of Community life the way it has without the Court. I intend to perform this task by showing the character of the Court as an actor and as a transforming and affecting structure.

First I will describe the structure of the Court and how it works. After that I will discuss the subject of integration and the theory of integration through law

¹ Vauchez, p. 8

² An opinion most often voiced by intergovernmentalists such as Moravcsik and Sandholtz.

before I will turn to the main question of this paper: in what way has the Court been an integrational catalyst?

I intend to show in what way and why the Court has been, and still is, an important actor, and in doing this I will point out the most important decisions of the Court and what these decisions have done for the integrational process. I will also point out how the Court has worked as an indicator of the integrational process and its progress.

2 The European Court of Justice

The jurisdiction of the Court was established in article 31 in the ECSC (The European Coal and Steel Community) Treaty in 1951. The Court's role was to interpret this treaty and in its task to do this it was given certain powers, which included to be able to quash acts from the other institutions, hear appeals, impose sanctions and order the Community to pay penalty costs on wrongful acts. But how the court was supposed to carry out these tasks was not strictly defined in the Treaty³.

It was first in 1957, when the Treaty of Rome (henceforth called the Treaty) was concluded, that the Court became an institution of the Union⁴. The Court's primary mission is to make sure that the practise of Community law is uniform and it does this through extensive dialogue with the lower courts⁵.

Since then the Court has expanded its work and interpreted the Treaty in extensive and sometimes very creative manners. This process has progressively developed the Community law into a strong instrument, and has also given the Court an extensive case law to base its decisions upon. Of course, at the same time, the work load of the Court have increased and this became a problem in the 1970s, when a pending request from any member state's court to the Court took six months to answer and a pending case took over nine months to be dealt with. In 1988 those figures had risen to eighteen months and twenty-four months respectively. It was obvious that the structure of the Court had not been created to take on such a heavy workload and that something had to be done. The effectiveness of the Court and the high requirement on the investigations of the Court was at stake. The situation could easily become a serious problem, and a threat to the Union structure, if the member states no longer trusted this institution do deliver fair and unbiased judgement. The work of creating a better system was not concluded until 1988 and the ratification of the Single European Act, in which the Court of First Instance (CFI) was created to relieve pressure on the Court⁶.

In the Maastricht Treaty the member states have shown their interest in hindering the supranational institutions of the Community to be involved as equal parties in the Community work by weakening their power in the field of justice and home affairs and in the field of foreign and security policy⁷. This could be seen as an action from the member states to take back some of the power that the

³ Arnall, p. 3

⁴ Treaty of Rome

⁵ Dehousse, p. 35

⁶ Arnall, p. 14

⁷ *ibid*, p. 21

Court, by itself, interpreted itself to have. The member states have, by their decision in the Maastricht Treaty, slowed down the progressive nature of the Court, and in doing this also slowed down the integrational process. This is of course a reaction to previous years, when the Court's decisions have been very influential and the Court was in the middle of the creation of a united Europe.

The treaty of Amsterdam from 1999 changed the disposition of possible influence the Court could have on the integrational process even further by making it impossible for the lower national courts to ask the Court for a preliminary ruling in cases covered by the Amsterdam Treaty⁸.

2.1 The Court as a structure

The Court is an international judicial body, but in many ways it shares more attributes with constitutional courts than with the International Court of Justice. The Court has a lot more power than any other international judicial organization due to the member states' common will to give up parts of their sovereignty to the Community. This means that in many cases the power and possibilities of the Court are much more like those of a national court than those of an international character. This gives the Court a strong position in the institutional framework and this is also one of the reasons why the Court has been so effective in pushing the European integrational process forward⁹.

The obligatory jurisdiction of the Court can be mentioned as one of the facts that has made its work possible. The member states accept the authority of the Court when they become a member. The competence of the Court is also exclusive and forbids the member states to resort to any other jurisdiction¹⁰.

These two rules, and the fact that not only does the Court arbitrate between member states but individuals can also seek remedy from the Court, makes the Court an important and powerful catalyst of integration. The Court, which at first glance seems to be separated from the rest of the Community institutions and their work of creating an united Europe, is in fact in the middle of it all, pulling the threads. The Court acts more as a constitutional court, supervising the member states' and the other EU-institutions' complacence with community law and makes sure that any infringements get corrected¹¹.

The Court owes a large part in its development to Article 234 in the Treaty of Rome, which makes it possible for the Court to have a dialogue with all the national courts in the Community. The rule of preliminary ruling symbolizes one of the fundamental thoughts behind the entire community building idea and

⁸ Arnall, p. 69

⁹ Dehousse, p. 17

¹⁰ *ibid*, p. 18

¹¹ *ibid*, p. 25

stresses the importance of integration. At the same time as it places the Court at the top of the judicial hierarchy in the Community, it also, in an obvious way, makes it possible for all the national courts to connect with the system of Community law¹². The use of this provision had a slow start but today it is the most frequently used procedure established by the Treaty of Rome. The use of this provision has made national courts more susceptible to Community law and the rulings of the Court, since the national courts have the possibility to develop and influence the Courts jurisprudence. This procedure makes the boundary between national law and jurisdiction and Community law and jurisdiction almost seamless. Many of the features of Community law have been shaped by the possibility the Court has given individuals, through its interpretation of the Treaty, to seek remedy for member states' Community law infringements¹³.

