International Journal of Innovative Research in Computer Science & Technology (IJIRCST)
ISSN: 2347-5552, Volume-10, Special Issue-9, September-2022
Innovative Projects 2022
Organized by Presidency University, Bangalore, India

Europe before the Court: A Political Theory of Legal Integration

Utsa Sarkar
Assistant Professor, Department of Law, Presidency University, Bangalore, India,
Email Id-utsa.sarkar@presidencyuniversity.in

ABSTRACT:

The European Court of Justice has been the unsung hero of European integration, subtly turning the Treaty of Rome into the founding document of the European Community (EC) and slowly expanding the reach and application of EC law. Political scientists have completely ignored the Court's authority, but legal experts have a tendency to take it for granted. With the use of a theoretical framework created by political scientists and the insights of legal experts, this chapter provides a preliminary theory of community law and politics. The idea of neofunctionalism, which predominated regional integration research in the 1960s, provides a set of independent variables that parsimoniously and clearly explain how the EC's legal integration process works. The main driving factors behind that process are transnational and subnational entities pursuing their own self-interests inside a politically isolated arena, just as neofunctionalism predicts. Its distinguishing characteristics include a gradual shift in the expectations of both governmental institutions and private actors participating in the legal system, a widening of the ambit of subsequent legal decisions according to a functional logic, and a strategic subordination of member states' short-term individual interests to postulated long-term collective interests. Just as neofunctionalists initially predicted for economics, law serves as a cloak for politics. Paradoxically, then, legal institutions' ability to fulfil that role depends on their intentional upholding of the independence of the law.

KEYWORDS:

Community, Law, Legal, Political.

I. INTRODUCTION

For the majority of the last two decades, European integration was thought to be politically and intellectually moribund, but it has since reemerged as one of the most significant and fascinating developments of the 1990s. The pundits are quick to point out that the much-touted "political and economic integration of Europe" is actually neither, that the "1992 program" to realize the single market is merely the realization of the fundamental objectives outlined in the Treaty of Rome in 1958, and that the Maastricht Intergovernmental Conference's plan for European monetary union offers more ways to avoid monetary union than to realize it. But the process of "uniting" Europe goes on. Even the self-described legion of European Community (EC) critics have forced to admit that, even while the community still falls far short of becoming a federal state, it has evolved into much more than a federation of sovereign states. The European Court of Justice (ECJ) seems to have played an unheralded role in this dramatic twist.

The thirteen justices secretly working in Luxembourg were able to turn the Treaty of Rome (hence referred to as "the treaty") into a constitution, according to their own account, which has since been corroborated by academics and politicians. As a result, they created the legislative framework for an integrated European political system. The Rome Treaty's implementation, like that of every other international treaty, was totally dependent on the member nations of the community's national legislatures up until 1963. By 1965, any domestic law provision deemed to be in violation with certain immediately relevant articles of the treaty might be challenged in court by a citizen of a community country. By 1975, a citizen of an EC nation might request the invalidation of a national law if it was shown to be in contradiction with self-executing elements of community secondary legislation, the "directives" to national governments adopted by the EC Council of Ministers. And by 1990, community members may seek their national courts to interpret national laws in accordance with local laws in the event that national legislators took unreasonable time to enact orders [1], [2].

Lawyers alone have long been privy to the ECJ's successes, ignoring or assuming their political significance. But in the early 1980s, a small group of legal academics started to investigate the relationship between the Court and

the political structures and procedures of the EC. These methods, however, fail to capture the dynamics of legal integration. They also don't have micro foundations. They give institutions involved aggregate motives and interests to show why a certain outcome makes theoretical sense, but they don't provide a convincing explanation of why the actual actors involved at each stage of the process might have an incentive to arrive at the result in question. Surprisingly, political scientists investigating regional integration on the opposite side of the academic divide in the 1950s and 1960s gave little attention to the potential role that supranational legal institutions may play in promoting integration. Even more perplexing is the fact that a significant portion of recent writing on the EC by American political scientists still downplays the importance of courts and common law to European integration [3], [4].

By creating a first-stage theory of the Court's function in society that combines the knowledge of local legal experts with a theoretical framework created by political scientists, we hope to address these shortcomings. We contend that the community's legal integration closely resembles the original neofunctionalist paradigm created by Ernst Haas in the late 1950s. Our dependent variable, legal integration, refers to the process through which EC legislation gradually permeates the local laws of its member states. This procedure primarily has two aspects. The first is formal penetration, which refers to the increase of (1) the categories of supranational legal acts from treaty law to secondary community law—that supersede domestic law and (2) the variety of situations in which people may directly rely on community law in domestic courts. The second factor is substantive penetration, which refers to the expansion of community law regulation beyond primarily economic domains to those dealing with matters like workplace health and safety, social welfare, education, and even political participation rights. The adoption of interpreting rules that increase the consistency and comprehensiveness of the community legal system cuts across both of these areas [5], [6].

