Essays

European Court of Justice and Article 234: Transformation of the Court into a Legislative Body?

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European Community has developed into a unique union of countries brought together for economic, social and political cooperation. In order for a community of this sort to flourish, and in order for its laws to be implemented in the member states, a judicial order and thus a judicial body is absolutely essential. Consequently, the European Court of Justice and the Court of First Instance, both of which stem their origin from Article 220 of the Treaty of Rome, were established. This Article provides that 'the Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of the Treaty, the law is observed.' This indeed is a broad definition and thus, has given the European Court of Justice (ECJ) an ability to expand its role in order to play a rather crucial part in the development of European community law. In particular, the ECJ has used Article 234 of the Treaty of Rome to strengthen the community law and establish the principles of supremacy, direct effect, indirect effect, and ability of individuals to sue the member states. This development over the course of time is

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rather interesting, especially considering the fact that these principles were not categorically established by member states in any of the agreements or treaties. It is therefore argued that the ECJ has gone beyond its original task of 'interpretation' and has actively participated in the development of European community law[1]. In this context, my paper examines the judicial activism of ECJ in developing the key principles of European jurisprudence by giving a broad interpretation to Article 234 of the Treaty of Rome. Moreover, this paper suggests that the ECJ has taken up a law-making role through such judicial activism.

A. European Court of Justice

The European Court of Justice is the supreme most judicial authority within the European Community with 25 sitting judges -one belonging to each member state. The ECJ also consists of eight Advocate Generals who assist the court in making decisions. The role of Advocate General is crucial to the understanding and working of ECJ, since in comparison to the succinct and short decisions given by the judges, the advocate general reads out a detailed analysis of the case and also suggests a solution. Though, this suggestion is in no way binding on the judges, however, it gives quite an important insight into how the judges may have reached their respective decisions.

ECJ has jurisdiction in the matters of preliminary rulings involving the cases sent to ECJ by national courts concerning matters of interpretation of the community law; matters of infringement against member states; and, other matters, for example, interim measures, disputes involving EC institutions, international treaties, etc.

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[1] Compare Takis Tridimas, *The Court of Justice and Judicial Activism*, E. L. REV. 1996, Vol. 21:3 at pp. 199-210 (specifically refer to the arguments about The Court of Justice being a constitutional court and the right to judicial protection).

B. Article 234 – Preliminary Rulings (formerly, Article 177)

The article 234 provides the national courts an opportunity to refer questions regarding interpretation and validity of Community acts and institutions to ECJ. National courts have discretion on whether to make a reference or not. Cases involving article 234 form the majority of cases heard by the ECJ. Once a question of interpretation of community law is sent to ECJ by the respective national court, the judges at ECJ answer that particular question and do not give a view on the merits of the case. This ensures that the work of ECJ is limited to interpreting matters of community law, while leaving it up to the competent national courts to decide the question of facts.[2]

Hence, ECJ works on the principle of continued cooperation between itself and the national courts. This creates an interesting situation especially when ECJ rules against the obvious wishes of national courts. Nevertheless, such an arrangement is absolutely necessary for the system to work considering the fact that ECJ in itself does not have a jurisdiction to execute its orders, and therefore must liaise with the national courts. In *Foglia v Novello,*[3] the ECJ aptly declared that the working of article 234 is based on "co-operation which entails a division of duties between the national courts and the Court of Justice in the interest of the proper application and uniform interpretation of Community law throughout all the Member States." Such a statement should be understood in light of the referral system of article 234 wherein the ECJ stays short of deciding the case and confines itself to the interpretation of matters related to community law. This can sometimes create a rather interesting situation, for example in *Arsenal v. Reed,*[4] where at the

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[2] See generally P. CRAIG AND G. DE BURCA, EU LAW: TEXT, CASES AND MATERIALS (OUP: 2003).

