

**The European Court of Justice in a policy perspective**

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In the past few years the Court of Justice has come to be a subject of analysis in the political science literature (Burley and Mattli 1993, Volcansek 1992, Weiler 1993, Weiler 1994, Alter and Meunier-Aitsahalia 1994; Garrett 1991, Garrett and Weingast 1993). There is, however, little agreement on methodology or theory, the definition of the dependent variable or the general evaluation of the importance of the Court in this developing debate. At one extreme some studies are undertaken in a rationalist/realist mood, use economic integration as the dependent variable and generally attribute a minimal (independent) role to the Court (Garrett 1992; Garrett and Weingast 1993); at another, a neo-functional theory explains 'legal integration' and depicts the Court in an 'engineering' role (Burley and Mattli 1993). Some studies occupy the space between these extremes.

This paper will present an account of the Court of Justice, from a policy perspective, initially developing the analysis in general terms, then turning to a series of case studies of the role of the Court in substantive policy-making, and finally, by way of conclusion, a critique of some of the most influential articles in this area will be presented. This paper will not directly consider the process of 'constitutionalizing' the Treaty of Rome. I have provided an account of this process elsewhere, again from a broad policy and institutionalist perspective (Wincott 1995).

### **Policy Analysis and the ECJ**

Analysis of the policy process tends to emphasize the interaction of a range of actors, none of which can control the process as a whole, because no single actor has the

power to dominate it completely. Indeed no single actor is in a position to understand the policy process synoptically. As a result, the construction of policy is a process in which ideas and power interact. Moreover, historically these factors are cast into institutional forms which come to play their own part in the process

For the purposes of this analysis the European Court of Justice will be treated as a political actor, which has some autonomous influence on European integration.

However, the Court operates in an environment which both constrains and provides opportunities for it. This environment is at least in part made up of the other European institutions and the member states. In other words, the influence (or power) of the Court is relational.

In principle, of course, courts do not have a power of initiative. They must wait for cases to come up before they can have an impact on a particular policy. The 'reactive' role of courts suggests that they will be able to have more of an impact on policies which already have some legal grounding, rather than creating a policy from nothing. It also means that the Court is dependent on the 'accidents of litigation' (Weatherill and Beaumont 1993). In particular, when acting in a manner which would not be supported by the legislative institutions of the Community, the Court seems to require a stream of litigation, and preferably a group or organization capable of following a litigation strategy. In the area of equality policy, Ms. Defrenne and her legal team in the 1970s, and the British Equal Opportunities Commission in the 1980s, followed litigation strategies which allowed the Court to have an important influence on the

development of this Community policy, and which influenced the development and passage of legislation in the late 1970s and mid 1980s.

On the other hand, the fact that the Court is open to this sort of strategy also means that it is difficult for the Court to avoid strategic litigation which might have potentially disintegrative effects. The Court's attitude towards litigation around the issue of abortion in Ireland may be one example of this sort of difficult litigation. The 'saga' of Sunday trading in England and Wales is clearly another. Partly as a consequence of these patterns of litigation the Court partially retreated from its very expansive *Dassonville* interpretation of Article 30. Thus we shall see that the *Dassonville* interpretation led to the involvement of the Court in a wide range of rules regulating trade within the Community, in the end, even in issues the Court would have preferred to avoid.

The Court is most likely to have a important impact on substantive policy making not when it acts alone, but in 'interaction' with other Community institutions (Wincott 1993) and actors in Europe. One aspect of this 'interaction' occurs when its judgements provoke a political response, or 'jar' the political process' in the terms suggested by Alter and Meunier-Aitsahalia (1994). I believe that Alter and Meunier-Aitsahalia's idea of 'jarring' is useful, but needs to be stated more clearly, and, probably extended. They imply that 'jarring' includes the 'threat of de facto policies', and the issuing of verdicts with unpopular policy implications, at least as far as member states are concerned (1994: 577). However, Alter and Meunier-Aitsahalia reject a heroic image of the Court, which seems to include an vision in which 'judicial decisions

are seen as setting the context of political integration by altering member state preferences through the creation of de facto policies, which themselves serve as constraints on the actions of member states' (1994: 536). This is a slightly confused and therefore potentially misleading position.

Be that as it may, it seems worth setting out ways in which the Court can have an influence in the policy process, which are in my opinion compatible with the 'jarring' perspective. First a judgement does not necessarily have to 'create' a fully fledged policy, it might simply alter - extend - an existing policy (or create confusion in it). Secondly, the question of whether member state preferences are altered in this process is moot. In general, I do believe that participation in the integration process influences what often gets called the 'preference formation process' of a state or an executive. In the context of the development of a specific policy, a Court decision can - Court decisions have - altered the 'preferences' of member states for particular bits of legislation. Viewed differently, however, the underlying preferences of the states may not have altered. Instead it is the environment or, as Alter and Meunier-Aitsahalia hint, the context, within which member states legislate which changes.