We discover that the neofunctionalist theory's independent variables provide a concise and logical explanation of legal integration. We contend that this process is driven by supranational and subnational players who are pursuing their own self-interests inside a politically isolated arena, precisely as neofuctionalism predicts. The distinctive characteristics of this process include a functional logic-based expansion of the scope of subsequent legal decisions, a gradual change in the expectations of both governmental institutions and private actors involved in the legal system, and a deliberate strategic subordination of member states' short-term individual interests to hypothetical long-term collective interests. Just as neofunctionalists initially predicted for economics, law serves as a cloak for politics. The key finding of neofunctionalist theory is the need for a "functional" domain to avoid the direct conflict of political interests. However, it would at least serve as an adequate buffer to accomplish goals that could not be directly attained in the political sphere. This domain could never be fully isolated from politics.

Political decision-makers often see the law as being "mostly technical," so they allow attorneys a freer rein when it comes to speaking on behalf of the national governments, the EC Commission, and the EC Council of Ministers. As a consequence, crucial political decisions are argued and made using the language and reasoning of the law. A role for the Court in broader processes of economic and even political integration is foreseen by the principle that law is a medium that both masks and, to some extent, alters political conflicts, despite the argument we make here for the strength of neofunctionalism as a framework for explaining legal integration, an area in which the technicality of the Court's operation is reinforced by the apparent technicality of the issues it addresses [7], [8].

This definition of the ideal circumstances for the neofunctionalist dynamics functioning also enables the definition of the theory's political boundaries, which the neofunctionalists themselves acknowledged. The degree to which the functional domain is resistant to politicization determines how effective it is as a breeding ground for integration. However, this contradiction provides an alternative perspective on the alleged naivete of "legalists" Judges must at least seem to be doing law rather than politics in order to maintain the essential insulation to support integration. Thus, they must adhere to the requirements of both substantive law and the methodological limitations imposed by legal reasoning in order to maintain a minimum level of political freedom. In other words, insisting vehemently that legal facts be distinguished from political realities may really be a powerful political instrument. The first section of this essay provides a succinct overview of the key components of neo-functionalist theory and concentrates the investigation on the more particular challenge of explaining legal integration. The second section describes how the Court's structured process of legal integration fits the neofunctionalist paradigm. The third section revisits the more general issue of the ECJ's relationship with the member states and considers some of the results' more general theoretical ramifications [9], [10].

II. DISCUSSION

A Return to Neofunctionalism

An analysis of the Court's influence that political scientists would regard as credible as lawyers must start with a political justification of the Court's function. Instead of starting with legal integration as a fait accompli and posing the question of how the two relate to each other, it should instead start by constructing a political theory of how the Court integrated its own jurisdiction. The "power of the law," as the legalists tacitly presume and even expressly proclaim, did not bring about the process of legal integration. Judges, attorneys, and litigants were all individual actors with distinct identities, motivations, and goals. They engaged in a particular setting and using certain procedures. Only a sincere political explanation of how they accomplished their goals in the legal integration process will serve as the foundation for a methodical examination of how that process interacted with the political processes of the EC. Although it has previously been given, this kind of report has never been submitted before the Court specifically. This account is neofunctionalist.

Historical considerations of neofunctionalism: a philosophy of political integration

The Uniting of Europe was the first to thoroughly investigate and develop the logic of political union. Neofunctionalism is a theoretical framework that this work and a number of subsequent contributions7 share. Neofunctionalism aims to clarify "how and why nation-states cease to be wholly sovereign, how and why they voluntarily mingle, merge, and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts among themselves. Neofunctionalism is a process that "persuades political actors in several different national settings to shift their loyalties, expectations, and political activities towards a new and larger center, whose institutions possess or demand jurisdiction over the pre-existing national states." Neofunctionalism was a theory of European integration, but it was reliant on a unique constellation of exogenous historical, global, and local variables—a collection of extremely contingent preconditions. However, for the time being, the main contributions of neofunctionalist theory are its identification of the functional categories that are most likely to be open to integration and its description of the actual mechanisms of breaking down national barriers within a given functional category after the integration process has been initiated. Overcoming national obstacles using neofunctionalism as a philosophy of the integration process

