

***Between Law and Politics: Taking the Law Seriously in
Rationalist Models of Judicial Autonomy in the EU.***

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1. Introduction

Theoretical debates on the level of autonomy possessed by supranational institutions in the EC¹ have until recently been an either-or debate. Neofunctionalists and reflectivists have argued that supranational institutions are essentially 'rogue elephants' that circumvent the preferences of the Member States, while intergovernmentalists and realists have contended that they merely act within the range of the preferences of Member States in solving collective action problems. In the late 1990s the debate has moved towards a form of convergence, in that most theorists now agree that reality is somewhere in between these two poles.

However there has still been no convergence within the theoretical debate on *what factors determine* the level of supranational autonomy. Social constructivist and reflectivist approaches focus on processes of identity and interest formation, arguing that through social interaction norms and 'logics of appropriateness' are formed that make behavioral claims upon governmental actors, often preventing them from sanctioning supranational institutions (Checkel, 1997, 1999a; Wind, 1998). Recent rationalist theorization argues that the level of autonomy of supranational actors varies in different situations depending upon the efficacy and credibility of the sanction mechanism possessed by the principals (EU Member States²) (Pollack, 1997; Tallberg, 2000).

While both rationalist and social constructivist/reflectivist approaches are able to shed light on important aspects of the nature of supranational autonomy, both approaches also have significant deficiencies. Social constructivism proves unable to explain under what circumstances supranational institutions defer to the preferences of EU Member States, while rationalist approaches are unable to explain Member State compliance with the decisions of supranational institutions in situations where compliance has very high political and/or economic costs.

These weaknesses are particularly glaring when we attempt to analyze the level of autonomy that the European Court of Justice (ECJ) possesses vis-à-vis the Member States, as the relationship between the Member States and the ECJ is neither a case of the ECJ simply following the preferences of the Member States, nor is the ECJ a rogue elephant that systematically ignores its principals. There have been prominent cases in the 1990s where the ECJ has 'deferred' to the preferences of the Member States, but the overall picture of the relationship between the ECJ and the Member States is one of Member State compliance with adverse rulings, even in cases where

¹ - In the following the terms EC and EC law will be used, as this paper deals exclusively with EU institutions acting within the supranational first pillar of the European Union (the EC).

² - The term Member State is reserved for Member State governments, excluding national courts from the definition.

compliance is extremely 'costly' for a government. In these cases there is evidence that the normative 'pull' of the law makes behavioral claims upon actors that can override the 'rational', instrumental interests of actors.

What is necessary to move theoretical work on the level of autonomy enjoyed by the ECJ is to take seriously the distinctive features of both 'the law' and 'politics' by drawing on the strengths of rational institutionalist principal-agent models, and supplementing them with key insights from modern social constructivism regarding the normative power of law³. Additionally, the special characteristics of judicial institutions should also be included in the model, as existing theories of supranational autonomy do not differentiate between different types of EC institutions. This is problematic for theoretical development as there are manifest differences in the character of supranational institutions, with the ECJ as a judicial institution being affected by different motivations and constraints than a bureaucratic institution such as the Commission.

The argument in this paper will proceed in four steps. First, the state of theorizing on supranational autonomy and the ECJ will first be briefly reviewed in section 2, discussing the weaknesses of existing approaches. These problems lead to the development of a modified theoretical model in section 3, which incorporates a normative dimension of law into a rational institutionalist model, while also detailing the distinctive characteristics of judicial institutions: in effect an attempt to take 'the law' seriously. Clear testable hypotheses are then derived from the model, and put to a tentative test in section 4 on a sample of several key cases from the 1990s, where the utility of the modified theory is demonstrated.

2. The state of the art - the need for theoretical synthesis

The first-generation of theorizing on ECJ autonomy was unhelpfully centered on a bipolar either-or debate between intergovernmentalists and neofunctionalists. The basic tenant of *intergovernmentalists* such as Garrett was that the ECJ was an agent of the Member States, and that what on the surface appeared to be 'autonomous' behavior was essentially the ECJ following the preferences of the Member States in ensuring the credibility of commitments to agreements such as the Internal Market (Garrett, 1992, 1995). *Neofunctionalism* saw the ECJ as a highly autonomous institution, with its power based on the actions of a coalition of self-motivated subnational and supranational actors, acting within a politically insulated technical sphere of law (Burley and Mattli,

³ - The phrase 'taking the law seriously' is loaned from Joerges, 1996.

1993). This technical community proved able to systematically override the perceived interests of the Member States (Mattli and Slaughter, 1995:184). Both theories however are unable to account for the complicated relationship between the ECJ and the Member States, where the ECJ is neither a mere agent of the Member States, nor a rogue elephant pushing integration ever-forward contrary to the preferences of the Member States.

In the second-generation of theorizing on the ECJ, the debate has converged, in that most theorists now agree that reality is somewhere in-between the two poles of agent / rogue elephant. *Neorationalism* builds on the insights of intergovernmentalism, but also adds that the ECJ is a strategic actor with some degree of autonomy, especially in policy-areas that have low costs for the Member States, and where the Court is able to base controversial rulings on precedence (Garrett et.al, 1998). *Rational institutionalism*, or principal-agent theory, argues that the level of agent (ECJ) autonomy is a function of the efficacy and credibility of control mechanisms possessed by the principals (the Member States) (Pollack, 1997). The basic *social constructivist* argument is that the ECJ has been able to systematically override the preferences of the Member States through processes of interest and identity transformation, where ECJ rulings have created social practices that constitute a large element of actor interests and identity (Christiansen and Jørgensen, 1999; Checkel, 1998).

There are however two fundamental problems with existing theories on the ECJ. First and most importantly, both rationalist and social constructivist theories present a partial representation of the relationship between the ECJ and the Member States which significantly limits their explanatory power. Secondly, there are few theories that differentiate between the type of supranational institution investigated.

Partial pictures of reality

The strength of rationalist approaches such as principal-agent theory is that they are able to offer plausible hypotheses that can explain under which circumstances supranational actors defer to the preferences of the Member States. The basic postulate of Pollack's principal-agent theory is that ECJ autonomy vis-à-vis the preferences of the Member States is a function of the efficacy and credibility of control mechanisms possessed by the Member States. For instance, in the *Irish Abortion case* (see below), in the face of a conflict between EC law and the Irish constitutional prohibition on abortion, the ECJ deferred to the preferences of the Irish government to avoid probable Irish non-compliance, using a legal technicality to side-step the main question in the case.

Unfortunately rationalist theories prove unable to offer satisfactory explanations for why Member State governments comply with 'costly' adverse ECJ rulings. In the *Working-Time Directive case* (C-84/94) (see below) the British Conservative government 'complied' with an adverse ECJ ruling in a situation where the 'rational' strategy of the British government should have been non-compliance. Crucially, evidence in *the Working-Time Directive case* and many other similar cases indicates that Member State compliance with EC law is not only based upon the instrumental interests of actors, but also includes a normative dimension involving 'logics of appropriateness' regarding 'acceptable' governmental behavior.

Social constructivist theories, while able to explain why Member States have acquiesced to and/or accepted costly ECJ rulings, run into difficulties when attempting to explain when and how the Member States are able to influence the rulings of the ECJ. For instance in the *Kalanke case*⁴, the ECJ, much to the dissatisfaction of a large majority of Member States, gave a very narrow interpretation of the types of positive action programs that were legal under the Equal Treatment Directive (76/207/EEC). This ruling provoked a coalition of Member States to both propose an amendment to the directive, and to amend EC Treaty Article 141 EC (ex Article 119 EC) in the 1996-97 IGC in order to make it easier for Member States to adopt and maintain broad positive action programs. These actions were a strong signal to the ECJ that the *Kalanke* ruling was unwanted, and led the ECJ to in a subsequent case⁵ to overturn *Kalanke* by broadening the types of positive action programs that were legal under EC law.

What is therefore necessary is a modification of existing theories to combine the strengths of rationalist theories with insights from social constructivist theories to enable us to incorporate the normative power of law into a model of the level of ECJ autonomy.

Lack of focus on the characteristics of judicial institutions

A second problem with existing theories of supranational autonomy is that they do not distinguish between the types of supranational institutions analyzed. For example Pollack's otherwise compelling principal-agent theory does not take into consideration that different types of institutions sometimes perceive the credibility of sanctions differently (Pollack, 1997). This is crucial, for if control mechanisms are to affect actor behavior, they have to be subjectively perceived as credible by agents. However judges do not perceive 'control mechanisms' in the same manner that

⁴ - C-450/93.

⁵ - *Marschall*, C-409/95.

politicians and bureaucrats do. While bureaucrats are used to thinking in terms of power and institutional battles, judges are trained to think in terms of legal principles and the rule of law when deciding a case, making them potentially less attentive to strong negative policy inputs from their principals. Additionally, negative policy inputs can even be interpreted by judges as an indication that they are doing their job of being an independent judicial institution correctly.

In interviews with ECJ judges, they indicate that they have not perceived the adoption in the 1990s of several Treaty protocols and amendments as sanctions, even though they were ratified by the Member States to reverse or prevent unwanted effects of certain ECJ decisions. ECJ judges viewed these amendments as the natural exercise of legislative authority by the Member States acting as the 'Masters of the Treaties', and not as 'sanctions'. They therefore have had little if any effect upon the case law of the Court in the post-Maastricht era. This is clearly indicated by a wave of strongly pro-integrative rulings in the late 1990s that have struck at the very core of state sovereignty, often contrary to the express preferences of a large majority of Member States. One of the best examples of this were the *Francovich* line of cases, see below pages 29-34. Other examples in the second half of the 1990s include the *Commission v. France* case (C-265/95), where the Court ruled that the obligations of Member States under EC law even extend to dealing 'adequately' with domestic riots that affect intra-EC trade. In the *Belgium v. Commission* case (C-75/97) the ECJ ruled that provisions of social security schemes could constitute state aid, creating far-reaching implications for highly regulated welfare states such as Denmark, the Netherlands, and Sweden.