For example, member states with particular preferences about the conduct of 1) monopoly and merger policy and 2) the extent of national power/sovereignty they wish to surrender to the Community found that after the Court's *Philip Morris* judgement, they could achieve these objectives better by passing legislation (which had been blocked in the Council since the early 1970s) than by allowing a policy to emerge through the everyday practices of the Court and Commission. In particular they could

gain influence over the criteria such policies would be judged against, and could limit the extent of Community competence by setting high thresholds for the size of business regulated by the Community (see below).

Another feature of the Court, which has been considered earlier is the 'incrementalism' of its doctrinal development. This incrementalism certainly allows it to judge reactions from the political environment within which it operates. In the context of the interaction of the Court with this environment, this incrementalism also helps the Court to react to legislative developments which do not follow its policy preferences precisely, and gradually 'bend' or modify them. The so-called 'Barber protocol' in the Maastricht Treaty was an attempt legislatively to usurp the judicial role. In the run of cases since Maastricht the Court seems to have accepted the letter of the protocol (which it might have done anyway) and then attempted to limit its ramifications in other areas of equality policy (see the *Ten Oever*, *Neath*, *Vroegge*, *Fisscher* cases).

The particular characteristics of the Court of Justice and the Community system both provide it with certain opportunities and impose constraints on it. First, as a single institution in a complex institutional and wider system, the Court seems to be in a weak position to become actively engaged in the day-to-day life of the peoples of Europe. In fact, one of the main efforts of the Court in the 'constitutionalising' process, has been largely aimed at addressing this problem. The Court has developed the preliminary reference provision of Article 177 EEC effectively into a method of judicial review of national law against a Community standard. The development of Article 177

in this way was itself a remarkable example of judicial and extra-judicial activism on the part of the Court

Ironically, the form taken by this preliminary reference system may have allowed the Court, single rather small institution, to have an astonishing influence, a much greater scope for its own purposive behaviour than might have been predicted from the original text of the Treaty of Rome. However, it also illustrates the fact that the achievements of the Court of Justice are largely relational. They are dependent on the goodwill of national courts. Or, to put the point another way, the ECJ has had to persuade national courts to become involved in this form of judicial review. Ultimately the national courts take the final decisions in Article 177 cases. It is also the case that many of the most important challenges to the ECJ have come from national courts refusing to accept and use the Article 177 procedure.

A second characteristic of the Community system in general, which has a particular impact on the ECJ, is the extreme weakness of its coercive capacity, if compared with that of a state. Outside of competition policy, and even given the development of a capacity to fine those who fail to obey Court rulings, the 'policing' capacity of the Community is weak. The direct rulings of the Court seem to be obeyed simply because of their judicial character, not because of any effective threat behind them. The use of Article 177, and a series of developments of the relationship between the ECJ and national courts, based on the 'loyalty clause' in Article 5 E(E)C effectively engage the judicial credibility and coercive capacity of the member states in the implementation

and enforcement of Community law. Again we see that the Court of Justice is significantly dependent on national courts in order to make Community law effective

In keeping with the recent interest in the role of 'ideas' in policy analysis and political science, a number of commentators have suggested that the Court has had a powerful impact on the process of integration by contributing new 'ideas'. This literature has focused particularly on the Court's 'creation' of the idea of mutual recognition in its *Cassis* decision as a crucial element in the launching of the internal market programme. There is a risk, however, that this discussion can degenerate into a search for the 'original' statement of a particular idea, a search which is, in general, likely to be fruitless. It is particularly pointless in the Community context where informal groups and shadowy committees play an important part in the early development of policies

Indeed, there is evidence that the Court of Justice itself was not responsible for the development of key ideas which are often attributed to it. For example the Commission's legal service, not the Court, thought up the ideas of direct effect and supremacy (Stein 1981, Gerber 1994). In fact, the Court proved reluctant to develop these ideas as rapidly as the Commission's legal service suggested. The Court's 'intellectual leadership' role is not primarily one of ideological creativity (Gerber 1994) instead it consists in the construction of particular ideas as a form of legal knowledge, drawing on the normative salience of 'the law' give them authority (of course, this authority is closely connected to the general development of a community of European law, with a modicum of influence within national legal communities). In other words, the (developing) place of Community law biases Community knowledge processes so



as to give lawyers and the law a peculiarly prominent position in the Community, perhaps as a kind of epistemic community

In a policy perspective the role played by 'ideas' centres on the importance of the process of their development, in which 'the law' plays a central part. In addition a policy perspective would stress the role of ideas in the construction of preferences and interests. Thus the hypothesis here is that in the Community 'the law' has played an particular and important part in these processes. However, in an analogy with the Court's inability to 'control' or 'dominate' the making of Community policy, its role in the 'ideological' space of the Community is important, but limited. It plays a part, but only a part, in the development of 'ideas'.