[3] Case 244/80 Foglia v Novello (No 2) (1981)

[4] Case C-206/01 Arsenal v. Reed (2002)

receipt of ECJ's opinion, the national judge declared that the ECJ was in ultra vires of its jurisdiction as it not only answered the issues pertaining to community law but has also given an opinion on the other matters of the case. The national court, therefore, refused to apply ECJ's opinion in its judgment.

Moreover, the ECJ may also reject a reference under article 234 if the facts of the case are not well laid out by the national court, or if it is not clear as to how the question or facts relate to a matter of community law. This was the issue in *Telemarsicabruzzo,*[5] where ECJ maintained that "the need to provide an interpretation of community law which will be of use to the national court makes it necessary that the national court determine the factual and legislative content of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based." The court therefore refused to give an opinion on the matter when the national court failed to provide relevant details.

The article 234 further ensures that the community law is uniformly enforced in every member state. As pointed out in *Rheinmuhlen,*[6] this article is essential "for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community." However, this goal is rather difficult to achieve. While it may be theoretically possible to have a similar interpretation of European community law in various member states, the practicality of such a proposition is quite difficult considering that each member state has its own legal tradition, history and judicial system.

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[5] Case C-230 322/90 Telemarsicabruzzo (1993)
[6] Case 166/73 Rheinmuhlen (1974)

C. Article 234 – A Key Tool of ECJ?

European Court of Justice can review a wide variety of cases under article 234. This article indeed has given the ECJ substantial powers to alter, develop and correct the community law, sometimes even at the expense of national law. Once ECJ decides a matter of community affair, it carries substantial authority for courts and tribunals when considering similar points of law. The ruling on a particular matter, therefore, sets a precedent which must be followed by the national courts going forward.

The ECJ has used article 234 to develop certain principles of community law that are key to the functioning of community. However, interestingly, some of these principles were not originally part of EC law. ECJ has played a key role in developing the principles of supremacy of EC law, direct effect, indirect effect, and the right for individuals to sue member states. In the next section, each of these principles has been discussed separately, in order to explain the use of article 234 in their respective development.

1. Supremacy of Community Law

A conflict between community law and national law should not be thought of as a matter of surprise but more as a matter of logical consequence. Whenever two legal systems are simultaneously operational, especially in a situation where the two legal orders are not specifically designed to operate in coherence, historically, traditionally, or otherwise, then there will be several issues where the two legal orders will diverge, or at worse, conflict.

It may be assumed that when the member states agreed to join the European Community, it was implicit that in community matters, EC law will be superior to national law. However, the treaty did not

explicitly mention the provision of supremacy and the concept has been established and advanced by the decisions of ECJ.[7]

While clarifying its stance on the supremacy of community law in *Costa v ENEL*,[8] the ECJ said that "...the terms of the Treaty, make it impossible for the States, as a collary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them." More importantly, in this case, ECJ insisted on creating a new legal order, per se. The court went on to say that, "By creating a Community of unlimited duration, having its own institutions, its own personality, real powers stemming from a limitation of sovereignty or transfer of powers from the State to the Community, the Member States have limited their sovereign rights..."

Essentially what the court has argued is that by agreeing to join the European Community, member states have willingly relinquished certain powers that were initially a prerogative of the respective national governments. Nevertheless, a perusal of the judgment shows that the court's language is rather intense, especially where the honorable court discusses the limiting of the sovereign rights of state. It is submitted that although the member states did agree to abide by community laws, however, if by that agreement they were in fact giving up their sovereignty, there ought to be some mention of it in the Treaty. It would have been more appropriate if decisions and agreements of such magnitude had been decided by the member states after deliberation, rather than ECJ deciding upon them.

Another very important case especially in relation to the applicability of EC law in United Kingdom is *Factortame (No 2)*.[9] ECJ created history in this case by maintaining that, "Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must set aside that rule." This stance of ECJ sent shock waves

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[7] See Horspool and Humphreys, *supra* note 2 at chapter 8; Craig and De Burca, *supra* note 3.

