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Question: “There has been on-going debate about whether the European Court of Justice (the ECJ) is 'activist' or is simply carrying out its responsibilities under the treaties. Analyze this issue and draw your own conclusion.”

Date: Jan. 2, 2005
Quality: 10 / 10 (Where 10 is best)

Introduction

Similar to the United States Supreme Court, the European Court of Justice\(^1\) has been criticized for interpreting law in an activist manner.\(^2\) This essay highlights the never-ending debate on “activist” law-making in the Court and offers perspectives of both sides. To better understand why the Court is criticized, it is important to identify the context of this debate. The first section thus outlines the evolution of the Court and its ever-growing influence on EU politics. The second part of this essay discusses claims by critics that the ECJ is an illegitimate quasi-legislative institution and activist law-maker. The essay then attempts to refute these charges and proffers scholarly and practical reasons why the Court interprets law in a broader manner which may, at first glance, appear to be outright “activist” law-making.

The Historical Context of the Debate

Today, the ECJ is considered by commentators to be the most important court in Western Europe.\(^3\) However, some scholars believe the Court was initially nothing more than a peripheral institution of the EU that did not share the same prestige and power common to the three core institutions.\(^4\) Others have described the ECJ in the early phases of the EU as an institution “tucked away in the fairyland Duchy of Luxembourg . . .

\(^1\) Hereinafter “ECJ.”
\(^3\) Mitchel Lasser, *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Court de cassation and the United States Supreme Court*, at 38 (January, 2003), http://www.jeannetonnetprogram.org/papers/03/030101.pdf
blessed . . . with the benign neglect by the powers that be and the mass media.”

This changed in the Court's “heroic period” when the ECJ began to assert its powers and became a major force in the integration of the European Union. Its efforts parallel those of the United States Supreme Court which decided many well-known cases that established a strong central government. For instance, the ECJ decided seminal cases including Van Gend en Loos and Costa v. E.N.E.L. that significantly strengthened the Community. In the first case, the ECJ established that Community law regulated not only Member States, but also their nationals. The second case set forth the concept of “direct effect” which provided for direct application of EU regulations, and gave EU citizens the right to invoke the authority of Community norms in national courts.

Today, many of the major constitutional decisions have been taken, and the amendments to the Treaties no longer focus merely on the “ever-closer union.” Accordingly, the Court's decisions have taken into account a greater emphasis on the concept of subsidiarity.

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6 Judge David Edward, former judge of the ECJ, described the early period of the Court as its “heroic period” in which the Court worked closely with the Commission to formulate key constitutional-type principles, such as those set forth in Costa v. E.N.E.L., that would be refined in later years. Interview with Judge David Edward, former member of the European Court of Justice, in Denver, CO., at http://www.law.du.edu/donsmith/eulaw/streamingvideo/eulawstreamingvideo.htm.
7 At the same time, the ECJ's efforts led to the expansion of the powers of the EU institutions over the institutions of the Member States. Volsansek, supra note 4, at 8.
8 In the United States, cases such as Marbury v. Madison, McCulloch v. Maryland, and Gibbons v. Ogden established the supremacy of the Supreme Court, and formed the foundation for a strong “national” government. Id.
11 Volsansek, supra note 4, at 9.
12 Interview with Judge David Edwards, supra note 6. The concept of “direct effect” clarified that the European Community (and subsequent European Union) was not merely an organization or confederation, but a supranational government. See Volsansek, supra note 4, at 9.
13 Interview with Judge David Edwards, supra note 6.
14 The Maastricht, Amsterdam and Nice Treaties shifted the emphasis of the EU toward subsidiarity, and
sometimes cause a ripple on the surface of public consciousness and, very occasionally, a tidal wave.”

Is the Court an Activist Legislating Institution?

Issue 1: Prejudicial judges. Judges of the ECJ are selected for six year terms. Critics argue that this short tenure threatens the impartiality of the ECJ, because judges may attempt to appease their Member States to ensure reappointment. Critics also argue that interest groups might be able to unduly influence judges if they learn how individual judges will vote. Both arguments fail, however, because it is impossible for member states or the public to learn about the views of individual judges - the ECJ publishes one judgment, and, unlike in the U.S. or Britain, the opinions of each judge are not made public.

Issue 2: Interpretation that is contrary to the Treaties. The Court occasionally interprets laws contrary to the express terms of the Community Treaties. For instance, EC Treaty article 39 confers the right of free movement of workers to those who have already received an offer of work. The ECJ, in Procureur du Roi v. Royer, nonetheless determined that free movement of workers could be extended to those still looking for work.