The Court's judges are chosen by the member states and there is one judge for every member state. It can be argued that the way the judges are chosen could hamper the autonomy of the Court and directly harm its legitimacy and role as an independent arbitrator. The judges, just like the commissioners in the Commission, can feel pressured to make political stands that their national governments demand under the implicated threat that otherwise they will not be re-elected. To hinder this unwanted pressure on the judge there are several rules to guarantee voting anonymity and that the judges' deliberations are secret. There is also an unwritten rule that prevents the possibility of a judge ruling in a case from her or his own country. All these rules have but one goal and that is to prevent politics from infiltrating the legislative process¹⁴. To the member states' defence, it should be mentioned that no abuse of the appointment power has been noticed, despite the fact that the Court has made some very controversial rulings¹⁵.

The Court's structure and its role as an actor within the Community differs greatly from other judicial organs within the sphere of international law. The Court has two more categories of actors to consider compared to other international judicial organizations, who as a rule only has states' rights and obligations in mind when implementing and interpreting Community law. The Court must also consider other institutions of the Community and individuals. This has made its mark on the structure of the Court and its work. Therefore the legal integration of the Community could in large be contributed to the Court and its work, and how the other actors of the structure have reacted to the Court's decisions¹⁶.

¹² Dehousse, p. 28

¹³ *ibid*, p. 34

¹⁴ *ibid*, p. 12ff

¹⁵ *ibid*, p. 15

¹⁶ Stone Sweet, p. 24

2.2 The Court as an actor

The Court works as a trustee rather than an agent and this is one reason why the Court has been allowed the amount of discretionary power it has drawn from the Treaty without any protests from the member states. The role of a trustee is seen as a more reliable actor, since it cannot be controlled by neither the member states nor by the institutions on the supranational level¹⁷.

The Court in itself originally has a weak legal base considering the statute it draws its power from, the Treaty. The Treaty in itself did not follow a debate on how an integrated Europe would look like and be governed, it was inspired by functionalistic strategies on how certain goals could be achieved in ways that would suit most parties involved. The Court has interpreted and constructed its own jurisprudence from this document and given itself the role of an innovator, an explorer, a role unparalleled within national and international judicial organs¹⁸. The Court's work to constitutionalize the Treaty made it possible for the Court to be the important actor it turned out to be. Since most of the work done within the Community, between the different actors, is bargaining, dispute settlements and reconciliation, the role of the Court as a centre for all this action comes natural¹⁹.

One unavoidable question is: why do member states comply with the rulings of the Court? It is a fact that the Court's decisions have not, in the past, and probably will not, in the future, satisfy all parties, and that many of its rulings have been controversial and not always embraced by all states, but yet every member state has followed the rulings of the Court. One answer to this could be that it is very difficult to change a verdict of the Court. This can only be done by treaty amendment, which demands unanimity among the member states. But the member states do not have to be as drastic as that to hinder the Court. The members could have stopped following and complying with the rulings, appointed judges that were more sensitive to states' wishes, or reduced the influence of the Court by political means, and yet they have not. The jurisprudence of the Court did not become questioned and criticised until the mid 1980s. Up until then the Court seems to have built up a capital of trust and legitimacy that national courts, member states and Community institutions accepted²⁰. The Court has an authority that other institutions within the Union lack. The judges of the Court interprets and applies rules in order to clear and resolve disputes. This can be done through the Court's unique knowledge and its unbiased opinion and judgements²¹.

Furthermore, it would seem as contradicting actions by the member states to dedicate so much power in the Treaty to a Community institution that could hamper

¹⁷ Stone Sweet, p. 29

¹⁸ Dehousse, p. 117f

¹⁹ Stone Sweet, p. 24

²⁰ Dehousse, p. 120

²¹ Stone Sweet, p. 23

and diminish their autonomy, and then not complying with said institution's decisions. Another possible answer to the question of compliance is that all the individual member states have an interest in an independent judicial organ that upholds Community law and ensures compliance by all members. The Court is the incentive for the member states to comply with and carry out the decisions made by the Community, even if these decisions once a while contradict their own national interests²².

The Court is not perceived, neither by member states nor by the population of Europe, as much an actor of the Community as the rest of the institutions since the opinion of a judicial organ is that it only hands out judicial rulings and has nothing or very little to do with politics. However, the idea of separating law from politics could be deceiving when it comes to the interconnected systems of the Union. In the Court's case, law and politics are two sides of the same coin, and in the multilayered system of the Union, the Court and the other actors has to consider both of these sides to keep legitimacy in their actions.

Through its effectiveness, and the interconnectedness with national courts, the Court has upheld its legitimacy and thus avoided criticisms to a large extent. The communication between the Court and the national courts have given the national courts the possibility to affect Community law and to be a part of the bigger picture, a sociological factor that in many cases may have mitigated their criticism of the Court's supremacy. Also, the role of the Court as a mediator between conflicting interests, and its aspiration to avoid unnecessary conflicts, has worked to preserve its role as an independent actor and thereby preserved its legitimacy²³.

²² Dehousse, p. 122

²³ *ibid*, p. 146

3 Integration

The term integration can be given different meanings due to its context. Among other things, it means a cultural exchange, to be able to benefit from other cultural groups' advantages, and to create something new but yet, to all parties, familiar. Integration is when different cultural aspects from two different groups can be seen in both groups. The groups have traded different cultural traditions and manifestations with each other and in doing this they have become more similar without either of them becoming more dominant than the other²⁴.

