# THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE INTEGRATION PROCESS OF THE EUROPEAN UNION

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## ABSTRACT

### THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE INTEGRATION PROCESS OF THE EUROPEAN UNION

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This thesis analyses the role of the European Court of Justice in the process of European integration. The role of the Court of Justice as an important supranational institution is discussed by taking into account various decisions of the Court that established the fundamental principles of the European Union Law. The thesis also analyses the contribution of the Court from the perspective of its interactions with the other actors within the EU. In this framework, the thesis will seek to answer such questions as: What are the contributions of the European Court in the development of the EU legal system? How did the Court play such an important role in the process of European integration? Finally, how did the interactions of the European Court with the other actors affect the process of European integration?



Keywords: European Court of Justice, European Union, European Integration.

# ÖZ

## AVRUPA ADALET DİVANININ AVRUPA BÜTÜNLEŞMESİNDEKİ ROLÜ

Güner, Selin Ece

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Bu çalışma Avrupa Adalet Divanı'nın Avrupa bütünleşme sürecindeki rolünü incelemiştir. Çalışmada Adalet Divanı'nın Avrupa Birliği hukuk sisteminin dayanağını oluşturan kararlarından yola çıkılarak, Avrupa Birliği entegrasyon sürecinde önemli bir ulusüstü örgüt rolü oynadığı tartışılmıştır. Çalışmada ayrıca, Adalet Divanının entegrasyona yapmış olduğu katkı, onun Avrupa Birliği içindeki diğer aktörlerle etkileşimi çerçevesinde ele alınmıştır. Bu bağlamda şu sorulara yanıt aranmıştır: Adalet Divanının Avrupa Birliğinin hukuksal sisteminin gelişmesine olan katkıları nelerdir? Adalet Divanı entegrasyonda neden bu derece önem taşımaktadır? Adalet Divanının diğer aktörlerle olan etkileşimi entegrasyona ne ölçüde katkılar sağlamıştır?

Anahtar Kelimeler: Avrupa Adalet Divanı, Avrupa Birliği, Avrupa Entegrasyonu.

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## TABLE OF CONTENTS

# CHAPTER 1

## INTRODUCTION

In the debate among political scientists, lawyers and scholars of international relations, the European Union (EU) is regarded as one of the most interesting political experiments in world history. This is because of the fact that some of the world's oldest and strongest states have voluntarily given away some of their governing power to supranational institutions. Therefore, it is widely accepted that the EU is not a traditional international organization within the traditional framework of international law[1]. The European Union constitutes a new political phenomena that contains elements of both fragmentation and federalization (Shaw, 1996). During the evolution of this new political structure, the legal principles and mechanisms created by the founding Treaties and the Community institutions have played an important role. The legal order which has been established through this long period is still developing and this 'constitutional order' is now ready to accept its formal Constitution. Within this long period of constitutionalization of the European Union, the role that has been played by the European Court of Justice (ECJ) deserves to pay some attention.

The social scientists begin to accept that, a full understanding of the process of integration can not be reached without taking into account of the Court and its case law[2]. On the other hand; there is a growing awareness among lawyers[3] that

[1] See Başlar (2004), Weiler (1999), Günuğur (1993),Tekinalp (2000), Shaw (2003), Weatherill (1995), Dougles-Scott (2002).

[2] See A.M. Burley and W. Mattli (1993), D. Wincott(1995), K.J.Alter(2001), M.Slaugher (1998).

[3] See Snyder (1990), Shaw and More (2003), Weiler (1999).

the Community rules and principles fell short of providing a full understanding of the process of integration. These two movements combine on a common ground of an interdisciplinary research. Rather than the internal logic of the legal constructs, this interdisciplinary approach emphasizes the constant interplay of the Court's role with the Community's other political actors (Shepel, 2000:460). Therefore since 1980s, there has been a considerable amount of research which fuse legal and political science accounts of the development of the Court's case law.

As Wind states:

> law and political science have quite substantial theoretical and historical baggage in common, but they also have a lot to learn from each other. Studying European integration only from a political science perspective would be like asking for comments on a soccer game from someone who was unfamiliar with the basic rules and knew nothing of the spirit of the game. The result would be meagre indeed, and would preclude any in-depth understanding of how the rules of the game emerged, were reproduced and eventually might change' (Wind, 2001:12).

This thesis is written by a political science student who wants to investigate the legal aspects of the EU development. While doing this, the rules of the 'game' will be tried to understand but at the same time the perspective of a political scientist view will be contended. As Craig (Craig, 2001; in Alter, 2001:Preface) argues, while legal scholarship has largely focused on the norms which have been created and on their implications, political science scholarship has concerned itself more with *how* and *why* events have occured, interests have been formed and decisions have been taken. He continues as; 'primarily legal approaches have tended to concentrate on procedures and the substantive content of norms, while political science research has focused more on understanding the reasons for their adoption, acceptance and impact in practice'.

As Wind (Wind, 2001:11) states, we have been witnessing in Europe a gradual

emergence of a constitutional structure embracing citizens and member states of the Community. In this structure, the relations of power overlap, compete and collaborate. The EU is becoming a 'multicentered' polity founding a new political construct. This change did not happen overnight nor without the influence of the supranational institutions of the Community. Through its self-appointed powers, the European Court of Justice -in close collaboration with citizens and lower courts in the member states- managed to create a legal regime that is fundamentally different from the character of international law.

The case-law of the Court have had a crucial contribution to the legal system of the EU. It has developed fundamental constitutional principles of EU law which have not been mentioned in the original Treaties. In collaboration with ordinary citizens and the lower courts in the member states, it has managed to make Community law both *directly effective* and *superior* to the constitutional orders of the member states. As a consequence of this, member states now have to set aside all national legislation that contradicts Community law. The ECJ also made it possible for ordinary citizens to claim rights on the basis of the Treaties, turning those citizens into the most efficient enforcers of the Community law.

There is an inherent judicial independence in the ECJ's position as legal supreme which grants the institution an autonomy that makes it easier to introduce measures in the interest of the EU integration. Therefore; especially during the 1960s and 1970s, the ECJ has been a considerable actor in the process of deeper integration.

As was mentioned, in the process of European integration, the European Court of Justice has played a very important role. Then, the main question of this thesis appears as in the following: What is the role of the ECJ in the establishment of the European legal order? To put it differently, What did the

ECJ do in order to integrate the legal order of Europe? Why is the Court so important regarding the integration? If the ECJ is such an important actor in the integration of the EU, has it done this 'quiet revolution' all by itself or has it engaged in different interactions with the other actors in the Community?

The thesis is composed of three Chapters. In the first Chapter, the different theoretical perspectives considering the role of the Court in the integration process are analyzed in order to provide a general framework of the academic debate. Then, the Court of Justice and the Court of First Instance are examined in order to evaluate the Court's role within the framework of legal norms. In this chapter, the functions of the Court of Justice and the Court of First Instance and their composition are analyzed to provide a basic ground for the thesis. In the following Chapter the Court's "judicial activism" is analyzed. In this framework, the Court's role in the formation of the fundamental doctrines of the European legal order is evaluated. In the third Chapter, the Court is viewed from a broader perspective in order to provide a full picture of the Court's role within the integration process. In this chapter, the Court's interaction with the other actors is analyzed and the importance of the Court's interaction with other actors in the integration process is emphasized. Finally, in the Conclusion, the previous chapters -the Court's functions, its historical contributions to the integration of the legal system and its relations with other actors are evaluated to reach a conclusion for the role of the Court of Justice in the integration process.

# CHAPTER 2

# THE EUROPEAN COURTS

## 2.1 Theoretical Debate Concerning The Role of the Court of Justice in the Integration Process

The European Court of Justice (ECJ) was long neglected by the academics or more specifically by the political scientists even after its revolutionary decisions concerning the legal integration of the European Union (Dougles-Scott, 2002:199). It was only in the 1980s and early 1990s that the academia has started to discover the Court and its importance in the European legal integration. Scholars such as Eric Stein, Francis Snyder, Martin Shapiro, Hjalte Rasmussen and Joseph Weiler brought an interdisciplinary approach to the study of the ECJ integrating the political science and legal perspective while analyzing the Court's functions. Thus, only then the European Court of Justice started to be examined in political, economic and social contexts.

Traditionally there were two main branches in the academic debate which discuss the role of the supranational institutions- the Commission, the European Parliament and the ECJ- in European integration. On the one hand there was the view which saw these supranational institutions as the "engines of integration" independently driving the European integration; on the other hand there was the view which argued that these institutions are the "obedient servants" effectively controlled by national governments (Tallberg, 2003:1). These two dominating theories of regional integration were named as the 'neofunctionalist approach' and the 'intergovernmentalist approach' respectively. The third approach which is called 'institutional theory' provides a different answer to the debate. This approach sees the supranational institutions neither as 'servants' nor as

'masters' but the institutionalists claim that, both above mentioned perspectives contain important answers for the debate. Below; these three main approaches will be presented shortly in order to provide a better ground for the debate.

### 2.1.1 Neo-Functionalism

The central claim of the early neo-functionalist literature[4] which started in 1950s was that the supranational institutions were highly instrumental to the progress of European integration. Unlike the realist perspective, they questioned the identification of state interests as unitary economic interests. Rather; the main idea behind neofunctionalism was that; sovereign states may give up control over certain areas of policy on the condition that the benefits are likely to flow from a common approach to problem solving (Shaw, 1996:12). If the sovereign states perceive a benefit, they may accept to transfer their power to a central authority which exists at a level above the nation state and which exercises its powers independently of the Member States – that is; *a supranational body*. However, the transfer of powers is just a part of a continuing process.

According to neofunctionalists, one level of integration would lead on to the next: '...a sectoral Treaty dealing with coal and steel leads on to a general Treaty covering all economic sectors; a customs union incorpoorating the removal of internal customs tariffs and the erection of a uniform external tariff leads on to a common or internal market, with comprehensive free movement for all commodities and factors of production'(Shaw, 1996:12). In this way, the integration would progress step by step. This process was termed 'spill-over' by neofunctionalists and the evolution of the European Community and later the European Union have indeed passed through a number of stages as described by the neo funcionalists. Therefore, the supranational institutions-and the ECJ are

[4] See Haas (1958), Lindberg (1963), Scheingold (1970)

instrumental to the progress of European integration.

In this logic of thinking; modern-day neo functionalist scholars[5] have asserted that, institutions drive European integration further and sometimes this is contrary to the initial intentions of the member states. They also assert that; the ECJ has significant autonomy by virtue of seperation of law and politics and also, the court's legitimacy as the 'legal actor' has given the ECJ a power and autonomy to rule *against* the interests of the member states (Alter, 1998:122). Therefore, the ECJ is seen as a catalyst in the integration of the European Union and the importance of the 'legal character' of the ECJ is emphasized while asserting that the ECJ's autonomy was also the result of the perception of ECJ as the 'neutral' entity.

### 2.1.2 Intergovernmentalism

Contrary to the neo-functionalist thought, early intergovernmentalists[6] which were grounded in classisical realist conceptions of anarchy and power politics, asserted that, national governments had not and were unlikely to endow the supranational institutions with powers that would take away their own autonomy. According to intergovernmentalists, the EU is primarily a creature of its component states. Therefore, the authority of supranational institutions was perceived as limited in scope and they claimed that the maneouvre of the supranational institutions were conditional on member state approval.

Contemporary debate of the neo functionalists and the intergovernmentalists concentrate on the question of whether the supranational institutions have developed roles for themselves that go beyond those that national governments intended. In this debate, intergovernmentalists assert that; supranational

[5] See Sandholtz and Zysman (1989); Burley and Mattli (1993), Cram (1997)

[6] See Moravcsik (1993), Keohane and Hoffman (1991), Garrett (1992)

institutions do not enjoy autonomy and are not capable of exerting independent influence on the process of European Integration. On the contrary, these institutions are the passive devices whose faith lies in intergovernmental bargaining.

Regarding the ECJ, intergovernmentalists claim that, the ECJ's legal system is consistent with the interests of national governments and that it tends to 'tailor' its rulings to the preferences of the major member states (Tallberg, 2003:4). Thus, the role of the ECJ was largeley viewed as subservient. The Court simply applies treaty provisions and rules formulated by the member states of the EU. According to this model, judicial interpretation is nothing more than a translation of the rules into operational language devoid of political content and consequence (Slaughter, 1998:180). In the analysis of intergovernmentalists, the ECJ decisions that deviate from the preferences of powerful states are likely to be ignored and the Court will be careful not to stray from the preferences of the powerful member states like Germany of France (Slaughter, 1998).

### 2.1.3 Institutional Theory

Since mid-90s; a new perpective was included in the debate on the European integration referred as the Institutional Theory[7]. This literature explain the influence of the supranational institutions from a perspective which see the supranational institutions neither as 'servants' nor as the 'masters'.

According to institutionalists, both the intergovernmentalist and the neo functionalist accounts contain significant elements of truth. Institutional theory claims that; member states intended to create a court that could not compromise national sovereignity or national interests, but the ECJ changed the EU legal system fundamentally undermining member state control over the Court.

[7] Alter (1998); Tsebelis and Garrett (2001).

However, the Court is neither a "master" nor a "servant" of the member states. The institutions can determine the sequence of moves, the choices of actors and the information they control and as a result, different institutional structures affect the strategies of actors and the outcomes of their interactions (Tsebelis and Garrett, 2001: 384).

The institutional approach is in between the black-and-white positions of the neofunctionalists and intergovernmentalists. As Alter argues; the 'legal nature' of ECJ decisions affords the Court some protection against political attacks but member states also have significant tools to influence it (Alter, 1998:122).

Among these three approaches, the institutionalist theory most fully explains the role of the Court of Justice in the integration of the European Union. As it will be explained in the next chapter; the Court's transformation of the "preliminary ruling system" into a mechanism to allow individuals to challenge EC Law in national courts into a mechanism to allow individuals to challenge *national law* in national courts is a good example of the Court's ability to stray from the initial intentions of the member states. Moreover, the institutionalists offer to see the institutions as the 'independent variables' unlike the intergovernmentalists who study these institutions as the 'dependent variables' and concentrate on the treaty bargaining. Therefore, while the intergovermentalist claims concerning the ability of the state to impose significant constraints on supranational actors such as the ECJ should be recognized, as Garrett and Tsebelis (2001) argue, the analysis of the intergovernmentalists have a "myopic" focus on treaties.

## 2.2 THE EUROPEAN COURTS

One of the most important features of the Community law, is the impact it has had on the legal and political integration of the Member States. In contrast to

other state-centered international organizations such as the Council of Europe or the United Nations, the European Community has created an organization of states with an autonomous legal system (Kapteyn, 1998). The system of norms bind each of the states and have been internalized into the domestic systems of the different states as a uniform body of law. Much of this development has been brought about not by the express agreement of the states which founded the Community but through the interpretive practice and influence of the European Court of Justice (Başlar, 2004). Through its case law, the Court has developed the most important principles of Community Law.

According to Article 220 TEC (Treaty Establishing the European Community), the ECJ was originally created with the specific and in a sense limited mandate 'to ensure that in the interpretation and application of this Treaty the law is observed'. However, the ECJ acquired a decisive role in shaping the evolution of the Community structure by its Case-law during the process of European integration (Weiler, 1999). This development was unforeseen by the Member states and resulted in the creation of an autonomous legal order. Especially when the Community stagnated politically, economically and institutionally, the ECJ produced an impressive amount of case law that maintained the conditions for deeper integration (Weatherill, 1995).

Judicial supervision of the Community law is exercised by two Courts: the Court of Justice[8] (often referred to simply as "the Court") which was set up in 1952 under the Treaty of Paris (establishing the European Coal and Steel Community) and the European Court of First Instance established in 1988 attached thereto.[9]

[8] Arts.4(1) EC, 7 ECSC, and 3 Euratom

[9] Article 168A EC and Council Decision 88/591 OJ 1988 L319/1

The EU's Courts have played an important role in the establishment of the EU's legal order. This is because, they exercise three key legal roles: First, there is the role of Constitutional Court deciding the inter-institutional disputes and disputes about the division of powers between EU institutions and member states. Second, there is the role of supreme court with the procedure of preliminary ruling having the purpose of uniform application and interpreation of EU law. And third, there is the role of administrative court, as when the ECJ and the CFI are called upon by private parties to offer protection against illegal executive acts by EU institutions (Dougles-Scott, 2002). Below, the structure and powers of the ECJ and Court of First Instance (CFI) will be discussed separately.

### 2.2.1 THE EUROPEAN COURT OF JUSTICE

The ECJ was created to perform three limited roles for the member states: ensuring that the Commission and the Council of Ministers did not exceed their authority, filling in vague aspects of EC laws through dispute resolution, and deciding on charges of non compliance raised by the Commission or by member states (Kapteyn, 1998). The general structure, functions and powers of the Court will be discussed below.

#### 2.2.1.1 Structure, powers and functions of the Court of Justice

Located in Luxembourg, the Court of Justice was founded in 1958 as the joint court for the three Treaty Organizations that were consolidated into the European Community (the predecessor of the EU) in 1967.

Articles 220-245 of TEC stipulate the role, composition, location, procedure, jurisdiction and powers of the Court. The Court, under Article 164 EEC (Art.220 TEC), ensures the observance of law in the interpretation and

application of the treaties and their implementation rules. To this end, the Court is conferred a number of powers. These powers are mainly intended to enable the Court to judge the acts and omissions of the Institutions and the Member States in accordance with Community law and to ensure uniformity of interpretation of Community law in the application of this law by national courts (Art.220 TEC).

The powers of the Court can be divided into three categories: the settling of disputes, the giving of binding opinions and the giving of preliminary rulings (Kapteyn, 1998). The jurisdiction of the Court extends to disputes about the interpretation and application of Community law between Institutions, between Member States and between Institutions and Member states or private parties. In this last point, the Court differs from most international courts before which private parties can not appear as parties to the proceedings (Kapteyn, 1998).

The Court is composed of one judge per member state, so that all the EU's member states are represented (Art.221 TEC). Judges are selected on the basis of their independence and legal stature and must either have the qualifications to be appointed to the highest court in their home member state, or otherwise have an outstanding or professional legal record (Art.223 TEC). A large number of the cases referred to the Court concern questions of Community law which arise in national legal proceedings. Therefore, the presence of a judge from each member state assists the Court in understanding the different legal contexts.

The judges and advocates-general are either former members of the highest national courts or highly competent lawyers who can be relied on to show impartiality (Shaw, 1996:135). They are appointed by joint agreement of the governments of the member states. According to Art. 223 TEC, each is appointed for a term of six years, after which they may be reappointed for one

or two further periods of three years. The judicial appointments of the judges of the Court are in effect in the gift of each individual government (Tekinalp, 2000:236). The national practices with regard to the appointment of judges to the highest courts vary considerably. While some members may be elected by the legislature, head of state or by legislative chambers, other may have established judicial appointments boards or other procedures (Shackleton, 2002). The absence of any Community vetting procedure for the Court is widely considered unsatifactory as the Judges are called upon to review the acts of the governments that appointed them (Bradley in Shackleton, 2002:120).