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15 Id., at 2.
16 EC Treaty art. 223. While judges are selected for six year terms, they may be, and usually are, considered for reappointment. John Fairhurst, Law of the European Union at 147 (Pearson Education Ltd. ed., 5th ed. 2006).
17 Id. at 147.
18 David Fairlamb, They're Changing the Face of Europe, Business Week, Nov. 2, 2004.
19 This makes it difficult for the public or Member States to determine whether a judge is liberal or conservative based on individual opinions. See Fairlamb, supra note 18.
20 EC Treaty art. 39.
These types of decisions should be tolerated even though they are contrary to the treaties, because the Court is not bound by mere literal interpretations of treaties. Rather, in interpreting laws, the Court may also evaluate the context of a provision and the objective of the relevant treaty. If the objective and context suggest another interpretation, the Court must be allowed to interpret the law contrary to its literal expression. In *Procureur du Roi*, the Court found that the Treaty's objective to enable the free movement of labor could not be achieved if the Court had been limited to the express wording of EC Treaty article 39.

**Issue 3: Direct effect and gap filling.** When the Court introduced the concept of “direct effect,” it determined that Community regulations could not only bind governments of Member States, but also confer rights on individuals. Parties to disputes can now rely on these rights and expect that they will be protected in national courts. Critics claim that “direct effect” is not set forth in most Treaty provisions. The Court should therefore not be allowed to use the concept to expand its jurisdiction over areas otherwise within the traditional sphere of the national courts.

“Direct effect” may appear to be an invasion of the competency of the various member states, but it is consistent with the expanding position that the Court has taken to

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22 Lecture by Judge David Edward, former member of the European Court of Justice, in Denver, CO. , at http://www.law.du.edu/donsmith/eulaw/streamingvideo/eulawstreamingvideo.htm
24 Pollicino, *supra* note 5, at ¶ 90.
25 Fairhurst, *supra* note 16, at 161. P v. S and Cornwall County Council (1996 E.C.R. I-2143) is another good example where the Court looked at the relevant directive as a whole to arrive at an interpretation that was not intended by the legislator. In that case, the Court looked towards the spirit and goals of the relevant non-discrimination directive to hold that the directive also protected transsexuals. See Pollicino, *supra* note 5, at ¶ 90.
27 *Id.*
29 *Id.*
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pursue its long-standing policy objectives.\footnote{The Court's objectives include strengthening the Union's structure, increasing the scope and effectiveness of Community law, and enhancing the powers of the Community institutions. Fairhurst, supra note 16, at 162 (citing Case 213/89, R v. Secretary of State for Transport, ex parte Factortame, 1990 E.C.R. I2433).} By finding that many Treaty provisions directly apply to individuals, the Court made it easier for the Community to ensure that Member States correctly apply EU law.\footnote{Id.} The Court's objectives have therefore been vital drivers to facilitate the effective development of the Community.\footnote{Government by Judges? The ECONOMIST, Jan. 15, 2004.} Indeed, without the Court's “activist” agenda, the European Union would have lacked its main “motor of integration.”\footnote{Pollicino, supra note 5, at ¶39.}

Critics also argue that the Court interprets Community law in a manner that is too broad and “creative.”\footnote{Id. at ¶6.} It is true that the Court broadly interprets Community law. The approach it has customarily used to do this is called the “teleological approach.”\footnote{Symposium, Supremacy of the Law and Judicial Review in the European Union: Celebrating Marbury v. Madison with Costa v. ENEL, 36 GEO. WASH. INT’L L. REV. 567, 579 (2004). The word “teleological” comes from latin and means “according to the purpose.” See Interview with Judge David Edwards, supra note 6.} With teleological reasoning, the Court interprets provisions in furtherance of the aims and objectives of the Community and Union as a whole.\footnote{Interview with Judge David Edwards, supra note 6.} This approach is necessary, because much of EU law consists of broad or vague rules that do not indicate how they are to be interpreted.\footnote{Fairhurst, supra note 16, at 159.} Strict interpretation would therefore make it impossible for EU law to function efficiently.\footnote{Interview with Judge David Edwards, supra note 6.} Indeed, teleological interpretation is now considered the “European way” which is significantly different from the common law principle of strict interpretation that is used in many of the Member States.\footnote{Fairhust, supra note 16, at 158.} Therefore, criticism of the
Court's tendency to promote integration is not justified, because the treaties themselves, such as the EC Treaty, clearly emphasize the need for integration. The Court must take these objectives into account and interpret the law accordingly even if Member States disagree.

Conclusion

In the United States, critics of the Supreme Court have consistently claimed that the Court pursues “activist” liberal objectives that are outside of the Court's sphere of competence. The ECJ has been subjected to strikingly similar controversy. However, while the Supreme Court has been able to weather the criticism over the past 200 years, and the United States government has become a fairly stable political system, criticism of the ECJ may still significantly impact the success of the European Union. Yet, this should not force the Court to give in to demands by critics for stricter interpretation of Community law. After all, the Court is not merely an instrument to maintain the framework of rules, but also exists to advance the construction of rules and to raise issues that legislators must address.

40 Edward, supra note 4, at 6.
41 Interview with Judge David Edwards, supra note 6.
42 Edward, supra note 4, at 8 (quoting from François Duchêne, Jean Monnet, the First Statesman of Interdependence 401 [Norton 1994]).
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