The European Court of Justice: An Agent of Member States?

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The European Union (EU) is accepted as one of the most challenging political experiments in world history by political scientists, legal, and international relations scholars. This is because of the interesting structure of the EU, in which some of the most powerful European states voluntarily delegated their governing powers to supranational institutions. Hence, it is not generally regarded as a traditional international organization within the traditional framework of international law. The legal principles and mechanisms which were formed by the founding Treaties and community institutions played a significant role during the formation of this new political structure. The legal structure, which has been established over a long period, is still in the development phase, and this legal order is now ready to adopt its formal constitution. The European Court of Justice (ECJ) has played an important role during the constitutionalization of the EU, hence the efforts of the ECJ require some attention (Guner, 2005).

The ECJ, with its special structure and self appointed powers, is able to be in close cooperation with citizens and lower courts in member states. Therefore, it created a constitutional regime which is basically different from the traditional structure of international law. The case law of the ECJ created the development of constitutional principles in EU law which were not discussed in the original treaties. The ECJ was able to make Community law both “directly effective” and “superior” to the constitutional orders of the member states by close cooperation with ordinary citizens and the lower courts in member states. As a result of this, member states now turn a blind eye to all national legislation which is in contradiction with Community law, and now all citizens of the EU are able to stake out a claim on the basis of the treaties. They have become the most active enforcers of Community law (Guner, 2005).

There are different theoretical perspectives about the role of the ECJ in the integration process, and they are examined in the first part of the essay to elicit a general framework regarding the academic debate about this issue. There are two main sections in the academic debate about the role of the ECJ in the integration process. “On the one hand there was the view which saw these supranational institutions (The Commission, the European Parliament and the ECJ) as the `engines of the integration’ independently driving the European integration; on the other hand there was the view which argued that the institutions are the `obedient servants’ effectively controlled by national government” (Tallberg, 2003).On the one hand neofunctionalism sees the ECJ as “engines of integration”; on the other hand neorealism views the ECJ as an “obedient servant” of member states. After that, the relations between the ECJ and members states are analyzed on the basis of the evolution of relations between the ECJ and member states, although there were almost no changes in the stature and responsibility of both parties. To have a more concrete assessment, the role of the ECJ is mentioned, and finally, different perspectives concerning the relations between the ECJ and member states are discussed.

Neofunctionalism:

Neofunctionalism explains “how and why nation states cease to be wholly sovereign, how and why they voluntarily mingle, merge and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts between themselves” (Burley and Mattli, 1993; Haas 1958). In other words neofunctionalism defines a process ‘’whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new and larger center, whose institutions possess

or demand jurisdiction over the pre-existing national states" (Burley and Mattli, 1993; Haas 1958).

Anne Marie Burley and Walter Mattli argue that the legal integration of the community corresponds remarkably close to the original neofunctionalist model developed by Ernst Haas in the late 1950s. The legal integration process has two principal dimensions. The first dimension is formal penetration, in which supranational legal acts grow from treaty law to secondary Community law, and become superior to domestic laws in member states. So, individuals may call upon Community law directly in domestic courts. The second dimension is substantive penetration, in which community legal regulations expand from a limited economic domain to different areas such as occupational health, safety, social welfare, education, and even political participation rights. Burley and Mattli argue that the enforcers of this process are both supranational and sub-national actors who go after their own self interests in an apolitical environment, just as neofunctionalism presumes. "The distinctive features of this process include a widening of the ambit of successive legal decisions according to a functional logic, a gradual shift in the expectations of both government institutions and private actors participating in the legal system, and the strategic subordination of immediate individual interests of member states to postulated collective interests over the long term" (Burley and Mattli, 1993).

Neofunctionalist scholars assume that the ECJ has autonomy which stems from the separation of law and politics. Also, the ECJ has inherent legitimacy as a strong legal actor, so it can use this power to prevail against the stakes of member states. According to Karen Alter, such analysis proves that virtually any international or national court can decide against the member states' interests because it is a legal body (Alter, 1998).

Neorealism:

According to neorealist scholars the ECJ does not have the autonomy to decide against the benefits of member states because member states have adequate control over the court. So, the ECJ cannot decide against the interests of powerful member states. Neorealists claim that the "EU is primarily creature of its component states" (Alter, 1998). In other words the ECJ, as an international court, is particularly subject to national governments.

The recent debate between the neofunctionalists and neorealists is over what happens if supranational institutions create roles for themselves which go beyond the intentions of national government. Neorealists in this debate assume that supranational institutions do not have autonomy and they are not in charge of exerting influence on the process of European integration. More precisely, supranational institutions are quiescent instruments whose actions are dependent on intergovernmental bargaining (Alter, 1996).The role of the ECJ is assumed by the neorealists to be as a loyal servant. The ECJ basically performs the treaty provisions and rules which are created by the member states of the EU. Burley argues that according to neorealists, "judicial interpretation is nothing more than a translation of the rules into operational language devoid of political content and consequences" (Burley and Mattli, 1998). Burley also argues that member states generally turn a blind eye to the decisions of the ECJ which do not suit the preferences of member states. Hence, the ECJ is careful about not making decisions which are not in the preferences of powerful member states like France and Germany.