3.1 Integration and the EU

In the case of the European Union, the word integration has become synonymous with economic integration. But the integrational process of the Union has spread from the economic sphere and now involves many different areas, such as environmental regulations, University grades and the size of strawberries. None of these examples seem to have anything to do with economical integration.

In this paper, the term integration means foremost the interconnectedness between the different institutions on the different levels of the Union. It means the process in which the institutions connect and create linkages within the structure of the system. This can be done in many different ways and the perfect interaction would mean that all parts of Community life, in all member states, are integrated and linked to each other through the different institutions. This integrational process can work in two different directions: vertical and horizontal. Vertical integration means that the actors at the different levels of the Union are connected and interact with each other, both at Community level and at member state level. Horizontal integration is when actors on the same level interact and connect with each other, member state to member state or the Parliament to the Commission²⁵. Both of these structures are needed for integration to be balanced and fruitful.

Talking about European integration, one can not neglect the two different phases of integration that has occurred: negative integration and positive integration. Negative integration means to reduce sovereignty among the member states, positive integration means to give the Community more power. In practical terms, this gives negative integration the role of removing barriers that hinder the

²⁴ Buskas. P, p. 1

²⁵ Stone Sweet, Sandholts, Fligstein , p .29

four freedoms (free movement of goods, services, persons and capital) and positive integration means to create legal policies to regulate EU matters²⁶.

3.2 Integration through law

Integration through law is a theory of integration. This theory considers law as something more than only rules to prevent or create certain behaviours. It sees law as a connecting tool between its subjects. The meaning of law is not only 'dos' and 'don'ts', the law is also a bearer of values. It is a tool which connects and divides, and it defines cultural boundaries as well as legal²⁷. When Hass points out that integration will start in one area and then by means of interconnectedness spill over to other areas which are linked together by something these areas have in common, he, without telling us what this 'something in common' is, describes law as this interconnecting tool²⁸.

Rules and regulations are the tools, but what are these rules and regulations? They do not come into existence by themselves and they have to be implemented to have their intended impact. Rules and regulations are created by the political institutions that govern the society for which the rules are intended. But the political institutions can not both create and implement these laws, not if they strive to be looked upon as a democratic society. Therefore these two functions are divided between different institutions that are separated from each other to ensure that they will have an equal amount of impact on society.

One problem with theorising around the concepts of law and politics is that we might draw false conclusions about their interconnectedness, and try to see them as separate entities which can exist by themselves – law as a separate 'pure' concept, uninfluenced by shifting political agendas. This is simply not true. One objective of law is to be a bearer of political information and at the same time make the political process easier by creating clear rules for the society to follow. There would be no law without politics, and there would be no politics without law. Integration is a political subject and at the same time a subject for the rule of law to consider. If the law is not rooted in the political sphere, and thereby in the minds of its citizens, the law has no meaning and no impact. A law which no one admits to is no law; to be an accepted rule most of those ruled must acknowledge and admit the rule.

²⁶ Stone Sweet, p. 48ff

²⁷ Wiener, Diez p. 178

²⁸ Stone Sweet, p. 16

3.3 Integration through law in the work of the Court

Since the EU is a cooperation built upon treaties and the rule of law, much of the communication and integration between the member states are through the process of law, whether it is for the purpose of creating new Community law or to implement the already commonly decided rules. Most of the work within the EU is strictly according to rules and regulations, and through these rules the member states are integrated in the supranational structure of the EU. The Court's primary function is to make sure that the other institutions, and the member states, comply to the rules set out in the different treaties²⁹. The Court has the power to make sure that the rules created by the member states, through the Commission, the Council and the Parliament, are implemented in the right way. The right way in this case means that the rules shall be interpreted in the way the treaties intend them to be, and by doing this the will of the member states is respected and carried out.

The Court is a judicial body, but its decisions and rulings have political effects. All of the principles mentioned above are, at the core, legal aspects, but they also have layer upon layer of political and cultural make-up. The problem the theory of integration through law in a European context is facing is not in the respect of normativity but in the respect of identification. It has been said that national law has a richer cultural context for the citizens to identify with than the Community law³⁰. The Court's work is to connect all the different national legal systems of the Community to one uniform unity of Community law.

The work of the Court is much like the work of a constitutional court. The member states have already agreed on the rules, and the Court is only carrying out their will through its interpretation. This could lead to the argument that the Court does not really have an important role to play in the integrational process, but that is too hasty an assumption to make. The development of European integration can in many cases be contributed to the work of the Court and its judgements, since much of the progress within the area of free movement of goods stemmed from the Court's case law rather than from decisions made by the political parts of the Community³¹.

Some integrational theorists³² have chosen to see law as a dependent variable which reflects rather than creates. These theorists have pointed out that integration between states are based on economic and technological factors, not on laws³³. For example, if we look at one of the four freedoms, the free movement of goods, it is quite clear that this area benefited more from the Court's interpretation than

²⁹ Bomberg, p. 62

³⁰ Wiener, Diez, p. 192

³¹ Dehousse, p. 81

³² Among others, Moravcsik and Sandholtz.

³³ Dehousse, p. 78

from political decisions³⁴. If we view the case law of the Court it is difficult to regard the rulings of the Court as descendant only from member states' interests. Many of the more influential rulings, such as *Les Verts*, *Van Gend en Loos*, and *Cassis de Dijon*, have ruled against powerful members. These cases seem to be more inspired by the rule of law than by national interests. But the Court should not be seen as a non-affected actor: many of its rulings have considered political climate and political debates, both at Community and national levels³⁵.