There are therefore few indications that the Court has taken 'sanctions' by the Member States in the 1990s into account in its case law⁶. In striking contrast, the Commission shifted to a lower-profile strategy in the mid-1990s in order to avoid future 'sanctions' by its principals after its high-profile strategy backfired in the 1990-91 IGC (Dinan, 2000). We must therefore also incorporate the special characteristics of the Court as a legal institution into the model, specifying how the ECJ differs from other types of supranational institutions such as the European Parliament or the Commission.

⁶ - This interpretation contrasts with the received wisdom today, where many commentators believe that the Court has shifted to a more 'self-restrained' course post-Maastricht, taking more into consideration the preferences of its principals due to the 'sanctions' of the Court included in the TEU (Rasmussen, 1998; Reich, 1994; Hartley, 1996; Frandsen, 1998; Dehousse, 1998). However these scholars have myopically based their arguments on only four cases from 1993-1994, ignoring broader trends in the ECJ's case law, and as seen above, there are at least as many examples pointing towards a shift in ECJ strategy towards a more pro-integrative line! For more see Beach, 2001:91-97.

3. An eclectic model of the level of ECJ autonomy

The modified theory developed in the following will describe three categories of independent variables that affect the level of ECJ autonomy: internal constraints, national courts, and the Member States. This should enable us to specify more precisely the level of autonomy enjoyed by the ECJ to follow its own institutional interests independent of the preferences of the Member States. My ambition is not to create a comprehensive theory explaining all aspects of legal integration, or even a partial theory of judicial decision-making that can be used to *fully* predict the outcome of all cases. My more modest ambition is through a modification and expansion of existing theory to develop a *mid-range theory* of judicial autonomy, inquiring into the nature of the delegation of power to supranational judicial institutions⁷.

The model will be developed in four steps. First, the need for and challenge of incorporating a normative dimension of law into a rationalist model will be discussed. Second, the interests of the ECJ will be elucidated, showing that the ECJ possesses interests that do not always overlap with the preferences of the Member States. Following this, three categories of independent variables that can affect the ability of the Court to follow its interests (level of ECJ autonomy) will be examined. Finally, explicit testable hypotheses will be developed from the model, which will be tested on an in-depth analysis of three controversial ECJ cases from the 1990s.

The challenge of incorporating social constructivistic elements into a rationalist model

The normative dimension of law is one of the best examples of a social practice that can be accounted for by social constructivist theory. Social constructivism offers a means of explaining how EC law has acquired a normative dimension, and how these normative prescriptions influence actor behavior in ways that cannot simply be reduced to the functional, instrumental interests of actors. Surprisingly though, there have been few attempts to incorporate insights from social constructivism into theorizing on judicial politics.

To understand actor compliance with EC law we often have to look beyond purely instrumental, utilitarian actor motivations to also include the normative power of law as an element of actor interests and identities. If we attempt to explain governmental compliance with EC law solely based upon the 'rational', instrumental interests of actors, we find significant instances where

⁷ - The model developed in the following can also be used to analyse the power and autonomy of other international courts, for example the European Court of Human Rights. See Beach, 2001.

the short-term political and/or economic costs of compliance with an adverse ruling are far greater than the longer-term, often diffuse instrumental benefits of compliance⁸. As mentioned above, a recent example of this was the *Working-Time Directive case* (C-84/94), where the ‘rational’, instrumental strategy of the British government should have been blatant non-compliance. However the UK government, despite the very high potential political costs, chose to ‘comply’ with the judgement, stating that it would ‘obey the law’. To explain compliance in situations such as these we have to incorporate a ‘normative’ dimension of EC law into the model to explain why actors feel ‘compelled’ to follow the law even in the absence of manifest instrumental interests. Crucially, evidence indicates that EC law has over time developed a normative dimension that in many respects is analogous to the normative pull of domestic law upon actor behavior.

In a classic study H.L.A. Hart convincingly demonstrated that purely utilitarian conceptions of law are unable to explain why actors comply with law (Hart, 1961). In domestic legal systems there are (often) effective mechanisms to enforce laws, but we cannot explain actor compliance strictly based upon the threat of sanctions. For instance, most people choose not to rob banks, but we abstain from doing so not only because we rationally weigh the expected take-in versus the risk of going to jail, but also because we believe bank robbing to be ‘immoral’ and ‘wrong’. Hart argues that these beliefs become over time internalized into patterns of actor behavior, forming standards of acceptable behavior that manifest themselves as normative prescriptions that make behavioral claims upon actors, even in the absence of manifest instrumental interests (Hart, 1961:83-88). These normative prescriptions then have the effect of moral ‘sanctions’ upon actor behavior.

How then does EC law as a social institution become internalized by actors if it does not only reflect patterns of material rewards and sanctions? Most integration theories operate with an exogenous model of interest change, with changes in actor interests reflecting the instrumental adaptation of actors to changes in external environmental factors, explicitly denying *endogenous* transformation processes, where actor interests and identities change in the absence of obvious material incentives. For instance, neofunctional theory maintains that actor interests can change over time, but the transformation of actor interests as modeled in neofunctional theory is based upon the instrumental adaptation of rational, self-interested actors to changes in their external environment (exogenous change) (Haas, 1968; Lindberg, 1963).

⁸ - Rational choice theorists would argue that this is simply a question of the correct definition of actor interests. However, in cases such as the *Working-Time Directive case*, with any plausible definition of the costs and benefits of compliance, compliance still cannot be explained *solely* based upon the instrumental interests of actors.

The so-called modernist school of social constructivism⁹ offers a model of *endogenous* change whereby actor interests and identities are constructed and reconstructed through their participation in social processes, with change occurring even in the absence of changes in material interests (Adler, 1997; Checkel, 1997, 1999a-c). The process of the social construction of actor interests and identities in modernist social constructivism is based upon the work of integrative sociological theorists such as James March, Johan Olsen, and Anthony Giddens. Arguing against purely individualist, rational-choice based theories, Giddens for example believes that social institutions such as law are originally created by actors based upon functional, instrumental interests, but then subsequently form a 'frame' for future actor interaction, prescribing what types of future actions are acceptable (Giddens, 1984). Social institutions are created and recreated by agent action in a dialectic process of '*structuration*'. Law thereby becomes internalized by actors as normative prescriptions of acceptable behavior (background frame), making behavioral claims upon actors that cannot always be reduced to instrumental interests. Actors still maintain a degree of agency in Giddens' theory, as they act based both upon 'frames', or institutionalized social practices, and their 'rational', instrumental interests. Given that actors maintain a degree of agency, the process of structuration is not an ever-increasing process, but can be stopped and/or reversed. Similar dynamics have also been described by March and Olson as processes of *mutual constitution*, where social institutions not only constrain behavior but also form '*logics of appropriateness*' that form part of the interests and identities of actors which cannot exclusively be reduced to utilitarian interests (March and Olsen, 1989).

An important caveat is needed before we proceed further. In a recent article Sterling-Folker has pointed out that most social constructivist analyses, despite arguing for endogenous processes of social change, actually use an exogenous, instrumentalist account of change (Sterling-Folker, 2000). Social practices are assumed by social constructivists such as Wendt and Ruggie to exist because they fulfil exogenous, functional collective needs, such as the need to meet the imperatives of rising state interdependence (Ibid, 2000:106-108). Similarly, Moravcsik has criticized social constructivist theorists such as Checkel and Marcussen for the use of the concept of 'crisis' as a background condition for interest transformation, arguing that this results in an analysis of *exogenous* change based upon instrumental interests, and not *endogenous* change (Moravcsik, 1999:675). What is therefore necessary to create a model that opens for the possibility of endogenous change is to maintain that social institutions such as the power of law form normative standards for behavior,

⁹ - The term 'modernist' refers to the positivist epistemological methods of the approach, distinguishing it from more reflectivist-inspired social constructivism (e.g. Diez, 1999).

and that the construction and reconstruction of these norms *cannot solely* be reduced to the instrumental adaptation of actors to changes in their environment, but also occurs through the social construction of actor interests through socialization processes.

The normative power of EC law included in my model is based upon this social constructivist approach. EC law was originally created to fulfil the functional, instrumental needs of Member States, primarily ensuring the credibility of commitments. Over time the perceptions of actors regarding EC law have been reconstructed through their participation in the EC legal system, and they have come to perceive EC law in many instances as a form of law analogous to domestic law, with a similar level of normative power. This transformation has not only reflected the instrumental interests of actors in solving free-rider problems, but also crucially involves the internalization of 'logics of appropriateness' regarding compliance with EC law, with normative concerns such as the 'rule of law' and 'government under law' central. Actor compliance with EC law is therefore not only based upon material incentives, but also upon the normative 'sanctions' or prescriptions for acceptable behavior of the internalized 'logics of appropriateness' that form a part of actor interests and identities.

The social construction of actor interests and identities regarding EC law has been most evident within the legal profession, where the identities and interests of lawyers and national judges have been partially constructed and reconstructed over time through their participation in the EC legal system. Today EC law is viewed by most legal actors as simply 'the law of the land', indicated for example in a recent journal article directed to British lawyers stating simply that 'Community law is *your* law.' (Lang, 1997:16). Law students in most Member States are now taught that EC law is a form of law *analogous* to domestic law. Practicing lawyers indicate their acceptance of EC law as 'the law' through their extensive use of EC law in situations where national legislation does not offer any means of recourse. Once certain national courts accepted EC law as 'the law of the land', this gave EC law a normative stamp of legitimacy, leading other national judges to also accept EC law as 'the law of the land' even in instances where they had instrumental interests in not accepting EC law within their jurisdictions (Weiler, 1993:422). Crucially, these changes have not only reflected the instrumental interests of national legal actors as they adapted to changes in their environment, such as increased litigation dealing with intra-EC trade, but are also due to the social construction of actor interests and identities.

