

The European Court of Justice as a tool of European integration

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Abstract

‘European integration’ is the unification of European states into a continent with shared systems, institutions, and values. This article argues that there are four main ways in which the European Court of Justice (‘ECJ’ or ‘the Court’) facilitates integration. First, the ECJ has created a series of case law that unites the treaties of the European Union (‘EU’) into a single, ‘constitutionalised’ body of law that resembles a national constitution. Second, the human rights agenda of the ECJ aligns states to a single, set ideology the Court espouses. Third, the Court has enhanced EU power by giving the European Parliament power to be involved in ECJ litigation, and by articulating the principle that European law must be considered with respect to integration. Finally, the Court’s preliminary ruling mechanism provides that the EU has supremacy over all legal matters that involve EU principles, effectively curtailing opposition to the expansion of EU law. In these ways, the ECJ is a significant contributor to European integration.

I Introduction

The European Court of Justice (‘ECJ’ or ‘the Court’) is considered a ‘pro-integrative institution’ due to its role in actively facilitating European integration.¹ ‘European integration’ refers to the unification of European states into a united continent with shared systems, institutions, and values.² This has historically been achieved by the creation and growth of the European Union (EU). Each of the EU’s institutions, including the ECJ, play a unique role in facilitating integration. European integration can be categorised twofold. First, ‘negative integration’ involves the removal of barriers between EU member states, and is instigated by policies such as the sharing of goods, the removal of tariffs, and the opening of borders. Second, ‘positive integration’ is the increase in power of the EU through the creation and fortification of EU institutions including the European Parliament and the ECJ.³ This article argues that the ECJ has facilitated both positive and negative integration, in four main ways.

First, the ECJ produces judgments that constitutionalise the EU’s system of treaties.⁴ ‘Constitutionalisation’ is the creation of a legal structure in the EU resembling a constitution rather than individual pieces of law.⁵ Constitutionalisation institutionalises the hierarchy of EU law above member states’ domestic law. Second, the human rights agenda of the ECJ has contributed to the cultural unity of member states, by aligning states to the set ideology the Court espouses. Third, the ECJ has interpreted treaties to give the European Parliament power to be involved in the Court’s litigation, and has articulated a principle that EU law must

¹ Domitilla Sartorio, ‘The European Court of Justice: A Catalyst for European Integration’ (2005) 1(4) *Rivista Internazionale di Studi Europei* 18, 19.

² *A Dictionary of Contemporary World History* (3rd ed, 2008) ‘European integration’.

³ Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford Scholarship Online, 2005) 1.

⁴ Arjen Boin and Susanne Schmidt, ‘The European Court of Justice: Guardian of European Integration’ in Arjen Boin, Lauren Fahy and Paul Hart (eds) *Guardians of Public Value* (Palgrave Macmillan, 2021) 135, 145.

⁵ Anne Peters, ‘The Constitutionalisation of the European Union—Without the Constitutional Treaty’ in Sonja Puntischer Riekmann and Wolfgang Wessels (eds), *The Making of a European Constitution* (Verlag fuer Sozialwissenschaften, 2006) 35, 35.

be must considered with respect to integration. The effect of these interpretations is to increase the power and role of the EU, thereby contributing to positive integration. Fourth, the Court's preliminary ruling procedure curtails any member state opposition to EU law and further proliferates EU law into the domestic systems of member states. The preliminary ruling procedure is the requirement that the ECJ hears all matters pertaining to EU law, even if they originate in a member state's domestic jurisdiction. For these four reasons, the ECJ is a significant contributor to European integration.

II History and role of the ECJ

The ECJ was established in 1952 to interpret and control EU legislation while maintaining and respecting state sovereignty—that is, the right of states to have power over their own affairs.⁶ However, member states have allowed for the Court to adapt and evolve into an institution that goes beyond this initial mandate. Today, the Court plays a role in the cultural, legal, and political unification of the EU member states.⁷ This evolution has been accepted by member states due in part to the Court's status as a non-political, neutral institution that should not inherently favour any one state.⁸ As a result, despite the Court's initial mandate, its new function has included making judgments with broader implications on EU member states and the status of integration as a whole.⁹ This article will illustrate that the ECJ has been an important tool in integrating EU member states, both through positive and negative integration, in four ways.