³⁴ Dehousse, p. 81

³⁵ *ibid*, p. 178f

4 Interpretation of law

There is a widespread opinion that judges are passive actors, who only apply the law to the cases put before them. In theory this is correct, since in theory all judges are rational human beings who, given correct information, will give the same ruling for the same sort of case every time without corrupting the law with personal opinions. But in practise this is fiction. The judges interpret the wording of the law. The interpreting process in itself is a creative process where the judge has to choose between several possible meanings of one rule. These different meanings are coloured by the society the judge lives in, and by her or his political opinion, to mention only a few possible influences. The judges not only have to consider the reason and the background for the law that they are interpreting but also what it has developed into and if the meaning of the law has transformed. The judges have to regard previous judgements and in what context they were made, and if these previous judgements can still be looked upon as valid and a good basis for their decisions³⁶.

The next stage of the interpretation process is the outcome of the ruling. By giving a ruling in a case the judge is engaging in the law-making procedure. The ruling will not only affect the parties involved in this particular case, but will also be used in the future as a reference for similar cases³⁷.

4.1 Interpreting the Treaty

To understand legal integration within the scope of the European Union, one must first know the purpose of the Court. This purpose is not only laid down in the Treaty but also indicated by the Court itself through its interpretations of the Treaty. The most essential work of the Court is to interpret the Treaty and give decisions and judgements concerning Community law. The Court seeks to intensify the effectiveness of Community law within the national legal order of the member states and to accomplish the broader goals of the Treaty by evolving the concept of supranational governance³⁸.

Interpretation, in the case of the Court, means reasoning around the provisions of the Treaty to find possible decisions that can be justified. In this process the Court has to take into account different reasons - legal norms, values, policies and

³⁶ de Búrca, Weiler, p. 83ff

³⁷ Dehousse, p. 72

³⁸ Stone Sweet, p. 27

principles - to justify its decision³⁹. When the Court interprets the Treaty it also has to balance all the different interests of the Treaty and make sure that no interest get a disproportional advantage. The interpretation of the Court not only has to be internally justified but also externally justified. The judgement must be rooted in law and it has to be the right decision, which means it must be acceptable ethically, politically and ideologically⁴⁰.

The Treaty is written as a framework with non-specific provisions, and this not only opens up for interpretation by the Court - it demands it. Without the Court's clarifications of the provisions, it would be hard, maybe even impossible, to uphold the unanimous practice of Community law and to obtain the meaning of the rules intended in the provisions⁴¹.

This balance between conflicting interests has in the past lead to extensive interpretations and the Court has had the possibility to clarify other goals of the Community than strictly economical ones. The environmental goal of the Community is one of these interpreted goals, emerging from the required balance between conflicting interest in the *Danish bottle case*, *ADBHU case* and the *Wallon waste case*⁴².

What should not be forgotten in this process is that the Court only interprets the intention of the decision-makers, the member states, in its reading of the Treaty. The only tool the Court has in its work to interpret the Treaty is the guiding values of the Community: the idea of the integrational process between states that is neither a tight federation nor just a loosely structured regional cooperation but a Union with a structure and a system that promotes integration in all areas of life⁴³. The Treaty is the only primary source of law the Court can use, and that is not much for the Court to draw its interpretations from. Therefore the interpretations are wide and generalized, very much unlike national courts' interpretations and readings of law. This has to do with the structure of public international law in general and with the structure of EC law in particular. This also offers an explanation to why the Court has been able to give both creative and extensive rulings, thereby pushing the integrational process further.

4.2 The case law of the Court

The primary law of the Community is not very dense. It consists of treaties, with provisions upon provisions of 'dos' and 'don'ts', but the provisions themselves are not always easy to grasp. Therefore the Community actors developed a dense

³⁹ de Búrca, Weiler, p. 44

⁴⁰ *ibid*, p. 61

⁴¹ Dehousse, p. 76

⁴² de Búrca, Weiler, p. 67ff

⁴³ *ibid*, p. 83ff

secondary law catalogue - the case law of the Court. It is a manifest of the actions and interactions between different actors on the European and intranational level: national courts, lawyers, judges, lobbyists, bureaucrats, politicians, private firms and individuals. All these actors are brought together by one common factor: the Court. The legal integration-procedure within the Community have facilitated the supranational governance and the transnational society of the Union and this has been done by the rule-making of the Court⁴⁴.

The integrational process of the European Union can this far be seen as a two-step project. These two stages are one political and one legal process, which both began in the 1950s and 1960s. The Union started out with the political process and the goal of creating a political community, but this idea was abandoned in the mid 1950s and due to this the political integration came to a halt. Instead of the failed political integration, the legal integrational process took place, driven by the European Court of Justice. The Court transformed the Union structure through unification and this led to a more federal structure of the institutions. These changes are to be seen as results of the actions and decisions of the Court⁴⁵.

The influence of the Court on the integrational process can be divided in to two branches: direct and indirect. Direct influence are the rulings and case law of the Court, its direct interpretations of the Treaty and its obvious actions. Indirect influence are all the different ways in which the Court's rulings conditions the rights and obligations it has interpreted from Treaty provisions. These conditions can indicate new areas that has to be explored and clarified, as well as legitimating decisions and provoking the Commission to instigate legislature⁴⁶.