If the Court's institutional position in the wider European environment is weak, it is in much stronger in relation to the legislative institutions of the Community, short of a wholesale rejection of its authority. In particular the character of the Treaty of Rome as a *traité cadre* or framework treaty, gave the Court a number of resources in the European policy process. First the Court had the benefit of a number of rather general and grand objectives, which it can use to guide and legitimate its political role.

Secondly, a range of specific policies are set out, giving the Court and Community a potentially rather wide range of competence. Finally, the 'specific' policies are set out in rather general terms, so the Court is not tightly constrained by the particularity of their provision. Particularly once the doctrine of direct effect of Treaty provisions had been developed by the ECJ, and accepted by national courts, the *traité cadre* gave the Court a fairly wide scope.

## **The Court of Justice in the European Policy Process**

The analysis will now turn to a series of case studies mainly concerned with how the ECJ influences policy-making in the EC, a subject about which ‘little is known’ according to Alter and Meunier-Aitsahalia (1994: 556).

### The Internal Market

The Court’s judgement in the *Cassis de Dijon* case is often used to mark the beginning of the ‘new approach’ to harmonization which created the internal market. To be sure, this judgement did mark an important shift in the development of the Community. However, many political analysts fail to recognise that the *Cassis* ruling was, in fact, a development and modification of the Court’s position in an earlier case (but see Volcansek 1992 and Alter and Meunier-Aitsahalia 1994). In the *Dassonville* case (1974) the Court had decided that ‘...all trading rule enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’ (*Dassonville* Case 8/74 1974: 852) would be illegal. Given that the phrase ‘trading rules’ was not interpreted restrictively (Gormley 1989:379-380) this ruling potentially had an enormous scope to strike down the non-tariff barriers to trade set up by Member States.

The immediate policy impact of the *Dassonville* ruling was limited, partly because the scope of the notion of ‘trading rules’ was unclear, but arguably also because the ruling was too radical to be fully effective. The *Cassis* ruling made a double move, first to

draw out clearly the implication of *Dassonville* that goods lawfully marketed in one Member State should also be saleable in the others. This is the famous principle of 'mutual recognition'. In fact the Court did not use this expression in the *Cassis* ruling. Instead, in its (unprecedented) response to the judgement it was the Commission which borrowed this expression from other area of Community law and used it in relation to the free movement of goods.

Secondly, and perhaps paradoxically, the *Cassis* decision effectively extended the policy scope of *Dassonville* by formally limiting it. The main legal innovation in *Cassis* was to introduce a number of exceptions to the general principle. This 'rule of reason' allows the State to make rules which hinder trade if they are necessary to pursue certain policy objectives, such as the protection of the environment, if and only if the State did so by means of a policy which did not discriminate between EC imports and domestic products. Although some political commentators have seen this as an indication that the court was limiting its role (Alter and Meunier-Aitsahalia 1994 547), it is more plausible to suggest that the Court was making its policy more palatable by leaving some policy scope for the Member States, making room for other important Community objectives and highlighting the full extent of the general principle, by specifying a limited (though expanding) range of exceptions.

The full implications of this position only became clear in later judgements. The simple fact of a difference between national systems of regulation could, on the face of it, create barriers to intra-Community trade, even if no individual regulatory system discriminated against imports from the rest of the Community. These difference would

be allowed only if they were minimum policy necessary to meet one of the few public policy objectives (mentioned above), known as 'mandatory requirements' (see the *Cinetheque* case)

These developments are largely ignored by political analysts (Alter and Meunier-Aitsahalia 1994; Garrett 1992, Garrett and Weingast 1993, but see Armstrong forthcoming for an institutionalist account of the regulation of the free movement of goods). While they did not amount to the development of a fully fledged internal market policy on their own, they did keep the pressure on the Council of Ministers in the development of the internal market programme, and the negotiation of the Single European Act. In fact focusing research on the question of whether the ECJ was/could have developed a policy on its own directs attention away from the key issues of how the 115 Article 30 cases (Alter and Meunier-Aitsahalia 1994: 548) interacted with the legislative process in the development of the internal market.

Moreover, it is clear that the Court held to/developed a 'policy position' on the question of market integration, to the point where it made sense for business groups to consider a strategy of litigation to create a policy of mutual recognition through the ECJ (Alter and Meunier-Aitsahalia 1994: 544)

Even this sort of policy could run out of control of the Court as the Sunday trading 'saga' has shown (Rawlings 1993). The scope given to Article 30 by the ECJ's interpretation of it provided an opportunity for individuals or groups to challenge aspects of their national regulatory regimes with which they disagreed. Restrictions on

trading which applied equally to all Community products, might nevertheless be found to contravene Article 30 if they reduced the overall trade within the EC.

A striking example of the disruptive influence of strategic litigation on the integration process is the 'saga' of Sunday trading (Rawlings 1993), in which various UK retailers, particularly those specialising in DIY, attempted to use Article 30 to provide a basis for trading on Sunday, which was then banned by rather ramshackle legislation in England and Wales. The UK politics of reforming this legislation was complicated because it cut across conventional political cleavages. In the ruling Conservative party the issue pitted free marketeers against proponents of traditional religious and family values. As a result it proved difficult to find a consensus in favour of either rolling back the *de facto* increase in trading on Sunday or a fully liberalised solution.