i. The actors: eluding the government

Above and below the nation-state are the main stakeholders in the integration process. Political parties and interest groups are examples of actors above the state. Regional institutions at the supranational level are above the state. These transnational organizations support integration, encourage the growth of interest groups, create strong relationships with them and their fellow technocrats in the national civil services, and, if necessary, manipulate both. For instance, the Commission of the European Communities has the ability to take action. The commission forms covert working alliances with pressure organizations in order to have the Council of Ministers approve its ideas. Interest groups come together to pursue common objectives across national lines as their influence in government increases, accelerating the integrative process. The "integrationists" do not necessarily need to be persuaded that these groupings are correct. They are forced to adapt because of the community's mere existence, which changes their circumstances. What function do governments serve? Neofunctionalism asserts that the duty of government is to be "creatively responsive." Governments have the absolute authority to accept, evade, disregard, or undermine the decisions made by the federal government. Although unilateral avoidance or recalcitrance may be unproductive if it creates a precedent for other countries given their diversity of interests in several issue-areas. Governments may therefore decide to give in to pressure from convergent supra- and subnational interests or feel compelled to do so.

ii. The motives: instrumental self-interest

The introduction of an unmistakably utilitarian concept of interest politics, which contrasts sharply with the ideas of unselfishness or shared goods that permeate functionalist discourse, is one of the major achievements of neofunctionalism. It is not necessary to posit notions of good will, compatibility of interests, or commitment to the common good to explain integration. By itself, ruthless egoism is sufficient. The process of community formation is dominated by nationally constituted groups with specific interests and aims, willing and able to adjust their aspirations by turning to supranational means when this course appears profitable, according to Haas. "The 'good Europeans' are not the main creators of the... community," Haas writes. The players at the transnational level are also susceptible to utilitarian thought. They continuously work to broaden the purview of their own institutions so that they may have a stronger voice in local politics.

iii. The process: incremental expansion

The dynamics of integration are fundamentally based on three connected ideas: functional spillover, political spillover, and upgrading of shared interests. Functional spillover is based on the premise that the various industries in a modern industrial economy are highly interdependent, and that any integrative action in one sector creates a situation in which the original goal can only be assured by taking additional actions in related sectors, which in turn create another condition and the need for additional action, and so on. "Sector integration... generates its own drive for expansion throughout the whole economy even in the absence of explicit group demands," says Haas in his description of this process. Political spillover is the term used to describe the process of adaptive behavior, which includes the gradual adjustment of expectations, the modification of values, and the convergence of national interest groups and political parties at the supranational level in reaction to sectoral integration. Neofunctionalism does not assume an inevitably cumulative integrative process, which is an important point to make. Once again in Haas's words, "The spillover process is far from automatic, despite being rooted in the structures and motivations of the post-capitalist welfare state," "Functional settings tend to be independent; lessons acquired in one organization are not necessarily and automatically implemented in another, or even by the same group at a later stage of its existence." Neofunctionalism, in other words, recognizes certain connection processes but does not assume that actor responses to functional links are inevitable.

The third component of the neofunctionalist explanation of the dynamics of integration is improving shared interests. It happens when the member nations have substantial difficulty coming to a consensus policy even while they recognize the need of taking a unified stance to protect other parts of their interdependence. By trading concessions in relevant industries, one may break this impasse. In actuality, the improvement of the parties' shared interests depends on the assistance of an established independent mediator. Participants are encouraged to seek compromises and abstain from using their veto power as a result of this institutionalized switching mechanism, which strengthens the power base of the central institutions.

iv. The context: nominally apolitical

Successful integration takes place in an economic, social, and technological environment. Here, Haas seems to agree with a fundamental tenet of functionalism, which postulates that functional collaboration must start on the more understated economic and social levels. Any political program "would start a dispute," according to David Mitrany, "while any working arrangement would raise a hope and make for confidence and patience." However, political issues are ultimately inseparable from economic and social issues. In functionalism, the relationship between economics and politics was dichotomous; however, Haas replaced it with a continuous one, saying that "the supranational style stresses the indirect penetration of the political by way of the economic because the 'purely' economic decisions always acquire political significance in the minds of the participants." However, "technical" or "noncontroversial" aspects of cooperation may be so unimportant as to fall beyond the range of essential human expectations and behaviors for integration. Therefore, the region must be economically significant and have a high level of "functional specificity."

