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Abstract:

This essay presents a critical perspective on the contemporary and controversial issue regarding the role of the Court of Justice of the European Union (CJEU). It responds to a prominent criticism that the CJEU has granted itself powers which enable it to overstep its judicial function. This paper calls the engaged reader to address the fundamental and preliminary question of defining the role of the CJEU prior to participating in the on-going debate as to whether or not the CJEU may be properly regarded as overstepping its bounds. Given the current political climate of the UK, namely the recurring and persistent discussion around ceasing EU membership, this essay highlights some important underlying issues in the context of the CJEU that ought to be taken into account in order for one to achieve a more holistic perspective on this highly contentious debate. This essay concludes that it is only after a clear definition of the role of the CJEU has been achieved that critics may justifiably accuse the Court of exceeding its proper function.

The Importance of Defining the Function of the CJEU

Introduction

This paper will consider the legitimacy of the accusation that the Court of Justice of the European Union (CJEU) “assumes for itself powers which go beyond its judicial function.”¹ By examining the doctrine of supremacy, and the doctrine of direct effect, in addition to the relevant case law, the reasons underpinning this criticism become apparent. However, it is in light of the wider context within which the CJEU operates, including its overarching objectives and its proper

¹Tridimas, ‘The Court of Justice and judicial activism’ (1996) *European Law Review* 199.

function, that this charge may be rendered unjustified. Notably, these arguments ultimately hinge on how one conceptualises the CJEU's judicial function. In debates regarding the CJEU's function, tension emerges between accusations of the Court engaging in judicial activism, versus the Court fulfilling its role via teleological reasoning. It is only after a clear definition of the CJEU's judicial function has been established, that one may reasonably discern whether or not it has granted itself powers which 'go beyond' said function.

The Creation of Powers

Although the CJEU may be said to have created various powers for itself, this paper will focus on the two major powers, namely; the doctrine direct effect, and the doctrine of supremacy. The doctrine of direct effect formed in *Van Gend en Loos*,² established that European Union (EU) law can create rights for individuals that national courts are obliged to protect. The Court employed a purposive method of interpretation when it held that the EU constitutes a 'new legal order' in international law, "on behalf of which states have limited their sovereign rights in certain fields and whose subjects comprise not only states but also individuals."³ As a result of this doctrine, where a provision of EU law has direct effect, it creates enforceable rights for individuals that their domestic courts must protect. This principle is exemplified in the *Marshall*⁴ case, where the claimant was permitted to rely on Article 5(1) of the Equal Treatment Directive, where there was no remedy under English law⁵. This doctrine demonstrates the Court creating powers for itself as these powers were not prescribed in any Treaties. Here we see that, "to infer the existence of a doctrine of direct effect, it was not necessary that the text contained an explicit statement, rather it was enough that the text did not explicitly exclude it."⁶ The Court exercised a similar degree of creativity when it established the doctrine of supremacy.

²Case 26/62 [1963] ECR 1

³*ibid.*

⁴Case 152/84 [1986] ECR 723

⁵s.6(4) Sex Discrimination Act 1975

⁶G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (1st, Cambridge University Press, Cambridge, UK 2012) 27.

Despite its tremendous significance in shaping the 'new legal order' of the EU, the doctrine of direct effect is not in itself adequate to assure the effective application of Community law.⁷ Thus, the Court later employed its teleological interpretation to establish the doctrine of supremacy in the case of *Costa v. ENEL*⁸. In this case the Court declared that, "[t]he transfer by Member States from their domestic legal systems to the [EU] system of rights and duties carries with it a permanent limitation of their sovereign rights, against which a later, unilateral act incompatible with [EU] law cannot prevail."⁹ Again, the Court audaciously implemented a degree of creativity where there was no explicit authorization in any Treaties granting supremacy to EU law. The closest reference to the doctrine of supremacy is found in the 'loyalty clause'¹⁰ which states that, "pursuant to the principle of sincere cooperation, the Union and all Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."¹¹ Following *Costa*¹², the Court has consistently reiterated the importance of supremacy to preserving its integrity.¹³ This is displayed in *Simmenthal*¹⁴, where it was ruled that:

"any court must, in a case within its jurisdiction, apply [EU] law in its entirety and protect rights... [conferred] on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [Union] rule...and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means."¹⁵

The aforementioned doctrines exemplify the exceptional nature of EU law in its

⁷R. Dehousse, *The European Court of Justice* (1st, Macmillan Press Ltd., London, UK 1998) 41.

⁸Case C-6/64 [1964] ECR 585

⁹*ibid.*

¹⁰ Treaty on European Union, Article 4(3)

¹¹*ibid.*

¹²*Costa*(n 8).

¹³R. Kuper, *The Politics of the European Court of Justice* (1st, Kogan Page Limited, London, UK 1998) 17.