Looking at developments in Denmark¹⁰, during the first 15 years of Danish EC membership, EC law was seen by the Danish legal profession as a somewhat 'exotic' field with little importance for the Danish legal system (Hagel-Sørensen, 1994:114-121). During this formative period EC law had little normative power over actors, indicated by the often blatant non-compliance by Danish governments with EC law, and the lack of use of EC law before national courts. As knowledge of key doctrines of EC law spread over time¹¹, Danish lawyers, judges, and politicians gradually came to accept EC law as also part of the 'law of the land', with a similar level of normative power to domestic Danish law. For example, while rightist governments blatantly violated EC public procurement law in the 1980s, a dramatic shift occurred after the *Great Belt* case¹², with the new Social Democrat-led government agreeing to comply with EC law despite strong political interests in promoting employment through public work contracts. What had changed were not the 'rational' instrumental interests of governments, e.g. in gaining access for Danish firms to other public markets in the EU, or in using public contracts to promote employment. The key change that led to a change in governmental behavior were the perceptions of EC law as a part of the 'law of the land' among Danish politicians and lawyers (Hagel-Sørensen, 1994, 122-124).

There are naturally inherent disadvantages in creating an eclectic theoretical model. By incorporating social constructivist logics into an essentially rationalist model we attempt to combine two types of theories with different ontological assumptions, raising well-known agency-structure dilemmas. Secondly, how should we weigh norm-based interests contra instrumental, 'rational' interests in a given situation? While this paper raises this topic, a full investigation must await further cross-national and cross-sector investigations. Finally, social constructivist approaches have been criticized for their inability to generate empirically testable propositions (Moravcsik, 1999:670). However as modernist social constructivism is based upon a positivist methodology, it is in fact possible to empirically measure variables such as the normative power of EC law. For instance Caldeira and Gibson in a 1995 study measured the normative power that EC law has among the general public, and it is naturally also possible to measure elite attitudes¹³. While there

¹⁰ - For studies of the reception of EC law within different national jurisdictions, see the contributions to Slaughter, et.al. (1998). For the British case see Chalmer, 2000.

¹¹ - This process is often linked to particular salient events, such as high-profile ECJ rulings. In Denmark the judgement in the *Great Belt* case played a significant role in the disseminating the fact that EC law also is the 'law of the land' in Denmark (Hagel-Sørensen, 1994:123-124) (Case C-243/89, *Commission v. Denmark (Storebælt)*). In the UK the *Factortame* cases played a similar role, making especially politicians aware that the absolute sovereignty of the Parliament had come to an end in relation to EC law (Cases C-213/89, C-221/89, C-48/93).

¹² - Case C-243/89.

¹³ - Another notable attempt to maintain a positivist approach to social construction includes the work of Jeffrey Checkel (1997, 1999b, 1999c).

might be significant bias in the findings, with national actors probably responding ‘politically correctly’ to questions regarding whether they should follow EC law even when it is perceived as ‘unjust’, this is a more general problem with social science measurement that is naturally not exclusive to the model developed here.

Concluding, by including a normative dimension of EC law into an institutional model of the ECJ, we can create a model that can account for actor compliance with EC law even in situations where actors have no manifest instrumental interest in compliance, but are affected by normative prescriptions for proper behavior that make behavioral claims upon actors.

The ‘interests’ of the ECJ

The next step in creating the model is to detail the interests of the ECJ, which do not always overlap with the interests of the Member States. In a legal formalistic analysis the ECJ would naturally be portrayed as a neutral, judicial institution that ensured the proper functioning of the EC legal system. However as conclusively proven by institutionalist theories in political science, even courts have interests and goals that diverge from their formal, stated purpose.

The interests of the ECJ can be differentiated into *institutional* and *substantive* interests. The Court’s *institutional interests* are maintaining and/or increasing the institutional power and prestige of the Court. The basic and most obvious institutional interest of all institutions is the *goal of survival*. However once a court has established itself as a legitimate judicial institution, the risk of serious attacks upon its fundamental powers becomes considerably lessened, as the court will be protected by norms such as the ‘rule of law’ and the ‘separation of powers’. Regarding the ECJ, after the initial establishment period where the Court established itself as a legitimate judicial institution, the importance of survival as a goal became less central. But as was indicated by the Court-bashing proposals from both the UK and France in the 1996-97 IGC, the risk of serious attacks upon the fundamental prerogatives of the Court is never fully absent.

This maintenance and/or increase in the institutional power and prestige is achieved by maintaining or increasing the level of effectiveness and scope of EC law, and by maintaining the legitimacy of the Court as an institution by ensuring the persuasiveness of its rulings. One revealing example of the institutional interests of the Court in the 1990s was the ECJ’s opinion that parts of the proposed EEA Agreement were contrary to EC law, primarily due to the fact that the proposed EEA Court would impinge on the jurisdiction of the ECJ (*First EEA case*, Opinion 1/91).

The Court’s *substantive goals*, or what can also be termed the Court’s ‘mission’, is basically the building of an ‘ever-closer union’ among the peoples of Europe as contained in the EC Treaty

preamble. Most observers agree that the Court has an extremely strong sense of mission, and members are socialized into the Court's collective interests through their work on the bench (Chalmers, 1997:168). This substantive goal still exists in the 1990s, indicated for example in the strongly pro-integrative off-bench speeches by Court judges (see for example European Court of Justice, 1995). These goals manifest themselves as pro-integration interests of the Court, where the Court other things held equal tends to choose the legal solution that strengthens the Community and EC law¹⁴.

Factors affecting the level of ECJ autonomy to pursue its own institutional interests

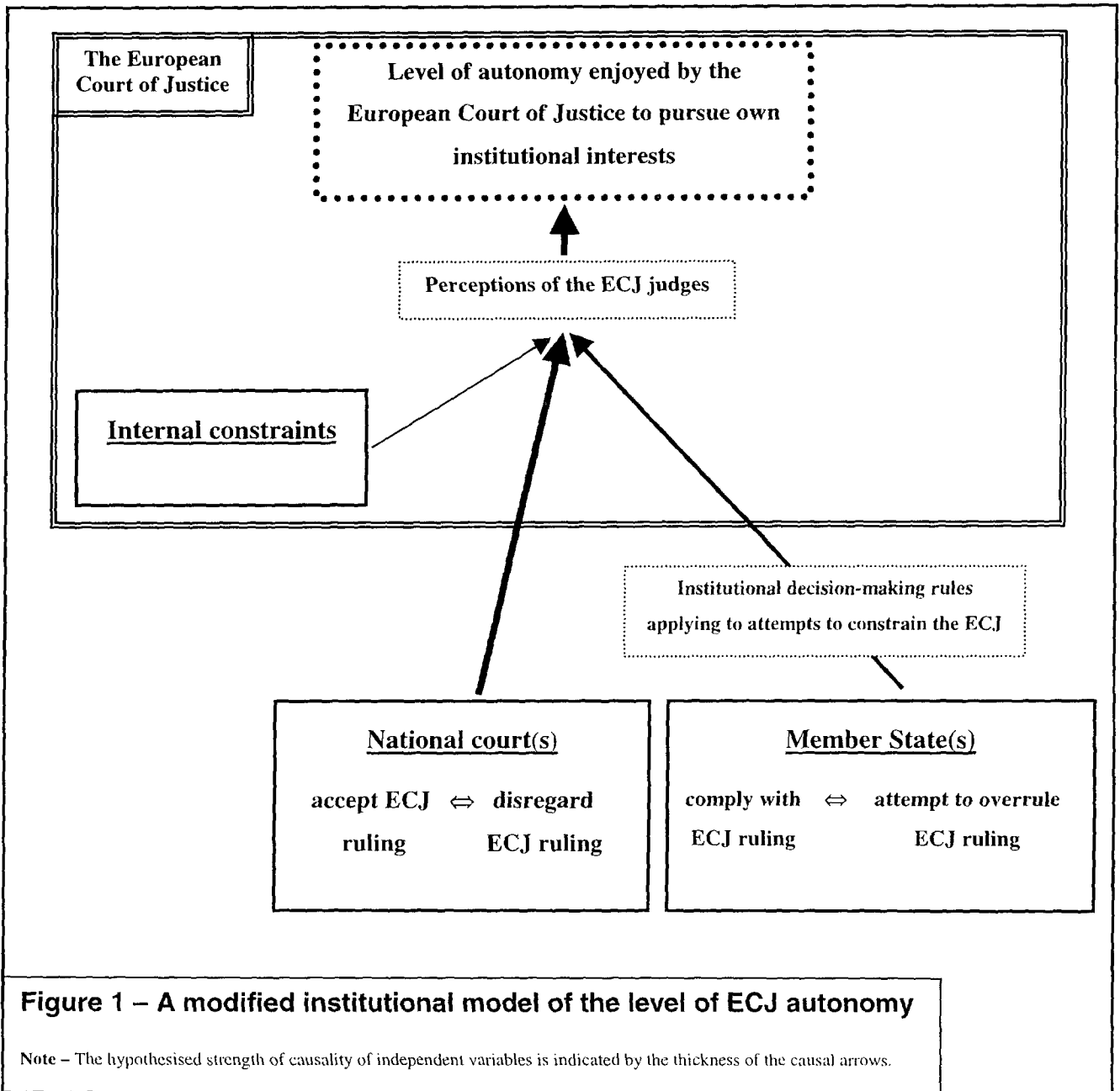
The first category of independent variables in the model of ECJ autonomy depicted in figure 1 are the three types of *internal constraints* under which the ECJ works: 1. legal doctrine and reasoning; 2. work-load of the Court; 3. randomness of litigation brought before the Court.