In exercising its indirect influence the Court takes on many different roles. It can act as an agenda-setter and a policy-innovator. In several cases (the most known being *Van Gend en Loos*, *Continental Can*, *Cassis de Dijon* and *Philip Morris*) it has pointed out problems and tasks of importance that have to be addressed. The Court does this through its Treaty-defined right as the sole interpreter of the Treaty. Because of its rulings, and the possibility that the rulings will alter the relationship between the actors within the Community, it can create issues that will have to be considered by the political institutions of the Community⁴⁷.

The Court can also act as an policy innovator and this has most been noted in the area of free movement of goods. By concluding that national regulations are subjected to Community law as well as the fact that the Treaty is a bearer of rights even for individuals and the importance of Community law being uniform, the Court has instigated the harmonizing process. By interpreting the Treaty as a non-discriminatory set of rules, the Court declared that the area of free movement of

⁴⁴ Stone Sweet, Sandholtz, Fligstein, p. 34f

⁴⁵ Josselin, Marciano, p. 59ff

⁴⁶ Dehousse, p. 82

⁴⁷ *ibid*, p. 82ff

goods needed policies to be free and equal between all the member states. The Court left the conditions on how these policies should be concluded to the Commission to decide but it indicated that policies in this area were needed. In making this 'suggestion' the Court renovated the integrational process once more in a time when it had slowed down. In introducing the concept of *mutual recognition*, which was the outcome of the harmonizing idea, the Court changed the structure of the Community and the roles of the different actors⁴⁸.

In its Treaty interpretation-processes, the Court fills in the gaps left by the Commission and by doing this it puts pressure on the member states to consider provisions and principles which might extend beyond what single member states originally intended. All of the above mentioned decisions have but one goal: to motivate the Commission as the legislature of the Community, to make it clear to the member states that action is preferable to non-action and to show that harmonizing different spheres of Community law will lead to benefits for all⁴⁹.

In its work to integrate the Community and the member states even more the Court has pushed the integration within the Community institutions in the same direction. The Court made it possible for the Parliament, the Commission and the Council to all be able to be counter-parties before the Court. The Treaty already gave the Commission and the Council this right, but the Court interpreted the provision and the wording 'institutions' to involve the Parliament as well. The Court extracted the spirit of division of power from the Treaty and saw the importance of the elected Parliament to be able to question the decisions of the Commission and the Council in their task to make the voice of the people of the Union heard. This process took several years (1980-1988) and involved many cases (*Les Verts* and *Chernobyl* among others) in which the Court carefully and thoroughly, step by step, built on its own case law to make the final ruling which gave the Parliament the same right to instigate judicial procedures as the other institutions of the Community.⁵⁰

Since one of the Court's obligations is to act as an arbitrator between the other institutions it is inevitable that it will have an impact in the decision-making process. Ever since the Court took its place as an equal among the other institutions, the other actors have developed other strategies than the most common one, political debate, to reach their goals. Among these strategies the most obvious one is going to court⁵¹. This makes the policy process very different. The mere possibility that the political action in question could be questioned in front of the Court makes the politicians, member states and institutions of the Community more inclined to integrate legal concerns into their action programs. The concept of Community law is always present in the political decision making⁵².

⁴⁸ Dehousse, p. 86f

⁴⁹ *ibid*, p. 93

⁵⁰ *ibid*, p. 98ff

⁵¹ *ibid*, p. 104

⁵² Dehousse, p. 107

The Court has provided more room for all kinds of political actors within the legal sphere. This have shifted the balance between the political actors and the judicial actors. More and more important decisions are made by the judiciary and more plaintiffs will be tempted to go to court if there is much at stake. All these different examples show that the decisions made by the Court cannot be considered as only judicial and without political impact. They work as clear examples of how well intertwined politics and judicial decision are and show us that the Court has a tremendous impact in the integrational process within the Community.

As mentioned and discussed above the integrational work of the Court has reached far beyond what the founders of the Union could ever have imagined. Through its progressive interpretation of the Treaty, the legal branch of the Community has shown the political branch how the integrational process could be conducted, and the cooperation between the institutions at Community level has created new processes of law making.

5 Essential decisions of the Court

The work of the Court, since it was created through the Treaty, has been nothing less than out of the ordinary. The Court has interpreted and treated the Treaty as a constitutional charter for the Community and has declared that the Treaty cannot be changed, not even by the will of the member states, due to its important character and constitutional status, and in deciding this the Court has declared that only it can interpret the provisions of the Treaty in the correct way, and create an unanimous practise of Community law⁵³. The Court has built up a structure of constitutional character, which rests on three fundamentally important notions of Community law: the doctrine of direct effect, the notion of supremacy and the provision of preliminary ruling⁵⁴. Of these core concepts, the doctrine of direct effect and the notion of supremacy are results of decisions made by the Court. The provision of preliminary ruling is established in Article 234 in the Treaty, and will not be examined further in this paper.

5.1 Direct Effect

Direct effect is a cornerstone of European Community law. The legality of direct effect is not established by any treaty but through a ruling of the Court in the case of *van Gend en Loos* in 1963⁵⁵. The doctrine of direct effect not only applies to the Community treaties but to secondary legislation as well⁵⁶. For the national courts to use the notion of direct effect the regulation must fulfil three criteria (these criteria were established in the case of *Van Duyn v. Home Office* in 1974⁵⁷): the rule that is to have direct effect must be clear and precisely stated, it must be unconditional or non-dependent and it must deliberate a certain right for individuals to base their claim⁵⁸. The principle of direct effect means that the rules are enforceable in all the member states' national courts, for states as well as for individuals.