¹⁴Case 106/77 [1978] ECR 629

¹⁵*ibid.*

capacity to “penetrate domestic law”.¹⁶ It is precisely this unique quality that stirs so much controversy provoking accusations of the Court overstepping its bounds. As Bredimas points out, “[t]he main difficulty lay with the fact that the Community Treaties contain no formal and unequivocal assertion of the supremacy of the Community legal order over the legal orders of the Member States, just as they contain no clause decreeing the direct applicability of Community law.”¹⁷ The absence of said explicitly prescribed provisions leave the Court’s more innovative decisions open to question.

The Court’s Function

Clarifying the Court’s purpose and function is crucial to dealing with questions as to whether or not it has created powers for itself which ‘go beyond’ its function. Case law indicates that, “the Court of Justice considers it its duty to build a logically coherent legal system for the Union...The Court strived to shape the legal system of the Union, albeit with a watchful eye on restrictions set by the Treaty structure.”¹⁸ Ultimately, the Court has the duty of interpreting and applying “a complex and expanding body of law”¹⁹ and in order to do so with utmost efficacy, it uses a teleological method of interpretation. This has also been referred to as ‘functional interpretation’,²⁰ where the Court interprets in such a way that will serve to further the overarching aims of the EU. Hence, where the Court is more innovative in its interpretation, it justifies its creativity with the objectives of the EU for which it functions to serve. This pattern is illuminated by cases such as *Costa*²¹, where the court explains that:

¹⁶J. Steiner, *Enforcing EC Law* (1st, Blackstone Press Ltd. , London, UK 1995) 3.

¹⁷A. Bredimas, *Methods of Interpretation and Community Law* (1st, North-Holland Publishing Company, Netherlands 1978) 81.

¹⁸A. Hinarejos, *Judicial Control in the European Union* (1st, Oxford University Press Inc., New York, NY 2009) 184.

¹⁹J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (1st, Oxford University Press Inc., New York, NY 1993) 79.

²⁰J. Bengoetxea, N. McCormick, L. Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in G.de Burca, J.H.H. Weiler (eds), *The European Court of Justice* (1st, Oxford University Press Inc., New York, NY 2001) 57.

²¹Case C-6/64 [1964] ECR 585

“the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves...The executive force of Community law cannot vary from one State to another...without jeopardising the attainment of the objectives of the Treaty.”²²

This alludes to Community law being far more determined by Treaties’ objectives than their explicit provisions; and when interpreting them the Court is “left with guidelines and its legal conscience.”²³

Although the established doctrine of supremacy may be problematic *prima facie* by lacking adherence to democratic procedure, the Court is stating that EU law must prevail in order to attain the Treaties’ objectives. One might say that the democratic ingredient lies within the presumption that the Member States support the objectives of the Treaties and trust the Court to do what is required to advance towards them. As Bengoetxea points out, “judicial control and interpretive fidelity to the dynamic character of the Treaties by the [Court] has been a contributing factor in achieving legitimacy of the Community project by the furthering of principles such as legal certainty and the rule of law.”²⁴ Notably, “The Lisbon treaty²⁵ describe[s]...the goal of the institutions as being to promote the Union’s values and advance its objectives, to serve the interest of the Union, its citizens and member states, while ensuring the consistency, effectiveness and continuity of its policies and actions.”²⁶ Yet, what is lacking here is any precise specifications as to how the Court should fulfill this function. It is this apparent element of vagueness that leaves room for dispute.

Beyond Which Function?

²² *ibid.*

²³ A. Bredimas, *Methods of Interpretation and Community Law* (1st, North-Holland Publishing Company, Netherlands 1978) 71.

²⁴ J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (1st, Oxford University Press Inc., New York, NY 1993) 103.

²⁵ Treaty on European Union, Article 13(1)

²⁶ A. Duff, *Saving the European Union* (1st, Shoehorn Media Ltd., London, UK 2009) 41.

In response to the charge that the CJEU “assumes for itself powers which go beyond its judicial function,”²⁷ one might convincingly argue that it does not; rather, it assumes for itself powers which are *conducive* to its function. Hinarejos asserts that, “[t]here is...an arguable logic to how the [Court] can sometimes seem to be pushing the boundaries of some Treaty provisions.”²⁸ However, this logic becomes apparent only upon scrutiny of the wider context within which the Court functions. Criticisms of legitimacy are inevitable, especially in situations where the Court reinterprets Treaty provisions in such a way that appears indistinguishable from simply rewriting it. The Court spurs controversy where it must assume the role of a type of legislator.²⁹ In cases such as *Van Gend en Loos*³⁰ and *Costa*³¹, however, the Court is diligent in justifying its creative interpretations in relation to the objectives of the EU. Thus, it appears cognizant of the fact that to stray too far from Treaty provisions and objectives would be to undermine its role and legitimacy. Accordingly, it will exercise judicial restraint³² where necessary. Conversely, critics such as De Waele adamantly maintain that, “the Court’s activism cannot be justified by virtue of the fact that there is sufficient evidence of restraint as well.”³³

However, if one accepts the Court’s function as serving the objectives of the EU, and said objectives require uniformity, consistency, and the rule of law, then it appears as though the Court remains within its ambit in respect to creating the doctrine of direct effect and the doctrine of supremacy. Steiner makes the salient point that, “[w]ithout uniform enforcement ‘solidarity’ between member states would be lost.”³⁴ Kuper explains that, while the Court’s judgements might be ‘over-reaching’ and sometimes ‘unexpected’, its judgments remain coherent in respect to their commitment to a

²⁷Tridimas, ‘The Court of Justice and judicial activism’ (1996) *European Law Review* 199.