III Constitutionalisation as a tool of integration

First, the Court's constitutionalisation of European treaties has significantly contributed to the integration of Europe. The Court has achieved this constitutionalisation through its articulation of two legal principles—*direct effect* and *supremacy*. First, the principle of direct effect provides that some provisions of EU law will confer rights on individuals within the EU.¹⁰ Domestic courts are then obliged to recognise and enforce these rights. Rather than creating duties on states, this empowers individuals in Europe with positive rights and recognises that laws of the EU directly apply to EU citizens.¹¹ In doing so, the principle of direct effect constitutionalises the treaty system by giving individuals a 'direct stake in promulgation and implementation of community law'. As such, it ensures that entities other than just member states play a role in the legal system of Europe.¹² In a case pertaining to the principle of direct effect—*Defrenne v Sabena (No 2)*—the Court made evident the role of individuals in binding member states to their obligations.¹³ By holding that Article 119 of the *Treaty of the European Community* was enforceable between individuals and the government, the Court recognised the role of the individual in binding member states to their obligations.¹⁴ Second, and in contrast to direct effect, the principle of supremacy purports that EU provisions and directives are superior to domestic law in cases of a conflict.¹⁵ This clarifies a hierarchical

⁶ *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) art 19 sub 1 ('FEU').

⁷ Yvonne Gierczyk, 'The Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws' (2006) 12(153) *ILSA Journal of International and Comparative Law* 153, 156.

⁸ Sartorio (n 1) 22.

⁹ *Ibid.*

¹⁰ *Van Gend en Loos v Nederlandse Administratie der Belastingen* (C-26/62) [1963] ECR 1.

¹¹ Geoffrey Garrett et al, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52(1) *International Organization* 149, 175.

¹² Boin and Schmidt (n 4) 141.

¹³ (C-43/75) [1976] ECR 455, 477.

¹⁴ *Ibid.*

¹⁵ *Costa v ENEL* (C-6/64) [1965] ECR 585, 594.

structure, with EU law ranking above the law of individual states. This is therefore how the principle of supremacy constitutionalises the treaty system.

This constitutionalisation has contributed to European integration, by transforming the European body of law from individual treaties to a system of law with the character of a ‘constitutional charter’.¹⁶ The treaties’ character as a constitution moves it from being a series of legally binding documents to a system of crystallised rights and responsibilities that apply to all entities within Europe.¹⁷ This is an example of negative integration, as a constitutionalised legal system removes the powers of interpretation away from states. This is because it articulates their clear obligations to the union as member states. It is also an example of positive integration, as the constitutionalised laws have supremacy over domestic laws. The hierarchy of laws exists such that member states cannot undermine EU laws they disagree with.¹⁸ In this way, constitutionalisation facilitates positive and negative integration.

Constitutionalisation through direct effect and supremacy requires member states’ judiciaries to accept and respect the constitutional nature of the EU treaty system. This is achieved through the ECJ’s preliminary ruling procedure, which plays a fundamental role in ensuring there is sufficient cooperation between the ECJ and national courts.¹⁹ Article 267 of the *Treaty on the Functioning of the European Union* establishes that it is within the Court’s jurisdiction to make preliminary rulings on issues of EU law, when requested from a member state’s domestic court or tribunal.²⁰ These decisions are binding on member states. This binding nature ensures national courts and tribunals respect and enforce decisions of the ECJ, and as a result, the preliminary ruling procedure enforces the hierarchy of law associated with constitutionalisation.²¹

IV Protecting the fundamental rights of citizens at the EU level

In protecting the fundamental rights of citizens in the EU, the ECJ creates cultural and moral unity across member states, which contributes to positive integration. Upholding certain human rights has been integral to the foundations of the EU. As a result, this ideological framework is reflected in the judgments of the ECJ.²² A pro-human rights ideology is ensured by the concerted socialisation of ECJ judges to this ideology.²³ For example, in *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, the Court stated that fundamental human rights are an integral part of the general principles of the law that the ECJ is mandated and required to uphold.²⁴

In applying a human rights framework to its decisions, the ECJ curates and standardises a specific set of morality in the EU. Human rights discourse centres on the ideas of individualism, liberty, and personal autonomy, which is the ideology reflected on ECJ decisions. For example, these three values are

¹⁶ Joseph Weiler, ‘The Transformation of Europe’ (1991) 100(8) *Yale Law Journal* 2403, 2470.

¹⁷ Michael Blauberger and Susanne K Schmidt, ‘The European Court of Justice and its Political Impact’ (2017) 40(4) *West European Politic* 907, 918.

¹⁸ Rafal Manko, ‘The EU as a Community of Law: Overview of the Role of Law in the Union’ (Briefing, European Parliamentary Research service, March 2017) 4.

