EC Roundtable: Law

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An overview of European Community law must speak to a number of different audiences. It must distinguish between law for lawyers, and law for political scientists. It must further distinguish between substantive EC law and studies of the European Court of Justice (ECJ) and the creation of the Community legal system, which fall into a separate category for lawyers and political scientists alike. The following round-up will begin with an excursion into some of the major works of substantive law, divided into treatises and casebooks, and then turn to studies of the Court by both lawyers and political scientists of different theoretical persuasions.

The Law

1)Treatises

The past five years have witnessed the publication of new editions of four important treatises on European Community law. These are the lawyers' bibles, intended not for teaching purposes but as reference works for scholars and practioners alike. Here are the digests of the cases and the analysis of every nuance of the ECJ's substantive jurisprudence, presented as a composite and logical narrative. Here also are summaries and analyses of key Treaty provisions and Community directives. Laurence Gormley has edited the second edition of Kapteyn and Verloren van Themaat's 1973 classic, *Introduction to the Law of the European Communities*. The first edition described the contours of a legal system still in its infancy; the second (based on the fourth Dutch edition) presents the institutional architecture and substantive policies of a thriving if still young legal order, with a particular emphasis on "the unity of the market perspective" inherent in the Community Treaties. Resting comfortably on the same shelf is Schermers and Waelbroek (4th. ed., 1987; 5th ed., 1992), an extensive and

masterful delineation of precisely how the judicial power of the Community is brought to bear on individuals, undertakings, and member states (the 5th edition is available in paperback). Hartley (2d ed., 1988) and Brown (3d ed., 1989) offer less magisterial but nevertheless useful overviews of the Court and its dominion. Add Gerhard Bebr's *Development of Judicial Control of the European Communities*, a 1981 study that remains valuable for its lucidity and sensitivity to the judicial function as a mechanism of social control, and any library will be well-stocked.

2) Casebooks

American law teachers have been complaining for years about the lack of an updated casebook on European Community law. Bermann, Goebel, Davey and Fox (1993) has filled that gap. Organized as a standard law casebook in the West format, it is thorough, accessible and enormously useful for both teaching and reference purposes. It is divided into five parts: 1) the legal and institutional framework of the Community, including the reception of Community law in the member states; 2) the four freedoms of goods, workers, services and capital within the internal market; 3) competition policy; 4) external relations and commercial policy; 5) specific Community policies, including agriculture, environmental policy, social policy, equal rights for women, and economic and monetary coordination. Well-edited cases and descriptive commentary are followed by thoughtful notes and questions. Best of all, each of the thirty-three chapters concludes with a well-researched bibliography of English language books and articles for further reading. Equally helpful is an excellent introductory note on official and unofficial electronic and paper sources of EC legal materials, including databases and commercial reporters of ECJ cases and Commission directives. Overall, this book will become the standard casebook for law school courses on European Community law, and could easily be taught to political science graduate studens and even upper-level undergraduates as well.

The European market has been better served over the years. Recent additions to a generation of older casebooks include Weatherill (1991), the second edition of Plender and Usher (1989); the fifth edition of Lasok and Bridge (1991), and Steiner (1988). Specialists interested in the newly minted Court of First Instance may consult Willett (1990).

The Court

1) Legalists

Political scientists interested in "EC law" are actually more likely to be interested in the European Court of Justice, and above all in how the Court succeeded in creating and enforcing the body of rules that lawyers now study as EC law. In looking for accounts of this process, however, they are typically disappointed with the tales lawyers (and judges) tell themselves. These are the narratives of the "constitutionalization" of the Treaty of Rome, describing a legal world that operates largely according to its own internal logic, hermetically closed to considerations of power and self-interest. Judge Mancini (1989) offers the latest in a long line of such analyses, offering a lively and sophisticated description of the ECJ's careful wooing of the national courts. He admits to a degree of judicial policymaking as the glue that holds the Community together in times of political stagnation, but ultimately stresses the quality of the Court's legal reasoning as the principal ingredient of its success. This article epitomizes the "legalist" approach to the Court, shared by other authors such as Mackenzie Stuart (1977); Lecourt (1976); Pescatore (1974); Kutscher (1976); Everling (1984),; Bettati (1989); and Barav (1980).