According to Art.223 TEC, the Court is assisted by eight "advocates-general" whose qualifications for office and appointment procedure are identical to those of the judges. Their role is to present reasoned opinions on the cases brought before the Court. They must do so publicly and impartially. If the Court requests, the Council may, acting unanimously, increase the number of Advocates-General (Art.222 TEC). Each of the five largest member states appoints one advocate-general and the remaining posts are filled by the other member states on a rotation basis. The advocate–general takes part in the process by which the Court decides the case, by delivering a first opinion on the issues. The Court is not bound to follow the opinion although in majority of cases, it does so (Shackleton, 2002).

The Court of Justice may sit as a full Court, in a Grand Chamber (13 Judges) or in chambers of three or five Judges[10]. According to the Statute of the Court of Justice, the Court sits in a Grand Chamber when a Member State or a Community institution that is a party to the proceedings so requests, or in particularly complex or important cases. Other cases are heard by a chamber of three or five judges. The Presidents of the chambers of five judges are elected for three years, the Presidents of the chambers of three judges for one year. The

[10] Statute of the Court of Justice.

Court sits as a full Court in the very exceptional cases exhaustively provided for by the Treaty (for instance, where it must compulsorily retire the European Ombudsman or a Member of the European Commission who has failed to fulfil his obligations) and where the Court considers that a case is of exceptional importance. The quorum for the full Court is 15. While cases are heard and judgements are published in all the Community languages, the working language of the ECJ is French.

#### 2.2.1.2 Types of Cases Before the Court

The Court can not itself initiate actions. It must wait for cases to be refferred to it. This can happen in a number of ways the most important of which are stated below.

##### 2.2.1.2.1 Failure to Fulfil An Obligation

Under Articles 226 and 227 TEC, the Court rules on whether member states have failed to fulfill obligations under the Treaty. Actions may be brought either by the Commission or by other Member States. Whether the case is brought before the Court by the Commission or by the member state, the Commission must first conduct a preliminary procedure which gives the Member State the opportunity to reply to the complaints against it (Art. 226 TEC). If that procedure does not result in termination of the failure by the Member State, an action for breach of Community law may be brought before the Court of Justice.

Under the Community Treaties, the Commission is vested with the primary responsibility for ensuring that the member states comply with both the applicable Treaty provisions and Community legislation. It carries out this duty mainly through the *infringement action* under Article 226 TEC, which is the

most significant manifestation of its duty to act as guardian of the Treaty. The Commission may pursue a member state before the Court for any breach of Community law, such as failing to apply a Treaty rule, a regulation or a decision, or failing to transpose, implement or apply a directive (Shackleton, 2002:124). If the Commission wins, the Court will merely declare that the Member State has failed to respect the particular legal obligation. In practice, it is usually the Commission which bring the action to the Court because of the fact that, the member states are extremely reluctant to engage in direct public confrontation with one another (Nugent, 2003:249).

The Maastricht Treaty gave the Court, for the first time, the power to impose penalties on member states: Under Article 228 TEC, the Commission can initiate action against a state that it believes has not complied with a judgement of the Court in a case involving failure to fulfill an obligation under the Treaty. In the first stage, the state in question is given the opportunity to submit its observations and issue a reasoned opinion that specify the points on which the state has not complied with the judgement of the court and which also specifies a time limit for compliance. If the state does not comply with the reasoned opinion within a specified time limit, the Commission may bring it back before the Court. In so doing, the Commission must specify the amount of the lump sum or penalty payment to be paid 'which it considers to be appropriate in the circumstances'. If the Court finds that the member state has not complied with its judgements, it may impose a lump sum or penalty payment. Actions involving failure to fulfill an obligation constitute-after preliminary rulings-the second highest number of cases referred to the Court[11].

**2.2.1.2.2 Application for Annulment**

Under Article 230 TEC, the Court 'shall review the legality of acts adopted

[11] www.curia.eu.int/15.05.2005

jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-a-vis third parties'. As this Article states, the proceedings for annulment are directed against binding Community acts. As the opinions and recommendations do not have binding force, proceedings may not be brought in respect of them.

The Court can not conduct reviews on its own initiative, but only in response to actions brought by a member state, the Council, the Commission, plus the European Parliament under the Nice Treaty or by individuals to whom a measure is addressed or which is of direct and individual concern to them (Craig, 1997). Reviews may be based on the following grounds: 'lack of competence, infringement of an essential procedural requirement, infringement of (the) Treaty or of any rule relating to its application, or misuse of powers'(Art.230 TEC). If an action is well founded, the Court is empowered under Article 231 TEC to declare the act concerned to be void.[12] Then, the act ceases to have any legal force as from the date when it originally took effect (Murphy, 1996:36).

The *Tobacco Advertising Case* (Bradley, in Shackleton:2002) is a good example of a successful annulment action: In October 2000, the Court annulled for the first time a measure which had been adopted under co-decision procedure. Concerning the 1998 directive prohibiting all forms of tobacco advertising, the Parliament and Council contended that the Treaty allowed the Community to adopt any measure to regulate the internal market not just those that liberalize trade. The Court held that, the Community legislator could not rely on other articles to circumvent the express ban in Article 152 TEC on harmonization of health measures. It also held that, measures based on Article

[12] The grounds on which an act can be declared void are widely defined in the Treaty.

95 TEC must have as their object the improvement of the conditions of the internal market, not mere market regulation; any other position would breach the express wording of that provision, undermine the principle of conferred powers, and render nugatory judicial review of the choice of legal basis (Shackleton, 2002:126).

EU law can be made by several procedures which are different from each other. Which procedure applies in a particular case depends on the article(s) of the Treaty upon which legislative proposals are based. For example, if a proposal related with the competitiveness of industry in the internal market is based on Article 95 TEC (which considers approximation of laws –internal market), the co-decision procedure applies with Qualified Majority Voting(QMV) in the Council. This means that, Council approval does not depend on all member states supporting the proposal and the European Parliament has a potential veto power over the proposal. If, however, the proposal is brought forward on the basis of Article 157 TEC (industry), the consultation procedure applies, with unanimity in the Council. This means that, a single member state can veto the proposal in the Council while the EP's power are weak. In these kinds of situations, the legality of the procedures of law making can be left to the the interpretation of the Court by bringing an action for annulment (Art.230 TEC) .

Institutions appeal to the Court when they believe their prerogatives have been infringed during a legislative procedure (Nugent, 2003:250). The EP has been very active in this regard, taking a number of cases to the Court where it should have been consulted but was not, or that the Council changed the content of legalisation after it left the EP and than EP was not reconsulted. In general the Court has supported the EP in such cases (Nugent, 2003:250).

Article 230 allows any 'natural or legal person' to institute proceedings for annulment. Rulings under this provision have tended to strenghten the hand of

EU institutions and to serve as useful underpinnings to some EU policies (Dougles-Scott, 2002).

Under Article 229 TEC, the regulations governing certain policy spheres may allow unlimited jurisdiction to the Court with regard to the penalties. Aggreviated parties may appeal to the Court against Commission decisions and the penalties it has imposed. This situation is another form of annulment where the court may annul or confirm the decision and increase or decrease the penalties.

#### 2.2.1.2.3 The Preliminary Ruling Procedure

Article 234 TEC which contains preliminary ruling procedure have had an important role in shaping both Community law and the relationship between the national and community legal systems (Burca, 1997:398).

According to Article 234[13], if there is a dispute before the national court which raise one or several issues of Community law, the national court can obtain a ruling on the Community law question from the Court. In this process, the Court only answers the Community law question and does not decide the case.

Preliminary Reference has been a tool for the Court to use in the furtherence of integration. Indeed, the history of Article 234 has been seen by some scholars as "the record of European integration" (T de la Mare, 1998). In many respects,

[13] Art.234 reads as follows: 'The Court of Justice shall have jurisdiction to give preliminary rulings concerning; (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. /Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. /Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice'.

this definition is not an exaggeration. In most cases, crucial ECJ judgements have come in response to requests from national courts for preliminary rulings on points of Community law. First of all, the preliminary ruling procedure has constitutional significance as it has played its part in the conceiving of the founding principles of EC law like in *Van Gend en Loos*[14] and *Costa v Enel*[15] which will be examined in the next Chapter. Secondly, it enabled the ECJ to ensure the uniformity and effectiveness of EC law. Issues of EC law were litigated in domestic courts and in this way, all the national courts interpret the articles of the Treaties in one way. Thirdly, the ECJ has been able to develop EC substantive law deciding key cases on free movement of goods, persons and sex discrimination law and many more.

Article 234 has also been widely used by litigants who have identified a whole new spectrum of remedies which are directly effective in their national courts under EC law (Dougles-Scott, 2002:226). As the national law can not be directly challenged before the Court by the private parties who are infringed by the breach of EC law, the preliminary ruling has been a means to challenge those national acts. In order to do so, the litigants had to persuade the national courts to use Art. 234. The national judges have been voluntary in working in partnership with the ECJ. This partnership will be evaluated in detail in the next chapter.

In the Treaty of Nice, Article 225 was amended to make it possible for certain types of preliminary rulings to be transferred to the CFI[16] but in general, applications are made only to the ECJ. It is the national court and not the parties

[14] Case 26/62, *N.V Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administrie der Belastingen* [1963] ECR 1; [1963] CMLR 105.

[15] Case 6/64, *Flamino Costa v. Enel* (194) ECR 585, (1964) CMLR 425, 593

[16] Article 225(3) reads 'The Court of First Instance shall have jursidiction to hear and determine questions referred for a preliminary ruling under Article 234 in specific areas laid down by the Statute'.

which decides to make a reference. Proceedings are stayed in the national courts until the ECJ gives its ruling and then, on receipt of the ruling, the national court must apply it (Dougles-Scott, 2002:227). The Court's ruling is binding, not only on the referring court, but on all the courts of all the member states faced with the same issue.

ECJ has given a wide scope to its interpretative power under Art.234. In this way, not only the treaty provision or a secondary legislation but also the association agreements with third countries are covered by the preliminary reference procedure. The Court has also interpreted its jurisdiction under the preliminary ruling procedure very widely as to the national bodies which can make such references. The ECJ's primary concern is whether the body in question exercises a judicial function[17]. Other key factors which the ECJ look for[18] are that the body in question should have official recognition, be independent and permanent, make binding decisions on legal rights and obligations and not be a part of the legislature or executive. Moreover, the body in question must be a court or tribunal of a 'member state'. There are two sets of circumstances: the courts who *may* refer and the ones who *must* refer. The courts which *may* refer include all national courts or tribunals except those of last instance which are the ones who *must* make a reference as against them there is no judicial remedy under national law (Art. 234 TEC).

In this way, the national governments are forced to apply the EC law as it is much harder to refuse to implement the decisions of their own national courts instead of an international tribunal (Weiler, 1999). As the procedure depends on mutual cooperation, it imposes duties on the national courts. The relationship of the national courts and the ECJ will be explained in the third chapter.

[17] Established in *Politi v Italy-Case 43/71 Politi v Italy[1971] ECR 1039*

[18] Detailed in *Vaassen case* and known as the 'Vaassen Criteria'

#### 2.2.1.2.4 Failure to Act

The action for illegal failure to act is the other side of the coin to annulment proceedings. It allows the member states and the institutions of the community to complain that another institution has failed to adopt an act which it is under a legal obligation to adopt. This condition is established with the Article 232 TEC where the Court of Justice and the Court of First Instance is charged with reviewing the legality of a failure to act on the part of a Community institution. The Court also have jurisdiction in the areas falling within the European Central Bank (ECB)'s field of competence and in actions or proceedings brought against the ECB. Moreover, in circumstances which are defined with the Treaty, the 'natural or legal persons' may initiate an action before the Court.

Regarding the Article, the action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Among the actions for illegal failure to act, the one that attracted much attention was initiated by the EP with the support of commission, against the Council in 1983 (Shackleton, 2002). The case concerned the alleged failure of the Council to take action to establish a Common Transport Policy, despite the provision for such a policy in the EEC Treaty. The Court ruled that while there was a duty for legislation to be produced, it had no power of enforcement because the Treaty did not set out a detailed timetable or an inventory for completion; it was incumbent upon the national governments to decide how best to proceed.

#### 2.2.1.2.5 Action to Establish Liability

Articles 235 and 288 provide individuals a remedy in damages for harm caused

to them by the Community institutions. Therefore, the power has been given to the Community Courts[19] to control the functioning of administration.

The Treaties confer on the Court of Justice (and the CFI) the exclusive jurisdiction to order the Community to pay damages because of its actions or its legislative acts on the principle of non-contractual liability (essentially tortious)(Art.288 TEC). The Court decides the basis on which liability is to be determined, whether the damage is due to community action, the amount of damage caused and the sum to be paid in compensation. By contrast, the Community's contractual liability is subject to the general law of the Member States and to the jurisdiction of their courts (Art.240 TEC).

In order for an action in damages against the Community to be well-founded, there must be a wrongful act or omission imputable to the Community; damage to the claimant and; a causal link between these two (Dougles-Scott, 2002:388). The applicant has a five-year limitation period to bring the action and this time will not begin to run until all the requirements for liability have materialized[20].

Regarding the AG Tesaur's opinion in *Brasserie du Pecheur*[21] in December 1995, by then, only eight awards of damages against EC institutions had ever been made. Since 1995, several more awards have ben made which tended to be made in the context of administrative failures rather than legislative acts (Dougles-Scott, 2002:399).

The concept of 'damage' is nowhere defined in the Treaty. The standarts of

[19] The Court of First Instance now has exclusive jurisdicition to hear all claims for compensation against the Community brought by individuals.

[20] Article 43 of the EC Statute of the Court of Justice(which is annexed by way of protocol to the EC Treaty)

[21] Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur v Germany* and *The Queen v Secretary of State for Transport*, ex parte Factortame (1996) ECR I 1029.

'damage' is generally, its being certain, specific and quantifiable (Dougles-Scott, 2002:401). Many of the cases brought under Article 288 are economic in nature and the Court will award damage for economic loss. (Dougles-Scott, 2002:401). In *Kampffmeyer*[22], for example, as a result of unlawful EC action, the applicants had been forced to break their contracts. ECJ ruled to recover damage for cancellation fees and lost profits on the contracts already concluded. Similarly in CNTA case[23], the applicants were given compensation caused by currency fluctuations which the EC had been responsible for exposing them to, but were unable to recover their anticipated profits. The ECJ has also made awards for the types of damage other than economic loss, such as damages for anxiety and hurt feelings where, for example, EC employees have been wrongfully dismissed or unfairly treated (Dougles-Scott, 2002:401).

**2.2.1.2.6 The seeking of an Opinion**

Under Article 300 TEC, the Council, the Commission, or a member state plus the EP under Nice Treaty, may obtain the opinion of the Court on whether a prospective international agreement is compatible with the provisions of the Treaty.

The Community enjoys a wide power to conclude international agreements with third countries and other international organizations. Under the Treaty of Nice, a political institution or member state obtain a preventive ruling from the Court on whether an agreement is compatible with the Treaty, before the Community commits itself on the international plane (Art.300). Though described as an 'opinion', the Court's conclusions are binding; if the opinion is negative, then either the international agreement or the Treaty must be amended to eliminate the incompatibility (Art.300).

[22] Case 5,7,13-24/66 *Kampffmeyer* (1976) ECR 245

[23] Case 74/74 *CNTA SA v Commission* [1975] ECR 533

An example of an extremely important opinion is issued in 1994 (Shackleton, 2002). The Commission took the Case before the Court, arguing that Article 113 (133 TEU), which gives the Commission sole negotiating powers in respect of certain international commercial agreements, should extend to trade in services and trade-related aspects of intellectual property rights. The Court ruled (Opinion 1/94) that the Community and the member states shared competence to conclude such agreements and therefore the Commission did not have sole negotiating powers.

#### 2.2.1.2.7 Appeals

Under Article 225 TEC, certain decisions of the CFI are subject to appeal to the ECJ. Appeals can not be made on the substance of a case, but only on points of law. There are three broad grounds for appeal: the CFI lacked jurisdiction, it breached procedural rules, or it infringed Community law. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the Court of First Instance. Where the state of the proceedings so permits, the Court may itself decide the case. Otherwise, the Court must refer the case back to the Court of First Instance, which is bound by the decision given on appeal. Statistically, there are, on average, around 30 appeals each year, most of which fail because the ECJ will only accept appeal on points of law, not points of substance and because the CFI generally follows previous case law of the CJ[24].

## 2.3 THE EUROPEAN COURT OF FIRST INSTANCE (CFI)

Regarding the ECJ's constantly expanding workload; under the SEA, the Council was empowered to establish, at the request of the Court, a Court of First Instance. Such a request was made by the ECJ and in 1988 the CFI was established by Council Decision 88/591. The CFI began to function in

[24] www.curia.eu.int/cje:25.05.2005

November 1989.

According to Article 224 TEC, The Court of First Instance is currently composed of 25 Judges, at least one from each Member State and the Judges are appointed for a renewable term of six years by common accord of the governments of the Member States. According to the same Article, the Members of the Court of First Instance elect their President and the Presidents of the Chambers of five Judges from among their number for a renewable period of three years. There are no permanent Advocates General attached to the Court of First Instance. However, the task of an Advocate General may be performed in a limited number of cases by a Judge nominated to do so.

All cases heard at first instance by the Court of First Instance may be subject to a right of appeal to the Court of Justice on points of law only (Art.225 TEC). In this way; the creation of the Court of First Instance instituted a judicial system based on two levels of jurisdiction.

In view of the increasing number of cases brought before the Court of First Instance in the last five years, in order to relieve some of the caseload, the Treaty of Nice, which entered into force on 1 February 2003, provides for the creation of 'judicial panels' in certain specific areas.

On 2 November 2004 the Council adopted a decision establishing the European Union Civil Service Tribunal[25]. This new specialised tribunal, composed of seven judges, will hear and determine at first instance disputes involving the European civil service. Its decisions will be subject to a right of appeal before the Court of First Instance on points of law only. Decisions given by the Court of First Instance in this area may exceptionally be subject to review by the

[25] Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal (2004/792/EC,Euratom)

Court of Justice. The European Union Civil Service Tribunal should be able to assume its functions some time in 2005.

### 2.3.1 Jurisdiction

The Court of First Instance, like the Court of Justice, has the task of ensuring that the law is observed in the interpretation and application of the Treaties constituting the European Communities and the provisions adopted by the competent Community institutions (Art.225 TEC).

Under Articles 230, 232, 235, 236 and 238, in order to fulfil its main task, the Court of First Instance has jurisdiction to hear and determine at first instance all direct actions brought by individuals and the Member States, with the exception of those to be assigned to a 'judicial panel' and those reserved for the Court of Justice. Categories of direct actions are: Actions for annulment (against acts of the Community institutions), Actions for failure to act (against inaction by the Community institutions), Actions for damages (for the reparation of damage caused by unlawful conduct on the part of a Community institution), Actions based on an arbitration clause (disputes concerning contracts in public or private law entered into by the Community, containing such a clause), Actions concerning the civil service, (disputes between the Community and its officials and other servants). Subject-matter of direct actions are; all matters, including: agriculture, State aid, competition, commercial policy, regional policy, social policy, institutional law, trade mark law, transport, Staff Regulations.

The composition of the Court of First Instance is determined by the Council at the request of the Court of Justice and after consulting the European Parliament and the Commission.[26]

[26]Arts. 168a(2) EC, 32d (2) ECSC and 140a (2) Euratom.

By Declaration No 12 adopted at the Nice Summit, the Conference of the Representatives of the Governments of the Member States called on the Court of Justice and the Commission to give overall consideration to the allocation of jurisdiction between the Court of Justice and the Court of First Instance, in particular in the area of direct actions, and to submit suitable proposals for examination by the competent bodies as soon as the Treaty of Nice entered into force.