ECJ- Member State Relations

According to Alter, both neofunctionalist and neorealist approaches include substantial amounts of truth. The legal structure of ECJ decisions provide the ECJ some protection against political attacks, however member states have important devices that can affect the ECJ's decisions. None of the theories can explain why the court, which has historically been politically incapable and cannot digress far from the preferences of member states' governments, has important political authority and can take decisions against the member states' governments. The nature of the ECJ has not transformed, nor have the devices that member states have that can affect judicial politics (Alter, 1998).

When they created the ECJ, the intentions of member states were to create a court which did not underestimate national sovereignty or national interest. However, the ECJ transformed the EU legal system and it fundamentally blocked member state control over the ECJ. Legal scholars explain the transformation of the ECJ as "how ECJ changed the preliminary ruling system which allows individuals to challenge EC law in national courts into a

mechanism to allow individuals to challenge national law in national courts" (Alter, 1998). Alter raises some questions which are significant. First, how is the ECJ able to expand its authority beyond the control of member states? Second, once the ECJ transformed the EU legal system and expanded its authority beyond the intentions of member states' governments, why did the member states not react to the situation and reverse it (Alter, 1998)? Alter provides three arguments to answer these questions.

First, he argues that judges and politicians have significantly different time horizons which cause them to have different interests in the consequences of individual cases. "Because of these different time horizons, the ECJ was able to be doctrinally activist, building legal doctrine based on unconventional legal interpretations and expanding its authority, without provoking a political response" (Alter, 1998). The politicians, according to Alter, have shorter time horizons because of elections. In order to stay in office, politicians give importance to short-term goals and they basically ignore the long-term implications of their actions, or more precisely in this case inaction.

Second, he argues that national governments became limited as a result of the national judicial support for the ECJ, and now national governments have to explain their response in a way that could seduce a legal audience.

Third, he argues that the sort of policy responses available to national governments are basically transformed as a result of the national court enforcement of ECJ jurisprudence at the EU level. Traditionally, member states trust their veto power to block any EU policy that is against their strongly held stakes and convictions. When member states do not agree with ECJ decisions they want to reject them, but have found it very difficult to reverse EU legislation or to assault the jurisdiction or authority of the ECJ. Because, to reverse EU legislation or to limit the authority of the ECJ, there must be a consensus among member states or member states need to have a credible threat which can make the Court more passive. "Instead the institutional rules combined with lack of political consensus gave the ECJ significant room to maneuver" (Alter, 1998).

Roles of the ECJ

Member states established the ECJ to fulfill three limited roles.

1- "Ensuring that the Commission and the Council of Ministers did not exceed their authority."

2- "Filling in vague aspects of EC laws through dispute resolution."

3- "Deciding on charges of non-compliance raised by the Commission or by member states" (Alter, 1998).

Alter argues that none of these rules aim to raise challenges by individuals about national policy in national courts or to strengthen EC law against national governments. Actually, member states intended a limited role for national courts in the EU legal system. The ECJ was created as a part of the European Coal and Steel Community. The purpose of its establishment was to guard member states and firms by guaranteeing that supranational institutions like the Commission and Council do not exceed their authority. The primary responsibility of the ECJ is to control the Commission and Council whether they exceed their authority or not. When the EU was established, the mandate of the ECJ was transformed, but the primary function has remained the same. "Individuals can bring challenges to Commission and Council acts directly to the ECJ and preliminary ruling system allowed individuals to raise challenges to EU policy in national courts" (Alter, 1998).

Dispute resolution is the second role of the Court. The Court takes this responsibility when EC laws are ambiguous. "The ECJ may be seized in the event of a disagreement between member states or firms on the one hand, and the Commission or national governments on the other, about how the treaty or other provisions of EC law should be interpreted. The ECJ resolves the disagreement by interpreting the disputed EC legal clause and thus by filling in the contract through its legal decision" (Alter, 1998). Individuals can challenge the EC law interpretations of the Commission or national administrations in national courts by the process of the preliminary ruling system. Third, the

ECJ was not created to control breaches of EU agreements; it is the responsibility of the Commission, however the ECJ became responsible for playing a co-role in the enforcement process by the Rome Treaty. The primary monitor of the EU is still the Commission, but the ECJ acts as an intermediary over Commission charges and member states charges regarding reputed treaty breaches. Actually, the ECJ does not have necessary authority to check the compliance of national law with EC law in preliminary ruling cases. Member states have extended the resources of the ECJ in order to keep supranational institutions in check, in order to complete contracts and for mediation. However, none of these roles mention that EC law is superior to national law, so it does not imply that individuals can control member state compliance with EC law by raising cases in national courts or national courts having the power to enforce EC law instead of national law. "These aspects of the Court's jurisdiction were not part of the Treaty of Rome; rather, they were created by the ECJ, which transformed the preliminary ruling system from a mechanism to allow individuals to question national law" (Alter, 1998).