The philosophy of this school is aptly summarized by Schermers (1987, p. 1): "At their present stage of development the Communities are more in a position to benefit from a comon effort to support and to utilise the structure

laboriously built up by the Court of Justice than from any attempts to alter or demolish this structure." Accounts of the "political" role of the Court would do just that.

2) Contextualists

A new generation of Community lawyers is less reticent, however. Where pure legalists assume, or at least write *as if* they assume, that law can operate in a political vacuum, contextualists endeavor to analyse the reciprocal relationship between the legal and political spheres in European integration.[1] Leading the way is Joseph Weiler. Of critical importance for anyone interested in the Community legal system is his synthesis of a decade of thinking and writing about the interaction of the Court and the political organs of the Community, an article entitled *The Transformation of Europe* (1991). Also valuable is Dehousse and Weiler (1990). Weiler ultimately argues that the political disarray of the Community in the 1960s and 1970s made it possible for the political institutions to "digest and accept the process of constitutionalization" (*Ibid.*, p. 2428-29). He introduces two concepts from Albert Hirschman's *Exit, Voice and Loyalty* (1970). Exit describes the mechanism of organizational abandonment in the face of unsatisfactory performance; Voice describes the mechanism of intra-organizational correction and recuperation. Weiler claims that the process by which Community norms and policy hardened into binding law with effective legal remedies constitutes ``the closure of Selective Exit" in the EEC. This in turn increased the importance of Voice.

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[1]This approach was pioneered by Stuart Scheingold in a study of the early Court (1953-early 60s) when it served as the judicial arm of the European Coal and Steel Community (ECSC), and in 1957 extended its activities to the European Economic Community and the Atomic Energy Community: (Scheingold, 1965). The pioneer of this kind of analysis among legal scholars was Eric Stein (1981).

Danish law professor Hjalte Rasmussen is less sanguine about the impact of the Court. His book *On Law and Policy in the European Court of Justice* (1986) was received by the Court itself as an immoderate and unjustified attack. Immoderate it certainly is, as well as stylistically and methodologically rough in many places. Nevertheless, it offers a self-styled expose of the Court's political agenda and the lengths to which it is willing to go to achieve its goals, as well as a discussion of the allegedly counter-productive reception of the Court's jurisprudence by the national courts. As a committed integrationist, his complaint is that the Court periodically jeopardizes its long-term authority and legitimacy for short-term gain. This book should be read together with Rasmussen's more recent offering in an issue of the *University of Chicago Legal Forum* (1992) dedicated to the legal dimensions of the 1992 program.

Anther interesting account of the Court by a lawyer with good political antennae is Lenaerts (1992). Lenaerts is both a law professor a Judge of the Court of First Instance of the European Communities. He identifies four strands that characterize the interaction between law and politics in the context of European integration. Most interesting is his description of the way in which the Court signals and paves the way to explicit terms on which the political actors can further integration. Lenaerts' description of the reactions of the Member States to these judicial ``invitations" sharply contrasts with both Weiler's and especially Rasmussen's accounts. He notes that ``rather than provoking some kind of aversion on the part of...[the political] process against the dynamics of what might have appeared at times as excesses of judge-made law, the Court kept the confidence of the institutions of the Community and saw them often move forward from where it had itself left an issue at the outer boundary of what was still solvable on the basis of the existing texts." (*Ibid.*, p. 35).

Francis Snyder's 1991 book *New Directions in European Community Law* is a must-read for any political scientist interested in the Community legal system, particularly for those who wish to push beyond the Court. Snyder self-consciously presents Community law in "political, social and economic context," emphasizing 1) "the relationships among institutions, rules, ideologies and processes"; 2) "the role of law in economy and society"; and 3) "the place of the European Community, including its legal system, in the international political economy" (Snyder, 1991, p. 4). The result is a sophisticated and highly literate set of essays examining concepts of "interests" in the Communities, the Community legislative processes, competing ideological perspectives on the 1992 program, the special status of agriculture, and the contradictory nature of Community external development policy.