In the ruling of *van Gend en Loos* the Court established the doctrine of direct effect by interpreting the Treaty in a non-literal way. Instead, the Court looked to the spirit and intent of the parties at the time when the Treaty was concluded. This

⁵³ Dehousse, p. 36

⁵⁴ *ibid*, p. 37

⁵⁵ Bomberg, p. 240

⁵⁶ Wiener, Diez, p. 180

⁵⁷ EURLex case 41-74 *van Duyn v. Home Office*

⁵⁸ Melin, Schäder, p. 39

is a typical example of the extensive interpretation that the Court has conducted in earlier years, as mentioned above. In this interpretation the Court explained and tried to grasp the intentions of the Community and the entire regional cooperation. The Court took a side for the integrational process and pointed out that for this cooperation to work as it was intended, the rules and regulations within this cooperation had to be more alike and interlocked than they had turned out to be. In this case, the Court took the opposite side of the politicians and most of the member states on a subject that was considered to be highly political and not the slightest judicial: integration⁵⁹.

In practical terms Community law instigated by for example the Council, is to be considered the law of all the member states with effect immediately. This was the interpretation of the Court in the case of *van Gend en Loos*. The Court interpreted the treaty of Rome:

“...the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.”⁶⁰

By this ruling the Court not only interpreted and established the principle of direct effect, but also gave individuals new and never before seen rights on an international level. The Court established that individuals could hold their countries accountable for decisions and commitments they had made to other states through the Community treaties⁶¹.

At the time of the ruling the European Parliament was not directly elected, and the nationals of the different member states were much further away from the centers of power within the Community than today. The political climate was harder, and the possibilities for nationals of member states to make their voices heard within the Community bureaucracy were fewer. The thought of the integrational process within the Community had not yet been spoken of, but the

⁵⁹ Dehousse, p. 38

⁶⁰ EURLex case 26-62. *NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*

⁶¹ Wiener, Diez, p. 180

action of the Court showed how much it was inspired by the spirit of the Treaty and the thought of an united European Community⁶².

The doctrine of direct effect gave the nationals of the different member states the role of guardians of the integrity within the Community system. By doing this the Court changed the dynamics of the integrational process, thereby contributing greatly to the effectiveness of the Community system. The slow and bureaucratic days of the Community met an end, since now the institutions and member states had to consider the nationals as a new player in the game⁶³.

5.2 Supremacy

The next core concept of Community law is the principle of supremacy⁶⁴. Together with the doctrine of direct effect this principle builds the core of Community law and gives the Court its important position in relation to the national courts of the member states⁶⁵. The rule of supremacy guarantees that the doctrine of direct effect has its intended effect: to make Community law uniform and effective. As in the case of the doctrine of direct effect, the principle of supremacy is not mentioned in any treaty⁶⁶. The Court has in several cases ruled that Community law is to be seen as superior to the individual member states' national laws. This means that whenever a conflict arises between national law and Community law, the Community law has precedence over national law. This principle emerged in the case of *Costa v. ENEL* in 1964⁶⁷.

“The integration into the laws of each member state of provisions which derive from the Community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore not be inconsistent with that legal system. The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.”⁶⁸

⁶² Dehousse, p. 39

⁶³ *ibid.*, p. 41

⁶⁴ Wiener, Diez, p. 180

⁶⁵ Stone Sweet, Sandholts, Fligstein p. 61

⁶⁶ Wiener, Diez, p. 180

⁶⁷ Melin, Schäder, p. 113

⁶⁸ EURLex case 6-64. *Flaminio Costa v E.N.E.L.*

By this ruling, the Court established that the member states had a duty to give Community law precedence over national law as a consequence of their commitment to the Community and its members. The principle of supremacy also reserves for the Court the right to declare any Community law invalid, which makes the Court not only ruler of the land but the highest ruler of the land⁶⁹. The Court motivated its interpretation with the fact that Community law could, and cannot, be different in the different member states. The Court stated that this would be to go against the Treaty and the very ideal of the Community idea. The meaning and the possibility of an existing and functional Community demanded that Community law was seen as supreme to national legislation. The rule of supremacy, declared the Court, is essential for the survival of a unified cooperation and just as important to the legal security, legitimacy and democracy of this cooperation⁷⁰. By the Court's decision, the rule of supremacy made Community law absolute over all national provisions, even constitutional provisions, and again the Court provided a constitutional character to the Treaty.

The Court went even further, and made it clear that the integrational thought in the Treaty had to be regarded as one of the fundamental ideas of the Community, and that the process of harmonizing the Community and its member states' different laws by creating Community law should not be stopped, or even hampered, by the unwillingness of some states to fulfil their obligations in time⁷¹.

In practise this means that the member states have given up part of their national sovereignty to the Court. It means that every member states' national judicial system is subjected to the ruling of the Court, and that community law is to be complied with, without exception, as if it was national law. It also means that the member states have relinquished normative power in those areas where Community law is present, and therefore cannot create new laws in these areas⁷².