Under the new Article 225(1) EC, the Court of First Instance is the court of general jurisdiction at first instance not only for actions brought by individuals and undertakings, but for all the direct actions referred to in the first sentence of Article 225(1). Within that framework, those exceptional cases in which the Court of Justice retains exclusive jurisdiction must be justified by particular circumstances.

# CHAPTER 3

# "JUDICIAL ACTIVISM" OF THE EUROPEAN COURT OF JUSTICE

## 3.1 The 'Judicial Activism' of the European Court of Justice

> '*No other international organization enjoys such reliably effective supremacy of its law over the laws of member governments, with a recognized Court of Justice to adjudicate disputes. Indeed, of all Community institutions, the Court has gone farthest in limiting national autonomy, by asserting the principles of superiority of Community law and of the obligation of member States to implement it'*
> (Keohane and Hoffmann, 1991)

The term "judicial activism" is a phrase of common law terminology seen in the Anglo-Saxon Countries where the Courts make the law. This means that, judges create and improve the law by their interpretation (Buckley, in Başlar, 2004:134).

The Court, with its case law, has successfully constitutionalized the EU legal order and therefore, the term 'Judicial Activism' has been widely used to define the achievements of the ECJ by its case-law (Başlar, 2004:134). This 'judicial activism' of the Court has made a very important contribution to the integration of the EU. If the case law of the Court was missing from the history of the EU, it is certain that, European Union could not achieve the integration level that it has achieved so far. As Judge Mancini (1989) remarked, the degree of 'judicial activism' which the European Court has displayed in fostering integration and forging European unity may not be doubted. This role of the judiciary has a political dimension. While deciding on the Cases, the ECJ has engaged in a 'political' mission which was to achieve a closer Union. In order to achieve this

end, the ECJ has established a set of norms which govern many of the relations between Community and Member States.

As Weiler (1999) mentions, ECJ's making a federal-type constitutional framework involved an 'aggressive' and 'radical' doctrinal jurisprudence and sometimes this 'revolution' had been realized at the expense of the power of other actors in the Community. While establishing the legal foundations of the EU, the ECJ has been criticized of 'overstepping its boundaries' (Rasmussen, 1986). These criticisms included the argument that unelected judges were confusing their role with that of elected legislators (Başlar, 2004:135) or that the ECJ was departing from the objective meaning of the Treaty (Dougles-Scott, 2002:211). According to Rasmussen (1986), the Court of Justice was engaged in 'activist pro-federalist policy-making', far beyond the limits of legislative texts. He argues that, the Court has federalized the EC in disrespect of the 'legal commands of the Treaty's texts' and of 'the Founder's intentions' leading to a 'decline in judicial authority and legitimacy'. Therefore, he criticizes the Court of using the logic of the legal argument and 'myth of judicial value neutrality' to 'mask' its policy-making. However, as Schepel (2000) argues; for a political scientist, legal reasoning and judicial neutrality are *always* a 'mask' behind which to hide policy preferences, and the judicial process is *always* defined in terms of interests. In other words, legal reasoning is always rhetorical exercises in legitimation of ideological positions. For a political scientist, there is no boundary such that the law ends and policy begins.

With its 'judicial activism', the Court has created an agenda of its own. It changed the EU legal system fundamentally and it established very important principles of Community law. When the Court was developing powerful set of legal doctrines, the national governments paid insufficient attention to these developments and when the member governments had realized that the ECJ

was a powerful actor, reining the Court's power had become very difficult in the 80s (Başlar, 2004:140).

Alter (1998) argues that, the creation of an internal market in Europe was *not* intended to create a political model that limit the sovereignity of the Member States. While the politicians were wanting to have an economic integration, they were unwilling to limit their national sovereignity. However, there was an institution which was not recognized as a 'threat' to the national sovereignity. This supranational institution was the Court which established unpredictable principles that limit their national sovereignity. According to Alter (1998), the politicians who reject supranationalism were 'unaware of what they were doing' when they empowered the judicial branch of the Community. Similarly, Wind (2001) argues that member state governments were in fact so reluctant to go along with the integration project in order to protect their national sovereignity. He says that, the implications of the principles established by the Court were not fully recognized until much later and for a long time went completely unnoticed in politicall circles in Europe as well as among lawyers and political scientists (Wind, 2001:129).

Then, if the original intention of the Member states was not to limit their sovereignity up to such a degree, we can conclude that, by its 'judicial activism', the ECJ, as a supranational institution has changed the direction of the evolution of the European integration.

Because of this 'judicial activism' of the ECJ and its impact on the integration of the EU, the Court is said to be similar to the US Supreme Court in many respects (Başlar, 2004). This similarity is mainly due to the fact that United States was the largest and earliest common market in the world before the accessions of Spain and Portugal to the Community and secondly, the Court reads EU Treaties as though they represent a de facto constitution for Europe

and exercises judicial review over laws and practices within member states (Başlar, 2004:161). Therefore, there are parallel lines between the US Supreme Court's endeavours and the integrationist case-law of the Court of Justice. For example on the way of establishing economic unity, the US Supreme Court's case law is said to be very parallel to that of the Court of Justice (Başlar, 2004). In relation to the free movement of goods, like the US Supreme Court, the Court also tried to remove the barriers against economic integration.

As it will be disussed, through its case-law, the Court of Justice has made a crucial contribution to the legal integration of the European Union. Therefore, studying EC law necessitates studying ECJ Case Law. The Case law of the ECJ has created a 'normative supranationalism' and this 'normative supranationalism' has had important impacts for the integration. Başlar (2004) argues that; in political science, 'supranationalism' is a process of decision-making. In 'political' supranationalism'; structures and procedures of decision-making is important. In the context of EU integration, this includes, Member States' abstain from vetoing proposals and try to achieve agreement by downgrading their national interests. However, there is a second aspect of supranationalism which relates to operational aspect of integration process. This includes how the Community policies and Community law are implemented. Weiler (1999) calls this as 'normative supranationalism' which implies supremacy of Community law and its penetration into national legal systems. The main difference between these conceptions of supranationalism is that, while the first one came into being by the Treaties and the discussions among the Member States, the 'normative supranationalism' has come into being by the case law of the ECJ (Başlar, 2004).

Especially during the 60s and 70s the Court has taken bold steps in the way to the establishment of constitutionalization (Craig, 1999). Indeed; it established the basic foundation on which the legal system of the EU stands today. Especially the principles of direct effect and supremacy have been the main

characteristics of this foundation (Craig, 1999). With the establishment of these principles which will be explained below, the Community law has achieved some characteristics which is found in a federal state. The Court not only *established* these principles but also *expanded* their meaning, scope and effectiveness with its later judgements. For example, the Court established the principle of direct effect with *Van Gend en Loos* but after this, the coming Cases have enlarged the scope of direct effect- from the provisions of Treaties to regulations, decisions and agreements with third Countries.

In the next sections, it will also be discussed that, the Court's establishment of the constitutional principles made it to be referred as a 'Constitutional Court' (Weatherill, 1995:184). The ECJ turned the Treaties to Constitutions. This shift from Treaty to Constitution has made the EC legal order very different from traditional international law. Indeed, this is the reason why the EC legal order is called as *sui generis*.

Another element in the constitutionalization of the Treaties was the establishment of the principle of state liability. Wind states that, 'the ECJ by developing these principles, not only rewrote the Treaty of Rome without the official agreement of the member states but also delibaretely sought to place itself as the final arbiter of law in Europe' (Wind, 2001:136).

As it will be explained below, because of the 'judicial activism' or the case law of the ECJ, the 'judicial protection of individuals' in the Community was developed. The Community system of judicial protection as conceived by the Treaties had some shortcomings and even gaps. The Treaties were protecting the rights of the individuals in cases where the breach was made by a Community institution (Art.215). However, there was no provision engaging in the liability of the member states for damages inflicted on individuals caused by a breach of their Community obligations. Accordingly, the protection of individuals against infringements of Community law by the member states

received relatively little attention. These considerations led the court to improve the judicial protection of individuals and develop more adequate and effective system of judicial protection. Over the years, the Court of Justice has established a system to better meet the actual requirements of the developing Community legal order.

The first step for the 'judicial protection of individuals' was the leading cases establishing the fundamental principles of 'direct effect' and 'supremacy of Community rules'. As it will be discussed below, without these rulings, the Community legal order would most likely have resembled that of a traditional international organization deprived of any integrative force (Bebr, in Curtin, 1994:304). The second step was the establishment of the crucial principles for judicial protection of individuals among which the most important was the principle of 'state liability' which will again be discussed in the following section.

This 'judicial protection of individuals' were in fact, the most important catalyst to integrate national judiciary with the Community legal order (Schermers, 1997). Because of this, a cooperation between the member state national courts and the Court could be sustained. In Court's view, the national Courts were under a duty to ensure the effective operation of the Community legal order and a full and effective protection of the Community rights of individuals (Bebr, in Curtin, 1994:316).

As a result, the integration process has gradually linked the national judicial systems with the Community legal order. National courts of the member states have frequently been called to apply Community law and enforce the Community rights of individuals. Thus, the gradually developing Community judicial system based on cooperation between the Community court and the national courts has become the real backbone of the Community legal order. In the absence of Community rules, national courts had to apply national remedies

and national rules of procedure and enforce Community rights. This helped the integration process considerably. Below, the principles which have been established by the Court and which establish the foundations of this mechanism will be discussed.

## 3.2 Major Principles of EU Law

In the law of the EU, the body of legal rules which comprise the 'sources of law' can be divided into two categories: (Günuğur, 1993:159) 1-The Primary Sources and 2-Secondary Sources. The Primary sources are the founding Treaties. They constitute the basis of the EU law and they are often referred to as the 'Community's Constitution' (Shaw, 2003:179). Similar to a State's constitution, no other new legislation can be enacted against the Treaties (Günuğur, 1993:189). The secondary sources are the legislations enacted by the Community institutions. These legislations are regulations, directives, decisions and opinions each of which will be defined in the section of 'direct effect' principle. The 'secondary sources' also involve the international treaties in which the community is a party. These include agreements with one or more third states or other international organizations concluded by the Community (Shaw, 2003:180). Besides these sources, the general principles of law and decisions of the Court of Justice are also the important sources of Community law. The general principles of law are a body of rules for the most part unwritten which bind the EU and they offer a background statement of values and basic standarts. The most important source of the EU law for the purpose of this thesis are the *case law of the ECJ*[27].

Regarding the Court's role in European integration process, the most important impact has been the development of general principles of Community Law through the Court's *case-law*. In order to solve conflicts arising between

[27] This was explained in Chapter 1 in detail.

Community law and national law, to protect individual rights and more importantly to ensure effective enforcement of Community law, the Court, through its judgements, has developed certain principles. The most important of these will be mentioned below. These principles are important as a means of effective enforcement of Community law. Without these principles, the level of legal integration could not achieve the level that it has achieved today.

### 3.2.1 Establishment of Basic Principles of Community Law

#### 3.2.1.1 Principle of Direct Effect

In its broadest definition, 'direct effect' refers to the capacity of a provision of law to invoke *rights* and *obligations* for individuals. Similarly, in EC Law, the principle of 'direct effect'[28] refers to the capacity of EC law to be invoked by individuals in proceedings before national courts (Craig, 1997:152).

In the early days of Community law, there was a tendency to use the terms "direct applicability" and "direct effect" interchangeably, but this is no longer the case (Craig, 1997). As Tekinalp (2000) argues, the question of direct applicability deals with whether *action by national bodies* is necessary to give effect to a provision of Community law. However, the question of direct effect relates to whether an *individual* can rely on a particular provision of Community law before national courts. In other words, if a provision is directly applicable, this means that there is no need for a national action in order to give effect to a provision. But, the concept of direct effect is independent from the action of the national authorities. This means that, a provision may be directly

[28] If the 'right' which originates from the principle of 'direct effect' is invoked before the states, it is called *vertical direct effect* and if this right is invoked in individual-individual conflicts, this is called *horizontal direct effect*. As it is mentioned in the definition, direct effect may also impose obligations. If direct effect principle impose obligations on individuals to the states, then this is called, '*reverse direct effect'*. When the principle of direct effect impose *obligation* to an individual and a *right* to another individual, then this kind of direct effect is called '*mutual direct effect'*. (Tekinalp, 2000: 120)

effective without being directly applicable. For example, as it will be explained below, a directive which is not directly applicable may be directly effective.

The domestic effect of an international agreement or treaty has been a matter to be determined in accordance with the constitutional law of each state which is a part to the treaty. International agreements and treaties do not give rise to rights or interests which citizens of the states which are party to such treaties can plead and have enforced before their national courts (Kapteyn, 1998: 527). Even if they are designed for the protection of individuals, the provisions of these treaties bind only the states at an inter-governmental level and in the absence of implementation, can not be domestically invoked or enforced by citizens (Craig, 1997:151).

However, the European Court of Justice took a rather different approach to the EC Treaties which became clear in one of its most important decisions in which it outlined the doctrine of 'direct effect'. This decision was established in Case *Van Gend en Loos v. Nederlandse Administratie der Belastingen*[29].

The *Van Gend en Loos Case* was the first decision by the European Court on *direct effect* and it is the most important judgements ever handed down by the Court. The main issue was whether Article 12 of the EEC Treaty is directly effective and the Court concluded that Article 12 of the EEC Treaty (25 of EC) 'must be interpreted as producing direct effects and creating individual rights which national courts must protect'. With this decision, under Article 12, the individual was a holder of rights and national courts were obliged to hear the individual's claims when putting the rights into action.

The importance of the *Van Gend en Loos* is not only the fact that it established

[29] Case 26/62, *N.V Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administrie der Belastingen* [1963] ECR 1; [1963] CMLR 105.

'direct effect' principle but also the fact that it defines the EU law as 'a new legal order of international law' (Spiermann, 1999:766). Direct effect made the Community legal order 'new' because in view of the Court, the EEC Treaty counted not only the member states but also the *individuals* as its subjects. For this reason, even after thirty years from the decision of Van Gend en Loos, Judge G.Federico Mancini (1994) wrote: 'But if the European Community still exists 50 or 100 years from now, historians will look back on Van Gend en Loos as the unique judicial contribution to the making of Europe'. Similarly, as Timmermans states, if there were no decision like Van Gend en Loos, uniformity of application of Community rules within member states would easily be disrupted and 'there would be no single market and no common policies' (quoted in Jansen, 1997).

In EC Law, the provisions which can be counted as directly effective and the conditions of direct effect has been developed by the Case-law of the ECJ. In other words, each single case concerning the direct effect makes a contribution to the development of the principle and with each single decision, a new dimension of the principle of direct effect comes into light. Since its establishment with Case *Van Gend en Loos*, there has been many cases before the ECJ which help to reformulate the principle in a more comprehensive manner. Regarding the major cases which make a contribution to the definition of the principle of direct effect, the legal scholars has classified the different conditions in which the principle of direct effect may occur. These classifications can be summarized as follows:

#### 3.2.1.1.1 Direct Effect of the Treaty Provisions

There is no statement in any of the Treaties as to whether Treaty provisions are directly effective but with its Case-law the ECJ established this principle (Murphy, 1996). As it is stated above, the first decision of the Court

establishing the direct effect was on a provision of a Treaty. This famous case, which is labelled as a 'ground-breaking judgement'(Craig, 1998) in the development of Community law and which outlined the doctrine of 'direct effect' was called *Van Gend en Loos.*

The Van Gend en Loos company had imported a quantity of chemical substance from Germany into the Netherlands. It was charged by Customs and Excise with an import duty contrary to Article 12 of the EEC Treaty. An appeal against payment of the duty was brought before the Dutch Tariefcommissie and Article 12 was raised in argument. The Tariefcommissie referred to the Court of Justice under Article 177 of the Treaty, asking whether Article 12 of the EEC Treaty has direct effect within the territory of a Member State, in other words, whether nationals of such a state can, on the basis of the Article in question, lay claim individual rights which the court must protect.

In *Van Gend en Loos*, the Article 12 EEC was held to confer rights on individuals where the Court observed that:

> The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is *more than* an agreement which merely creates mutual obligations between states....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 the member States, Community law therefore *not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage* (emphasis added).

With this decision, the observance and the protection of the EC law was given to the hands of the individuals besides the Commission. In other words, the state violations of EC law may be challenged not only at the 'supranational level' whereby the Commission may initiate proceedings against a defaulting

state, *but also* at national level by an *individual* who is able to rely on the principle of direct effect. For the individual, prejudiced by a violation of Community law, it is possible both to alert the Commission and also to make use of national procedures in order to secure protection through his own efforts.

In this way, the principle of direct effect established by the ECJ, makes a vital contribution to the enforcement of EC law whereby, placing the enforcement of EC law in the hands of individuals *and also* the *national judges*. Therefore, the ECJ's another contribution with this decision is to integrate the national judges within the enforcement mechanism of EC law (Weatherill, 1995). This is of highest importance because as Weatherill (1995) states; once the European Court has acquired loyal allies in the national courts, it has done much to repress possibilities for state revolt against Community law (Weatherill, 1995:99). In other words, national courts became Community courts and enforce Community rules. As a constitutional device, direct effect principle has created a system within which Community law and national law are not distinct layers but instead part of the same mixture.

According to Witte (1999), the major novelty of Van Gend en Loos is not the discovery that EEC law could have direct effect but that the question whether specific provisions of the Treaty (or, later secondary law) had direct effect was to be decided centrally by the Court of Justice rather than by the various national courts according to their own views on the matter.

In the decision of *Van Gend en Loos* the conditions for a provision of a Treaty to be directly effective are established as follows: 1) The provision must be clear and unambiguous; 2) It must be unconditional, 3) Its operation must not be dependent on further action being taken by Community or national authorities.

After the establishment of the principle of direct effect, the ECJ has defined various provisions of the Treaties as being directly effective. In these decisions, whether the provision has a *vertical* or a *horizontal* direct effect has also been defined.

#### 3.2.1.1.2 Direct Effect of Regulations

The features of the Regulations which form the most important part of *secondary sources* of EC Law, has been defined in Article 292/2 of TEC (ex Art.189) stating that, a regulation is 'binding in its entirety and directly applicable in all Member States'. As the regulations of the Communities establish general rules which are abstract and objective, in their nature, they are directly effective. The Court observes this fact on various occasions[30] stated as follows: 'Regulations, by reason of their nature and their function in the system of Community law, ...have direct effect and are as such, capable of creating individual rights which national courts must protect'[31].

Among these Cases, one example is the Case 39/72, *Commission v. Italy*[32] where the Commission by a series of regulations instituted a system of premiums for slaughtering cows and for witholding milk products from the market. It considered that Italy was in breach of the regulations since Italy had not properly applied or given effect to the premium system in its territory. The

[30] There are only two occasions in which the regulations are not defined as having direct effect *by their nature.* These are, Cases *Schlüter and Rogers/Darthenay* where the Court has observed that the regulations have direct effect not *by their nature* but by the fact that they satisfy the '*conditions of direct effect'*. But in general, the Court accepts the direct effect of the Regulations on the basis of their *nature.*

[31] E.g Case 43/71 *Politi SAS v. Ministry of Finance of the Italian Republic* [1971] ECR 1039 at 1048, Case 84/71 *Sp A Marimex v. Ministry of Finance of the Italian Republic*[1972] ECR 89 at 96, Case 93/71 *Leoneio v.Ministry for Agriculture and Forestry of the Italian Republic* [1972].