First, the ECJ in order to maintain its institutional legitimacy must remain 'minimally faithful' to the *constraints imposed by substantive legal doctrine and the methodological constraints of legal reasoning*, where developments in EC law must be perceived to be a logical consequence of EC Treaty rules and not a result of policy choices by the ECJ (de Búrca, 1998:232; Chalmers, 1997:169-170; Mattli and Slaughter, 1998:187). These constraints have the 'negative' effect that the Court is not able to use law as an instrument of policy in the same manner that the Commission or the Parliament is able to (de Búrca, 1998:232). However they also have a 'positive' effect for the level of ECJ autonomy, in that the methodological constraints of law can 'force' the ECJ to rule contrary to the stated preferences of the Member States.

Another internal constraint is the *random nature of ECJ litigation*, which can increase the level of ECJ autonomy by preventing the ECJ from 'correcting' rulings that the Member States protest against, as there might go over many years before the Court receives another similar case.

¹⁴ - For an empirical confirmation that the Court acts upon these pro-integration interests based upon a review of legal basis legislation, see Jupille (2000).

A final internal constraint is the *workload* of the Court. Basically, a court that is overwhelmed with litigation simply does not ‘have time’ to pursue a strategic course in its case law, seeking to maximize its autonomy.



The *level of support of national courts* is very important in understanding how the ECJ has been able to develop such a high level of autonomy vis-à-vis the Member States, and also in explaining salient instances where the ECJ’s level of autonomy was lower than otherwise expected. Once national courts accepted key doctrines of EC law and began enforcing EC law within their jurisdictions, this allowed the ECJ to ‘lend’ legitimacy from national courts (Weiler, 1991). While a

national government might attack a decision from the ECJ, it goes deeply against the rule of law in most Member States for a government to attempt to reverse a decision by a national court (Weiler, 1991; Alter, 1996). In addition, with national courts enforcing EC law this gives EC law the same sanctions as available under national law, in effect giving EC law 'teeth' (Weiler, 1991). In contrast, when national courts do not support the ECJ, the Court has few powers available to enforce its judgements against Member States (Mancini, 1991).

The decision by a national court to either accept or disregard an ECJ ruling can be analyzed by looking at both the instrumental and normative 'interests' of national courts. First, certain national courts have *instrumental interests* (self-interest) in accepting both the supremacy and direct effect of EC law, and vigorously enforcing EC law within their jurisdictions. Karen Alter has called this '*judicial empowerment*', and both the ECJ and certain national courts have benefited from this relationship (Alter, 1996, 1998a, 1998b). However not all national courts have incentives to cooperate with the ECJ. National courts have both institutional and substantive interests in not cooperating with the ECJ (*judicial discretion*). High national courts have certain institutional interests in not always accepting that EC law and the rulings of the ECJ are superior to their own ability to authoritatively interpret national constitutions (Alter, 1996). In addition, as convincingly demonstrated by Golub, there are also substantive reasons for national courts to not cooperate with the ECJ (Golub, 1996). For instance British judges have declined from referring environmental questions to the ECJ in order to protect traditional British environmental practices (Ibid).

However instrumental interests are not fully sufficient in explaining the complex relationship between national courts and the ECJ. In processes of *social construction*, national judges have also gradually come to perceive EC law as part of the 'law of the land', which it is their duty as national courts to uphold. This factor has been termed '*legal formalism*' by Joseph Weiler (1993:423-424). The normative power of 'the law' influences the 'rational', instrumental calculations of national judges, and over time makes them more prone to accept EC law as the 'law of the land', other things being held equal. For this factor to influence national judges they must however perceive ECJ rulings as being within what they perceive to be the 'formal' bounds of legal reasoning.

The third category of independent variables deals with the *ability of Member States to constrain the ECJ*¹⁵. Basically, Member State governments weigh the 'costs' of compliance with an adverse ruling against the 'costs' of attempting to change an adverse ruling, for example through non-compliance, which entails significant material and normative costs.

Looking first at the *costs of complying with an adverse ECJ rulings*, the costs for a Member State government depend upon the rulings domestic economic and social impact. Economic impact is based upon the size of the affected sector(s) and their political importance, whereas the social impact depends on the political importance of the affected group(s). We can thereby also incorporate differences in national politics, where for example pro-integrative social policy rulings have potentially much higher 'costs' for the highly-regulated Northern European welfare states than for other Member States in the Union.

On the other side of the equation are the *costs of changing an adverse ECJ decision*; both instrumental and normative. For instance, the *instrumental costs* of governmental non-compliance with an adverse ECJ decision are: the risk of weakening an effective EC legal system which ensures compliance with the mutually beneficial Internal Market; the fear of quid pro quo actions from other Member States in other policy-areas; and the damage to one's reputation (Garrett, 1992, 1995, 1998; Pollack, 1997). As argued above however, we cannot reduce actor interests in following EC law only to rational, instrumental interests, but must also look at the socially constructed normative power of law. The *normative costs* of non-compliance deal primarily with the 'costs' of breaking strong normative prescriptions for behavior, especially when domestic actors perceive breaking EC law as just as 'illegal' and 'wrong' as breaking domestic law. The relative weight of these two types of interests vary based upon the perceived 'rational' interests that a Member State has in for example a functioning Internal Market, and the normative power that EC law has over governing national elites.

Both the ECJ and the Member States can *lower the domestic costs of adverse rulings*. The ECJ can limit both the scope and the application of a ruling to reduce its the domestic impact, for instance by making prospective judgements, ruling that actors are not liable for past misdoings. Member States also have means whereby they can limit the domestic impacts of rulings, for example by ensuring that in cases involving the financial liability of the government for non-implementation of a directive, that no precedent is set before national courts (see page 28).

¹⁵ - It must be pointed out *Member States* can also provide *support* for the ECJ and its jurisprudence. This is included in my theory through the intervening variable of institutional decision-making rules. When a number of Member States support the ECJ's ruling this makes it almost impossible for Member States to sanction the ECJ depending upon the decision-making rules.

Regarding the *methods available to the Member States to constrain unwanted ECJ behavior*, principal-agent theory points to three instruments available (Pollack, 1997)¹⁶. First, the Member States can dismiss or refuse to reappoint judges. This method of sanctioning the ECJ is not very effective, and no judge has ever been dismissed from the Court. There are though commentators who argue that Germany ‘sanctioned’ its judges by not reappointing them¹⁷ after the controversial ECJ ruling in the *Reinheitsgebot* case¹⁸, which went against stated German preferences (Dehousse, 1998:12). However this reads too much into the non-reappointment of the two German judges, as non-reappointment is common practice in Germany. The post of ECJ judge is a part of a larger domestic political game, where the major German political parties divide senior judicial posts between themselves.

The second instrument available to Member States is to change EC legislation or the Treaties themselves to reverse or modify unwanted ECJ rulings. While this instrument has been used, given the intervening variable of the institutional decision-making rules (see below), it has also proved to be a very difficult instrument to use effectively.

A final possibility open for Member States is *unilateral non-compliance* with a decision by the ECJ (Pollack, 1997:118). Rationalists point out that unilateral non-compliance entails significant costs for the reputation of a Member State (Pollack, 1997:118; Garrett, 1992:557). More importantly however, governmental non-compliance with adverse ECJ rulings also often collides with normative prescriptions for governmental behavior, such as that governments must respect the ‘rule of law’, and not take ‘illegal’ actions.

An intervening variable between a governmental *decision* to attempt to overrule an ECJ decision, and the actual *ability* of governments to constrain the ECJ are the *institutional decision-making rules* that apply to a given method of constraining the ECJ. This part of my model is based upon Pollack’s excellent discussion of why Member States, even when they have interests in sanctioning the ECJ, often are unable to do so due to ‘joint-decision traps’ and other institutional pitfalls (Pollack, 1997; also Alter, 1998a). Drawing on Scharpf, Pollack argues that when the ‘default condition’ in the event of no agreement is the status quo, it becomes almost impossible to change

¹⁶ - Pollack includes the power of the purse as a fourth instrument in his principal-agent analysis, but this is not as relevant for a legal institution such as the Court (see Pollack, 1997:117). A court naturally must have the means to hire the required personnel and maintain buildings, etc., but the Member States have never used this weapon, and it seems highly improbable that the power of the purse could ever be used effectively.

¹⁷ - Judges Bahlmann and Everling were not re-appointed in October 1988. The *Reinheitsgebot* judgement was given in March 1987.

¹⁸ - Case 178/84.

existing primary or secondary EC legislation to sanction the ECJ due to the 'joint-decision trap' (1997:118-119). In situations where there is a status quo agreement which can be fallen back on, any amendment must increase the utility of an empowered number of parties in relation to the status quo agreement; often an impossible task. Depending upon whether decisions are taken by majority vote or with unanimity, the 'joint-decision trap' therefore makes it difficult/impossible for principals to sanction agents, as the status quo is often preferable for at least a blocking minority of actors.