[8] Case 6/64 Costa v ENEL (1964)

[9] Case C-213/89 Factortame (No 2) (1990)

across the corridors of British parliament. ECJ was instructing the superior courts to 'set aside' a piece of national legislation if it was an impediment in the implementation of community law. In the United Kingdom (UK), such a proposition is a clear negation of their notion of 'supremacy of parliament.' It had even more drastic consequences for the countries that have a written constitution. ECJ has suggested that the community law, and therefore the decisions of ECJ, were above the constitution. While it is argued that this limitation on sovereignty, and therefore the supra-constitutional nature of EC law was accepted when the member states decided to join the European Community, nevertheless, it is clear that ECJ went out of its way to establish the principle of complete supremacy of EC law over national laws.

The supremacy of European community law over national law is not absolute, however. Let us take the United Kingdom as an example. Being a dualist country, in U.K., international law and national law are two separate legal systems. In order for international law to become part of the national law, the Westminster parliament will have to enact an Act of Parliament. Consequently, in 1972, the parliament passed an act called European Communities Act 1972, and it is through this act that the European community laws and obligations became part of the national law of U.K. It may be remembered that according to the principle of sovereignty of parliament, an Act of parliament can be amended, or for that matter, repealed, by another Act of parliament. If that happens, then there is no argument left to suggest that EC law will still be superior to the law of UK since it will cease to exist in UK. Similarly, if the Parliament, knowing that it is passing an Act contrary to the EC legislation, still goes ahead and passes an Act, then under the principle of parliamentary sovereignty, the courts will be obliged to follow the new Act of parliament. As Lord Denning pointed out in *McCarthys Ltd v Smith*,[10] "If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty or any provision in it - … then I should have

[10] Case 129/79 McCarthys Ltd v Smith (1980)

thought that it would be the duty of our courts to follow the statute of our Parliament..."

France, Germany, Italy and various other countries within European Community have also shown concerns in accepting the absolute supremacy of EC law. The French supreme administrative court *Conseil d'Etat* has been particularly adamant on resisting the absolute sovereignty of EC law, although recent case law points towards a substantial trend in recognizing the sovereignty of EC legislation, albeit with considerable caveats.

2. Direct Effect of Community Law

Recent ECJ case law has removed ambiguity regarding *direct effect* of Directives and Treaty articles. It may be noted that Regulations are directly applicable in all member states as per article 249.

a. Direct effect of Treaty Articles

Article 249 is silent in regards to the *direct effect* of treaty articles. The *direct effect* of treaty articles, thus derives its origin from the case law. The most important case that unequivocally established the principle of *direct effect* is *Van Gend.*[11] In this case, the court concluded that, "... according to the spirit, the general scheme and the wording of the Treaty, article 12 must be interpreted as producing direct effect and creating individual rights which national courts must protect". The court in this judgment has clarified any doubts about the *direct effect* of treaty articles in member states. The judgment also makes it unambiguous that no action on the part of a nation state is needed to make treaty articles effective for the states and their individuals. The court went on to state that, "Independently of the legislation of member states, Community law therefore not only

[11] Algemene Transport-en Expedite Onderneming van Gend en Loos v. Netherlands Belatingadministratie (1963)

imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

The ECJ has further established that community laws stemming from Treaty articles that affect the relationship between individuals are also directly effective. This was held in *Defrenne v Sabena,*[12] a case regarding equal pay for men and women. The court categorically stated that, "... the fact that certain provisions of the Treaty are formally addressed to member states does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties laid down...".