[32] Case 39/72, *Commission v. Italy* [1973] ECR 101, [1973] CMLR 439

Commision brought infringement proceedings against Italy under Art. 169 EEC claiming that both the delay and the eventual manner of giving effect to the system were in breach of Community obligations and of the Commission Regulations. In this case, the Court confirmed the direct effect of regulations[33].

**3.2.1.1.3 Direct Effect of Directives**

Under Art.249/3 TEC, directives 'shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Therefore, the implementation of the directives are left to the Member States which may not be uniform in each Member State. Because of this reason, the directives does not have 'direct applicability'. Each Member State is obliged to reflect the rules of directives to its national law with its own national procedure. However, these factors did not deter the Court from considering whether directives might give rise to direct effects. In Case *Van Duyn*[34] the Court observed that, provisions of the directives can also have direct effect.

Yvonne Van Duyn was a Dutch national who has come to the UK to take up an offer of employment with the Church of Scientology, an organization which was officially regarded by the British Government as socially harmful, although no legal restrictions were placed upon its practices. Van Duyn was refused leave to enter the UK on account of her plans to work for the Church of Scientology. She challenged this refusal on the basis of Article 48 of the EEC Treaty, Regulation 1612/68, and Directive 64/221, all of which regulate the freedom of movement of workers within the Community. The High Court referred several questions to the Court of Justice, asking amongst other things whether Directive 64/221, which governed the kinds of restrictions on the free

[33] '...Consequently all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardizing their simultanous and uniform application in the whole of the Community'.

movement of workers which Member States remained free to adopt, was directly effective.

The Van Duyn case has been a signal to the individuals pointing to the fact that the directives may also create rights for them which can be invoked before their national courts. This decision was another step in the ECJ's contribution to the legal integration of the Community Law.

In its later decisions, the Court has developed the conditions for the direct effect of directives. In this sense, decision on Case *Ratti*[35] is important. In this case, Mr Ratti's Italian company had begun packaging and labelling its containers of solvents in accordance with two Council directives regulating the area. These directives had not yet been implemented in Italy, and the requirements of the Italian legislation on the matter were more strict than those under the Directive, and provided for penalities for those who failed to comply. Criminal proceedings were instituted against Ratti under the domestic legislation in Milan, and he relied in his defence on the Community Directives. A preliminary reference was made to the Court of Justice asking whether the provisions of the Directive were directly effective. In its decision on Ratti Case, the Court defined that the directives can have direct effect on condition that they are not properly implemented by the Member States or not implemented within the prescribed periods. In its decision in *Marshall I*[36], the Court ruled that, directives are capable of only 'vertical' direct effect and unlike regulations and Treaty provisions, they are not capable of 'horizontal' direct effect.

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[34] Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337, [1975] 1.

[35] Case 148/78, *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629,[1980] 1 CMLR 96

[36] Case 152/84 [1986] ECR 723

### 3.2.1.1.4 Direct Effect of Decisions

The ECJ accepted the direct effect of decisions which are directed towards the Member States in Case *Grad*[37]. The 'conditions for direct effect' which are defined in the direct effect of Treaties is also applied to the decisions. However, only the decisions which are directed towards the *Member States* have 'vertical' direct effect. The horizontal direct effect of such decisions has not been discussed in ECJ Case Law. Moreover, it is improper to discuss either the vertical or horizontal direct effect of the decisions directed towards the *individuals* because of their nature.

### 3.2.1.1.5 Direct Effect of Agreements with Third Countries

By virtue of Articles 210 and 228 of the EEC, the community has legal personality and is empowered to enter into contractual relations with other persons and organizations. In order to make the actions and agreements of the community more effective, the Court held that international agreements can, in certain circumstances, be directly effective.

Despite some cases[38] where the Court has denied the direct effect of the provisions of specific international agreements or treaties, there are many more cases where the Court recognized the direct effect of the provisions of international agreements. For example; in *Hauptzollamt Mainz v. Kupferberg*[39], the Court held that a different provision of the free trade agreement with Portugal was directly effective since the provision was unconditional,

[37] Case 9/70 *Grad / Finanzamt Traunstein* [1970]

[38] Case Case 21-24/72, *I International Fruit Company v. Produktschap voor Groenten en Fruit*, [1972]ECR 1219, [1975] 2 CMLR 1, Case 270/80, *Polydor Ltd. and RSO Records Inc. v. Harlequin Record Shops Ltd. and Simons Records Ltd.[*1982] ECR 329

[39] 104/81 [1982]ECR 3641, [1983] 1 CMLR 1.

sufficiently precise and its direct application was within the purpose of the agreement.

The Court also recognized the direct effect of provisions of certain international agreements, in particular of the association agreements concluded with countries which hope to join the Community as a full member. The context and aim of these agreements are not very different from those of the Treaties since they usually represent a stage in the process of eventual accession to the Community. The following case was not even a provision of an international agreement to which the Community was party but rather a decision which was adopted by a Council of Association which had been set up by the Turkey-EC Agreement.

This Case was called *Sevince*[40] where Mr.Sevince, a Turkish national living in The Netherlands, had appealed from a decision of the Staatsecretairis rejecting his application for a new residence permit. Certain provisions of the Association Agreement between Turkey and the Community followed the principles set out in the chapter of the EEC Treaty on the free movement of workers, and the EEC-Turkey Association Council which was set up under the former agreement had adopted certain decisions to implement its objectives. Sevince relied in his application upon the decisions of the Association Council, by virtue of which a Turkish worker was entitled, under certain conditions, to free access to any employment of his or her choice. The Dutch Court refferred to the Court of Justice. The Court held that 'since they are directly connected with the Agreement to which they give effect, the decisions of the Council of Association, in the same way as the Agreement itself, form an integral part, as from their entry into force, of the Community legal system'. Following this, the Court stated that a provision in an agreement concluded by the Community with

[40] Case C-192/89, *S.Z. Sevince v. Staatsecretaris van Justitie* [1990] ECR I-341,[1992]2 CMLR 57

non-member countries must be regarded as having direct effect regarding the wording, nature and purpose of the agreement. This provision is said to have direct effect if it contains a clear and precise obligation which is not subject to the adoption of any subsequent measure. In other Cases[41] following the *Sevince,* the Court accepted the direct effect of the decisions of the Association Council regulating the rights of employment and settlement of Turkish workers.

**3.2.1.1.6 The importance of the Establishment of Direct Effect**

In its decision in Van Gend en Loos, the Court has defined the EEC Treaty as establishing a 'new legal order of international law for the benefit of which the states have limited their sovereign rights'. With this statement, the Court has claimed a sovereign authority for the EEC Treaty. Such a claim breaks from the doctrine of conferred powers which asserts that international organizations only have those legal rights and duties which are specified in their constituent documents (Chalmers, 1998:271). According to this doctrine; as the source of the organization's power is their grant by the Member States, the organization must occupy a subordinate position to those states. However, the Court established that, the basis of the Community powers are not derived from the Member States, but are autonomous and original. In this way, as Chalmers (1998:277) argues, the process of 'constitutionalization' has begun in the Communities.

By establishing the principle of direct effect, the Court also asserted that the founding Treaties of the European Communities has created a Community not only of States but also of peoples and persons. Therefore, not only Member states but also individuals must be seen as being subjects of Community law. Following a democratic ideal, the Court called for participation of individuals in

[41] See Tekinalp, 2000: 137

the Community legal order (Wind, 1999). It emphasized that, private individuals are not only liable to obligations but that they also have rights which must be legally protected.

Moreover, the principle of direct effect has established a strong enforcement mechanism in which the Member States have to comply with the provisions that they had agreed (Wind, 1999). In this way, the force and effectiveness of Community norms was strenghtened by the automatic internalization of Treaty rules into national legal systems. The function of the Commission which is to enforce the Community norms was enlarged to the individual level and all levels of the national court system.

Thus, because of all these reasons, the principle of direct effect is a key component of the *sui generis* constitutional nature of EC law. If the direct effect was not a part of the EC legal order, the dynamic development of EC law would be considerably reduced. The realization of the overall objectives of the Treaty is secured with the Court's establishment of the principle of direct effect.

Moreover, the national judges were also made the guardians of the EC enforcement system which limited the maneuver of politicians in their violation of EC law. As Weatherill states, the European Court has acquired local allies in the national courts which reduced the possibilities of state revolt against the Community law (Weatherill, 1995:99). In Mancini and Keeling's words, the direct effect took the Community law 'out of the hands of politicians and bureaucrats' and gave it to 'the people'.

#### 3.2.1.2 Establishment of the Principle of Supremacy

According to the Court's reasoning in Van Gend en Loos, the subjects and participants in the '*new legal order'* were both the Member States and their

citizens. However, the principle of direct effect was not the only crucial contribution of the Court to the EU law. The principle of direct effect would have had little impact if Community law did not supersede national law. In this situation, the Member States would simply ignore Community rules that conflicted with national rules.

Two years later than the Van Gend en Loos Case, the Court established the principle of *supremacy* with Case *Costa v. Enel*[42]. In the following years; the principle of supremacy of Community law was further developed with the case law of the ECJ. Among these cases the most important ones which has developed the principle are *Simmenthal*[43] and *Factortame*[44]. These cases have established *the principle of supremacy* which is a cornerstone in the European constitutionalization (Alter, 2001).

The principle of supremacy basicly implies that all direcly effective Community provisions and in certain circumstances directives which are not directly effective are superior to the provisions of national law in case of a conflict between Community law and national law (Alter, 2001). In such circumstances, Community law is the one to be applied. Moreover, no new national legislation may be introduced unless it is compatible with Community law.

To begin with the *Costa case*; in 1962, an Italian law nationalized the production and distribution of electricity undertakings to National Electricity Board (ENEL). Mr. Costa was a shareholder of one of the companies that were nationalized and in legal proceedings before the Giudice Conciliatore in Milan,

[42] Case 6/64, *Flamino Costa v. Enel* [1964] ECR 585, [1964] CMLR 42,593.

[43] Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629

[44] Case C-213/89, *R. v. Secretary of State for Transport ex porte Factortame Ltd. And Others*, (1990 EGRI-243), (1990) 3 CMLR.

he claimed that, this law infringed various provisions of the EEC Treaty. A reference was made to the Court of Justice under Art.177 and the Court held that; Article 37(EEC) provides that:

> Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed..' and that 'such a clearly expressed prohibition which came into force with the Treaty throughout the Community....forms part of the law of those states and directly concerns their nationals...it creates individual rights which national courts must protect.

As it is seen in the quotation, the Court once more emphasized the principle of direct effect. But besides this, it established that '....the law stemming from the Treaty, an independent source of law, *could not* because of its special and original nature, *be overriden by domestic legal provisions*,..'(emphasis added). In other words, the Court observed that, Community law had to be given primacy by national courts over any incompatible national law.

In the decision, the Court stated that, the Treaty created its *own legal order* which has become an 'integral part' of the legal systems of each member states and also made an emphasis on the member states' *transfer of powers* to the Community and their decision on the limitation of their own sovereignty by these Treaties. Moreover, in its decision, the Court concluded that, it is 'impossible' for the Member States to accord primacy to domestic laws since the aims of the Treaty were those of integration and co-operation. The achievement of these aims would be undermined if one Member State refuse to give effect to a Community law. The Court also asserted that, the Member States should not enact any new legislative acts which are contrary to the Community provisions.

The importance of this decision is that, the Court emphasized the 'special and original nature' of the rules of the community. This judgement implies how a

supranational institution- the ECJ has directed the route of the development of the European integration. As Craig (1997) argues; decision in Costa 'was a bold step for the Court to support its conception of the Community legal order by declaring that the states had limited their own powers and had transferred sovereignty to the Community institutions'(Craig, 1997:245). Therefore, there is a political significance of the Court's ruling in Costa. It established that, the Treaties establishing the European Communities creates its own legal system which is different from the legal systems of each of the Member States and this new legal system has brought a 'transfer of jurisdiction'[45] to the Community institutions.

In Costa and Van Gend, the Court set out its theoretical basis for the principle of supremacy of Community law. The practical application of the principle became clearer in its later decisions. The *Simmenthal II* established that, the principle of supremacy was not simply a matter of principle or of theory only, but was a practical effect of Community law.

In this case, Simmenthal imported some beef from France into Italy and was made to pay a fee for a public health inspection when the meet crossed the frontier. This was laid down by an Italian law passed in 1970 however this was contrary to the EC Treaty and two Community regulations passed in 1964 and 1968. The case began in an Italian court where two points were raised by the Italian authorities: first that the Italian law must prevail because it was passed after the two Community regulations, and secondly, that even if the Italian law conflicted with Italy's treaty obligations, it had to be applied by the Italian courts until it is declared unconstitutional by the Italian Constitutional court. A reference was made to the European Court to obtain a ruling on these issues.

Here, it is necessary to quote the key passages in the judgement:

[45] This definition was introduced by Advocate General Lagrange in his opinion on the Case.

> ...Furthermore, in accordance with the principle of *precedence of Community law*, the relationship between *provisions of the Treaty and directly applicable measures* of the institutions on the one hand and the *national law of the Member states* on the other is such that *those provisions and measures* not only by their entry into force *render automatically inapplicable any conflicting provision of current national law* but-in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States- *also preclude the valid adoption of new national legislative measures* to the extent to which they would be incompatible with Community provisions...(emphasis added)

In this judgement, there are three crucial points. First of all, it asserts that, Treaty provisions and directly effective[46] provisions are superior. Secondly, the conflicting national provisions are not 'void' but 'inapplicable'. Thirdly, not only *existing* national legislation which conflicts directly with a Community provision but also the possible new legislation are inapplicable.

Regarding the first point then, *all the Community provisions including the directly effective directives and decisions* will prevail over inconsistent national legislation. Indeed, in the following years, the *Ratti and Marshall* cases supported this judgement asserting the supremacy of directives over national legislation-provided the right contained in the directive is invoked against the State. Referring to this judgement again, a directly effective provision in an international agreement will also prevail over inconsistent national legislation.

Significance of the second point is that, by declaring the national legislation 'inapplicable' but not 'void'; the court gave a signal to the national legislation that it respect the sovereignty of the national law and that the principle of supremacy is a principle which is to be applied in the circumstances of *conflict* between the national law and Community law. In this way, it has emphasized that, there is not an absolute hierarchical relationship between the Community

[46] The Court uses terms 'direct effect' and 'direct applicability' interchangeably.

rules and the national law in all circumstances (Tekinalp, 2000:180). In other words, the Court points to the fact that the provision of a national law is *inapplicable* when it is contrary to a directly effective Community provision but it leaves the duty to the national authorities to declare that the legislation is *void*. In this way, it distanced itself from the national sovereignty of the member states.

However, while the Court respects the sovereignity of the national legislation, it also imposes a positive obligation on Member States to repeal conflicting national legislation even though it is inapplicable. In other words, even though it defines those rules as 'inapplicable' but not 'void', it asserts that the Member States should take necessary precautions to avoid those national legislations. This obligation was laid down, in its later decision in *French Merchant Seamen* case where the Court held that, the failure to repeal the law created 'an ambiguous state of affairs' which will harm the Community law.

The *French Merchant Seamen* Case concerned a French law which provided that, a certain proportion of the crew on French merchant ships had to be of French nationality. This was plainly in conflict with Community law and enforcement proceedings under Art.169 EC were brought against France. In this Case, the French Government argued that, the French law was not in fact *applied* and that, since under Community law, it was inapplicable, the continued existence of the law did not constitute a violation of the Treaty. As a response, the Court held that, the failure to repeal the law created an 'ambiguous state of affairs' which would make Community seamen uncertain 'as to the possibilities available to them of relying on Community law'. Judgement was therefore, given against France.

The third point in Simmenthal was that, not only *existing* provisions that are in conflict with the Community norms are inapplicable, but also the ones that have a *potential* are inapplicable. This means that, even when the provision is

enacted later in date, it is inapplicable. So, the argument of the Italian Court that the provision was adopted later than the Community provision can not be respected.

The decision in Simmenthal was also very important from the view of the national courts (Weatherill, 1995). The Court held that, it was the duty of a national court to give full effect to the Community provisions and *not* to apply any conflicting provision of national legislation. But more importantly, it held that, the national court should not wait for the national law to be declared as unconstitutional by the Constitutional Court. In this way, the decision had given full responsibility to the lower courts in not applying a national legislation which is in conflict with a Community provision even if there is a higher Court which is responsible to declare that the national law is unconstitutional. Thus, the case was one of the most important examples of how the Court has conferred on domestic Courts powers and jurisdiction which they did not have under their own national law (Craig, 1997:249).

This situation became clearer in the United Kingdom after the ruling in *Factortame*[47] where having repeated much of its ruling in Simmenthal on the need of effectiveness and for the automatic precedence of Community law over national law, the Court addressed the issue of interim relief. The Court held that, the requirement that priority be given to directly effective Community law over conflicting national law meant that, even if the Community law were only allegedly directly effective, a national rule which prevent domestic courts from giving interim relief should be set aside or ignored by those domestic courts. It held that, if the domestic law prohibited an interim relief which should be granted regarding the Community law, then the domestic court should 'ensure the legal protection which persons derive from the direct effect of provisions of

[47] Case C-213/89, *R.v.Secretary of State for Transport,ex parte Factortame Ltd and Others*, [1990] ECR I-2433, [1990] 3 CMLR 1.

Community law' and set aside national legislative provisions which might prevent Community rules from 'having full force and effect'.

In *Von Colson and Kamann*[48] and *Marleasing*[49] Cases, the Court has established that, not only the directly effective Community provisions but also directives which are not directly effective are also superior to the domestic provisions (Tekinalp, 2000:149).

As a result, by 1989, the principle of supremacy of Community law was established with these major cases by the Court of Justice. However, the supremacy of Community law is a bi-dimensional matter which involves not only the Court decisions but also the practical application of the Member States. The internal acceptance and adaptation of the legal and constitutional orders of the Member States is another dimension in the principle of supremacy. Regarding this dimension, as Weiler has argued, evolutionary process is more complicated. In some Member States, the reception of the principle caused no major problems(Benelux), in others, the Courts accepted the doctrine with reservations(Italy), while in some other countries like France, the judiciary split, one branch accepting the doctrine and the other refusing it (Weiler, 1999).

While respecting this second dimension which should be studied in studying the principle of supremacy, within the limitations and purpose of this study, the focus has been made on the *Court's* establishment of the principle. The reflections of this principle in 25 Member States each of which have different domestic legal systems will exceed the purpose and limitation of this paper.

[48] Case 14/83 *Von Colson and Kamann v. Land Nordrhein Westfalen*, [1984]

[49] Case 106/89, *Marleasing v. La Comercial Internacional de Alimentacion SA*, [1990]

#### 3.2.1.2.1 Importance of the Court's Establishment of the Principle of Supremacy

The principle of supremacy differs fundamentally from the principle of precedence in international law (Witte, in Craig, 1997:182). In international law, it is a generally accepted principle that in the relations between powers who are Contracting Parties to a treaty, the provisions of municipal law can not prevail over those of the Treaty. But, as Witte argues (in Craig, 1997), this principle applies to 'relations between powers' and that it is applicable on the *international plane*. However, the Costa Case was about the *internal primacy* of EC law. This means that, in the principle of Supremacy in the European Communities, there is also the *duty* of the national courts to enforce EC rules even when they conflict with national legislation. Again taking the view of Prof. Witte, such a duty had never been considered to be part of international law.