5.3 Direct effect and supremacy at work

It is necessary to once more point out that without the doctrine of direct effect and the notion of supremacy, the case law of the Court, the Court's influential work and its role as an integrational catalyst would never have come to be. I would like to argue that the doctrine of direct effect and the notion of supremacy are the necessary tools the Court needs to be able to do its work: to interpret the Treaty and make sure the Community evolves into what its founders intended it to be.

⁶⁹ Wiener, Diez, p. 185

⁷⁰ Dehousse, p. 42

⁷¹ *ibid*, p. 39

⁷² Melin, Schäder, p. 45f

With these tools the Court has been able to interpret and constitutionalize the Treaty, not only to be a legal document binding certain states together, but to crystallize and point out the rights and responsibilities all the actors in the European arena have towards each other. In this part of the paper I will point out two examples where these two crucial concepts have been necessary for the integrational progress of Community law.

The notion of supremacy and the doctrine of direct effect were established in the first period of the integrational process, and they are necessary conditions to make law, and the rule of law within the Community, reliable. These two concepts were also the tools needed to create the common market and they are still needed to keep the market afloat. These concepts were also crucial when the Court developed the concept of mutual recognition in the second period of the integrational process of the Community⁷³. This far most of the Court's work has been concerning the four freedoms, but there are other goals of the Community where the Court's work has been, and will be, very influential, and where the concepts of direct effect and supremacy are necessary: environmental protection and respect for human rights.

The Treaty is silent on both the idea of environmental protection and the question of human rights-issues. But, as has been mentioned above, the Court has in its most important and influential rulings interpreted the Treaty to hold rights and ideas beyond the literal text. The Court has placed the Treaty in a Community context and has, through this, been able to see Community goals that have not been clearly declared by the member states⁷⁴. Again, these extensive interpretations of the Treaty would not have been possible without the Court's earlier work, the forming of the doctrine of direct effect and the notion of supremacy.

The Treaty original does not mention human rights and its purpose was primarily to create a common market, but through the Court's interpretation the Treaty has also become a charter of rights. This process started in the late 1950s but it was not until the late 1980s that the Court began to point out acts by member states that could be considered violations of rights.

Due to the fact that the Treaty is silent on the matter, the Court's first decision had to be whereas it actually had jurisdiction or not in this field. This was done through several cases where the Court used the European Charter of Human Rights (ECHR) to establish which rights the member states of the Community considered to be fundamental. The Court reasoned that since all members of the Community also were parties to ECHR, they had recognised and agreed that these rights should be respected. They also referred to these rights as fundamental in other obligations towards each other, and since the Court had concluded, in the *Warchauf* case, that one of the Community goals was to respect fundamental

⁷³ Stone Sweet, p. 61ff

⁷⁴ *ibid*, p. 200

rights, the Court, by analogical interpretation, was able to transfer the rights catalogue from the ECHR to the Treaty⁷⁵. This was possible since the Court established that the recognised rights in ECHR already were recognised by the member states in their constitutions. By this decision the Court pointed out that there has to be a balance between the rights of governments and the rights of private actors, firms and individuals. There are certain values that cannot and should not be compromised by the the endeavour to create a common market.

The Court's decision was fully accepted by the member states and ratified by the other institutions of the Community in 1977, when the Parliament, the Commission and the Council jointly recognised the capacity of the Court as able to guarantee the fundamental rights of the Community, since these rights were established in the constitutions of all the Community members through the ECHR⁷⁶. In the late 1980s there were two cases, *Solange I and II*, that ruled that as long as the Court has the possibility to effectively protect the fundamental rights of the Community, it should be allowed to do so⁷⁷.

Since then, in 2004, the member states have decided upon a common charter for the Community which specifies the fundamental human rights within the Community. This charter was motivated by the the member states on the ground that a precise legal status for the rights was needed and that a codification of the rights already used by the Court was needed to give these rights the proper attention. This is a good example of how progressive the work of the Court has been. The Court interpreted the Treaty, and thereby the intentions of the member states, to build a case law that the member states later codified and made into Community law⁷⁸.

The very same process can be seen in the way the concept of environmental protection became a fundamental goal for all the member states of the EU. Prior to the SEA, the Community had no provisions on environmental protection or even any written text stating that the protection of the environment was an objective of the Community. The treaty did not mention environmental protection as a goal of the Community and it definitely did not state that the Court had any competence in making decisions and rulings in this particular area of Community law. But still the Court made a decision in the *ADBHU* case in 1983, proclaiming that the protection of the environment is one of the central objectives of the Community⁷⁹. Once again, the Court decided that it had jurisdiction, and then went on to make a binding decision stating, again, that there are certain values that cannot and should not be compromised, not even by the all-important economic goals of the Union.

⁷⁵ Stone Sweet, p. 87ff

⁷⁶ *ibid*, p. 90

⁷⁷ *ibid*, p. 88

⁷⁸ *ibid*, p. 91

⁷⁹ *ibid*, p. 200

6 The changing role of the Court

Since the mid-1980s the work of the Court has changed, and it has even been said that the Court's most influential period is over. The change in the Court's behaviour can be seen in the transformation of its functions and in its environment. Since the completion of the SEA in 1992 new areas of friction and tension between the system actors have emerged, and the Court has found itself, as a mitigator, in the midst of these⁸⁰.