A number of retailers sought to by-pass the national political debate by means of an appeal to Community law on free movement, so the Court of Justice was drawn into the 'saga'. Specialist legal teams evolved both for the retailers and for the local authorities which prosecuted them. The litigation strategy placed the ECJ in a difficult position, as it did not want to get entangled in a difficult issue of UK domestic politics. However, the Court's attempt to keep its distance resulted in an ambiguous ruling in the *Torfaen* case, the first to come before it, which also aroused criticism. The judgement has been described as 'delphic' in places (Rawlings 1993. 317, referring to the *Torfaen* case). The Court of Justice left it up to the national court to decide

whether the 'restrictive effect' of the Sunday trading rules on the free movement of goods exceeded 'the effects intrinsic to trade rules' (cited in Rawlings 1993: 317)

Both sides claimed victory after this decision, the general impact of which was to sow confusion in the English legal system.

In end the English legislation was altered, and Sunday trading was (partially) liberalised, as a result of a general political and legal campaign, of which the Euro-litigation was only one part. Indeed, the main 'use' of the European litigation for those campaigning for the right to trade on Sunday was to cause chaos in the English law, thereby forcing the government to legislate to clarify the situation. This use of Community law places the European Court in a difficult position. As one commentator has suggested the ECJ's part in the Sunday trading 'saga' 'may do great damage to the reputation of Community law inside and among member states' (Rawlings 1993: 335) Moreover, it probably contributed to the Court subsequently seeming to retreat from its very wide ranging *Dassonville* interpretation of Article 30 on the free movement of goods in the *Keck* judgement (Cases C-267, C- 268/91 not yet reported)

Despite the subsequent case law, the development of the internal market owed more to legislation and the interaction of the Commission and the Council. In fact, the most important effect of the Court's *Cassis* judgement was its impact on the legislative process, variously described as providing a 'focal point' for the existing preferences of the Member States (Garrett and Weingast 1993), or, attributing more power to the Community institutions, by creating a new alternative which lay beyond the knowledge

horizons of the States (Wincott 1993) and then contributing to the creation of a new consensus around it (Alter and Meunier-Aitsahalia 1994)

### Gender equality

Article 119 of the Treaty of Rome committed the member states to implement equal pay for women and men by the end of 1962. The historical record shows that this deadline for implementation fell by the way, as did many subsequent ones during the 1960s. Even by the mid-1970s Article 119 was effectively unimplemented. Despite regular pressure from the Commission, the member states were unwilling to tackle the issue (Warner 1984). By the early 1970s, however, a number of influences favourable to the implementation of Article 119 had developed. First, 'second wave' feminism gained ground across Europe and secondly, the political leaders of the member state adopted an attitude more open to the development of European social policy.

However, these influences were not sufficient conditions for the passage of Community legislation on equality. Although the women's movement undoubtedly influenced the general climate of opinion in the member states and the Commission, the 'direct input' into the European policy process by women was small (Hoskyns 1986: 308). The evidence from other aspects of social policy suggests that although a number of pieces of social legislation were passed in the late 1970s, many of the proposals in the Commission's 1974 Social Action Programme failed to become law.

Judgements made by the Court of Justice made a crucial difference in raising the issue of equality on the Community's legislative agenda, and in putting pressure on the member states to pass proposed legislation. In the 'Defrenne' cases it was hinted (in 1970-71) and subsequently confirmed (1975-6) that Article 119 of the Treaty of Rome was directly effective. In other words, by 1976, irrespective of existing national legislation any woman (or man) who had been treated unequally in terms of pay could sue her employer. These cases had a strong impact on the legislative agenda by raising the idea that Article 119 could be directly effective. They also altered the terms on which the member states participated in the legislative process.

It is worth noting that the Court did not move immediately to declare Article 119 directly effective, never mind to produce an expansive interpretation of what 'equal pay' might mean. Instead in the first Defrenne case (Case 80/70 *Defrenne*) the Court did not consider the question of the direct effect in its judgement, despite the fact that the Advocate-General had raised the issue. Indeed the Advocate-General, argued that Article 119 did have direct effect (although not in this particular case). It was only in the second *Defrenne* case (Case 43/75 [1976] ECR 455) that the direct effect of Article 119 was confirmed by the Court.

If the gradualism of the Court in relation to the confirmation or attribution of direct effect of Article 119 shows a characteristic, and political, feature of its methods, the second *Defrenne* case involves one of the most dramatic presentations of the Court's



political face. As a matter of legal principle, if Article 119 was directly effective, its effect should date from the end of 1962, as the Court recognised in its judgement. However, in the face of considerable pressure from national governments, the Court inserted an extraordinary proviso that the judgement would have only have prospective effect, except for those individuals who already had cases before a court.