The Court's emphasis on the Community order as constituting a *permanent* limitation of sovereign rights is also radical compared with the traditional international law where commitments are almost always of limited duration and agreements do not have the element of irreversibility (Wind, 2001:147). Therefore, as Wind states; the supremacy principle 'crossed a clear demarcation line in international politics and certainly went beyond the traditional understanding of international obligations.'

Another significant point is that, The Treaty of Rome contained no supremacy clause providing for the supremacy of Community law over that of its member states. However, with its judicial activism, the Court established a principle which is found in federal constitutions (Dougles-Scott, 2002:255). The Court ruled that, the member states have limited their sovereign rights by entering into the Communities and thus have created a body of law which binds their

nationals and themselves. It is the Court's establishment that a directly effective Community law provision is to prevail over national law. Even a fundamental constitutional provision can not be invoked to challenge the supremacy of Community law. Thus a hierachy of norms was established between the Community law and national law in cases of conflict.

As it is mentioned; with the establishment of the principle of supremacy, the Court also gave power to national lower courts in the implementation of the Community law. According to the Court Case Law, the lower court, even if not empowered under national law must give full effect to Community law.

Finally, another significance of the principle of supremacy is that, it impose certain obligations on the domestic courts to implement the effective enforcement of EU law. As it is described above, with the principle of supremacy, in cases that come before them, the national courts are given the obligation to set aside the national legislations if they are contrary to the Community law. This situation is often called as the 'duty to disapply' (Craig, 1997). However, disapplication is only a minimum requirement. As it is stated above, in its later decisions, the Court held that the Member states are obliged to repeal existing laws which are in conflict with the Community rules and should prevent any new legislation that is in contradiction with the Community law.

The principle of supremacy and direct effect, supported by the Article 177 preliminary reference procedure, brought to the Community legal structure a pattern that is very close to a federal system of law (Weatherill, 1995). The hierarchy that places Community law on top is sustained by the principle of supremacy, the enforcement of the legal order is secured with the direct effect principle and preliminary ruling mechanism and as a result Community /state relationship has had close analogies with that of federal authority/province,state

(Weatherill, 1995:187).

### 3.2.1.3 Protection of Human Rights

The Charter of Fundamental Rights of the EU which was proclaimed in Nice in December 2000, brings together "modern, economic and social rights with more widely recognized civil and political rights in a single text that aims to make visible "common values" of the European Union (Hervey&Kenner, 2003). These fundamental rights proclaimed in the Charter are drawn from a variety of international and national sources including human rights instruments of the United Nations, the Council of Europe and the European Community's own Charter of the Fundamental Social Rights of Workers of 1989. In addition to these sources, there are, the European Community Treaty, Community legislation and case law of both the European Court of Justice and the European Court of Human Rights (Hervey&Kenner, 2003).

This Charter has been incorporated to the draft Treaty establishing a Constitution for Europe which was adopted by the European Convention in June 2003 and formally submitted to the European Council in Rome on 18 July 2003 (Craig, 2004). Article I-9 (I) of the draft Constitution provides: "The Union shall recognize rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II" of the Constitution. Part II is entitled "The Charter of Fundamental Rights of the Union" and comprises the entire Charter, including its preamble (Craig, 2004).

It is true that if a treaty intended to set out the basic values and organizing principles of the Union did not include the Charter in some form, it would be extremely odd (Craig, 2004). Because in most modern systems, there are catalogues of fundamental rights, usually in the Constitution. (Craig, 2004). For the EU to adopt a Constitution which did not include a catalogue of

fundamental rights would undermine the notion- currently expressed in Article 6 (1) TEU and reiterated in Art. I-2 of the draft Constitution-that respect for human rights is one of the values on which the Union is founded (Craig, 2004).

Until the draft Constitution, the Treaties included no explicit provision on the protection of the fundamental rights and protection of fundamental rights for the first 40 years of European integration developed through the case law of the European Court of Justice until the Charter of Fundamental Rights of the European Union.

As described above, fundamental human rights constitute an essential ingredient of any constitutional democracy (Dougles-Scott, 2002). Together with the principles of direct effect and supremacy, the principle of fundamental human rights that has been established for the first time by the Court, have been the most important constitutional elements in the EU law. When the Court established the "twin pillars" of the Community legal order with the establishment of the principle of direct effect and supremacy, some national courts reacted strongly against this creation of a new legal order (Chalmers, 1998). In the late 1960s, the constitutional courts of Italy and Germany argued that, the Community law did not guarantee a standard of fundamental rights and they questioned the validity of Community law (Dougles-Scott, 2002). With the development of Community's human rights with the case-law of the ECJ, this potential threat had been overcome.

The case in which the European Court announced the new doctrine was *Stauder v. City of Ulm* [50]. This concerned a Community scheme to provide cheap butter for receipients of welfare benefits. The applicant received war victims' welfare benefits in Germany and was therefore entitled to the cheap butter; however, he objected to the fact that he was obliged to present a coupon bearing his name

[50] Case 29/69,[1969] ECR 419

and address in order to obtain the butter. He maintained that it was a humiliation to have to reveal his identity and argued that this constituted a violation of his fundamental human rights. He claimed that the Community decision in question was invalid in so far as it contained this requirement. The action was brought before the German courts and a reference was made to the European Court.

The European Court held that; the Community measure did not require the receipient's name to appear on the coupon. It then continued 'Interpreted in this way the provision at issue contains nothing capable of prejudicing the *fundamental human rights enshrined in the general principles of Community law and protected by the Court'*(emphasis added). This clause recognized that fundamental human rights are a general principle of Community law.

The next case was *Internationale Handelsgesellschaft*[51] which concerned the common agricultural policy. In order to control the market in certain agricultural products, a system had been introduced under which exports were permitted only if the exporter first obtained an export licence. When application was made for the licence, the exporter had to deposit a sum of money which would be forfeit if he failed to make the export during the period of validity of the licence. The applicants in this case, however, claimed that the whole system was invalid as being contrary to fundamental human rights. The German administrative court said that, the Community measure was invalid for violating the German Constitution and the question of its validity was referred to the European Court.

The European Court first said that, the validity of Community measures cannot be judged according to the rules or concepts of national law. Consequently; even a violation of the fundamental human rights provisions of a Member

[51] Case 11/70,[1970] ECR 1125

State's constitution could not impair the validity of a Community provision. However, the Court added that:

> ...However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, *respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.* The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore, be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

The important point in this decision is that; the Court asserts that the concept of human rights derives its validity solely from Community law *but*; it is 'inspired' by *national constitutional traditions.*

Another step was taken in *Nold v. Commission*[52]. This case concerned a Commission decision under the ECSC Treaty which provided that coal wholesalers could not buy Ruhr coal direct from the selling agency without purchasing a certain minimun quantity. Nold was a Ruhr wholesaler and was not in a position to meet this requirement. He claimed that the decsion was a violation of his fundamental rights because it deprived him of a property right and it infringed his right to the free pursuit of an economic activity. He brought proceedings before the European Court under Art. 33 ECSC for the annulment of the decision.

In the course of its judgement, the European Court made the following statement:

> As the Court has already stated, *fundamental rights form an integral part of the general principles of law,* the observance of which it ensures./In safeguarding these rights, *the Court is bound to draw inspiration from constitutional traditions to the Member States*, and *it can not therefore uphold measures which are*

[52] Case 4/73, [1974] ECR 491

> *incompatible with fundamental rights recognized and protected by the constitutions of those States.*/Similarly, *international Treaties for the protection of human right on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.*(emphasis added)

This statement makes clear that, a Community measure in conflict with fundamental rights will be annulled; and secondly, it reveals a new source of 'inspiration' for these rights which are the *international treaties.*

Another important case which involves European Court's most detailed discussions of human rights is *Hauer v. Land Rheinland-Pfaltz*[53]. This case concerned a Community regulation which imposed a temporary ban on all new planting of vines. Hauer owned a land in Germany which she wanted to plant as a vineyard and was prevented from doing so by the regulation. She began proceedings before the German courts and a reference was made to the European Court, which accepted as principles of Community law the right to property and the freedom to pursue a trade or profession. The Court however, found that, Community measure was justified in the general interest and thus fell within an exception to these rights. The importance of this judgement is that; in this judgement, the European Court referred to particular provisions in the constitutions of three Member States (Germany, Italy and Ireland) in order to establish that the right to property is subject to restrictions. In the decision, the Court also analysed in some detail the relevant provisions of the European Convention on Human Rights.

In the light of these important cases, it can be said that, if a right is generally accepted throughout the Member States and does not prejudice fundamental Community aims, it is probable that the Court will accept it as a fundamental right under Community law.

[53] Case 44/79, [1979] ECR 3727

The ECJ has recognized a variety of rights in its jurisprudence like rights to trade and to property, to engage in economic activity, rights to a fair hearing, freedom of expression, privacy, right of access to information, rights to non-discrimination on grounds of sex, right of association etc.(Dougles-Scott, 2002:446). However, there are certain circumstances where the right is controversial. Abortion is the best example of a contraversial right. The right to life of the unborn is constitutionally protected in Ireland and as a result, abortion is prohibited there[54]. However, in many other Member States, the right of a pregnant women to choose whether to give birth or have an abortion is supported by the public opinion though not constitutionally protected (Hartley, 1994:146). In these situations, for the European Court, to accept either the right to life of the unborn or the right to choose as a fundamental right would cause hostility among the Member States. In these cases , the appropriate course is to let each Member State decide for itself (Hartley, 1994:146).

This issue came before the European Court in *SPUC v. Grogan*[55]. In this case, the Society for the Protection of Unborn Children, brought legal proceedings before the Irish courts to prevent student unions in Ireland from publicising the addresses of British abortion clinics. The society based its case on the provision of the Irish Constitution upholding the right to life of the unborn[56]. The students raised a defence under Community law and argued that abortion was a service within the terms of Art. 59 EC and that Community law therefore prohibited Ireland from placing restrictions on the right of Irish residents to have abortions in other Member States.

In this judgement the Court accepted that abortion clinics perform a service for

[54] Art.40.3.3. Constitution of Ireland.

[55] Case C-159/90, [1991] ECR I-4685

[56] Art. 40.3.3 Constitution of Ireland

the purpose of Art. 59 if their activities are legal in the member state where they are located. Subject to certain exceptions, this would normally mean that they could publicize their activities in other Member States. However, the Court held that, the defendants could not benefit from this right because they were not acting on behalf of the abortion clinics but they were simply trying to help their fellow students. As a result, in this case, the Court has not defined either option as a fundamental right.

As was mentioned above; besides the national constitutional traditions of the member states for the Court's concept of fundamental human rights, a second source of 'inspiration' are the *international treaties*. The most important Treaty in this respect is the European Convention for the Protection of Human Rights and Fundamental Freedoms. All the Member States are parties to it and the rights protected by it are also the Community human rights. The Court has made express reference to it on a number of occasions[57]. Other Treaties to which it has referred include European Social Charter of 18 November 1961 and Convention 111 of the International Labour Organization[58] (25 June 1958).

As a result, with its case-law, the Court has established that fundamental human rights are a general principle of Community law and it drew the general boundaries of the concept much more earlier than the EU Bill of Rights of 2000. As neither of the Treaties explicitly established the principle of fundamental human rights, the Court's judicial activism on this issue has also had a crucial contribution to the establishment of the EU legal order.

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[57] Some examples of which are Case 36/75 *Rutili v. Minister for the Interior* [1975]; Case 130/75 *Prais v. Council* [1976] ECR 1589; Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979]; Cases 209-215 and 218/78 *Van Landewyck et al. V. Commission* [1980] ECR 3125; Case 136/79 *National Panasonic (UK) Ltd. v. Commission* [1980] ECR 2033; Case 63/83 *R. v. Kirk* [1984] ECR 2689; Cases 46/87 and 227/88 *Hoechst AG v. Commission* [1989] ECR 2859

[58] Like Case 149/77 *Defrenne v. SABENA* [[1978] ECR 1365

### 3.2.2 Other Principles taken into account in the Application of Community Law

Article 5 of the EEC Treaty (Art.10 TEC) requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. This article obliges the Member States to cooperate with the institutions. Accordingly, as Rene Barents (in Jansen, 1997:61) argues, the draftsmen of the Treaty made a delibarate choice for a 'decentralized system' of Community administration[59].

As was mentioned, the application of Community law takes place principally in the legal activities of the Member States. Therefore, the national Courts occupy a central role in this process. The provisions of Community law which are directly effective can invoke rights or obligations before the national courts. Through the directions of the Court of Justice under the Preliminary Ruling procedure, it is the task of the national court to decide whether national rules and administrative acts are compatible with Community law and whether individuals have acted in accordance with the Community law (Kapteyn, 1998: 559).

However, the Community Treaties does not specify the conditions in which an action may be brought before the national court on the basis of a right deriving from a Community Provision (Tekinalp, 2000:171). These conditions are defined and developed by the case law of the European Court of Justice. Therefore, the decisions of the Court of Justice on the issue of the application of Community law has also made a crucial contribution to the development of EC law.

[59] Barents, R; '*The Preliminary Procedure and the Rule of Law in the European Union'*, in 'European Ambitions of National Judiciary' (1997), p.61

Through its case law, the Court of Justice has developed certain principles and rules which should be applied by the national courts in the application of Community law. Together with the principles that are described in the previous section, these rules have structured the ground on which the Community law stands. The most important ones among these principles are:

### 3.2.2.1 The Principle of the Autonomy of the National Authorities in the Application of Community law

As has been explained in the previous section, the national court is obliged to interpret national law as far as possible in conformity with Community law, to apply directly effective provisions of Community law, and, in the case of conflict between the Community law and national provisions, to disapply national law.

However, the degree to which the national court, can apply Community law is dependent on the possibilities offered by its national legal order for this purpose. So, as Keus describes, national law is the vehicle on which Community law must ride (Kapteyn, 1998: 559). The principle of the autonomy of the Member States' legal systems covers all substantive and organizational rules and principles applicable to actions brought to obtain judicial protection.

The principle of autonomy is described in Case *Ferwerda*[60] depending on the Article 5EC[61](Art.10 TEU) as:

> The legal protection made available as a result of the direct effect of the Community provisions both when such provisions create obligations for the subject and when thay confer rights on him. *It*

[60] Case 265/78 *H.Ferwerda BV v. Produktschap voor Vee en Vlees* [1980] ECR 617

[61] Art.5 EEC states that the Member States should 'take all appropriate measues, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty'.

> *is, however, for the national legal system* of *each Member state to determine the Courts having jurisdiction and to fix the procedures for applications to the courts intended to protect the rights* which the subject obtains through the direct effect of Community law **but** such procedures may not be less favourable than those in similar procedures concerning internal matters **and** may in no case be laid down in such a way as to render impossible in practice the exercise of the rights which the national courts must protect. (emphasis added)

This passage from the judgement in *Ferwerda* embraces earlier case law and contains the definition of the Court concerning the autonomy of the Member State legal systems (Kapteyn, 1998: 560). According to this, it is the duty of the *national court* to afford judicial protection and the national legislative measures are left autonomous in their application. However, there must be no distinction between claims brought under community law and the claims brought under national law and also the exercise of the rights must not be made impossible.

By drawing the lines of the principle of autonomy, the Court has made the Article 5 more concrete and more complete. It is again the case law of the ECJ which helped to structure a basic principle deriving from a Community provision. The decisions of the Court therefore, formulated the most important aspect in the application of Community law which is the principle of autonomy.

#### 3.2.2.2 Principle of Proportionality

According to the principle of Proportionality, a public authority may not impose obligations on a citizen which extend the purpose of the measure (Emiliou, 1996). If the burdens imposed are out of proportion, the measure will be annuled. In other words, there should be a reasonable relationship between the end and the means (Hartley, 1994:155).

This principle was incorporated to the Community law first by the European Court and now it has been embodied in the Treaties. Under the Maastrich

Agreement, the principle of proportionality (Article 3b) is inserted into the EC Treaty.

The decision which established the principle was *Fedechar*[62] in 1955 and later with *Fromançais*[63], the Court has developed its definition of the principle of proportionality. In these decisions, the Court established that, the means that are employed by the Community to achieve its aim should correspond to the *importance* of that aim and these means should be *necessary* for the achievement of the aim.

The principle of proportionality is of particular importance because it enables the Court to exercise not only control of the legality of a measure but also, control of its merits (Tridimas, 2000:549). This means that, the measure that the Community employs for an aim of the community law should be proportionate to the achievement of that aim and if a measure is not necessary for the achievement of that aim, then it is against the principle of proportionality. Therefore, the decision of the Court concerning the measure will investigate both the legality of the measure and also its merit.

For the purpose of this section, the principle of proportionality is important because it should be applied also by the national courts while deciding the cases on the application of Community law. Thus, the measures taken by the Member States in the application of Community law should be compatible with the principle of proportionality.

One of the important cases before the Court of Justice which concerns the

[62] Case 8/55 [1954-1956] ECR 292

[63] Case 66/82, *Fromançais v. Forma* [1983] ECR 395

measures adopted by the national authorities is Case *Watson*[64]. This case was about the legality of the decision of the Italian authorities to deport a British citizen from Italy. Ms Watson, a British citizen was claiming rights of residence in Italy on the basis of the right of free movement of workers as a fundamental Community right. However, the right of free movement of workers was subject to limitations which are 'justified' on the grounds of public policy, public security or public health. (Art.48 (3) EC) The Italian authorities sought to invoke this derogation to expel Ms Watson from the country. The reason given for the expulsion was that she had failed to comply with certain administrative procedures required under Italian law.

The legality of the national provisions came into question in the main proceedings and the Pretore of Milan made a reference to the Court under Article 177 EC. In Court's decision, Advocate General Trabbuchi noted that:

> ...in this context, special importance attaches to the principle that the obligation imposed *should be proportionate* to the legal objective sought by public authorities. Indeed, this principle is not confined to cases of derogation from such rights but is of general application and constitutes one of the principles which must govern action by public authorities Community or national, within the Community legal order....(emphasis added)

As is seen in the quotation, the Court establishes the principle of proportionality with respect to both the Community authorities and the national authorities. Therefore, in the application of the Community law both the Community authorities and the member states should employ proportionate means to the aims of the Community.

This principle is important also in situations where national authorities enact

[64] Case 118/75 *Watson* [1976]

penalties to secure compliance with the EC law. In *Hansen*[65] for example; the central issue was the extent of Member States' discretion with regard to the imposition of criminal penalties for breaches of EC law. The Court held that:

> where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the EEC Treaty requires the Member State to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, *whilst the choice of penalties remains within their discretion*, *they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive*, *which are* analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, *proportionate* and dissuasive (emphasis added)

As it is seen in the quotation, when the national authorities impose penalties for the infringement of the Community law, the principle of proportionality should be respected.

In general, the principle of proportionality regarding the application of the Community law by the national authorities have been defined by two criteria by the Court of Justice (Emiliou, 1996:169). First of these is that, the national authorities must always select the measures which are the least restrictive of the free movement of goods, persons, services and capital. The second criteria is that; the national authorities may not impose penalties or sanctions so disproportionate to the gravity of the infringement so as to become obstacles to the free movement of goods, persons, services and capital.