The doctrine of direct effect mentions that EC law has developed legally enforceable rights for individuals; it allows individuals to invoke EC law directly in national courts to challenge national laws or policies. National courts have the responsibility to check that EC law is applied over conflicting national laws as a result of the ECJ's doctrine of EC law supremacy. These doctrines are not part of the main design of the EU legal system. Because of the transformed preliminary ruling system, the ability of member states to control the ECJ is reduced significantly. Now, individuals can assert claims in cases which include prerogative domain of national policies, such as "the availability of educational grants to non-nationals" (Alter, 1998). As a result, alter claims that EC law puts limits on member states that they do not agree with. The changed preliminary ruling system let ECJ decisions become enforceable and it prevents member states from turning a blind eye to unwanted ECJ decisions. Alter says that "transforming the preliminary ruling system was not necessary for the ECJ to serve the member states' limited functional interests, and it brought a loss of national sovereignty that the Council would not have agreed to then and still would not agree today." Alter raises the question; "how could the ECJ construct such a fundamental transformation of the EU legal system against the will of member states?" In other words "how could the agent (ECJ) escape the principal's (member states) control?"

As it is mentioned earlier, the ECJ was able to construct a fundamental transformation of the EU legal system because of the different time horizons of politicians and judges, and also because of the lack of credible threat. Also national courts' support of ECJ jurisprudence against national governments takes away the ability of politicians to ignore unwanted ECJ decisions. So, national governments have to respond to issues that are raised by the ECJ in a way which is both legally acceptable to the ECJ and national courts (Alter, 1998).

Different Perspectives on the Relations between the ECJ and Member States

Some scholars refer to delegation theory to explain the ECJ's salience. Garret and Weingast claim that "the ECJ is powerful because it helps the member states overcome dilemmas of commitment and collective action" (Garrett 1992, Garrett and Weingast 1993). Other scholars like Pollack and Tallberg highlight "the complex details of the Court's overall grant of authority, which varies across different dimensions of government" (Pollack, 2003; Tallberg, 2003). Alec Stone Sweet says in his article, "The ECJ and the Judicialization of EU Governance," that "generally the more sophisticated accounts emphasize certain crucial particularities of the Court as Agent, and of the states as Principals" (Sweet, 2010). In this view, the principals have nominated the agent to help them govern themselves in case of drastic commitment problems regarding market and political integration. (Majone, 2005; Pollack, 2003). Sweet claims that "principals are not unified entity; rather they are represented by a multiple of governments who will typically exhibit divergent interests on any important policy issue on which the Court takes a position" (Sweet, 2010).

Sweet questions the feasibility of the Principal-Agent theory of judicial politics in the EU, more specifically with the ECJ which has authority to check member state compliance with EU law and to charge them in case of non-compliance. Besides Sweet's attempt, Majone (2005) proposes a model of "Trusteeship" instead of "Agency" framework for cases in which member states delegate their relative powers to supranational institutions, in this case to the ECJ. Sweet found the concept of Trusteeship applicable to the ECJ if three criteria are met. These are:

a- "The court posses the authority to review the legality of, and to annul, acts taken by the EU's organs of governance ad by the member states in domains governed by EU law."

b- "The court's jurisdiction, with regard to the member states, is compulsory."

c- "It is difficult, or impossible as a practical matter for the member states –as Principals- to punish the Court, by restricting its jurisdiction or reversing its rulings" (Sweet, 2010).

As a result of these criteria, the ECJ became Trustee of the values and principals in treaties. Some scholars like Pollack (2003) and Tallberg (2003) have not adopted the concept of Trusteeship; instead they refer to the ECJ as a Super-Agent. Despite everything, there is a consensus about the qualitative difference between the various definitions of an agent.

a- "An agent designed to govern third parties in the name of the Principals."

b- "An agent designed to govern both third parties and the Principals themselves."

c- "An agent whose rule making can easily be reversed by the Principals."

d- "An agent whose decisions are well insulated from reversal" (Sweet, 2010).

Sweet supports that "a Trusteeship situation combines (b) and (d), and can thus be characterized as one of structural judicial supremacy" (Sweet, 2010).

Basically, the relationship between the ECJ and member states cannot be defined only under the framework of Principal-Agent theory. Rather, the concept of Trusteeship is a much more convincing way to define the relations between the ECJ and member states. Hence, I agree with the Trusteeship definition from Sweet which implies that the ECJ is "an agent designed to govern both third parties and the principals themselves and its decisions are well insulated from reversal" (Sweet, 2010).

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