¹⁹ Sartorio (n 1) 22.

²⁰ FEU (n 6) art 267.

²¹ Sartorio (n 1) 22.

²² Samantha Velluti, ‘The Promotion and Integration of Human Rights in EU External Trade Relations’ (2016) 32(83) *Utrecht Journal of International and European Law* 41, 68.

²³ Boin and Schmidt (n 4) 148.

²⁴ (C-4/73) [1974] ECR 491.

propounded in all decisions pertaining to the free movement of persons. An illustration of this is in *Metock v Minister for Justice, Equality and Law Reform*. In recognising the right of migrants to move from one member state to another with their European spouse regardless of their nationality, the Court's decision had a flavour of protecting individual's decision-making and personal autonomy.²⁵ This demonstrates how the ECJ applies a freedom and autonomy-based ideology to Europe.

As the Court is tasked with ensuring equal application of its judgments to all member states, the Court is therefore projecting this ideology onto all member states.²⁶ This integrates states culturally and morally, as it ensures they are united by their obligation to the Court's judgments and, inherently, the ideology accompanying it. Arjen Boin and Susanne Schmidt articulate the Court's actions as having fostered 'a shared interpretation of mission and operations among a very diverse group of people'.²⁷ This demonstrates how the Court's protection of human rights has perpetuated an ideological framework that is being applied to all states and subsequently creating a united morality.

Ideological unity is a tool for integration. This may not be a clear example of negative or positive integration. However, this consistent pro-human rights agenda is, in fact, a positive integration tool through creating a European unity—European peoples converging on a standard of behaviour.²⁸ Unity in Europe—including cultural or moral unity—is a tool for positive integration. This is because when European peoples feel interconnected with each other, they are more likely to have a positive attitude towards the EU.²⁹ Subsequently, they will elect leaders or vote in ways that empower the EU. Hence, by providing for a uniform human rights model across Europe, the ECJ creates a universal standard of morality which contributes to the cultural integration of Europe.³⁰

V Interpreting treaties in an integration-friendly manner

The Court has facilitated integration by interpreting the *Treaty on the Functioning of the European Union (FEU)* in a way that increases the powers of the Parliament. The *FEU* already provided for two institutions, the European Commission and European Council, to be counterparties before the Court.³¹ However, through gradual ECJ jurisprudence—most notably in the case of *Parti écologiste 'Les Verts' v European Parliament*—the Court also interpreted the provision in the *FEU*, and the meaning of 'institution', to include the European Parliament as an institution that can be a counterparty to the Court.³² This is a clear example of positive integration, as it gives the European Parliament greater powers to be involved in the EU's legal process. This is something that would otherwise have been outside the scope of Parliament's power, based on its originally mandated powers.³³

Second, integration has been furthered by the ECJ's principle that the treaty system must be interpreted with respect to the state of integration. Rather than the rigid words of treaties alone, the Court interprets

²⁵ (C-127/08) [2008] ECR 6241.

²⁶ FEU (n 6) art 263.

²⁷ Boin and Schmidt (n 4) 148.

²⁸ *Ibid* 148.

²⁹ Arun Pokhrel, 'Eurocentrism' in Deen K Chatterjee (ed) *Encyclopedia of Global Justice* (Springer, 2011), 321.

³⁰ Kobenhavns Universitet, 'Unification Through Law: The Court of Justice of the European Union as a Cultural-Moral Agent', *Cordis* (Website, 26 July 2019) [1] <<https://cordis.europa.eu/project/id/846070>>.

³¹ FEU (n 4) art 218(11).

³² (C-294/83) [1986] ECR 1339.

³³ European Parliament, 'The Court of Justice of the European Union', *Fact Sheets on the European Union* (Webpage, December 2020) [15] <<https://www.europarl.europa.eu/factsheets/en/sheet/26/the-court-of-justice-of-the-european-union>>.

treaties to promote integration.³⁴ This is a clear example of the Court's role in European integration, as it is creating pro-integrative law and contributing to the development of future pro-integrative law through its precedent. In practice, ECJ decisions have precedential value even though as a matter of law, the doctrine of *stare decisis* (judgments being binding on other judgments) does not exist in EU law. Instead, the body of ECJ case law is a guide for judges to ensure consistency in judgments.³⁵ Courts are largely obedient to precedent as a matter of fact, and as such, previous ECJ decisions contribute substantially to the development of EU law.³⁶ In this way, the ECJ is contributing to a pro-integrative legal system.