As is seen above, the Court of Justice has established a general principle which is very important in the application of Community law much more earlier than the Maastricht where the principle has become a provision of a Treaty. With its

[65] Case C-326/88 [1990] ECR I-2911

case law on the principle of proportionality, it drew the contours in the application of the Community law by the member states and introduced one of the most important general principles of law to the Community legal order.

### 3.2.2.3 The Principle of State Liability

Concerning the application of Community law by the Member States, the principle of state liability can be described as the most novel principle that the Court has ever established (Tallberg,2000). It is very important because it helps to impose concrete sanctions on the member states when they breach a Community law. As has been stated above, the Community Treaties or the secondary legislation does not specify the conditions in the application of Community law. Therefore, the application of Community law by the national authorities has been defined and structured by the Case law of the ECJ.

Again as was mentioned, Art.5 EEC states that the Member States should 'take all appropriate measues, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty'. But, if the member states does not apply the Community law with proper national actions or if they don't interpret the existing national law in accordance with the Community law, can an individual claim compensation for the damage that is caused by the member state?

It was again the case law of the ECJ which gave an answer to this question. Beginning with *Francovich*[66] *and Miret*[67]*,* with a series of Cases, the Court established the principle of 'state liability'.

According to this principle, the Member States are obliged to pay liability in

[66] Case C6/90 *Francovich and Bonifaci v. Italy*, [1991]

[67] Case C-334/92, *Wagner Miret v. Fondo de Garantia Salarial (Miret),* [1993]

order to compensate a damage caused by their violation of Community law (Tallberg, 2000). In other words, when the member states disobey the Community rules they are sanctioned. According to the case law of the ECJ, the principle of state liability gets its legal foundation from the principles of supremacy and direct effect (Tallberg, 2000:182).

The Court of Justice, with its Case-Law, has defined and formulated the principle of state liability and also has defined the conditions of the member state liability for compensation. The Cases that will be mentioned below, are the major Cases which have shaped the definition and conditions of the principle of state liability.

**3.2.2.3.1 Inaction or Improper Application of Community Law by the Member States**

In *Francovich*, the basic issue was the failure by the Italian government to implement Directive 80/987 on the protection of employees in the event of insolvency of their employer. Regarding the directive the employer was obliged to pay owed wages in the case of an insolvency. However, no steps were taken by the Italian state to implement the directive. The applicants brought proceedings against the State and the Italian Courts called for a Preliminary Ruling from the ECJ. As a result, the ECJ stated that:

> ....It follows that the principle of State liability for harm caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty....It follows from all the foregoing that it is a principle of Community law that the member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible....(emphasis added)

As is seen clearly in the quotation, the Court establishes a new principle. The Court based the legal foundation by referring to Art.5 that is mentioned above.

With this Case, the Court established that; if the disapplication of the Community rules infringe a right derived from a Community rule, then the state which violates the Community law is obliged to pay compensation.

In Francovich, the directive in question was not directly effective. However, with the proper regulation of the national authorities, it had a potantial to create rights for the individuals. Italy, by not applying the Community Directive, has prevented to invoke a right. In this case, by not making the necessary arrangements in its national system, it prevented the creation of a right resulting from the directive. Therefore, it is the obligation of Italy to pay the damage that is caused by its diapplication of Community law.

*Francovich* establishes three conditions for the state liability in cases of diapplication or improper application of the directive:

-The Directive should confer rights on individuals
-The contents of those rights should be apparent from the directive
-There sould be a causal link between the state's failure to implement the directive and the loss suffered by the persons affected

When these conditions are satisfied, it is the duty of the national court and the national law to decide on the compensation.

**3.2.2.3.2 Improper Interpretation of the National Law**

In the application of the Community law, the Member State may decide that the existing national law is enough for the application of a Community provision and may not make new regulations. In this case, the existing national law should be interpreted so that the Community provision will not be violated[68].

[68] Case 14/83 *Von Colson*, Tekinalp,2000: 184-258

The decision in *Miret* is about this issue. In this decision Spain was found liable for the damage that it has caused because it had not interpreted its existing national law in line with the Directive 80/987.

This directive was not directly effective like the one in *Francovich* but if the existing national law had been interpreted in line with the Community Directive, it had the potential to invoke rights on individuals. According to the Court, with improper interpretation of the existing national law, Spain has prevented a use of right deriving from the Community directive.Therefore, it is found liable to pay compensation. In this Case, the Court established that, the same three conditions in the disapplication of Community directive was valid for the improper interpretation of existing national law.

As a result, the Case *Miret* showed that, the principle of state liability is valid not only in cases of the disapplication or improper application of a Community Directive, but also in cases of improper interpretation of the existing national law with regard to the Directive. In both cases, the conditions for the state liability are the same.

#### 3.2.2.3.3 The 'Horizontal' Directly Effective Directives

As is stated in previous sections, the Directives can not have horizontal direct effect and that they can only have vertical direct effect. However, if the national regulations are properly arranged, by entering into the national law, the rights deriving from the Directive may be used in individual-individual conflicts (Tekinalp, 2000:132). In other words, a provision of a Directive which is vertically directly effective may invoke 'indirect effects' in individual-individual conflicts with the proper interpretation of the national law[69].

[69] Principle of ' Indirect effect' simply means that, in the interpretation of national law, meaning and purpose of Community law should be observed.

In *Dori*[70], the Court decided that, if the member state prevents the application of a provision of a Directive among individual conflicts, by not making necessary national arrangements, then the state is liable for the damage. The conditions of this kind of liability are also the same that has been established with *Francovich*.

**3.2.2.3.4 State Liability in Directly Effective Provisions**

In *Brasserie du Pecheur*[71] and *Factortame III*[72], the Court established that, the damages caused by the violation of directly effective provisions should also be compensated by the member states. In these cases, the national law of Germany and Britain were violating the directly effective Articles of TEU (Art.28 and 43).

The Court has established in these decisions that the liability of the state also involves the legislative acts which are in violation of the Community law. However, at this point, the conditions for the liability differs from the previous Cases. The conditions for the state liability in these circumstances are:

-The Community provision should confer rights on individuals.
-There should be a *sufficiently serious* breach.
-There sould be a causal link between the state's failure to implement the Community provision and the loss suffered by the persons affected.

Within the framework of these conditions, the compensation is left to the national authorities. However, as is described in the principle of autonomy, there must be no distinction between claims brought under community law and the claims brought under national law and also the exercise of the rights must

[70] Case C-91/92, *Faccini Dori v. Recreb* , [1994]

not be made impossible. With its later case law[73], the ECJ has further established the definition of 'sufficiently serious breach'.

As is seen, with each case law, the ECJ expanded the principle and at last, the principle applies to *all* breaches of *all* Community law, that is, regardless of whether the infringed rule is a treaty article, directive, or regulation and regardless of whether the infringement results from the actions of the legislative, executive or judicial branches of governments.

**3.2.2.3.5 The Importance of the Establishment of The Principle of State Liability**

With the establishment of the principle of state liability, the ECJ created new sanctions against member states who fail to comply with EU law. Before this principle was introduced, national courts could only under very limited circumstances award damages to individuals who had suffered from member state non-compliance. As is stated in this section, the principle of direct effect only provided a remedy in the individual case. However, many directives were not directly effective and when the member states failed to implement such directives properly or in time, individuals were deprived of the rights granted by these rules. Moreover, they were incapable of claiming compensation in national courts. Therefore, with ECJ's introduction of this principle, individuals' possibility of obtaining compensation when their rights have been infringed have been improved.

It is also emphasized in this section that, this principle is also a powerful

[71] Case C-46/93 *Brasserie du Pecheur v. Germany ,* [1996]

[72] Case C-48/93, *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd*., [1996]

[73] *British Telecommunications* (Case C-392/93,1996); *Hedley Lomas* (Case C-5/94,1996);*Dillenkofer* (Joined Cases C-178,179,188,189,190/94,1996)

incentive for member states to comply with EU rules because it imposed concrete sanctions. Moreover, with the principle of state liability, the role of citizens and companies in the enforcement of EU law has greatly been expanded. Therefore, an ordinary citizen was made an enforcer of the EU law.

While the Court was establishing these principles, it succeeded to collaborate with other actors. Indeed it was this collaboration which has made a vital contribution to the legitimacy of the constitutional principles. This collaboration has not been established suddenly and it involved certain resistances but at the end, the constitutional principles that has been set out by the Court have been accepted and internalized by these actors. It is the main focus of the next Chapter to examine the relationship of the Court with those actors.

# CHAPTER 4

## ECJ and OTHER ACTORS

Many scholars agree that, by its Case-law, the ECJ was establishing a system of governance approximating that of a federal state[74]. However, they also claim that, ECJ did not have the power to do this by itself. It had important supporters both before and after the establishment of these principles. It needed the collaboration of Commission, Member State legislative and executives, national courts and ordinary citizens to establish and develop these principles. As Weiler (1999:102) argues, if these domestic actors had refused to accept the ECJ as legitimate and authoratative interpreter of Community law, the achievements of the ECJ could not exist today. In the following discussion, the most important supporters of the ECJ will be emphasized. It will be discussed that these supporters have been crucial contributors as an 'actor' in the process of the ECJ's establishment of the EU legal order.

While explaining the interactions of the other actors and the ECJ, political scientists like Karen Alter, Walter Mattli, Anne-Marie Slaughter concern significantly 'how' and 'why' the doctrines of the ECJ have been accepted and legitimized by these actors. Therefore, unlike the legal approach which focuses on the norms and their implications, political science scholarship concerns more with 'how' and 'why' events have occurred. They also involve 'interest analysis' in their discussions which include the preferences and interests of the judges and other actors. In this section, while discussing the contributions of these actors to the ECJ's consititutionalization of the Treaties, both perspectives

[74] Like Jo Shaw (1996), J.HH Weiler (1999), D. Chalmers (1998), K.Alter (1998), M.Volcansek (1996), G.Garrett (1998), Walter Mattli and Anne Marie Slaughter (1998), Marks, Hooge and Blank(1996)

will be tried to combined and presented.

## 4.1 ECJ and the Commission

In Urwin's definition (Urwin, 1995), the European Commission is a 'bonding element' within the supranational institutional structure of the EU. Really, the Commission is created to 'drive forward the motor of integration' by recommending policies for action, administering the Treaties and acting as a guardian of the Community interest (Shaw,1996:109).

The Commission which is based in Brussels and Luxembourg, is a college of Twenty-five Commissioners-at least one from each Member State- chaired by a President. The powers and tasks of the Commission are set out in Article 211 TEC[75]. In practice, the role of the Commission is described by dividing it into four basic functions (Shaw, 1996:103):

1-The formulation of policy;
2-The execution and administration of policy;
3-The representation of the interests of the EU;
4-The guardianship of the Treaties.

There are three main mechanisms whereby the Commission develops the policy of the EU. It makes proposals for action; it drafts the budget which determines the allocation of resources; and it takes policy decisions (Shaw, 1996:110).

[75]Art.211 states that; 'In order to ensure the proper functioning and development of the common market, the Commission shall: ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied, formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary, have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty, exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.'

Proposals for action take either draft legislative acts prepared by the Commission for adoption by the Council or commission proposals for EU action within a broad field. In its executive role, the Commission manages the finances of the EU and supervise both revenue collection and expenditure. The Commission also administers the structural funds of the EU aimed at ensuring economic and social cohesion. In its representative function, it represents the interests of the EU on wider global stage[76].

Under Article 226 TEC, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaty it has the power to bring the matter before the Court of Justice. An example can be given in relation to state aids (Art. 88 TEC). In this respect, any aid granted by a Member State which distorts competition between Member States is incompatible with the common market. The Commission shall keep under constant review all systems of aid existing in Member States. If the state misuse an aid and does not abolish that aid within a period of time which is determined by the Commission, Commission may refer the matter to the Court (Shaw, 1996).

Most of the scholars agree that the ECJ and the Commission are good partners in the process of European integration. Stein (1981), for example, emphasis the fact that, the Commission has been a powerful ally of the Court from its early days while furthering European integration. According to Burley and Mattli (1993), both the Commission and the Court are 'pro-integrationists' and they try to do their best to realize their own agendas. They also claim that Commission is a powerful actor because it has a reputation for being an "impartial provider of information and expertise that is above the political fray".

[76] As Shaw argues; The Commission's role in establishing diplomatic missions in third countries is becoming more important each day.

The historical development of events prove this partnership of the ECJ and the Commission. Parallel to te ECJ's case law development which were driving Europe towards a more integrated system, the Commission attempted to perfect the functioning of this system. Tallberg (2003) provides an in depth analysis of the two most important programs initiated by the Commission in order to support the ECJ: the *Citizens First Initiative* and the *Robert Schuman Project*. These initiatives are important in the sense that, they provide good examples of the Commission's cooperation with the Court. Therefore, for the purpose of this study it is necessary to mention these initiatives.

The origin of these initiatives was a report presented in 1992 by the High Level Group on the Operation of the Internal Market which was requested by the Commission to identify potential problems and suggest a strategy. High Level Group on the Operation of the Internal Market suggested that, it was necessary to strenghten enforcement mechanisms through national courts[77]. It stressed that, there was a need to both raise the awareness of internal market rules among citizens and business and also to improve the knowledge of EU law in the legal professions. These suggestions were later included in the Commission's 1993 Strategic Programme which stressed the need to ensure that 'the capacity of national courts to apply Community law is optimised'[78]. As a result of these developments, Commission developed certain policy initiatives among which these two are the most important as regards to the cooperation of the Commission and the ECJ. The common point in these initiatives was that they both aimed to enhance awareness of EU law and legislation[79]. As they are the concrete examples of the cooperation between the ECJ and the Commission

[77] European Commission, *The Internal Market After 1992 : Meeting the Challenge. Report on the EEC Commission by the High Level Group on the Operation of the Internal Market*, Brussels, October 1992.

[78] European Commission, *Making the Most of the Internal Market: Strategic Programme. Communication from the Commission to the Council.* COM(93)

[79] Ibid.

these two projects will be handled in this study:

*The Citizens First Initiative*

The main target of the 'Citizens First Initiative' was to encourage citizens and companies to turn to national courts when their rights are infringed. As will be discussed in the following sections, individuals are the most important enforcers of EU law because the individuals are the ones who bring the cases before the national courts. National courts are also important partner of the ECJ in the implementation of the EU law and the Case law of the ECJ. Therefore, this initiative of the Commission has had crucial support for the ECJ. In this way people became aware of their rights and in this way, 'the man on the street' became an EU law enforcer.

The Citizens First, started in 1994 when the Commission recognized: 'The adoption and implementation of legislation must be accompanied by an active information policy in order that citizens and companies are aware of their rights and obligations and can act quickly whenever they are infringed'.[80] Tallberg argues that, *The Citizens First* was the most ambitious information initiative ever undertaken by the Commission (Tallberg, 2003:109).In this way, the Commission would both increase citizen's awareness of their rights and opportunities in the EU and also they would create potential 'enforcers' (who are the ordinary citizens) in the application of Community law.

The first phase of the initiative, covering the rights of the EU citizens to live, work and study in another country started in November 1996 and the second which focuses on travelling, equal opportunities and goods and services began

[80] European Commission, *The Community Internal Market: 1993 Report*, Luxembourg:Office for Official Publications of the European Communities.

in November 1997[81]. The campaign used a formula of layered information: general information through free phone-numbers, an Internet site, and brochures on the various themes; detailed information through specialized fact sheets; expert advice through a sign post servive.

The reach of the campaign was very high. The Commission reports that, only in the first year 75 million people became aware of the initiative and over one million contacted Citizens First to obtain brochures and fact sheets[82].

The Commission's analysis of citizens showed that most problems encountered resulted from a lack of information[83]. At the Amsterdam summit in June 1997, a proposal for such a permanent program-'Dialogue with Citizens and Business'- was adopted as part of the Commission's Action Plan on the internal market. The new program was launched in June 1998, primarily oriented toward citizens, with an extention to business in January 1999[84].

In these policies, nearly all information brochures contained a page on 'How to get your rights recognized and enforced' which informed citizens of the legal routes they could follow if they encountered problems in exercising their rights. The Commission emphasised national courts and gave information about the financial compensation under the principle of state liability: 'You should start by following national procedures, because you have a variety of possibilities

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[81] European Commission, '*Citizens First:the next phase will be launched in November'*, Single Market News 9:4; European Commission*, Listening to Citizens:The Difficulties that People Face in Exercising their Rights within the Single European Market. A Report Drafted by the Signpost Service as part of the 'Citizens First' Initiative*, 1998

[82] European Commision, *Citizens First: EU Rights on Equal Opportunities, Buying goods and services and Travelling*, Press Release, IP/97/1035

[83] European Commission*, Listening to Citizens:The Difficulties that People Face in Exercising their Rights within the Single European Market. A Report Drafted by the Signpost Service as part of the 'Citizens First' Initiative*, 1998

[84] European Commission, '*Dialogue with citizens and business:encouraging awareness of opportunities in the Single Market*', Single Market News 13,1998

open to you and you may be awarded compensation. National courts must ensure that rights based on Community law are respected, where necessary, set aside any measure which infringes it'[85].

These brochures also informed citizens about the alternative solutions if their national procedures are inadequate . For example, they included complaint to the Commission which might open infringement proceedings or a complaint to a MEP who in turn could put questions to the Commission and the Council. The 'factsheets' clearly laid out relevant EU law in the area in question and indicated how citizens could go about enforcing these rights.

*Robert Schuman Project*

The main purpose of this initiative was to reduce second important informational barrier: insufficient knowledge of EU law in the legal professions. The origin of the program started in 1990s when pivotal role of national judges, prosecutors and lawyers in making the internal market work was first emphasized by the Commission[86]. Unless national judges and lawyers developed a 'EU reflex' which lead them automatically to check whether European solutions apply, they would be unable to secure individual's internal market rights (Tallberg,2003).

Surveys indicated that severe gaps existed in the awareness of EU law among legal practitioners. In 1995, two out of three lawyers considered their knowledge of EU law inadequate or very inadequate and only 25 percent of those who practiced EU law were satisfied with their knowledge (Tallberg, 2003). In view of this situation, the objective of Robert Schuman project was to

[85] European Commission, *Living in Another Country of the European Union*, Information Brochure, Citizens First Initiative, 1996

[86] European Commission, *The Internal Market After 1992 : Meeting the Challenge. Report on the EEC Commission by the High Level Group on the Operation of the Internal Market*, Brussels, October 1992.

raise the awareness of EU law among judges, prosecutors and lawyers: 'The effective and uniform application of common rules throughout the internal market now constitutes the main political priority for the Commission. The Robert Schuman project would enable us to target direct judges and lawyers, the key players in the correct application of internal market rules.'[87] Robert Shuman project constituted a necessary supplement to the Citizens First Initiative.

This project as designed to financially encourage and support national initiatives that sought to improve the knowledge of EU law in the legal professions. The program would rest on a partnership between national professional associations and the Commission and would not require member governments' active coopreation to be implemented (Tallberg, 2003).The proposal for a program was first submitted to the Council in late 1996[88]. An amended proposal was submitted by the Commission in late 1997 and at the Council meeting of November 27, 1997 a deal was finally reached in the action program, which officially entered into force in July 1998 for a period of three years.[89] Over the period 1997 to 2001, the Robert Schuman project supported a total of 180 initiatives, involving approximatley 15.000 legal practitioners[90].