These cases again show the importance of having a determined litigant or group of litigants, prepared to return time and time again. Although no doubt buttressed by the general development of the women's movement, the personal determination of Gabrielle Defrenne and her legal support, played a key role in the Court of Justice being able to develop its position on Article 119. Without a batch of cases on the subject, the influence of the Court would have been much more limited.

Subsequently, the legislation passed in the 1970s itself became the subject of expansive interpretation by the Court of Justice. During the 1980s the British Equal Opportunities Commission pursued a strategy of litigation attempted to force an unresponsive national government to develop equal opportunities policies. While this strategy met with some success, it eventually provoked a dramatic political response, which augurs badly for the future influence of the Court. Several member states and a number of major pension companies objected to a potential development of the Court's case law on equality into the area of pension provision. They managed to get a protocol (known as the Barber protocol) attached to the Maastricht Treaty which

amounted to a manipulation of the judicial process by politicians - a clear indication that the Community's legislators are prepared to restrict the judicial independence of the Court.

### Merger regulation

One of the most dramatic examples of the Court supporting the extension of Community competence has been in competition policy (see Bulmer 1994). The Commission has an unusually extensive administrative role in this policy area, which even includes a judicial component. Although on the face of it this might have marginalized the contribution of the Court, in fact it placed special importance on the particular ability of the Court to construct a position as legally legitimate.

As with the provisions of the Treaty of Rome on free movement of goods, the Articles governing competition provide the basis and framework for a policy. Articles 85 and 86 contain the main substantive provisions, and regulate cartels and the abuse of a dominant position respectively, but neither mention merger control. More generally the nature and extent of Community's competence remained to be spelled out. During the 1960s the Commission was not strongly concerned to develop a competence to regulate mergers, and indeed in 1966 it issued a memorandum specifically ruling out the use of Article 85 to control mergers.

By the early 1970s, the Commission's general role in the regulation of competition had become fairly well established, and the Commission's interest in merger regulation began to grow. In 1972, in proceedings against Continental Can, the Commission attempted for the first time to use Article 86 to control a merger. When this case was taken to the Court of Justice on appeal, the Court gave legal sanction to the principle that Article 86 could be used to regulate mergers, although, characteristically, the specific case against Continental Can was dismissed (Case 6/72 [1973]). Some nine months after the Court's ruling in February, the Commission brought forward a proposal for a merger regulation in October 1973. For a variety of reasons (not the least of which was the necessity for unanimity in competition legislation) this regulation was not passed by the Council of Ministers. Indeed, revised (and watered down) drafts of this regulation were re-presented to the Council during the 1970s and 80s, all of which failed to become law.

Even after *Continental Can* Article 86 did not provide a legal framework which forced companies to refer proposed mergers to the Commission. However, in the late 70s and early 80s uncertainty about the existing rules and the prospects for legislation meant that the companies began to refer plans for mergers to the Commission (Bishop 1993: 300-301). This development, in combination with the emergence of the internal market programme led big business to press for the development of a coherent Community regime for the regulation of mergers. Industry was particularly concerned that a 'one stop shop' should be created, so that the parties to a merger did not have to clear the project with a range of national authorities as well as the Commission

In 1987 the Court of Justice strongly increased the pressure for Community legislation on mergers. Its ruling in the *Philip Morris* case (joined cases 142/84 and 156/84 [1987] ECR 4487) altered the widely held understanding that Article 85 could not be used to regulate mergers. In interpreting Article 85 in this way the Court was contradicting the mood of the member states as expressed in their refusal to accept drafts of a merger regulation placed before them in 1982 and 1984. Arguably, the Court was able to make this move because of the emerging mood of support for Community level merger control among industrialists. The Court's decision in this case strongly increased the concern about the incoherence of merger control in western Europe. The magnification of the existing anxiety among industrialists strengthened their pressure for an EC regulation. In addition, this decision eroded the power (or sovereignty) of the member states, and weakened their will to resist Community level legislation. Indeed, after the *Philip Morris*, arguably the member states could actually regain some ability to limit the development of the Community merger control regime through participation. In this context it is worth noting that the substance of the regulation was further watered down between 1987 and 1989, when the Merger Control Regulation (Regulation 4064/89) was passed.

## **Conclusion**

By way of conclusion, I will consider how the 'policy approach' to the Court of Justice differs from a number of other legal and political analyses of it. Given that it formed the main focus of this paper, other perspectives on the contribution made by the Court

to the process of making substantive policy will be at the centre of the present part of the analysis as well.,

First, a number of political analyses of the role of the Court are concerned with the argument that the Court itself is capable of creating a complete or fully fledged policy. This is a possible implication of the notion that the Court is 'forcing' (Volcansek 1992) or has 'engineered' (Burley and Mattli 1993: 44) integration.