VI Preliminary ruling procedure

The ECJ's preliminary ruling procedure has also been a tool for both negative and positive integration. Foremost, the preliminary ruling procedure makes a substantial contribution to negative integration, as it effectively reduces state sovereignty. The decisions the ECJ makes upon referral from a domestic court are binding on all other member states. This means that the preliminary ruling system removes any possible resistance from states who would rather not comply with EU law. This curtails some state sovereignty, as member states do not have free power to ignore EU law when it does not suit them: they are bound by the ECJ's decision.³⁷ In this way, the preliminary ruling procedure is a tool for negative integration.

Moreover, the preliminary ruling mechanism is a tool of positive integration because it increases EU law expansion in domestic law systems. As acknowledged in the case of *Schwarze v Einfuhr-Und Vorratsstelle Fuer Getreife und Futtermittel*, the ECJ's preliminary ruling mechanism establishes certain judicial cooperation between national courts or tribunals and the ECJ.³⁸ In situations where the court is not a recognised judicial body in the state's established legal system, this relationship between the ECJ and the tribunal is a significant legitimising factor of the tribunal's position in national legal hierarchies.³⁹ In some circumstances, member state courts and tribunals can determine whether the decision is a matter of EU law and subsequently whether it should be referred to the ECJ. These tribunals have an incentive to refer to ECJ wherever possible, as interacting with the ECJ strengthens their legitimacy.⁴⁰ Subsequently, there is an increased number of cases before the ECJ, resulting in a greater number of decisions being imposed on member states.⁴¹ Member states are then faced with implementing the large number of ECJ's decisions. This is then necessarily how the preliminary ruling mechanism has resulted in the expansion of EU law in the member states' domestic law. The expansion of EU law is reflective of the expansion of EU power in member states, and it is in this way that the preliminary ruling procedure is a tool of positive integration.

VII European integration occurring separate to the ECJ

An important caveat of this argument is that European integration is not solely dependent on the ECJ. Rosato notes that European integration has been a long process, impacted by geographic, ideological, and

³⁴ Ibid.

³⁵ Marc Jacob, 'Precedents and Case-Based Reasoning in the European Court of Justice' (2014) 12(3) *International Journal of Constitutional Law* 832, 834.

³⁶ Ibid 832, 834.

³⁷ Sartorio (n 1) 23.

³⁸ (C-16/65) [1965] ECR 877.

³⁹ Daniel Kelemen and Susanne Schmidt, 'Introduction—The European Court of Justice and Legal Integration: Perpetual Momentum?' (2012) 19(1) *Journal of European Public Policy* 1, 6.

⁴⁰ Karen Alter, *Establishing the Supremacy of European Law* (Oxford Scholarship Online, 2003) <<https://academic.oup.com/book/32940>>

⁴¹ Sartorio (n 1) 20.

cultural factors beyond the legal and political systems in place by the EU.⁴² Trends of globalisation in the late twentieth century inherently facilitated integration. Hobolt and Vries argue that in the twenty-first century, popular sentiment for or against the EU plays a significant role in the progression of European integration.⁴³ Of particular note in a discussion on European integration is the European Single Market, an internal economic system guaranteeing free trade and movement of people. De Waele argues that the effect of the Single Market has been to generate an economic unity that means European states are inherently interrelated and interdependent.⁴⁴ The EU, acting as a proponent for the Single Market, necessarily grows in power as Europeans look for a mechanism for securing their common interest in the Single Market. Nonetheless, this article has demonstrated that there are four significant ways in which the ECJ has played an important, though not exclusive, role in European integration.

VIII Conclusion

The ECJ has played a significant role in reducing state sovereignty and increasing the power of EU institutions. Thus, the ECJ has been a substantial—but not sole—force in integrating Europe. This article contributed to the literature on EU integration by demonstrating that there are four important ways in which the ECJ integrates Europe. These four ways are by making decisions that continue to constitutionalise the treaty system; protecting fundamental rights of citizens at the union level; interpreting the constitutive treaties of the EU in an integrative-friendly manner; and reinforcing a hierarchy of EU law above domestic law through the ECJ’s preliminary ruling mechanism.

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⁴² Sebastian Rosato, *Europe United: Power Politics and the Making of the European Community* (Ithaca, NY: Cornell University Press, 2011).

⁴³ Sarah Hobolt and Catherine de Vries, ‘Public Support for European Integration’ (2016) 19 *Annual Review of Political Science* 413, 414.

⁴⁴ Henri de Waele, ‘The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment’ (2010) 6(1) *Hanse Law Review* 3, 7.

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