A final *intervening variable* between the three independent variables on the one side and the level of ECJ autonomy on the other are the perceptions of the ECJ judges themselves. First, rationalist theories often make heroic assumptions about the level of information possessed by agents. It is assumed that the ECJ accurately takes into account the preferences of 15 different Member States together with a myriad of different national courts. Additionally, these principals have varying levels of preference intensity in different cases. Furthermore, the public statements of Member State officials do not always reflect their 'true' underlying preferences, in that the strategy of *posturing* is often used in reaction to adverse ECJ rulings, where a government will publicly protest a decision, while they privately accept or acquiesce to it. It is therefore a heroic assumption to assume that the ECJ judges are able to fully take into consideration the widely disparate views of its 'principals', while at the same time also tackling the very difficult legal questions in the multitude of cases before it!

Secondly, as previously discussed, the Court is a judicial institution, which means that judges often perceive sanction attempts by the Member States differently than the Member States themselves might have intended. While the Member States might believe that a Treaty protocol is a signal to the ECJ that it has gone outside of what the Member States can accept, the ECJ judges might perceive the same protocol as the legitimate exercise by the legislative branch of its ability to change the laws, and therefore *not* change their jurisprudence in other similar areas of case law.

Concluding, *objective* factors such as the ability of the Member States to sanction the Court have to be *subjectively* perceived by the judges *before* they can affect ECJ behavior. Unfortunately, while this opens for a more realistic theory it also raises significant methodological problems, in that by looking at the subjective perceptions of judge it becomes difficult to empirically verify hypotheses in a fully satisfactory manner.

Hypotheses

Based upon the above discussion of the three independent variables that affect the level of ECJ autonomy, four hypotheses can be derived that can be tested against empirical developments in the three cases below.

- 1. the greater the negative/positive internal constraints upon the ECJ in a case, the lower/higher the level of ECJ autonomy in the case;**
- 2. the greater the ability of Member States to sanction the ECJ, the lower the level of ECJ autonomy in the case;**
- 3. the higher the costs of an adverse ECJ decision, the lower the level of ECJ autonomy in the case;**
- 4. the lower the level of support from national courts, the lower the level of ECJ autonomy in the case.**

4. Case analysis

In the following the theoretical model developed above will be submitted to a tentative test of its value upon three salient ECJ cases from the 1990s. The choice of a small-*n* case study is a theoretical first-cut, enabling us to investigate in more detail the motivations and constraints of key actors that are often overlooked in broader surveys, especially quantitative studies (e.g. Stone Sweet and Brunell, 1998; Stone Sweet and Caporaso; Chalmers, 2000; Jupille, 2000).

The three criteria for the cases chosen were: there was variation of the dependent variable; they were all controversial cases with high political and/or economic costs involved for the Member States; and they were cases where the ECJ had a margin of interpretation. The three cases investigated are the *Irish Abortion case* (*SPUC v. Grogan*, C-159/90), the *Working Time Directive* case (C-84/94), and the *Francovich* series of cases (most prominently Joined cases C-6, 9/90, Joined cases C-46, 48/93, C-5/94, and Joined cases C-178, 179, 188, 189, 190/94).

4.a. The conflict between the right to life and the free movement of services - the Irish Abortion case (*SPUC v. Grogan*, C-159/90).

The *Irish Abortion* case (*SPUC v. Grogan*, C-159/90) raised the potential of a conflict between the supremacy of EC law and a fundamental principle of a national polity, here the provision in the Irish constitution outlawing abortion. As will be demonstrated below, due to the very high costs of an adverse ruling, coupled with the perceived ability of Irish courts to ‘sanction’ the ECJ, the ECJ possessed a relatively low level of autonomy in the case.

In the belief that the Irish prohibition on abortion in Ireland was secure, the Irish anti-abortion lobby focused its attention on the use of abortion clinics abroad by Irish women (Wilkinson, 1992:22). One such lobby group, the Society for the Protection of Unborn Children (SPUC), brought proceedings in 1989 against the representatives of several student organizations who had included in their annual information pamphlets both the addresses and means of contacting abortion clinics in the UK. As the actions of the student groups were clearly illegal under Irish law based upon previous cases before Irish courts, the defendants in the *Irish Abortion* case based their defense upon the right to disseminate information under EC law about services in other Member States. In the domestic proceedings the Irish High Court asked the ECJ in a reference whether abortion was a ‘service’ under EC law, and if in the absence of EC-level harmonization of national abortion laws, Member States were authorized to prohibit the distribution about information on abortion in another Member State.

The legal case before the ECJ was relatively clear-cut. Looking at the first question, the Court had not previously ruled on whether abortion was a service, but had in the *Luisi and Carbone* case (Joined cases 286/82 and 26/83) ruled that the freedom to provide services also included medical treatment that is carried out as part of a professional activity in another Member State. Turning to the freedom to distribute information about such a service (question 2), the case law appeared to be relatively clear that if abortion was a service, then the ‘consumers’ of a service should have free access to information that would put them in a position where they effectively could exercise that right (*GB-Inno-BM* (C-362/88)).

Based upon the ECJ’s ‘interests’ in maintaining and/or increasing the scope of EC law, we would expect an ECJ ruling where abortion was classified as a service under EC law, and that EC law therefore prohibited a stop on the dissemination of information about legal services in other Member States.

The costs of such an adverse ruling would though have been enormous for Ireland, as the ECJ would in effect overrule the Irish constitution on a very sensitive issue of public policy. In such a situation it was unlikely that the Irish government and/or Irish courts would have complied with the ECJ ruling. That this was a very real possibility was for example indicated by the ruling of the Irish Supreme Court in an appeal in the case brought while the questions were pending before the ECJ. The Irish Supreme Court judge stated that, ‘...any answer to the reference from the European Court of Justice will have to be considered in the light of our own constitutional provisions.’ (in Wilkinson, 1992:27). The ECJ could of course not know beforehand whether the Irish courts or the government would actually decide to not apply such an adverse ECJ, but the ECJ was aware of the possibility of Irish non-compliance, especially as the political and legal sensitivity of the case would be explained to the rest of the Court by its Irish member.

The judgement of the Court

The Court knew that the case was very sensitive, and in its ruling in October 1991 attempted to avoid stirring up political sentiments. The ECJ in its judgement first ruled that abortion is a service under EC law. The Court further argued that while restrictions on information provided on the behalf of economic operators in another Member State are illegal, there must be an *economic link* between the provider of the service and the provider of information. In the present case the link was ruled as ‘too tenuous’, as the student groups had no economic relationship with the clinics (para. 24, *Irish Abortion case*). This argument has been extensively criticized in the legal literature, and given previous ECJ rulings on services together with the opinion of the Advocate General (who had argued for a connection between abortion as a service and the freedom of dissemination), this indicates that that the Court attempted to skirt the main issue in the face of potential Irish non-compliance by finding a technicality to avoid applying the legal principle to the case in hand. It is important to point out however that the judgement did open for the possibility that in a *future case* involving an agency acting on the *behalf of* an abortion clinic abroad, the ECJ would rule that the Irish prohibitions on the dissemination of information violated EC law. This indicates that the Court, while side-stepping the main question also attempted to preserve the scope of EC law. The implications of this prospective part of the judgement led the Irish government to present a protocol to the then underway TEU IGC that effectively removed the possibility that the ECJ could in the future undermine the Irish prohibition on abortion by allowing economic actors to provide information on abortion in Ireland.

Explaining the level of ECJ autonomy in the Irish Abortion case

That the ECJ avoided the main question in the case indicates a relatively low level of autonomy to follow its own interests in both preserving the consistency of EC law, and maintaining and/or increasing the scope of EC law. Why did the ECJ skirt the main question in the case, while also creating a precedent that could potentially undermine the Irish constitutional ban on abortions?

The hypothesis on the role of internal constraints is not very relevant in explaining the level of ECJ autonomy, as given the constraints of legal reasoning we would expect that the Court would make the natural corollary from abortion as a service to the EC legal rules on the dissemination of information about legal services in other Member States, which it did not. However the decision to make a prospective ruling that could in the future undermine the Irish constitutional ban on abortions appears to be based upon the ECJ's desire to maintain some legal consistency in its case law on services and the right to distribute information about services.

If we turn our attention towards acceptance of a potential adverse ruling by the Irish government and national courts, the ability of Ireland to sanction the ECJ, coupled with the very high costs of an adverse ECJ decision, tipped the 'cost/benefit' calculations of both the government and national courts towards not complying with an adverse ruling. The statements of the Irish Supreme Court judge in the appeal case (see above) indicate that the normative and instrumental costs of breaking EC law were perceived in Ireland as *lower* than the normative and instrumental costs of accepting that parts of the Irish constitutional prohibition on abortion were illegal under EC law.

However given the fact that the case only marginally affected other Member States, and given the need for unanimity in Treaty revision, the possibility of Treaty amendment to overrule an ECJ decision cannot have been what motivated the ECJ in its decision. What was crucial was the lack of support of Irish courts. The referring court in the case of course signaled that it accepted the EC legal system by referring the case to the Court under the preliminary ruling procedure, but as argued above, Irish national courts would most likely have chosen to not apply any ECJ decision that contradicted the Irish constitution (*judicial discretion*). In comparison to the normative power of the Irish constitutional ban on abortion, the normative power of EC law was relatively low. As it was Irish national courts, and not the Irish government that would have had to 'comply' with an adverse ruling, this lack of support can have led the ECJ to choose to conciliate, as the ECJ was fully aware that it did not have the full support of Irish national courts in the case.

Conclusion

The relatively low level of autonomy in the *Irish Abortion* case, where the Court avoided answering the main question in the case, can be explained by the perceptions of the ECJ judges of the high costs of an adverse ruling for Ireland, coupled with the very likely prospect of a lack of support from national courts, as it was Irish national courts that would implement the ECJ ruling. That the ECJ created a precedent that posed a risk to the constitutional prohibition in the future can be explained both by the need for legal consistency (internal constraint), and by the perceptions of the ECJ judges that the Irish government did *not* possess credible sanctions that could prevent the Court from creating the link between abortion as a service and the freedom to disseminate information in principle. That the perceptions of the judges regarding the credibility of the threat of Treaty revision proved ‘incorrect’ was later shown by the ability of Ireland in a protocol to the TEU to remove the possibility of EC law overruling the Irish constitutional prohibition on abortion.