A subsequent Snyder article provides a fascinating analysis of two modes of implementing Community law: 1) Commission bargaining, using litigation as a bargaining tool, and 2) the creation of a judicial liability system (1993). The second of these categories offers yet another narrative of the Court's work, albeit with an interesting focus on the possibilities of U.S.-style public interest litigation in the European Community. Snyder's more important contribution is his discussion of the way in which the Commission seeks to improve compliance with Community law through litigation, 'soft law' (regulations and decisions that are not legally binding), and structural reform involving national administrations. From the Commission's perspective, Snyder argues, "the main form of dispute resolution . . . is negotiation, and litigation is simply part, sometimes inevitable but nevertheless generally a minor part, of this process." (*Ibid*, p. 30).

As interesting as these accounts are, political scientists are still likely to find them unsatisfying. They suffer generally from two problems: First, the

nature of the relationship is often fuzzy and claims of cause and effect are insufficiently specified. Second, the incentives facing individual actors are not spelled out. Indeed, in *Transformation of Europe* Weiler retreats from causal claims advanced in earlier work, claiming instead to offer a ``synthesis and analysis . . . in the tradition of the `pure theory of law' with the riders that `law' encompasses that is much wider than doctrine and norms and that the very dichotomy of law and politics is questionable." (Weiler, 1991, p. 2409). And Rasmussen, for all his purported iconoclasm, takes as his inspiration American legal realists. For those hungering for social scientific explanation, or at least attempts in that direction, the final category of literature on the Court to be surveyed is writings by political scientists themselves.

3) Political Scientists

For decades Stuart Scheingold stood virtually alone as a political scientist (at least on this side of the Atlantic) seriously interested in the ECJ. And he grew increasingly pessimistic about the Court's impact. In*The Law in Political Integration* (1971) he revisited the claim of the federalizing role of the Court and found that the effect of judicial decisions upon the substance of Community policy has been ``rather modest...By and large, the Court of Justice has operated as a validator of decisions...rather than as a policymaker" (*Ibid.*, p. 16).[2] Writing a decade later, Martin Shapiro disputed the legalist account of the Court, but nevertheless suggested that the European insistence on a sharp division between law and politics might nevertheless reflect a highly sophisticated political strategy (Shapiro, 1980). The success of this strategy, as measured by the willingness of national courts to apply EC law, is canvassed in Usher (1981) and Volcansek (1986). Shapiro also revisits this subject in his contribution to *Euro-politics* (Sbragia, ed., 1990).

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[2]Essentially concurring is Taylor (1983).

The past year has witnessed a revived debate on the role of the Court, framed in theoretical terms as a contest between neo-rationalism and neo-functionalism. Garrett (1992) and Garrett and Weingast (1991) rely on a ``rationalist'' approach to the study of institutions, one that proceeds from the basic Realist premises of sovereign and unitary actors, but which accepts a role for institutions based on rational choice and game theoretic studies of cooperation. Member States' continuing collaboration within the European Community indicates that they value the gains from effective participation in the internal market more highly than the potential benefits of defecting from Community rules (Garrett and Weingast, 1991, p. 27; Garrett, 1992, p. 540, 557). However, due to the complexity of the Community system, the incentives for unilateral defection may be considerable, especially if cheating is hard for other governments to spot or if the significance of defection is difficult to evaluate. Logically, if cheating is endemic, there are no gains from cooperation. It is thus in the Member States' selfish interest to delegate some authority to the ECJ to enable it to monitor compliance with Community obligations. These various benefits notwithstanding, however, the Court would still not be worth the costs it imposes on individual Member States unless "it faithfully implement[s] the collective internal market preferences of [Community] members" (Garrett, 1992, p. 558).

Burley and Mattli (1993), by contrast, offer a neo-functionalist explanation for the Court's success in constructing a Community legal system that, initially at least, did not conform to Member State interests. They apply Haas's original model of the actors, motives, process, and context involved in a neo-functionalist account of how integration takes place to the EC legal community. They argue that the Court has been able to preserve law as a mask for politics, using sufficiently sound legal reasoning to insulate an incremental process whereby

national and supranational lawyers, judges, and legal scholars cooperated in the building of a Community legal system that afforded a happy marriage of ideals and material interests. The argument draws less on the autonomous power of law as fiat than on the rational motivations and interests of the legal community operating within a technically insulated sphere.

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