²⁸A. Hinarejos, *Judicial Control in the European Union* (1st, Oxford University Press Inc., New York, NY 2009) 184.

²⁹*ibid.* 188.

³⁰*Van Gend en Loos* (n 2).

³¹*Costa* (n 8).

³²see *Kremzow v Austria* [1994] 17 EHRR 322

³³H. de Waele, ‘The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment’ [2010] *HanselR* 3, 15.

³⁴J. Steiner, *Enforcing EC Law* (1st, Blackstone Press Ltd., London, UK 1995) 23.

particular form of European Community and economic integration.³⁵ This point seems intuitive *prima facie*, but critics such as De Waele remain sceptical of the very foundation which aims to justify the Court's creativity.

Continuing Controversy

What is persistently and understandably controversial is this element of creativity capable of being exercised by the Court – especially when paired with the doctrines of supremacy and direct effect. A primary concern is of 'inventions masquerading as interpretation.'³⁶ The fact that the Court has created for itself the capacity to override the sovereign rights, and even the legal sovereignty of the Member States³⁷ has spurred scholarly criticism and debate. The Court has demonstrated that it will not hesitate to "interpret against the *prima facie* meaning of a provision in order to achieve a result which is more consistent with its purpose."³⁸ Despite the Court justifying its creative decisions as a means to an end, *qua* advancing the EU's overarching objectives; it does not follow that all will accept this justification.

De Waele makes several valid criticisms in support of his claim that the Court has been "activist beyond proper measure".³⁹ He claims that the Treaties do not serve as an adequate justification for the Court to assume responsibility for Europe's integration.⁴⁰ Moreover, he emphasizes that rules creatively interpreted or created by judges "may well be inadequate and ill-suited to regulate the situations at hand, and serve as truly workable precedents for the future."⁴¹ De Waele shares Rasmussen's⁴² concern that activism within the Court will potentially 'weaken' and

³⁵R. Kuper, *The Politics of the European Court of Justice* (1st, Kogan Page Limited, London, UK 1998) 60.

³⁶J. Bengoetxea, N. MacCormick, L. Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in G.de Burca, J.H.H. Weiler (eds), *The European Court of Justice* (1st, Oxford University Press Inc., New York, NY 2001) 44-45.

³⁷*ibid.* 43.

³⁸*ibid.* 8.

³⁹H. de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' [2010] *HanseLR* 3, 23.

⁴⁰*ibid.*

⁴¹*ibid.*

⁴²H. Rasmussen, 'Towards A Normative Theory of Interpretation of Community Law', [1992] *The University of Chicago Legal Forum*, pp. 135-178, at 160.

ultimately 'erode' the Court's authority completely.⁴³ Lastly, De Waele poignantly remarks that, "excessive rule-making by the judges remains principally undesirable from a democratic perspective."⁴⁴ In light of De Waele's highly skeptical paradigm, it is clear that whether or not the Court has created for itself powers which exceed its judicial function will hinge on how one conceptualizes the Court's proper function.

Conclusion

Prior to arguing that the Court has in some way gone 'beyond its function' there is the preliminary matter of adequately defining its function. Currently, its function is defined very broadly to serve the aims of the EU, but as De Waele highlights, this need not be accepted. Central to the issue seems to be whether or not the Court, *qua* guardian of EU objectives, should be permitted to exercise creativity when striving towards said objectives. The perpetual dilemma is articulated well by Conway who states:

"on the one hand critics of European integration sense (rightly or wrongly) judicial activism; on the other hand it can be argued that the Court is merely confronting the Member States, the EU's institutions and indeed individuals with the logical consequences of what has been agreed."⁴⁵

This remark emphasizes the fact that Member States "have not been passive instruments in the 'Europeanisation' of national legal orders. They have been active participants in the construction of the Community legal order."⁴⁶ If the Court's function is to purposively interpret and shape the provisions in order to meet EU objectives (even if this requires establishing doctrines such as that of supremacy and direct effect to do so) then the Court has not exceeded its proper function. Ultimately, the justification of its decisions is based on its ability to achieve recognition of their

⁴³*ibid.*

⁴⁴*ibid.*

⁴⁵G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (1st, Cambridge University Press, Cambridge, UK 2012) 14.

⁴⁶M. Maduro, *We, The Court* (1st, Hart Publishing, Oxford 1998) 30.

legitimacy from the Member States.⁴⁷ While this paper offers no decisive definition, it illuminates how this criticism finds merit in calling one to scrutinise the proper function of the Court; an area that, evidently, warrants further exploration.

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