As a result, both *Citizens First Initiative* and the *Robert Schuman Project* demonstrate how the Commission worked in tandem with the ECJ in the

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[87] Euopean Commission, *Internal Market:Action Programme to Improve the Applicatiopn of Community Law*. Press Release IP/1996,63.

[88] European Commission, *Proposal for a European Parliament and Council Decision Establishing an Action Programme to Improve Awareness of Community Law for the Legal Professions (Robert Schuman Project).*COM, 1996

[89] European Commission, *Amended Proposal for a European Parliament and Council Decsion Establishing an Action Programme to Improve Awareness of Community Law for the Legal Professions* (Robert Schuman Project).COM, 1997.

[90] European Commission, *Report to the European Parliament, the Council, the Economic and Social Committee and he Committee of the Regions on the Implememtation of the Robert Schuman Project 1999-2001*. SC(2002)

process of integration. Both programs sought to increase effective enforcement of Community law through national courts. Below, there will also be a discussion on the relationship between the national courts and the ECJ in view of the different theoretical approaches.

## 4.2 ECJ and Member States

### 4.2.1 ECJ and National Courts

The relationship between the ECJ and national courts is the most crucial one among all the other actors. First of all, the 2/3 of ECJ's case law are the references made by the national Courts (Dougles-Scott, 2002:225). Secondly, the fundamental constitutional principles such as the supremacy and direct effect of Community law are in a way, the results of the cooperation with the national courts. In addition to this, studying the Court's relations with the national courts is much more complex than studying other actors. There are many complex theories which try to explain the relationship of the national courts and the ECJ. In order not to exceed the purpose of this thesis, only the main arguments of these theories will be presented here.

*Structural Bonds between the ECJ and the National Courts*

As indicated in the previous chapters, national courts are entrusted important tasks in the implementation of Community law and national courts' functions and role has been extended gradually especially by the Case Law of the ECJ. Chalmers (1998) describes the national courts as 'the beneficiaries' from the process of constitutionalization. As he claims, national court influence is increased vis-a-vis the other arms of national government. With the ECJ decisions, national courts which did not have the power to review previously have been granted the power to review acts of the other branches of government for their compatibility with the EC law (Chalmers, 1998:434). This section

discusses judicial cooperation between the Court of Justice and national courts by referring to both the Case law of the ECJ, procedure of preliminary rulings, and also the political studies of this relationship.

As mentioned in previous chapters, the national judiciary is incorporated into the system of EU law. The principles described in the previous section are the fundamental features of the Community legal order. They determine the relationship with the legal systems of the Member States. For the national judiciary, these principles, especially supremacy and direct effect, are of a particular relevance. The role of the national judge is incorporated in the very definition of direct applicability (Shaw, 1996:256). Indeed, after having declared that clear, unconditional and precise provisions of the Treaty may create rights for the benefit of individuals, the European Court immediately added that it is the duty of the *national courts* to protect such rights[91]. Therefore, if a private person wishes to contest the legal validity under Community law of the acts of the national bodies, he or she can not apply to the Court of Justice, but only to the national court.

Similarly, the supremacy of Community law over national law contains in its very formulation a reference to the national courts: Owing to its 'special and original nature', Community law can not be judicially 'overriden by domestic legal provisions, however framed....'[92]. It is clear therefore that at the judicial level, supremacy appears as a rule of conflict to be applied by the *national judge*. In case of incostistency or incompatibility between Community law and national law, the judge should give precedence to the former, while setting aside the latter.

Moreover, as mentioned, in *Simmenthal*, the Court stated that, national courts

[91] Case *Van Gend en Loos*

[92] Case *Costa*

were under a duty to give full effect to the provisions of Communitty law, setting aside of their own motion any conflicting provisions of national legislation. And with the establishment of the principle of autonomy, national judiciary is given the autonomy in the application of Community law. Therefore as Verburg argues, national judges have become the ordinary judges for the application of Community law, in fact, national judges are becoming 'more and more European judges'(Verburg, in Jansen, 1997:24)

When we consider the Treaty Provisions, as mentioned in the previous sections under Article 177 EC (Art.234 TEU), the Court of Justice has jurisdiction, to give preliminary rulings relating in particular to the interpretation of the Treaty, acts of the Community Institutions and the validity of those acts[93]. It was also discussed that, the national court is *entitled* (if it is a court of last instance *obliged*) to ask the Court for a preliminary ruling and that the preliminary ruling of the Court is binding on the national court. As it is seen, the Art.177 establishes a cooperation between the national courts and the ECJ. In *Schwarze*[94], the Court emphasized and defined this relationship in a sentence which summarize the whole meaning of the preliminary ruling system:

> ...Article 177 EC establishes a special field of judicial cooperation which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision (emphasis added)

As it is seen in the definition, the court has not been placed hierarchically as the highest court above national courts, but co-operates with them and each court exercises its own jurisdiction. The main function of Article 177 is also set out

[93] 'Acts' include regulations, directives, decisions, treaties concluded by the Community with third countries or international organizations etc.

[94] Case 16/65, *Firma C.Schwarze v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1965].

in the above quotation. The object is to ensure uniform application of Community law in all Member States.

Article 177 also fulfills an important function in the maintenance of law and in legal protection. It fosters the inclusion of Community law in the national legal orders. As seen in the previous chapters, a lower court is entitled to refer to the Court even though the lower court may in national law be bound by the ruling of the higher court. Therefore, the mere existence of such a rule in national law can not deprive the lower court of its right to make a reference[95].

In a study of the implementation of ordinary international law, Benvesti (Benvesti, in Wind, 2001) concludes that national courts tend to interpret international rules so as not to upset their governmental interests'. However, Wind adds that 'in the case of Community law, national courts at times seemed to do quite the opposite-*they did everything they could do to upset their governments*'(Wind, 2001:154). Really, in the evolution of the EU Law, the national courts and their interaction with the ECJ deserves some attention. The national courts have been the most important supporters of the ECJ in the implementation of the principles that it has established. Unlike the politicians who enter into contradiction with the supranational institutions when they understand that the sovereignity is under threat, the national judges have usually been the willing partners of the EU integration. As mentioned, the largest number of cases which reach the European Court do so by way of preliminary reference from Member State Courts under Article 177 (Weiler, 1999). This procedure has become the principle vehicle for the imposition of Community law because the governments' own courts are the ones which make reference and therefore, as Weiler argues '..(the governments) are forced to juridify[96]

[95] See Case *Simmenthal* in pg 47

[96] 'Juridifying' in Weiler's definition is as follows: ' 'Juridifying' a dispute means that a Member State may have to defend itself before the Court. This implies an interstatal discourse

their argument and shift to the judicial arena in which the Court of Justice is preeminent'. Moreover the governments find it much harder to disobey their own courts compared to other international tribunals (Weiler, 1999:102)

However, the relationship between the National Courts and the ECJ, can not be simply explained by the 'doctrinal theory' which can be described as the 'authoritative formal position as stated by national courts of the status of Community law within the national legal order'(Weiler, 1999). In other words, the formal reactions of the national judiciary is called the doctrinal perspective. To the question of 'why did the national courts accept direct effect and supremacy', the *doctrine* would answer that 'this was because the 'law' was required. This includes the inclusion of the national judiciary by the preliminary ruling procedure or certain case law of the ECJ and these have been explained above.

Under the doctrinal perspective, the political institutions of the Community (Commission, Council and Parliament) the governments of the Member States (and other actors wihin Member States) constitute together the objects of the Court's jurisprudence (Weiler, 1999). However, under alternative actor approach that is introduced by Weiler; they are *subjects* and *partners* to a 'dialogue' or a 'multilogue'. And in this view; 'the position of the court... is not a matter of legal determination and ...logical deduction from the doctrine but a matter of empirical observation and social and political explanation. Here one must go beyond the self-referential legal universe...'(Weiler, 1999).

Therefore, there is a second dimension to look while trying to understand the relationship between the National Judiciary and the ECJ. This second dimension has been handled by some political scientists and this view tries to

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with its own discipline, language and constraints which can be quite different to the discourse of, say, diplomacy'

understand this relationship from legal sociology, political theory, judicial politics and personalities, economic interests and legal realism (Weiler in Slaughter,1998). As Weiler mentions, this part of social science will look to factors such as empowerment, legal culture and many other factors. This second perspective of research concentrates on the political dimensions of the national court support based on various evidences and case studies.

These theories quesion *why* national courts have facilitated ECJ's expansion of power. Most of these scholars agree that law and legal reasoning shape decision-making but these scholars also point to another side of the question. They claim that, in most cases, numerous legal interpretations are possible and legal texts alone can not resolve interpretative disagreements. Therefore, they question the issue from the perspective of behaviours, interests anlysis and politics. Below, some of the main arguments which explain this cooperation will be discussed:

*Early Neo-Realist Accounts*

In reaction to the legalist approach (Mancini, 1989:600) which view that, the legal logic is the primary factor to understand the national court support to the ECJ's doctrines, political scientists developed new accounts that explain relationship between the national courts and the ECJ. According to this view, legal texts and legal reasoning shape decision making. But, in most cases, numerous legal interpretations are possible and legal texts and legal methods alone can not resolve interpretative disagreements (Alter, 2001.39). The best known is the neo-realist analysis of Geoffrey Garrett and Barry Weingast, who assert that the ECJ is intentionally reflecting national-interests in its decisions so that national government (and national court) support will be forthcoming[97].

[97] See Garrett, G.(1992); Garrett, G.(1995)*;* Garrett and B.Weingast.(1993)

Mary Volcansek (1986) offered a different neo-realist argument and she correlated the timing of changes in high court jurisprudence with changes in the national government's willing for legal integration. She implied that, national courts have changed their positions because the governments have changed their stance on European integration. In this respect, when the governments were more willing to obey the rules of the European Integration, the national courts have taken decisions which support the ECJ's decisions. The common perspective of neo-realist approaches is that, they see national interest as the primary shaper of the political behaviour of governments and judges. However, as Alter (2001) argues, there is evidence that the ECJ and national courts regularly decide *against* national governments. There are also numerous cases where different courts in the same country take opposing positions on the exact same ECJ legal doctrine (Alter, 2001:40).

In view of these approaches, the legalist accounts fail to explain why national judges accepted a role enforcing European law supremacy on the ground that they ignore *politics* and the neo-realist accounts fail also because they see the interests of the judiciary and the governments as *unique*. They don't consider the differences or variations of national court decisions and the preferences of governments. Because of these failings of the legalist and neo-realist approaches, different perspectives have been introduced by the political scientists in order to explain the relationship between the national courts and the ECJ.

*Neo-Functionalist Accounts*

In 1993, Ernst Haas's neo-functionalist theory have been revised by Anne-Marie Burley and Walter Mattli. They claimed that the European legal system expanded and prospered by motivating actors within national legal systems to pursue their self interest and thereby promote legal integration (Burley and

Mattli, 1993:41) According to this perspective, the Court created opportunities providing personal incentives for individual litigants, their lawyers and lower national courts to participate in the construction of the community legal system. The common ground of the neo-functionalist approach is that there were certain interests of these actors and that was one primary motive for the national courts to support the ECJ decisions.The variations within the neo-functionalist accounts have given different answers to the question of 'what were these different interests'.Below, the main lines of approaches within the neo-functionalist perspective will be discussed:

*Judicial Review*

According to this argument, the national judiciary has a desire to exercise some judicial review powers and adoption of the doctrines of direct effect and supremacy sustain such powers to the national judiciary. According to Mattli and Slaughter (1998), a number of country studies offer this kind of a link concerning the desire of the national judiciary to coopreate with the ECJ. For example, in the Netherlands, the national courts did not have the power to review legislation for its compatibility with international treaties. When in 1956, the national courts were given such a power by the Parliament, they were still reluctant to use their new powers. But when the ECJ encouraged the incorporation of the national courts, they found an ally in the international arena to use their new power. Monica Claes and Bruno Witte note that, it was Van Gend en Loos which encouraged Dutch courts to exercise their constitutionally recognized powers against the legislature (Claes, 1998).

Similar to Dutch situation, in Britain, the doctrine of parliamentary sovereignity prevented any courts from reviewing primary legislation. It was only after the formal acceptance of EU supremacy in 1990 that the national courts were granted the right to set aside primary legislation that violated Community

obligations (Mattli and Slaughter, 1998:192). Paul Craig who studied the British case notes that, 'the UK jurisprudence provides a good example of how readily national courts can embrace their newfound authority'(Craig, 1998b)

Another example can be given from the Italian experience. In Italy, lower courts supported the ECJ's principles of direct effect and supremacy as these principles gave them a power to control Italian national legislation for consistency with Community law. However, the Italian Constitutional Court tried to supervise the application of EU law as it understood that its exclusive constitutional review power was in jeopardy (Mattli and Slaughter, 1998). Francesco Ruggeri Laderchi (1998) concludes in his study on Italy Case that, only in 1980s, after the Constitutional Court perceived that it was lagging behind the supreme courts in other Member States, did it finally accept supremacy principle.

In France; until 1958, the monopoly of interpretation of public and constitutional law belonged to the Conseil d'Etat (Plötner, 1998). In that year, the power to review the constitutionality of legislation passed to the newly established Conseil Constitutionnel. In 1975 this body decided to abstain from examining the conformity of the international treties with national laws. Plötner argues that, for the Conseil d'Etat, any change in the status quo could mean a loss of influence and for the Conseil d'Etat, keeping the Community law 'out of the way' was in the interest of it as the situation was a 'question of power'(Plötner, 1998). It saw the interference by the ECJ in French domestic affairs as a threat to its administrative and political power and chose to ignore the ECJ. However, the reaction of the Cour de Cassation which is a lower court was just the opposite. It decided to accept the supremacy doctrine only four months after the Conseil Constitutionnel's refusal to review legislation on its compatibility with international treaties (Plötner, 1998).

*Judicial Interests*

Another important scholar in this debate is Karen Alter who claims that, the ECJ have played a decisive role in the transformation of the European legal system by declaring the direct effect and supremacy of European law (Alter, 2001:33). She adds that the main actors of the European legal system are the national courts of the member states as their references provide the ECJ opportunities to expand the scope of EC law. Alter discusses 'why' national courts have facilitated the ECJ's expansion of power. She explains the role of national courts with the 'judicial interest' theory.

According to Alter, different courts have different interests with respect to the application of EU law and national courts use the EU law in bureaucratic struggles between levels of the judiciary and between judiciary and political bodies (Alter, 1998b). According to this view, these different judicial interests involve an inclination to gain power and prestige relative to other courts within the same national legal system. These interests may involve gaining the power of judicial review, and some courts may seek to equalize their status with other national courts. Therefore, 'different national courts took opposing positions regarding the 'correct' interpretation of national and European legal provisions'(Alter, 2001:38). She says that, in most cases, numerous legal interpretations are possible and 'when the most obvious legal interpretation is extremely unappealing, judges have shown great ingenuity in finding ways within the text to reach counter-intuitive outcomes.'

As a group, judges are primarily interested in promoting their independence, influence and authority (Alter, 2001:45). Therefore they have an aim to protect their legal autonomy from political bodies. They want freedom to decide a case in the way they feel appropriate.They also want to influence policy and political debates. In addition to this, the impact of European law on a given national

court varies according to the court's institutional position in the national legal hierarchy therefore, high courts, as the protectors of the national legal order are more sensitive to the destructive influences of European law towards the national sovereignity (Alter, 2001).

However, the lower courts in a national legal system is more willing to agree with ECJ decisions because the ECJ decisions give legal credibility to a lower court decision and strenghten the influence of the lower court within the national legal system. As explained in the previos chapters, case *Simmenthal* had given full responsibility to the lower courts in not applying a national legislation which is in conflict with a Community provision even if there is a higher Court which is responsible to declare that the national law is unconstitutional. On the side of the national courts then, being in company with the ECJ gave them a more independent status. And on the part of the ECJ, as Marlene Wind argues, the active participation of the lower courts to the constitution making of Europe (by way of their preliminary references) helped the process of integration (Wind, 2001:156). Therefore a cooperation has become inevitable between the ECJ and the lower courts.

To sum up; the Case law of the ECJ and especially Article 177 gave a duty to the national courts to protect the EU law. When we see this situation from the legal perspective we can conclude that the cooperation of the ECJ and the national courts is legally inevitable. However if we consider the alternative theories of the political scientists, we should also see the different picture which is beyond the legal norms. As these political scientists argue, except the legal texts there were other reasons which helped to strenghten this cooperation of the national courts and the ECJ. Among these reasons, the interest to gain independence from the political pressure and to gain autonomy vis-a-vis the higher courts within the same legal system are primarily the ones which cause the national courts to cooperate with the ECJ.

### 4.2.2 ECJ and Member State Executive and Legislatives

As mentioned in the first Chapter; legal and neo-functionalist scholars have asserted that the ECJ has significant autonomy by virtue of the separation of law and politics[98]. According to this view, there is an inherent legitimacy of courts as legal actors and they use this autonomy to rule against the interests of member states[99]. This analysis emphasises the legitimacy of the judicial authorities in political systems where the rule of law is a political reality and it is this legitimacy, which makes the ECJ autonomous in furthering European integration.

According to this view, national governments paid insufficient attention to the Court's behaviour during the 1960s and 1970s when the Court developed a powerful set of legal doctrines and 'co-opted the support of domestic courts for them'(Schulz, 1998). By the time member governments finally realized that the ECJ was a powerful actor in the 1980s, 'reining in the Court's power had become very difficult'(Schulz, 1998).

In contrast, according to the neorealist perspective, member states are the determinants in the relations of power and the court can not have a control and autonomy to decide against the interests of powerful member states (Garrett and Weingast, 1993). In this view, EU member states have not been passive and unwilling victims of European legal integration; where the ECJ has been 'activist', the member governments have supported this[100]. From this perspective the member governments have given the ECJ autonomy to increase

[98] See Burley and Mattli (1993); Mattli and Slaughter (1995), K.Alter(1998), Slaughter, Stone and Weiler (1998), Stein (1981) and Weiler (1991).

[99] See Weiler (1991); Burley and Mattli (1993)

[100] See Cooter and Drexl (1994), Garrett (1992), Garrett(1995), Garrett and Weingast (1993)

the effectiveness of the incomplete contracts the governments have signed with each other (Schulz, 1998).

In fact both accounts have significant tools for us to understand the role of the Court in the integration process. It is true that "the legal nature of ECJ decisions affords the Court some protection against political attacks"(Alter,1998) but member states are also still the most important actors, which have the capacity to change the route of European integration. In this analysis, the ECJ is seen as neither 'master' nor 'servant'. When we see the ECJ within the context of the strategic interactions between the ECJ and EU member governments, we see that, the relationship of the ECJ with the member governments is that of a mutual one. None of the two actors are servants or masters. But there is an interaction between these two actors. At this point, the preferences of the Member States needs to be studied.

Tallberg argues that, Member States' preferences are complex and can not easily be reduced to a single overarching objective such as 'more Europe' (Tallberg, 2003:29). According to Tallberg, Member States hold three parallel and partly competing preferences. These preferences reflect member states' various roles in EU enforcement.

First; governments want to see the policy proposals agreed in the Council, implemented properly and complied with. It is obvious that; when EU governments agree on new rules in intergovernmental decision-making bodies; they do so with a purpose. Therefore, intergovernmental decision making rests on the expectation of member states' subsequent implementation and compliance.