b. Direct effect of Directives

Directives have to be incorporated in national law. Member States have the responsibility of incorporating *directives* into national law but have been granted considerable discretion as to the form and method of incorporation. It was established in *Becker*[13] that it is mandatory for member states to implement the *directives*. Usually the *directive* would give a timeframe during which a member state is expected to implement it in its national law. If a member state fails to do so, it cannot rely on its failure as a defense – as established in *Ratti*.[14] Consequently, while the responsibility and discretion of how to implement a *directive* rests with the member state, however, a state cannot keep postponing the implementation, nor it can rely on its inability to implement a particular *directive* as the defense against a claim.[15]

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[12] Case 43/75 Defrenne v Sabena (1976)

[13] Case 8/81 Becker v. Finanzamt Munster-Innenstadt (1982)

[14] Case 148/78 Pubblico Ministero v. Ratti (1979)

[15] See the analysis of Mr. J. Campbell in "Van Gend, Francovich, and all that... The Efficacy and Direction of the European Court of Justice's Approach to Ensuring Directive Implementation" University of Albertay Dundee. This article provides an interesting insight into the growth of direct effect, looking at its coherency and direction. Mr. Campbell argues that the phenomenon of direct effect is too "indirect" and "uncertain" for consistent

c. Direct Effect of Directives– Horizontal

It is established that *directives* are directly effective vertically since they are addressed to the state, but are not horizontally-effective directly. This means that one individual cannot sue another individual based on a *directive*. For example, in *Rolls-Royce*[16] the Court of Appeal held that although Rolls-Royce was 100% owned by the British Government, it was not dispensing a public service and was therefore not liable under an EC *directive*. It has also been held in *Marshall*[17] that 'a directive may not of itself impose an obligation on an individual...may not be relied upon as such against such a person". Consequently, it is firmly established, that the individuals cannot sue each other for non-conformity with a *directive*. There has been considerable academic argument about whether the directives should have a horizontal direct effect or otherwise.[18] However, ECJ has expanded the definition of a state, and instead of taking the meaning of state in its literal sense, a concept of 'emanation of state' has been established. This has been further expanded in the case of *Foster v. British gas.*[19] This case was particularly important because by the time the case was brought against British gas, the company was no longer under a state authority. Nevertheless, the Court ruled that as long as the authority is dispensing 'public service', it may be regarded as an emanation of state.

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development. Mr. Campbell then goes on to analyze the phenomena of damages for non-implementation of directives.

[16] Doughty v Rolls-Royce plc (1992)

[17] Case 152/84 Marshall v Southampton Area Health Authority (1986)

[18] See "Directives: Direct Effect, Indirect Effect, and the Construction of National Legislation", by Paul P. Craig, E.L. Rev. 1997, 22(6), 519-538. Here, Prof. Craig has conducted an excellent analysis on why directives should have a horizontal direct effect. Specifically, Mr. Craig has examined the textual argument, Publication and rule of law argument, and, the legal certainty argument.

[19] Case C- 188/89 Foster v. British gas plc (1990)

3. Indirect Effect

The concept of *indirect effect* was devised by ECJ as a measure to facilitate the implementation of community laws that would otherwise be impossible to implement under the umbrella of *direct effect*. The principle of *indirect effect* contemplates that it is mandatory upon the national courts to interpret the national law in conformity with community law. Whether the national legislation is passed before or after the community law has become effective, is of no significance. This is an important rule created by ECJ and has significant repercussions for national courts, including giving them substantially more power of setting aside the national legislation and using their whims in interpreting the national laws, as long as the general course of direction is in line with the community law.[20]

This principle was established by the ECJ in *Von Colson.*[21] The Court held that member states had a duty to "... interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in Article 189". The ECJ further clarified this position in *Marleasing,*[22] where the court emphasized the fact that whether the national legislation was put into force before or after the *directive* did not matter – the national courts must still read the wording and purpose of legislation and construe it in line with the directive.

4. Right of Individuals to Sue Member States

ECJ has also used article 234 for developing a concept of the liability of member states towards individuals. The concept of state liability is rather novice to common law jurisdictions. Until 1990, ECJ

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[20] See Paul P. Craig, *Directives: Direct Effect, Indirect Effect, and the Construction of National Legislation* by E.L. REV. 1997, Vol. 22:6 at pp. 519-538.