4.b. The spring of discontent – the potential British rebellion in the Working Time Directive case (C-84/94).

The ECJ in the *Working Time Directive (WTD)* case (C-84/94) case enjoyed a medium level of autonomy, as the Court despite the prospect of blatant defiance on the part of the UK gave an expansive interpretation of the scope of the Treaty article in question. However what is especially interesting about the *WTD* case is that it allows us to analyze the decision-making within a government in a situation where blatant unilateral defiance of the ECJ was seriously considered. While governmental non-implementation of ECJ rulings is relatively common, *blatant* unilateral defiance of an ECJ decision is a very rare occurrence¹⁹, with the most recent example being the blatant public refusal by the French government in 1979 to remove barriers to import of sheepmeat despite an ECJ ruling ordering them to do so (*Sheepmeat* cases, Cases 232/78, and 24, 97/80R).

Article 138 EC (ex Article 118a EC)²⁰ was one of the social policy articles inserted into the EC Treaty by the SEA. Prior to its amendment in the Amsterdam Treaty it dealt with encouraging improvements in the health and safety of workers, especially relating to their working environment. Voting under the Article was by qualified majority. The United Kingdom in the late 1980s and early 1990s had supported very limited social policy measures which secured the operation of the Internal

¹⁹ - While the non-implementation of ECJ rulings by Member States is by no means rare, *blatant* defiance is (see European Commission, 1999, 2000).

²⁰ - To avoid excessive repetition, I will in the rest of this section use the new numbering of the article (Article 138 EC) without using the parentheses to the old numbering prior to its amendment and renumbering in the AT.

Market, but felt that the social policy provisions in Article 138 EC had a very narrow scope dealing exclusively with the health and safety of workers (Rhodes, 1995:97-98). Both the Thatcher and the Major governments argued that broader measures should therefore be enacted under other provisions: either articles such as Article 308 EC (ex Article 235 EC) which require unanimity, giving the UK a veto; or under the Social Policy Agreement in the TEU, which excluded the UK.

In order to avoid the prospect of EC-level social policy adopted under the Social Policy Agreement, creating a two-tiered system, the Commission with the support of several Member States attempted to push forward social policy initiatives *within* the EC Treaty framework, playing a creative 'legal base game' (Rhodes, 1995). One example of this was the Working Time Directive (93/104/EC), which dealt with maximum weekly working times and minimum period of rest²¹. The Commission attempted in the proposal for the Directive to combine conditions of employment with health and safety entitlements to enable it to come under Article 138 EC, allowing the directive to be adopted by QMV in order to avoid a British veto. The UK started an annulment action against the Directive before the ECJ after it was adopted, with the primary argument being that the directive dealt with the terms and conditions of employment, and not the health and safety of workers.

The legal case before the Court was less clear-cut than the *Irish Abortion* case. The primary legal question was the scope of Article 138 EC. The United Kingdom argued that Article 138 EC had a narrow scope, and that the correct legal base for the Directive should have been Article 94 or Article 308 EC (ex Articles 100 and Article 235 EC). The Court had not ruled on the scope of Article 138 EC before, but had argued in 1993 that the article confers upon the EC internal legislative competence in the area of social policy (Opinion 2/91). Given both the wording of the Treaty provision, and the ECJ's previous expansive interpretations of EC competences in the social policy field (for example as regards equal pay under Article 141 EC (ex Article 119 EC)), we would therefore expect that the Court would interpret the legal scope of Article 138 EC broadly, and therefore dismiss the British action.

The costs of implementing the Directive were estimated at approximately £1.9 billion/year (House of Commons, 1998:22-23). However, to understand the political costs of the case we have to put it into the social context in which the Conservative government came to power, and the policies that were at the core of its agenda. Liberal social and employment policies were at the heart of the Conservative agenda since the Tory government came to power in 1979, based upon the belief that labor markets function most efficiently with a minimum of state intervention. These

²¹ - Another example of a similar use of Article 138 EC was the Pregnancy Directive (92/85/EC). However the UK decided not to raise an annulment action against the Pregnancy Directive (see Craig and de Búrca, 1998:861-863).

policies led the British government to vigorously oppose further social policy integration in the TEU IGC, with the subsequent opt-out from the Social Policy Agreement. The Major government believed that it had secured an effective opt-out from EC-level social policy in the Social Policy Agreement under the TEU, and therefore felt betrayed by the other Member States and the Commission when the legal base used for what was perceived as a social policy directive was Article 138 EC. Additionally, the British government argued that the WTD was only the 'thin end of the wedge', and that further social policy measures were underway, and that it was 'what is coming down that pipeline that would be so damaging to us.' Therefore the Major government believed that it had to 'stand on principle and to insist that, as was agreed at Maastricht, those are matters that should be decided by us and not by Brussels.' (Commons Hansard Text, 12.11.96:Column 159).

The Major government was also in a precarious political situation throughout 1996, with its parliamentary majority gradually being reduced to only a few MPs, forcing it to rely increasingly upon Eurosceptic MPs. The prospect of a Tory government, in the run-up to the general election in the spring of 1997, implementing the Directive after an adverse decision by the Court raised the potential of very serious conflicts with the Eurosceptic wing of the Conservative party, potentially leading to the loss of its parliamentary majority.

The opinion of the Advocate General and the threat of British rebellion

Advocate General Léger argued in his opinion in March 1996 that the UK annulment action should be dismissed in its entirety, arguing vigorously for a broad interpretation of Article 138 EC. This opinion, and the likely prospect that the Court would follow the Advocate General's reasoning, provoked a strong reaction from the British government. In the end of May the Ministerial Committee on Defence and Overseas Policy (DOP) met²². This was during the first flush of the BSE Crisis, where the UK was blocking legislation in the Council in protest over the beef export ban imposed on the UK. Another factor that affected the Major government's deliberations was the ECJ's ruling in a sensitive case in March, where the British government was ordered to pay £30 million in compensation to a group of Spanish fishermen (*Factortame III*, Joined Cases C-46, 48/93). Finally, a bill introduced by Conservative Eurosceptics attempting to reassert the primacy of British law over EC law had been only narrowly defeated in the House of Commons in April.

²² - The Financial Times has an account of the negotiations within the cabinet that according to a high-level inside source that I have interviewed 'reflects reality' (see Financial Times, 27.06.96:15). The following is based upon the Financial Times article, together with the high level official's own account of the negotiations.

The DOP discussed what the government should do if the Court followed the Advocate General's opinion, which was seen as very likely. The ministers were advised by their legal officers that they had no choice but to implement the directive if the legal challenge failed. Two main reasons were given. First, that the UK risked an infringement proceeding brought by the Commission for non-implementation of the directive under Article 226 EC (ex Article 169 EC). The second reason given was that the government in the event of non-implementation after the date prescribed by the directive would also be liable in national courts for costs incurred by individuals under the *Francovich* principle of governmental liability for non-implementation.

Three strategies were then discussed by ministers. The first strategy was to accept an adverse decision by the ECJ and subsequently implement the directive. The two other strategies dealt with ways of getting around an adverse decision. The first was to accept the ECJ decision, but attempt to get around it by negotiating with the other Member States in the IGC to change voting in Article 138 EC to unanimity, and by getting the Council to change the legal base of the Working Time Directive to the Social Policy Agreement, thereby excluding the UK. The final and most drastic option was to unilaterally defy the ECJ's decision and refuse to implement the directive, an action not taken since France's defiance in the *Sheepmeat* cases in 1979-80.

An alliance of Eurosceptics and traditional moderates in the cabinet committee agreed on the third option, in effect for breaking 'the law'. There were also suggestions that the policy of non-cooperation in the Council on beef should also be extended to cover a successful resolution of the working time issue.

The DOP committee met again in June after the Florence Summit, where the BSE Crisis had been defused. A briefing note prepared by legal officers for the meeting stated that ministers also risked being held personally liable for such an illegal denial of workers rights. The committee in the meeting decided to retreat from its previous decision, and decided to take the second strategy of attempting to change Article 138 EC and the Working Time Directive. In the meantime the government would obey 'the law' and begin the process of implementation, but would delay the actual implementation of the directive into national legislation until after the upcoming elections.

The ECJ decision on the 12th of November, 1996 broadly followed the Advocate General's opinion, with the exception that it annulled the second sentence of article 5 of the directive.

Explaining the level of ECJ autonomy in the Working Time Directive case

Why did the British government retreat from its previous decision on blatant unilateral defiance²³? Why did the ECJ rule against the British government despite the risk of British blatant non-compliance?

Focusing on the Member State independent variable, the inability of the UK to 'sanction' the ECJ played a large role in explaining the British decision to comply with the adverse ECJ ruling. First, the question of national liability for non-implementation under the *Francovich* principle did play a role in the DOP discussions, as it increased the instrumental costs of British non-compliance. However this was not the sole motivation for the decision to not defy the ECJ, in that the potential long-term costs in terms of state liability were much lower than the very high short-term political costs of complying with an adverse ruling, including the potential downfall of the Major government! Additionally, both the instrumental economic and political costs of 'non-compliance' had not stopped the British government from its rebellion in the BSE Crisis. Why did the UK in the BSE Crisis defy the fourteen other Member States by blocking Council legislation, while at the same time it decided to comply with a costly adverse ruling by the ECJ?