Secondly; member states are still anxious to preserve their state sovereignty. For the European governments, national sovereignty is still a positive value

despite the far reaching integration. While this idea seems contradictory, unity, identity and raison d'etre of the state is still the most important value no matter how far the integration has proceeded.

Thirdly, member states prefer to 'soften' the demands of new EU policies on national political, economic and administrative structures. That is mainly due to the fact that, introducing new rules generally challenges those with interests 'vested in existing procedures'. Proper implementation and subsequent compliance to the rules therefore tend to involve economic, political and administrative costs which make non-compliance an attractive option (Tallberg, 2003).

When these preferences are considered, the ECJ's judicial independence and its 'revolutionary' case-law which destruct national sovereignity (the best examples of which are principles of direct effect and supremacy) has obviously been unwelcomed in the capitals of Europe (Tallberg, 2003). Keohane and Hoffmann (1991) note in their study that 'of all Community institutions, the Court has gone farthest in limiting national autonomy, by asserting the principles of superiority of Community law and of the obligation of Member Sates to implement (it)'.

In response to this 'attack' on their sovereignity, Member States responded through various attempts to 'sanction' the ECJ (Tallberg, 2003:93). At the 1996-1997 Intergovernmental Conference (IGC), a campaign was started by some Member States in order to 'clip the wings of the ECJ'(Tallberg, 2003). Some governments even tried to revise the Treaties in order to restrict the powers of the ECJ[101].

[101] Britain suggested a treaty amendment to limit liability damages in cases where the member state acted in *good faith* as well as an amendment that explicitly allowed the Court to limit the retrospective effect of its judgements. However, the British proposals were rejected entirely by the other member states.

However, these attempts could not achieve their aims because there were high institutional and procedural barriers to revise the Treaties. In order to change the Treaty, member states need unanimous agreement and also ratification of the changes by all national parliaments. Obtaining a unanimous agreement about a new policy is very difficult, but, creating a unanimous consensus to change an existing policy is even more difficult (Alter, 1998:136). Small states have an interest in a strong EU legal system. In front of the ECJ, political power is equalized and within the ECJ small states are equalized with the bigger ones since each judge has one vote (Alter,1998). The Benelux states therefore, support a strong ECJ. On the other side, Germany is another supporter because it wants a 'United States of Europe' and a more 'federal-looking' EU legal system. The ECJ, which is the primary defender of such a system is useful for German interests (Alter,1998). However Britain and France try to weaken the independence of the ECJ as they are more sensitive to their national sovereignity (Alter,1998). States also have an interest in ensuring that other members of the EC respect the rules because in the event of conflict it is necessary to have an impartial enforcer[102].Because of these divergencies, sustaining unanimity to weaken the powers of the ECJ is nearly impossible. For this reason, Mark Pollack defines amending the treaty as the *'nuclear option*-exceedingly effective, but difficult to use' (Pollack, 1997).

Another factor which prevented the Court from the 'attacks' of the member states is the existence of a certain model of legal reasoning (Dougles-Scott, 2002:217). This means that, the status of the ECJ as the 'neutral' entity has given a legitimate position to the ECJ. Therefore it become more difficult for the member states to challenge the 'law' for their self-interests. In fact political

[102] For a discussion of this, see Gibson and Calderia, 'The legitimacy of Transnational Legal Institutions: Compliance, Support and the European Court of Justice'(1995)39 *American Journal of Political Science* 459; M.Shapiro, 'The European Court of Justice' in P.Craig and G. De Burca (eds) *The Evolution of EU Law*; 1999

scientists and critical legal scholars have pointed out how a 'formalistic view of law' may be used to 'mask' a political agenda followed by the courts (Burley and Mattli, 1993; Rasmussen, 1986). According to this thought, law can not be a formal exercise because in so many cases it will be impossible to reach a definitive answer merely by deductive reasoning. European cases are similar and they are often 'hard cases' which produce more than one possible right answer (Dougles-Scott, 2002:217). As Lord Reid stated (1972) 'in many cases it cannot be said positively that one construction is right and another is wrong...much may depend on one's approach'[103]. So, when the law is indeterminate, it will be necessary to make some sort of choice, to determine which result to take (MacCormick, 1978). However, even in these cases, ECJ present its conclusion with logical conclusions and with 'legal reasoning' (Dougles-Scott, 2002:217). This 'legal reasoning' justifies and 'masks' the preference of the Court. As Weiler (1999) argues, '..in this context the formalistic claim is that the judicial process rests 'above' or 'outside' politics, a 'neutral' arena in which courts 'scientifically' interpret meaning of policy decided by others.' As a result, this perception of the Court (as being 'neutral') by others prevents the Court from political attacks.

Moreover, as Weiler (1999) argues, besides the Court's legal reasoning, another factor which prevented the Court from political attacks was its Non-Partisanship. At times it is true that the Court was 'accused' of being too much 'integrationist' and therefore too much 'political'. However, there was no accusation for the Court of being in 'interstate politics' (Weiler, 1999:102). The Court was perceived as non-partisan and non-favoratist towards this or that specific Member State or group of Member States (Weiler, 1999).

Therefore, even if there were some resistances against the 'judicial activism' of the ECJ, in general, the Court is seen as 'neutral' and 'non-partisan' and

[103] *James v Secretary of State* [1972] 1 All ER 175

therefore its decisions are respected. For example, a survey of the attitudes of MEPs demonstrated high approval rate for the Court. More importantly, those MEPs who expressed great scepticism towards and were critical of the Commission (on the grounds of enyoying too much power and being 'too much' integrationist) did not show the same discontent to the Court (Weiler,1984).

Due to these reasons and the evidence available for the period until the SEA and Maastricht, the Court's 'structural and material construct' were accepted by both the executive and legislative branches of the Member States (Weiler, 1999).

## 4.3 Litigation, Individual Litigants and Companies

The basis for the legal integration is the cases that are presented to the national courts because, the cases which are presented to the national court opens the way for the preliminary ruling mechanism which opens the way for the ECJ's establishment of the major principles like the principles of direct effect or supremacy. Therefore, the various identities, motivations and strategies of litigants have inevitably influenced tha nature of the EU's legal integration (Mattli and Slaugher, 1998:186).

In this framework the analysis of W.Mattli and A-M Slaughter (1998) has important conributions to understand the different motivations and characteristics of the litigants (Mattli and Slaugher, 1998). They begin with Marc Galanter's (1974) definition of 'One-Shotters'(OS) and 'Repeat Players' which offers a typology of actors appearing before the courts. According to this distinction, OSs are likely to be small companies, whereas large multinational corporations are likely to fill the ranks of the RPs. While the OS will attempt to maximize the *tangible gain*, RP is interested in influencing the making of

*relevant rules*. In this framework, according to Mattli and Slaughter (1998), a good example of RPs before the ECJ are first of all, the 'pressure groups'. These pressure groups seek to use a variety of political and legal strategies to use in particular causes. In Britain, for example, there are particular litigants who have made strategic use of the greater rights afforded under Comunity law especially in emloyment law and gender equality (Craig, 1998b). Harlow (1992) also describes how pressure groups calculated use of litigation strategy offered under Art. 177 to establish freedom of movement, to claim social security benefits, equal pay and damages for invalid administrative action, to protest against discrimination, etc. Mattli and Slaughter (1998) argue that, these pressure groups conceal their identity behind the 'frontmen'.

Another category of RPs are the large corporate actors. (Mattli and Slaughter, 1998). French firms and their pressure on the ECJ is good example of this category. When the Italian Constitutional Court authorized lower national judges to declare national law incompatible with treaty obligations without having to refer the case to the Constitutional Court in 1984[104] and when the German Federal Constitutional Court announced in 1986 in the Solange II case that it would no longer control the constitutionality of Community legal acts; the French firms found themselves in a disadvantageous position relative to German and Italian firms. In order to remedy this situation, major import and export-oriented companies in France launched systematic attacks on government decisions which are contrary to Community law (Mattli and Slaughter, 1998:188). They brought cases before the ECJ which condemned France for breach of Community law and this increased the pressure on the French government and the Conseil d'Etat to comply with Community rule. Therefore, as Mattli and Slaughter argues, it is no coincidence that the decision by the Conseil d'Etat confirming direct effect of Community directives in France was initiated by Philip Moris and Rothmans.

[104] Italian Constitutional Court Decision 170/84, ibid.

Another account of the litigation strategy of corporate RPs in the European context is made by Rawlings (1993) in his study on the Sunday trading entitled *The Eurolaw Game*. In this sudy, he discusses British Shops Act of 1950 that place restrictions on Sunday trading. Large retailers used Art.177 in order to remove the national law. For large retailers, Sunday trading represented 23 percent of their turnover and they stated that, the Shops Act was contrary to the Art.30 EEC Treaty. Rawlings argues that, the strategy of these large retailers are in fact the part of a coordinated Euro-wide litigation strategy by corporate interests. Therefore, Art.177 is used by different litigants in different countries simultaneously to further their economic interests.

As a result, because of their economic interests, either intentionally or unintentionally, these large or small companies become a partner of the ECJ to enforce Community rules.

# CHAPTER 5

# CONCLUSION

During the process of European integration, supranational institutions that were created by the founding Treaties of the European Communities, have played an important role . Among these institutions, the ECJ is said to be the most 'neglected' one by the academics (Weiler, 1999:290) because even after its most important decisions which furthered the integration, the ECJ was not perceived enough attention from the academics. However, recently, there has been a number of studies on the role of the ECJ in the integration process. These various studies have usually followed an interdisciplinary understanding while viewing the Court's role. This study was an attempt to research and analyse these variety of works and try to make some conclusions based on these studies.

At the end of this research, it is seen that, the ECJ has made a very important conribution to the process of European integration. The 'Case-Law' which is the product of the cases before the ECJ has introduced pivotal principles for the implementation of EC law. The most important point is that, some of these principles were never mentioned in the Treaties and they were first pronounced by the ECJ. The principles which were created by its case-law was 'revolutionary' as Weiler (1999) usually calls. Then, what were these 'revolutionary' principles which were so important for the European integration?

The very first of these principles was the 'principle of direct effect'. It is important because, for the first time an international agreement has produced 'rights' for individuals which were to be evoked before the *national courts*. It is

true that, other international agreements also produce rights for individuals but the peculiarity of 'direct effect' was that, those rights could be evoked in the *national courts* of the member states (Craig, 1997). This may be interpreted as one step further move to federalization. With the introduction of direct effect, not only the states but also the individuals become the subjects of the Treaties. As discussed in the thesis, various provisions of the treaties, regulations, directives and even some decisions and international treaties were defined as being directly effective by the Court. With the introduction of direct effect, an individual is empowered to rely on a particular provision of the Treaties or acts of the institutions when he considers that his rights have been infringed. The principle of direct effect also integrated national judges to the sysem of EU Law. In this way, national courts become Community courts.

The second 'revolutionary' principle was 'the principle of supranationality'. This principle requires that, in cases of conflict, Community law is prior to the national law. The Court ruled that, Community law had to be given primacy by national courts over an incompatible national law. Like the others, this principle is also a creation of the Court and was not mentioned in the founding Treaties. That's why the ECJ was usually blamed to 'over-step' (Rasmussen, 1986) its boundaries by being too much integrationist. In its decision in *Costa*, the Court asserted that the '*Treaty created its own legal order which has become an integral part of the legal systems of each member states'* and also made an emphasis on '*the member states' transfer of powers to the Community and their decision of the limitation of their sovereignity by these Treaties'*. Therefore, the Court reminded to the Member States that, it is impossible for Member states to accord primacy to domestic laws since the aim of the treaty was integration.

As Craig (1999) argues, decision in *Costa* was a bold decision which was very crucial for the integration process. These decisions were 'bold' because despite the integrationist discourses, the states still wanted to preserve their

sovereignities. When they heard from the ECJ that they were no longer in the same 'sovereign' situation, they reacted to the ECJ's integrationist discourses. Some states blamed the ECJ by over-stepping its mission. And they replied through various attempts to decrease the autonomy of the ECJ. However, there were conflicting interests among the member states and reversing the ECJ's autonomy could not be possible.

The establishment of the principle of supremacy, showed that the supranational organizations have a power to influence international political systems. In *Simmenthal* decision even bigger steps were taken to further the integration. The most important point about Simmenthal was that, the Court held the national court responsible *not to* apply a national law which is in conflict with the Community law. The Court even declared that, the national court should not wait for the national law to be declared as unconstitutional by the Constitutional Court. In this way, the decision had given full responsibility to the lower courts in not applying a national legislation which is in conflict with a Community provision even if there is a higher Court which is responsible to declare that the national law is unconstitutional.

In the thesis, it was pointed that, the supremacy principle which was established by the ECJ went beyond the traditional understanding of international politics. Therefore, it is asserted that, it has important constitutional significance. But for the purpose of this thesis, what is important is that, the principle of supremacy (and in fact all other principles which are mentioned in this thesis) was created by the Court of Justice as a constitutional element and not by the Treaties. Neither the principle of direct effect, nor the principle of supremacy was mentioned in the legal documents which established the Communities. It was the Court which established these constitutional elements that formed the foundations of the EU law.

This law-making function of the ECJ was named as 'judicial activism' by many scholars[105]. While some scholars criticized this 'judicial activism' of the ECJ of being too much 'political' in the sense that it established certain integrationist principles; some others viewed that this was necessary for the creation of a more integrated Europe.

It is asserted in the thesis that, the principle of supremacy and direct effect, supported by Article 177 preliminary reference procedure, brought to the Community legal structure a pattern that is very close to a federal system of law. The hierarchy that places Community law on top is sustained by the principle of supremacy, the enforcement of the legal order is secured with the direct effect principle and preliminary ruling mechanism and as a result Community /state relationship has had close analogies with that of federal authority/province,state. This situation also proved that the ECJ has been very important for the process of integration.

In the thesis, the ECJ's role as an 'integrationist institution' was further proved by the ECJ's establishment of other principles such as principle of the protection of human rights, autonomy of the national court jurisdiction, state liability and proportionality.

The Court has established important decisions concerning the protection of human rights. This was also another step of the ECJ in its constitutionalization of the treaties. In this way, the Treaties have taken the form of a constitution. Although the Treaties included no explicit provision on the protection of the fundamental rights; protection of fundamental rights for the first 40 years of European integration developed through the case law of the European Court of Justice until EU Bill of Rights in 2000. It may be argued that, together with the principles of direct effect and supremacy, the principle of fundamental human

[105] See Chapter III

rights that has been established for the first time by the Court, have been the most important constitutional elements in the EU law.

The Court has established that fundamental human rights are a general principle of Community law and it drew the general boundaries of the concept much more earlier than the EU Bill of Rights of 2000. As neither of the Treaties explicitly established the principle of fundamental human rights, the Court's 'judicial activism' on this issue has also had a crucial contribution to the establishment of the EU legal order. With the Case-Law of the ECJ, a variety of rights were recognized by the Court like rights to trade and to property, to engage in economic activity, rights to a fair hearing, freedom of expression, privacy, right of access to information, rights to non-discrimination on grounds of sex, right of association etc. (Dougles-Scott, 2002).

By establishing the principle of autonomy, the Court has made the Article 5 more concrete and more complete. It ruled that, it is up to the national legal system of each Member State to determine the Courts having jurisdiction and to fix the procedures for applications to protect the rights which derive from the Community law.

Principle of proportionality was incorporated to the Community law first by the European Court and after that, it has been embodied in the Treaties. Under the Maastrich Agreement, the principle of proportionality (Article 3b) is inserted into the EC Treaty. The Court established that, the means that are employed by the Community to achieve its aim should correspond to the *importance* of that aim and the means should be *necessary* for the achievement of the aim. This means that, the measure that the Community employs for an aim of the community law should be proportionate to the achievement of that aim and if a measure is not necessary for the achievement of that aim, then it is against the principle of proportionality.

In the study of the application of Community law by the Member States, ECJ's establishment the principle of state liability which can be described as the most novel principle that the Court has ever established, was emphasized. The principle of state liability is very important because it helps to impose concrete sanctions on the member states when they breach a Community law. It is shown that, beginning with *Francovich and Miret,* with a series of Cases, the Court established the principle of 'state liability'. With this principle, the ECJ established that, the Member States are obliged to pay liability in order to compensate a damage caused by their violation of Community law.

By emphasizing about these principles, it is shown that, the Court, with its case law, has successfully constitutionalized the EU legal order and this 'judicial activism' of the Court has made a very important contribution to the integration of the EU. The ECJ has established a set of norms which govern many of the relations between Community and Member States. Depending on the researches about the ECJ, it is concluded that, if the case law of the Court was missing from the history of the EU, it could not achieve the integration level that it has achieved so far.

In the third Chapter of the thesis, it is shown that the collaboration of Commission, Member State legislative and executives, national courts and ordinary citizens was crucial for the ECJ to establish and develop these principles. While studying these relationships the analysis of different theoretical approaches were utilized. In this respect, political scientists' analysis of the relations between the ECJ and the other actors helped to view the broader picture. The Court is seen in a broader context in which different actors interact within a given system.

The first actor to be studied was the *Commission* which had been a powerful

ally of the Court from its early days while furthering European integration. In the study, two most important programs initiated by the Commission in order to support the ECJ was emphasized which were the *Citizens First Initiative* and the *Robert Schuman Project.*

The next actor was the *national courts* which provided support for the ECJ's role in furthering the European integration. Case law of the ECJ and especially Article 177 already gave a duty to the national courts to protect the EU law. Therefore from the legal perspective the cooperation of the ECJ and the national courts is already inevitable. But in addition to the legal perspective, different theories which explain this cooperation was also handled in the thesis. By researching these approaches it is concluded that except the legal texts, there were other reasons which helped to strenghten this cooperation of the national courts and the ECJ. Among these reasons, the interest to gain independence from the political pressure and to gain autonomy vis-a-vis the higher courts within the same legal system are primarily the ones which cause the national courts to cooperate with the ECJ.

Another actor which is important for the ECJ, was the Member States' executive and legislatives. In fact Member States constituted the most problematic relationship as regards the relationship with the ECJ. Despite the fact that they are the ones who have signed these treaties, they are still unwilling to transfer their powers to a supranational institution. Therefore, in the study it is concluded that they have created some problems and even at times they tried to decrease the powers of the ECJ. However, it is seen that they have become unsuccesful because they have had conflicting interests between themselves. Therefore it became very difficult for them to take unanimous decision. This situation enabled the Court to continue to establish its principles.

The last actor which was studied in the thesis was the private litigants. It is

concluded that, these litigants have been very important enforcers of the Community law. It is seen that they had different strategies and they had differents interests. But either willingly or unwillingly, they have contributed to the ECJ's establishment of its case law because without these litigants who bring cases before the Court, none of these important principles could have been established.

Through the integration process of the European Union, the ECJ together with other actors have created a system of "decentralized enforcement" in which the individuals and national courts are made the guardians of the European enforcement system. In this system, the integration of the national courts and the Court of Justice has been realized and individuals are given the right to defend their Community rights before their national courts. The Court of Justice established fundamental principles of EU law by its case-law.Therefore, this thesis proves that among the EU's supranational institutions, the European Court of Justice has influenced the course of European ıntegration in a positive manner by playing an independent role beyond the intentions of the national governments.

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