This view of the Court's role may have developed partly as a result of the prevailing wisdom of legal scholars about the integration process. With a small, but rapidly increasing, number of exceptions the legal literature on European integration reads oddly to political scientists, particularly those from common law jurisdictions. Several commentators have noted the overwhelming support for process of integration in Europe in general, and the particular role of the Court within it given by academic specialists in EC law (Rasmussen 1986; Volcansek 1992; Weiler 1993, Burley and Mattli 1993), which has resulted in a permeation of normative values in favour of the Court into the analysis of the integration process.

In addition, a good deal of the literature reifies the Court's role in the development of Community law, and the law's role in the process of integration. The unsurprising legal concern with the detail of the law and its development can easily become an assumption that the Community is wholly defined and completely constituted by the law, particularly given the doctrinal traditions of legal studies in continental law. This is

the tradition which Shapiro criticised from within the more social scientific US tradition of legal study, when he argued that

[I]t presents the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth, the case law as the inevitable working out of the correct implications of the constitutional text, and the constitutional court as the disembodied voice of right reason and constitutional theology (Shapiro 1980 538)

One result of this approach is that the development of policy, indeed the integration process more generally, is equated to the case law to a considerable extent.

Alter and Meunier-Aitsahalia (1994) effectively demolish the view that in a judgement or 'with the stroke of a pen' the Court could create a 'new' policy (1994: 556) in relation to the impact of the *Cassis* judgement on the development of the internal market. Their paper is based on some excellent empirical work. However, the framework of argument within which the empirical material is placed can make their paper confusing, or even misleading, in my opinion. By concentrating their work on the demolition of the view that the Court creates policies all on its own they bias it in potentially unfortunate ways. For example they are at pains to argue against the 'legal' view that *Cassis* and, indeed legal decisions more generally, created 'direct policy effects' (Alter and Meunier-Aitsahalia 1994: 547). I take it that they mean that the Court cannot create a complete and fully effective 'policy' through a single judgement (and indeed is rather unlikely to create such a policy jurisprudentially through a series of judgements). From a policy analytic perspective this is not surprising, as entire polities are rarely credited with this sort of policy-making ability.

However, the argument that the Court does not have ‘direct policy effects’ could be read (in my view *misread*) to refer to ability of the Court to have any impact on policy or the policy-making process. This (mis)reading of Alter and Meunier-Aitsahalia’s argument is lent some support by considering their conclusion, in which they argue that the Court has an impact actively by providing ideas and provoking political responses (1994: 557) and perhaps more passively by providing a medium for individuals and groups to pursue their interests (1994: 554-555). Ironically, within their discussion of the Court as a medium for other interests they do argue ‘that the ECJ can and does act autonomously of the policy interests of the Commission and the member states’ (Alter and Meunier-Aitsahalia 1994: 556).

The legal literature on European integration, even in its more social scientific and critical manifestations, contains further traps for the political scientist or policy analyst seeking to evaluate the role of the Court. In particular, legal scholars tend to term any move beyond the traditional interpretative and adjudicative roles of a court as judicial policy-making, even when they clearly do not mean to imply that the court created a complete or fully fledged ‘policy’ entirely on its own. For the sake of clarity I prefer to name this as the Court playing a political role (which is itself problematic, as it implies that Courts can be apolitical, that they can be purely ‘judicial’, and when they are judicial they are not political).

Partly, the description of the Court’s ‘policy’ when it moves beyond the judicial may originate from the view that it must *have* a policy to guide its political behaviour. While it is certainly true that the Court is likely to have objectives when it acts

expansively, these objectives might exist mainly at a rather general and abstract level - such as the Court seeking to promote the 'ever closer union of the peoples of Europe'. The detail, or even the general tenor, of a particular judgement cannot be 'read off' from overarching objectives of this sort.

Even one of the more 'political' readings of the Court's 'style' falls foul of a rationalistic fallacy. Usefully noting the incrementalism of the Court, Hartley nevertheless seems to assume that the Court first develops a doctrine, and subsequently its 'full extent' can be 'revealed' (Hartley 1988: 79). While the Court may have acted in this way on occasion, it is also possible that the Court has behaved in a more opportunistic way, taking advantage of apparent 'windows of opportunity' to achieve particular ends it may have. Moreover, the specific objectives of the Court themselves are likely to develop, as a result of the Court engaging in a process of learning about its (changing) context or environment.

The approach adopted in this paper is also at odds with the fascinating and influential account of 'Europe Before the Court' presented by Burley and Mattli (1993). Burley and Mattli seek to explain what they call 'legal integration' (1993: 43, 53), however it is not altogether clear what they mean by it. In some places it seems that 'legal integration' covers both formal and substantive aspects of integration. The 'formal dimension' concerns (1) 'the expansion of the types of supranational legal acts ... that take precedence over domestic law and (2) the range of cases in which individuals may invoke community law directly in domestic courts' (Burley and Mattli 1993: 43). The 'substantive dimension' concerns 'the spilling over of community legal regulation from



the narrowly economic domain into areas ... such as occupational health and safety, social welfare, education, and even political participation rights' (Burley and Mattli 1993: 43). However, in other places it seems that legal is distinguished from political integration, with the former concerned with the integration of the Court's 'own domain' (Burley and Mattli 1993: 53), perhaps conceived of as a (functional?) sector.