To explain the British retreat we have to turn our attention towards the normative dimension of law. By blatantly not implementing a legally adopted EC directive, the government would be breaking what was widely perceived as 'the law', going against a deep-rooted British tradition that governments are subject to the rule of law (Barnard and Greaves, 1994:1092). In addition, the government would not only be violating EC law but also an Act of Parliament (The European Communities Act of 1972). Such a blatantly illegal decision would probably not have been followed by the legal officers of the cabinet, and there is evidence that they would have resigned en masse in protest against such a decision (interviews with high-level British officials).

Further, the hypothesis on the costs of an adverse decision also explains part of the decision of the British government to comply with the adverse ruling. The ability of the government to delay implementation of the WTD until after the elections, and the subsequent limitation of the financial liability of the British state for non-implementation lowered the costs of the adverse ECJ ruling. The British state was liable under the *Francovich* principle for costs incurred by individuals due to British non-implementation in the time period between the date on which the directive was to come into force (23 November 1996) and the date on which the British implementing came into force (1 October 1998). However in the only two cases that had resulted from this as of the end of 1999,

²³ - There were some cabinet-level Eurosceptics that still talked about British non-compliance with an adverse ECJ ruling in the fall of 1996 (see Independent, 08.11.96).

both the Conservative and later the Labour government were able to avoid the creation of a costly precedence. In the first case the government bought out the plaintiff (*McHugh v. Attorney General for Northern Ireland*)²⁴, whereas in the second case the plaintiff declined the governmental offer to pay all legal fees in exchange for her dropping the case (*Burns*)²⁵. However the national court in *Burns* created a very strict precedence on the question of causation, making it almost impossible for subsequent plaintiffs to prove that they had suffered a loss, thereby lowering the costs for the UK government of the precedence created by the ruling.

Turning to the ECJ's decision to rule against the UK, the internal constraint of legal methodology is not very relevant, in that the Court's ruling was more based upon an expansive (teleological) interpretation of the social policy provisions of the EC Treaty than the specific text of the EC Treaty. The question of the perceived ability of Member States to sanction the ECJ is more relevant, in that British non-compliance was not perceived as a real threat by the ECJ. The Major government was widely viewed as isolated, especially after the BSE Crisis, leading to a situation where most other actors in the EU were simply biding time and waiting for the expected change of government following the upcoming British election. Unilateral British non-compliance was therefore perceived as a temporary situation that would stop once the expected Labour government would come into power. Additionally, it was expected that the isolated Conservative government would be unable to achieve any backing for its attempts to sanction the ECJ by either reducing the ECJ's powers in the 1996 IGC, or by limiting the social policy provisions in the EC Treaty.

The hypothesis on the role of national courts is less relevant in explaining either British compliance or the ECJ decision, as the case was brought by the British government against the Council of Ministers, and the subsequent decision on whether to implement an adverse ECJ ruling would be taken by the British government.

Conclusion

The ECJ in the *Working Time Directive* case ruled against the UK despite the threat of blatant British non-compliance. While blatant non-compliance with the expected upcoming adverse ECJ ruling was seriously contemplated, the British government backed down for two primary reasons. First, the government possessed means whereby it could lower the instrumental costs of an adverse ruling. Secondly and more importantly, blatant non-compliance was perceived within the government as against 'the rule of law', with high normative costs, as in effect the British

²⁴ - Case dropped before decision reached in Northern Ireland High Court.

²⁵ - *Application by Shirley Burns for judicial review* [1999] NI 175 [1999] NIEHC 5 (15th March, 1999).

government would be blatantly breaking 'the law'. This led the British government to accept the adverse ruling despite the very high political costs in doing so.

4.c. The high water mark of supranational autonomy - the Francovich cases.

The *Francovich* series of cases illustrates a situation where the ECJ had a very high level of autonomy to follow its own interests vis-à-vis the preferences of the Member States. In several waves of litigation the Court created and then subsequently strengthened the legal principle that Member States are financially liable to compensate individuals for losses incurred as the result of governmental non-implementation of a directive. These developments were contrary to the stated preferences of a large majority of Member States, including core states such as Germany.

Establishing the principal

In the first *Francovich* case (C-6 and 9-90), two applicants had sued the Italian government before two different domestic courts for the costs that they had suffered as the result of Italian non-implementation of EC Directive 80/987, which required Member States to establish institutions to guarantee payment of arrears to employees in the event of the insolvency of their employer, and which should have been implemented by October 1983. The Italian government had already lost an enforcement action brought by the Commission before the ECJ regarding its non-implementation of the directive (*Commission v. Italy*, Case 22/87), but had still not by 1990 taken any action to implement the directive. The two Italian courts in the case referred similar questions to the ECJ, asking whether the directive was directly effective, and whether the Italian government was financially liable for its non-implementation of the directive.

The legal case appeared to be relatively clear, pointing towards the denial of both direct effect and financial liability. Regarding the first question, as the directive required further action on the part of the Member State, the directive could not have direct effect. This meant therefore that under existing EC law an individual could not use the directive to claim remedies before a national court for governmental non-implementation. Second, in the EC Treaty and the case law of the Court there were no existing *Community* remedies for governmental liability for non-implementation of directives. In *Rewe v. Hauptzollamt Kiel* (Case 158/80) the Court had even explicitly stated that EC law '...was not intended to create new remedies in the national courts to ensure the observance of Community law other than those laid down by national law.' (para. 44, *Rewe v. Hauptzollamt Kiel*).

However during the late 1980s and early 1990s the problem of non-compliance with ECJ rulings in direct enforcement actions grew, with governments continuing to delay implementation given that the Commission and the ECJ were essentially powerless to sanction infringing Member States (Tallberg, 1999:165-170). Within both the Commission and the ECJ there were strong interests in creating more effective decentralized enforcement mechanisms in order to remedy the situation (Chalmers, 1997:191; Tallberg, 1999:194-206). Looking specifically at the ECJ, the Court had strong interests in maintaining and/or increasing the institutional power of the Court, which was clearly threatened by the repeated instances of the non-implementation of adverse ECJ rulings.

The creation of an EC principle of governmental liability was potentially very costly for the Member States, as it both could impose very high financial costs for governments, while also impinging on state sovereignty by strengthening the role of national courts as the decentralized enforcers of EC law. The opposition of a majority of Member States to the principle was clearly indicated in the 1990-91 IGC, where the Commission had proposed to strengthen the sanctions available in the EC legal system, including introducing governmental liability, but the Member States only agreed to a strengthening of Article 228 EC (ex Article 171) to include the possibility of fines (Lenaerts, 1993:8-9; Tallberg, 2000:109).

The judgement of the Court

The Court ruled in its response to the Italian courts that while the directive in question was not directly effective, Member State governments are however liable to compensate individuals for losses incurred as the result of non-implementation by the Member State of a directive subject to certain conditions. The argument used by the ECJ for the creation of the new legal principle was that unless Member States are liable for non-compliance with EC law, the full effectiveness of EC law would be weakened (para. 33, *Francovich*). The ECJ further argued that,

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is *inherent in the system of the Treaty*. (para. 35, *Francovich*, italics added).

The Court had no basis for this argument in the Treaty or its case law except Article 10 EC (ex Article 5 EC), which requires Member States to take all appropriate measures to ensure the fulfillment of their obligations under EC law. One critical legal scholar went so far as to say that the, ‘...principle exists because it is in the interests of the Community that it should exist.’ (Hartley, 1994:226).

The strengthening of the principle and the reaction of the Member States

The *Francovich* ruling itself was unclear as to the scope of the principle of governmental liability, especially whether it also applied to directly effective directives or instances where a government had a wide margin of discretion in implementing measures. In further references the Court clarified several of the outstanding questions. In the *Brasserie du Pêcheur and Factortame III* cases (Joined cases C-46 and 48/93), the Court confirmed that the principle applied to *all forms* of breaches of EC law. Where a directive had direct effect the ECJ argued that existing remedies before national courts were not sufficient in itself to ensure the full and complete implementation of the Treaty (para. 20). In several other cases the Court ruled on the question of the how serious the breach of EC law had to be before a governmental was financially liable. The Court ruled in *Hedley Lomas* that, ‘...the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.’ (para. 28, C-5/94). In *Dillenkofer* the Court went even further, stating that non-implementation *per se* after the deadline for implementation constituted a serious breach of Community law, and gave rise to governmental liability for injuries suffered by individuals suffering injury, given that these injuries were identifiable, and that a causal link existed between the breach and the damages suffered (C-178, 179, 188, 189, 190/94).

These further developments were strongly opposed by a coalition of Member States both in proceedings before the Court, and in the 1996-97 IGC. In the *Brasserie* case, the representative of the German government submitted that,

...it was not the intention of the Community legislature to establish any general liability on the part of Member States for infringements of Community law. It points out that during the negotiations concerning the Maastricht Treaty the Member States did not adopt any rules in that regard...The German government further states that an extension of Community law by judge-made law going beyond the bounds of the legitimate closure of lacunae would be incompatible with the division of competence between the Community institutions and the Member States laid down by the Treaty...’ (para.32, report of hearing).

In the 1996-97 IGC the British delegation submitted a series of Court-bashing proposals, one of which was designed to limit the financial liability of Member States (CONF/3883/96). The proposals were tacitly supported by both the French and the German delegations, and were echoed in a late French proposal to the IGC (CONF/3853/97) (Beach, 2001:103-104). However due to the opposition of several small Member States, the proposals were not adopted by the IGC (Beach, 2001:104). The continuing disapproval of the Member States for stronger enforcement mechanisms for breaches of EC law was later seen in their refusal in the 2000 IGC to accept a Commission proposal to amend Article 226 EC (ex Article 169 EC) along the lines of Article 88 ECSC. The

proposed amendment would have allowed the Commission to give legally binding decisions on whether a Member State had failed to fulfill its Treaty obligations, whereas in the existing system only the ECJ has the power to determine this.