There could be several reasons for this change. One might be that the integrational process by now has reached so far that much of daily life in the EU is affected by Community law. Community law is not only seen in the economical life of the Community, in the free movement of goods and in the monetary union, but also through the other freedoms and fundamental values of the EU, such as respect for human rights and deregulations of differing markets and health regulations. This development, which has been pushed forward by the extensive influence of the Court's interpretations of the Treaty, has put more focus on the Court than before and have created changes in the behaviour of the member states in relationship to the Court⁸¹. This new focus could have formed a more conservative attitude within the Court, influencing it to make decisions with concern to avoid being put in the spotlight by the other actors of the Community.

The Maastricht Treaty could be another reason why the Court has entered into a more conservative period. One could say that the restrictions imposed on the Court through the Maastricht Treaty came as a natural reaction to the Court's earlier extensive interpretations. The Court's influence on the Community and its policy processes had changed the course of integration into something that the member states had not anticipated and it is actually quite remarkable how long those member states sat by and accepted the Court's involvement in most policy procedures within the Community. Through the Maastricht treaty the member states have excluded whole areas from the jurisdiction of the Court, and by this made it clear that they will not tolerate more extensive interpretation and implementing of the spirit of the Treaty to push the integrational process forward. The areas excluded belong to the third pillar of the Union and are usually seen as core states matter. The Maastricht treaty has been amended several times to give clarifications on certain provisions intended to curtail the power of the Court's rulings⁸². The message to the Court is clear: the member states do need the Court,

⁸⁰ Stone Sweet, p. 155

⁸¹ Dehousse, p. 176

⁸² *ibid*, p. 164

and want it to perform its Treaty obligations, but they do not wish to have one more actor to deal with in the policy making process⁸³.

Is the Court's 'retirement' then something that should be considered a sign of the European integrational process slowing down? The expansion of Community activities and the areas where Community law has interfered with national law has increased drastically since the mid-1980s, about the same time that the Court started choosing a more conservative position. This has not happened by chance. The more integrated the Community has become, the more harsh voices of lost national sovereignty have been heard. Since the Community is a framework built by and of rules and regulations, and since many of the integrating decisions have been made by the Court, it is quite obvious that the member states reacted, and saw the Court as the cause of many of these changes. The result was the curtailing of the Court's power in the Maastricht Treaty.⁸⁴

So one could argue that the Court has lost power, since in fact it has due to the changes in the later treaties, but maybe a more precise argument would be that the focus of the Court has shifted. Up until the mid-1980s most of the work within the Community was concentrated on regulating the common market, to make the idea of the four freedoms a reality. Now, when the common market is a fact, with the necessary regulations in the field of movement of goods and trade in place, focus has shifted to other areas of the Community, areas that has not yet been under consideration, for example human rights issues and environmental protection. Since these subjects are not on the top of the agenda for most private or governmental actors, the directly notable influence of the Court may have shrunk, but this is only a fact from the point of view that issues such as these do not have top priority. The changed behaviour of the Court should not be interpreted as a weakening of the Court's influential power: it should be seen as a sign of changes in the Community system as a whole, rather than in any particular institution. What also must be considered is that the Court's attention has been drawn away from its work as in interpreter of Community law, to its role as an implementer of Community law. The number of infringements have increased at the same time as the number of Community rules has increased. The Court's work of today more and more looks like the work of a national court⁸⁵.

⁸³ Dehousse, p. 167

⁸⁴ *ibid*, p. 176

⁸⁵ *ibid*, p. 160

7 Conclusion

The legal system is the backbone of integration within the Community, and not giving the Court the credit for the pace and involvement of the integrational process would be denying this fact. Today Community law is as often enforced on a national level as on a Community level, and national bureaucracy implements Community law as often as Community bureaucracy does⁸⁶.

Through the doctrine of direct effect and the notion of supremacy, together with the provision of preliminary ruling, the Court has made itself and the national courts important actors within the Community structure and made legislature the main tool to push the unification of the member states to new and unexplored levels⁸⁷. In announcing the the doctrine of direct effect and the notion of supremacy the Court opened the European legal system to private parties, and in doing this enhanced the legal influence and the implementation of Community law. Community law became important to all actors, no matter on which level they were working⁸⁸. Private actors started to fuel the system with cases that concerned their personal areas of interest, and began working as watchdogs for the Community, motivated by their own economical interests. Thus, the legal institutions within the Community, both at EC level and at member state level, produced network effects that spread from one corner of the community to the other. This is the macro effect of the decisions and judgements made by the Court⁸⁹.

Most often, when integration and the integrational processes of the Union are mentioned, it is in a strictly political and economical context. At least that is how most people have come to think of it. What has to be remembered is that the concept of law and the concept of politics can only be separated in theory, and cannot be kept apart in practise. To argue that the Court do not engage in the policy process of the Community is to ignore the interconnectedness between policy-making and legislature. The Court has played a unique and never before seen role in the integrational process of international law. It has pushed the use of the Treaty of Rome to be seen as a constitutional charter and a bearer of rights for both states and individuals. By its interpretation of the Treaty, its case law has introduced new policies and pressed for new legislation⁹⁰. It is hard to overlook the importance of the Court in the integrational process and it is even harder to

⁸⁶ Stone Sweet, Sandholts, Fligstein p. 55

⁸⁷ Stone Sweet, p.15

⁸⁸ *ibid*, p. 21

⁸⁹ *ibid*, p. 41

⁹⁰ Dehousse, p. 70f

overlook the importance of law as an integrational catalyst within the Community. The Court has given the institutions of the Community, as well as the individual member states, the tools they have needed to perform the tasks necessary to make integration within the Community possible.

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