As presented in the *International Organization* article, their theory is actually much more focused on the formal dimension, the concern with the types of supranational legal action which takes precedence over domestic law, which it is much better suited to explain, rather than the spilling over of Community legal regulation into new areas. In the explanation of the formal dimension of 'legal integration', Burley and Mattli's argument that private individuals, academic and practicing lawyers and national courts supported this process because their interests (and particularly their material interests) were served by it contains an important element of truth. It certainly provides a useful counterbalance to the weight of idealism in most EC law scholarship. A number of caveats ought to be entered. First, the engagement of the material interests of private individuals and practicing lawyers does not necessarily bolster the development of EC law, as the 'Sunday trading saga' in the UK illustrates. Secondly, the notion of a functional spillover in the Community concerns the shifting of competence from the member states to the Community. In the law, this mainly concerns the effective acceptance of some sort of a shift from the nations, particularly the national courts, to the ECJ, whereas Burley and Mattli's detailed example of this 'functional' spillover seems to concern the development of doctrine in the jurisprudence of the European Court (1993: 65-66). The fact that supremacy was a logical corollary of direct effect,

may show that there was a kind of internal legal logic to the development of the European Court's jurisprudence, but it is not an example of the sort of functional spillover, emphasized by neofunctionalists, in which pressure from sub-national actors as they react to one development, leads on to further integration. Given that the Commission's legal service had argued that Community law should be supreme over national law in relation to the *Van Gend* case, supremacy hardly resulted from a pressure from interests outside of the Community institutions. In addition, it is hard to see how the central neofunctional notion of spillover going from one 'sector' to another can be applied to the development from direct effect to supremacy. Moreover, Burley and Mattli's account tells us nothing about the acceptance of the ECJ's position by national courts.

However, if the metaphor of 'spillover' can be applied in the area of Community legal principles, it is probably better applied to the development of protection of human rights under EC law than to the movement from direct effect to supremacy. Here, as an unintended consequence of asserting the supremacy doctrine, the ECJ found that it had encroached on the prerogatives of various national constitutional courts. At least in symbolic terms this presented the European Court with a credibility crisis, as a number of national courts were effectively challenging its (presentation of its own) supremacy by asserting their right to review Community legislation against their own national standards. Remarkably, the European Court initially reversed what seemed to be its earlier position and argued that human rights were protected by Community law, eventually more or less persuaded national courts to accept what was largely a jurisprudentially invented human rights protection and finally was able to turn human

rights protection into an important plank of its claim to have constitutionalized the Treaty of Rome

An important characteristic of the development of human right protection is that it operates largely within legal discourse and in the interaction between lawyers and judges. Even in this area, however, it is possible to argue that the contributions made by the political institutions were crucial to the character of the human rights protection which has developed in the Community, by both facilitating these developments, and setting strict limits to them.

Burley and Mattli do provide insights into the evolution of the relationship between the ECJ and national courts, to be sure. In effect this concerns the integration (or even creation) of a European legal sector. As an explanation of this evolution, Burley and Mattli's position, that national courts gained, in relation to their legislative and executive branches (see also Weiler 1993: 425) seems to me to be correct, at least at a rather general level - at a more detailed level particular courts have challenged various developments by the Court. In addition it seems to me that it is the institutional interest of the courts, rather than the individual material interest of judges, which is being served here.

If 'legal neofunctionalism' can provide some insight into the development of the general principles of Community law, it does not provide an adequate explanation of the substantive dimension of legal integration. Substantive Community law *has* relied on the general penetration of Community law into the legal systems of the member

states in order to achieve a measure of effectiveness unequalled by international organisations. Nevertheless, the functional 'spilling over of community legal regulation' has occurred as a result of a wider set of policy and legislative processes, to which the Court sometimes certainly contributed, but which, taken over the range of the expansion of competences of the Community, can hardly be attributed wholly to its jurisprudence. In fact, although it was predominantly economic in nature, the Rome Treaty itself provided a legal basis in for some policies beyond the narrowly economic. Moreover, the Court played little more than a permissive role some of the most dramatic examples of the development of new Community policy competences where the Community moved decisively beyond the range of competences provided by the Treaty of Rome, such as the development of environmental policy.

Although they describe the substantive broadening of EC as moving from the economic to cover health and safety, social welfare, education and political participation (1993: 43, 66) Burley and Mattli actually provide a little more detail on two substantive policies which they claim were entirely or almost entirely a product of the case law of the Court 'equal treatment with respect to social benefits of workers' (1993: 66) and 'community trademark law' (1993: 67). These areas hardly constitute the most dramatic examples of policy development beyond the strictly economic area in the Community. In addition, although the Court has played an important role in these policies, even in these areas abstracting the contribution of the Court from wider processes of policy development is misleading. In the case of equal treatment in social benefits in particular, the legislation passed as early as the 1970s extended the law in this area, and provided an important basis for subsequent case law.