Explaining the level of ECJ autonomy in the Francovich series of cases.

The ECJ possessed a very high level of autonomy in the *Francovich* line of cases that enabled it to follow its own interests in strengthening EC law contrary to the express preferences of a majority of Member States. How was the ECJ able to create and strengthen such a controversial legal principle in the face of such massive opposition from the Member States?

First, while the role of internal constraints cannot explain the ECJ ruling in the first *Francovich* case, they can partially explain why the Court did not 'back down' in subsequent cases. Once the principle was established, it would be seen as contrary to the constraint of legal reasoning to then argue in a subsequent case that the principle did not exist, or that it should be limited. However this cannot explain why the Court went even further than *Francovich* and strengthened the principle in later cases.

The inability of the Member States to overrule the *Francovich* doctrine, coupled with the gradual acceptance by national courts of the doctrine are the primary reasons why the Court has enjoyed such a significant level of autonomy in the cases.

First, while the ECJ was aware that many Member States were opposed to the *Francovich* principle as indicated by their interventions in *Francovich* and later the *Brasserie* case, the Court did not perceive the threat of sanctions as serious. In September 1995, while the *Brasserie* case was pending before the ECJ, the UK presented its Court-bashing proposals to the Reflection Group preparing the upcoming 1996-97 IGC. In the final report of the Group from December 1995, the isolation of the British delegation was clear, where it is stated that only 'one member' suggested examining the possibility of limiting governmental liability (Reflection Group, 1995:38). The isolation of the British, coupled with the traditional support for the ECJ from smaller Member States led the ECJ to perceive the threats of sanctions as not credible, given that overruling the ruling would require Treaty revision, which implied unanimity.

This lack of consensus allowed the Court to follow its own interests by strengthening the principle of financial liability with the ruling in the *Brasserie* case in March 1996. That the ECJ handed down a ruling that was clearly contradictory to the preferences of a large number of Member States only several weeks before the opening of the 1996-97 IGC clearly indicates that the Court did not perceive the threat of 'sanctions' from the Member States as very credible.

However it must also be remembered that the judges on the Court do not always perceive ‘sanctions’ in the same manner as other EU institutions. For the ECJ, the timing of its bold ruling in *Brasserie* immediately prior to the IGC can also have been viewed as giving the legislature (Member States) an opportunity to overrule the ruling if they so wished, enabling them to act as the legitimate ‘Masters of the Treaties’ and change the ruling through Treaty amendment.

Second, national courts in many Member States including France, Germany and Italy have indicated their acceptance of governmental liability *in principle* by drawing upon the principle of governmental liability in cases before them. However the same national courts have been reluctant to use the principle *in practice* to award damages to individuals (European Commission, 1998, 1999, 2000; also Tallberg, 2000:116-117). For example as was seen above in the *WTD* case, while the Northern Irish High Court in *Burns* indicated its acceptance of the ECJ’s *Francovich* case law, it then denied the plaintiff remedies in the specific case.

This has led some commentators to argue that this ‘sanction of inaction’ by national courts has been a more effective sanction of the ECJ’s autonomous behavior, limiting the effect of the principle of governmental liability along the lines of Member State preferences, and thereby also reducing the ‘real’ autonomy of the ECJ in the line of cases (Tallberg, 2000:115-117). However as with many rationalist studies, this argument ignores the long-term picture, denying that the Court has followed a strategic incrementalist strategy based upon its strong interests in strengthening the enforcement of EC law. What was important for the Court was securing the acceptance by national courts of the *Francovich* case law *in principle* in the short-term based upon the belief that this could be translated over time into the acceptance of using the doctrine of state liability *in practice* to award damages.

The first part of the Court’s strategy has been to lower the costs for national courts of accepting the doctrine of state liability in principle by granting them extensive autonomy in the use of the doctrine, enabling national courts to avoid using the doctrine in practice to award damages. For example, in contrast to the normal hierarchical ECJ-national court relationship that exists in EC law, where national courts are *obliged* to refer legal questions to the ECJ except in exceptional circumstances, national courts are explicitly allowed in the *Francovich* case law to *not* refer most legal questions regarding liability to the ECJ (Chalmers, 1997:195-196). This has allowed national courts to accept the doctrine in principle without being ‘forced’ by the ECJ to also use the doctrine in practice.

The second and overlapping part of the Court’s strategic gamble has been to accept the short-term ‘rebellion’ of national courts to using the doctrine in practice based upon the belief that over

time the doctrine will become gradually accepted within national legal orders, thereby gaining a normative dimension that makes behavioral claims upon actors. If we look at the acceptance of earlier controversial doctrines such as direct effect and supremacy we find similar processes, with these doctrines gradually becoming accepted as part of the 'law of the land', with a similar level of normative power (see above, pages 10-11). While the doctrine of state liability is still controversial in most national legal systems, there are indications that certain national courts, notably in Belgium and the United Kingdom, are gradually accepting the use of the doctrine in practice, and have in recent cases begun awarding damages to individual (see European Commission, 2000, volume VI, pp. 31-34). Whether these cases are anomalies, or whether they indicate a more general acceptance of using the doctrine of state liability in practice within the respective national legal orders is still too early to tell. However we can expect that once the use of state liability in practice is accepted in several national legal orders, this will lead to a broader acceptance of the doctrine throughout the EU through processes described by Weiler as 'judicial cross-fertilization' (Weiler, 1994:521-523).

Conclusion

The *Francovich* series of cases presents one of the best examples of a very high level of ECJ autonomy in the 1990s, clearly illustrating that the institutional decision-making rules regarding Treaty reform prevented a large coalition of Member States from sanctioning the ECJ to limit and/or remove the doctrine of governmental liability for the non-implementation of directives. The lack of support from national courts represents more of a puzzle, as given the hypothesis on national courts we would expect that the ECJ in the face of opposition from national courts would limit and/or reverse its rulings, and not strengthen the doctrine! However this paradox can be explained by looking at the Court's incrementalist strategy of accepting the 'rebellion' of national courts to using the doctrine *in practice* in exchange for national courts accepting the doctrine of state liability *in principle*, in the hope that in the long-term national courts will come to accept state liability as they have other controversial doctrines. This can be interpreted as a gamble on the part of the Court, accepting a slightly lower level of autonomy vis-à-vis the preferences of other actors (national courts) in the short-term based upon the prospect of considerably strengthening EC law in the long-term. The hypothesis on the level of support of national courts is thereby partially confirmed, in that the ECJ has been forced to act contrary to its own interest in strengthening EC law by granting national courts significant autonomy in their use of the doctrine of state liability.

5. Conclusion

This paper argued for the utility of a modified theoretical model of judicial politics that attempts to take into account the distinctive characteristics of *both* law and politics, using rational institutionalism as a baseline supplemented with a socially constructed normative dimension of law. The model also specified how judicial institutions differ from other types of institutions, primarily due to how judges perceive external policy inputs. The hypotheses developed from the model were tested on three in-depth studies of cases before the ECJ, and were found able to provide strong explanations for the level of autonomy possessed by the Court in the cases.

In the *Irish Abortion* case the ECJ possessed a relatively low level of autonomy primarily due to the lack of support from national courts, as the instrumental and normative costs of Irish non-compliance were lower than the costs of complying with a potential adverse ECJ ruling. The *Working Time Directive* case was a clear example of the importance of the normative power of EC law, where the British government seriously contemplated blatant public non-compliance but backed down in the face of the perceived illegality of the action, contrasting sharply with the rebellious British actions taken at the same time within the Council in the BSE Crisis. In the *Francovich* cases the ECJ possessed extensive autonomy, creating and strengthening the principle of governmental liability in the face of opposition from a large coalition of Member States including Germany, primarily due to the inability of Member States to sanction the ECJ. However the Court was forced to ‘compromise’ with national courts, sacrificing short-term autonomy for the longer-term prospect of national courts fully accepting state liability, which would significantly strengthen the effectiveness of EC law by creating a decentralized system of enforcement.

This tentative test of the theory illustrated the utility of creating a more comprehensive notion of actor interests, including *both* an instrumental and normative element. By solely focusing upon instrumental interests we would be stretched to explain British compliance in the *Working Time Directive* case, whereas by only including the normative dimension of law we would miss the strategic elements of the ECJ’s interaction with Member States and national courts. For instance in the *Irish Abortion* case, while the ECJ might have wished to extend the ambit of EC law to the case in hand, the threat of non-compliance on the part of Irish courts led the ECJ to find a technicality to avoid a direct confrontation between EC law and the Irish constitution. Additionally, by incorporating the distinct characteristics of judicial institutions into the model, we are for example able to explain why the ECJ has not changed its strongly pro-integrative case law in the 1990s despite being ‘sanctioned’ through Treaty revision in both the Maastricht and Amsterdam Treaties.

What is now needed are more rigorous empirical tests of this and other competing theoretical models. We should start by examining larger numbers of cases, and also broader trends over time in the ECJ's case law. This entails investigating developments both qualitatively and quantitatively over extended periods of time and across issue areas.

Further, we have to date no comprehensive empirical data on several of the elements of the model developed in this paper. Work is especially needed regarding how the normative power of law develops, measuring whether the views of EC law held by political and legal actors vary over time. One method could be to contrast views on accepted legal doctrines such as supremacy with newer doctrines such as state liability over an extended period of time. Finally, we also lack information on how ECJ judges perceive their relationship with Member States and national courts, and whether these perceptions have changed over time. Despite the significant progress made within political science on judicial politics within the past decade, we still have little empirical information on the understudied interaction between law and politics.

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