[21] Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen (1984)

[22] Case C-106/89 Marleasing SA v La Comercial International de Alimentacion SA (1990)

had left the determination of liability for matters of community law to the member states. However, the decision in *Francovich and Bonifaci*[23] proved to be the first concrete step in establishing an individual's right to recover damages from the member state for its breach of community law.[24] The court has maintained that for any breach of community rights for which a member state can be held responsible, the state must be liable for damages, as long as a causal link existed between the lack of appropriate action on part of member state and the harm or damage caused to the claimant. In order to recover damages, all an individual needs to prove is the causation and the fact that the right so argued has originated from the community law. In later cases, ECJ further clarified the issue adding that in order for a state to be liable for damages, the issue must be a serious one and the state must have particularly disregarded the community law. A number of other factors were clearly established to make sure that the breach occurred only if the state had knowingly acted to undermine an issue of community law.[25] Once a breach is established, it is incumbent upon the national courts to determine an appropriate level of damages considering all the circumstances and related remedies in national law. Essentially, therefore, ECJ has established the principle of an individual's ability to sue the state for damages, but has left it up to member states on how to determine the extent of damages.

An interesting situation in matters of state liability is the one relating to the highest court in a country and its decisions, that is, whether an erroneous decision by the supreme most court of a country creates liability on the member state for damages to be paid to the individual. This issue was addressed in *Kobler*[26] where Mr. Kobler asked for a salary raise in response of his service as a professor, but was refused pay increase by the respective national court. ECJ ruled that the member state will be liable for damages even if the liability

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[23] Case C-6 9/90 Francovich and Bonifaci v Italy (1991)

[24] See Josephine Steiner, *From Direct Effect to Francovich: Shifting Means of Enforcement of Community Law*, E.L. REV. 1993, Vol. 18:1 at pp. 3-22.

[25] Ibid.

[26] Case C – 244/01 Kobler v Austria (2003)

arose from an erroneous decision of the supreme most court of a country. The case of *Kobler* thus established the liability of member states for an erroneous decision of its judiciary. However, it is extremely hard to prove that a breach did indeed take place on the part of a judicial authority, and strict criterion has been put in place for determining such breaches.

Moreover, it is particularly difficult to implement the concept of state liability in the United Kingdom since the concept of liability of the state is non-existent in the domestic law. Although there have been suggestions by academics for creation of another type of tort dealing specifically with the breach of community law by the state, no progress has yet been made. Moreover, there is no case law authority which even remotely predicts the response of the domestic courts in matters related to liability of the state towards individuals in relation to Community law.

Conclusion

The European Court of Justice has played a crucial role in establishing some of the key legal principles of European Community law. Many of the concepts established by ECJ are not clearly laid out in the treaties, nor were they explicitly agreed by the member states. The ECJ has therefore played a pivotal role in establishing the principles of supremacy of community law, *direct effect*, *indirect effect*, and the liability of member states towards individuals. It is clear from the decisions of the ECJ that the court views itself as a body that continuously strengthens the European Community, its institutions, and most importantly, its jurisprudence. Nevertheless, the court has, on multiple instances, transgressed its assigned or envisaged task of 'interpreting' the community law. In order to establish the above-mentioned principles, the ECJ has used article 234, interpreting it to give the court very expansive and unrestrained powers. It has become a policy of the ECJ to establish new legal principles, which were practically non-existent and were never agreed

upon by the founders of the European Union. These principles would have been much more effective and widely accepted had they been proposed and thereafter adopted by the elected representatives of the member states after due deliberations. It therefore appears that this continuous and uninhabited judicial activism of ECJ has resulted in the evolution of the court into a law making institution rather than a law interpreting body.[27]

[27] For contrary view see Tridimas, *supra* note 1.