In general it seems to me that Burley and Mattli's argument suffers from two important flaws, both of which are probably present in the original formulation of neofunctionalism. First, the role of the Court in the processes of 'legal integration' seems slightly ambiguous in Burley and Mattli's theory. Neofunctionalism in general, at least as it seems to be commonly understood, seems caught between emphasizing the *process* of integration on the one hand, and the agency of, usually the Commission, and in this case the ECJ, in the process. (As this theory has developed it seems to have moved from a concern with unintended consequences, to one with a managed process of integration). Burley and Mattli (1993) do emphasize a number of other legal interests in the integration process, but they nevertheless depict the Court as a controlling institution, in a position to have 'engineered' (1993: 44) the integration process. From a policy perspective considerable scepticism is due about this image of the Court.

Secondly, it is hard to see how Burley and Mattli apply the idea of a 'sector' in their theory. The notion of a 'sector' contained some ambiguities in the original formulation of neofunctionalism (on the face of it a 'sector' would have to possess some distinctiveness and internal order in order to be defined as such, yet for functional spillover to take place it would also have to be permeable - Lindberg even wrote of the importance of 'inherently expansive tasks being given to the Community, 1963: 10). But Burley and Mattli's use of the term compounds this confusion. On the face of it some sense can be made of the notion of a legal sector - made up of various lawyers (legal firms) and judges. It is possible to investigate whether, or to what extent, these

actors have shifted their loyalty from the national to the supranational level - a version of political spillover. This process, along with the formal acceptance of the principles of Community law, seems to me to be what 'legal integration' should mean. However, as we have seen, in many cases - in the most important cases - it is not accurate to argue that pressure from this 'interest group' or sector caused doctrinal changes or changes to the basic principles of Community law.

Having looked at political spillover, we now turn to functional spillover. In the context of Burley and Mattli's argument, functional spillover has two uses, both of which are inappropriate, in my view. First, it is not at all clear that 'functional spillover' can be applied effectively to the whole development of the general principles and interpretive methods used by the Court. The existence of a kind of internal logic of the law is not necessarily the same as functional spillover. If an internal logic does exist, then the 'law as a mask' insight may well be important, but it is likely to be by means of a process of legal argument that national courts come to accept these principles. It is hard to specify how the material interests of judges could be the motivating force of this kind of development. We seem to be in a world of legal discourse - of the pull of legal formalism (Weiler 1993; 1994) more than of material interests.

Secondly, the language of functional spillover, and its application to 'legal integration' faces a severe problem as it seeks to explain the substantive broadening of Community law. It is artificial to cut the development of the Community legal system off from the substantive development of Community law - the development of the principles and doctrines of Community law takes place in the context of substantive judgements.

Presumably this is why Burley and Mattli sought to use their model to explain these substantive developments as well as formal ones. However, as we have seen in a few examples, the substantive development of the Community occurs as a result of a much broader range of factors than those Burley and Mattli identify as elements of 'legal integration'. Although, to be sure, the Court has often made a contribution to the substantive broadening of Community competence, it is rarely a pure matter of legal technicality.

Ironically, the fact that it has often 'made a contribution' to the legislative process actually draws attention to the Court's political character. Had the spillover from the narrowly economic domain been entirely due to jurisprudential innovation by the Court, it might have been possible to sustain the view that the Court's political contribution had been 'masked' the legal form it took. However, when the Court comes to judgements which both appear to augment (or contradict) the face value meaning of the text of the law and meet the expressed interest of another supranational institution, as in the *Philip Morris* case, the legal mask slips to reveal a political face. While sharing Burley and Mattli's (and Weiler's, if I read him correctly) view that the myth of the apolitical character of the law has been an important asset for the Court, I view the questions of how and how far it has managed to maintain its apolitical image as rather more serious than they seem to.

In conclusion, this paper has drawn attention to the substantial contribution made by the Court of Justice in the process of making policy in the European Community. However, it is a mistake to focus on the Court in isolation from other institutions.

Although there might be some analytic use in attempting to isolate a process of legal integration from wider processes of political integration, legal integration would have to be defined as the process of creating a European legal community, not as the contribution of the law to general integration. Even the creation of a European legal community would be a 'political' process. However, any definition of legal integration which attempts to generalise about the contribution of the Court to general integration must take other institutions and interests into account, beyond the legal community (communities). The dominating burden of the conventional wisdom of legal scholarship which has promoted the Court from its rightfully very important place, into a position of overweening dominance should not be allowed to weigh on political analysis any longer. The Court as wholly independent policy maker (Alter and Meunier-Aitsahalia 1994), or as 'engineer' of integration (Burley and Mattli 1993) is a figment which should not be allowed to dominate our imagination. Instead, those passages of this existing literature on the Court in political science journals, and the work of eclectic legal scholars, such as Weiler (1981; 1991; 1993, 1994) and Snyder (1993), which emphasize the Court in interaction with other interests and institutions should guide future work.



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