A neofunctionalist system of law

De Gaulle's vehement reluctance to go through with several integration measures that he believed to be against French interests triggered the first significant EC crisis in 1965, which resulted in a rise in criticism of neofunctionalism. The theory, it was said, had overstated the "gradual politicization" impact of spillover as well as the expansion influence of increments inside the economic realm. Neofunctionalists were also criticized for overlooking the nationalism's lasting significance, the political sector's independence, and the interplay between the global environment and the integrating area. The majority of the critique was accepted by neofunctionalists, who then painfully reevaluated their theory. However, Haas's book of The Obsolescence of Regional Integration Theory, in which he argued that scholars should go beyond regional integration and concentrate on more general concerns of international interdependence, served as the last nail in the coffin. However, with more perspective, we think that neofunctionalism has a lot to offer as a theory of regional integration. It claims ongoing importance as a description of the integrative process inside a sector, despite the fact that it acknowledges that external shocks may interrupt the integration process. Here, we apply it to the area of the European Community's legal integration.

The development of a comprehensive corpus of enforceable community law fits perfectly within the neofunctionalist framework. In this section of the paper, we discuss the phenomena of legal integration using the neofunctionalist categories of actors, motivations, process, and context that were mentioned before. We show that the particular qualities of the ECJ and its rulings within each category match to neofunctionalist prediction. We also demonstrate how the fundamental tenet of neofunctionalism, which holds that integration is most likely to

take place in a setting free from the interference of direct political interests, results in the paradox that actors are best able to avoid and get around political barriers by acting as unpolitically as they can. Therefore, judges who would pursue a pro-integration "political" agenda in the legal setting are likely to be most successful only to the degree that they stay inside the seeming parameters of the law.

i. Actors: a specialized national and supranational community

The six advocates-general, who are formal members of the Court and are tasked with providing an unbiased judgment on the law in each case, the commission's legal team, and the thirteen ECJ judges are the main players on the supranational level. Judges and attorney's general are chosen from academic institutions, federal courts, eminent members of the community bar, and representatives of the federal government. Two crucial aspects of the Court's decision-making process—the confidentiality of deliberations and the lack of opposing opinions—free judges from responsibility to their home governments and allow them to uphold their oaths to determine matters independently of national allegiance. The creators of the ECJ likely intended for the Court and its employees to communicate largely with other community organs and member states, based on a cursory review of the Treaty of Rome sections pertaining to the ECJ. The commission or other member states may accuse a member state of failing to uphold its commitments to the community under Articles 169 and 170. A range of actions taken against the commission or the council by a member state, the commission, the council, or by particular people who have been the target of a council or commission decision that was specifically targeted to them are covered by extra jurisdiction under Article 173.

The Court may deliver "preliminary rulings" on any problem concerning the application of community law that arises before the national courts, according to Article 177, which was almost an afterthought. Lower national courts have the option to send such issues to the ECJ; national courts of final resort are obligated to do so. In reality, the Article 177 process has given the Court a structure for relationships with subnational actors, including individual plaintiffs, their attorneys, and subordinate national courts.32 The European Court of Justice has fought to expand the use of Article 177 as a means for private citizens to challenge state laws as being incompatible with community law. From a low of 9 in 1968 to a peak of 119 in 1978, and an average of over 90 each year from 1979 to 1982, the number of Article 177 cases on the Court's docket increased significantly during the 1970s. Through this strategy, member states have effectively lost control over a significant chunk of the work involved in interpreting and implementing international law. These initiatives have also led to the community bar's current success. Private practitioners are often invited to attend instructional seminars and visit the Court in groups. Private organizations like the International Federation for European Law, which has affiliates in the member nations and includes both academics and private practitioners, provide them with further encouragement and assistance.

There are also many smaller practitioners' organisations affiliated with national bar bodies. A highly specialized and interconnected community above and below the level of member state governments was able to emerge as a result of the growth of community attorneys. Henry Schermers, an esteemed member of the EC legal community and editor of the Common Market Law Review, provides the finest witness to the nature of the links that bind that society. A former legal adviser to the commission was recently honored for his work "creating bridges between [the Commission], the Community Court and the practitioners," The Court of Justice of the European Communities deserves a lot of the credit for the Community legal system, but Schermers noted that the Court would be the first to admit that they cannot take all the glory. Preliminary inquiries and preliminary decisions would not have been made without the devoted help of the national judiciaries. And if national proponents hadn't argued it to them, the national judiciaries themselves would not have embraced Community law. The whole legal profession had to get familiar with the new system and its standards in order for the Community Legal Order to be established and thrive. It was necessary to inform business attorneys, solicitors, and advocates about the potential provided by the Community legal system.

Community law academics are another significant group of subnational players that Schermers mentions in this ode. These scholars split their time between providing in-depth analysis of the Court's rulings and serving as private advisors on matters that are before the court. They publish book-length treatises as well as edit and write for an increasing number of specialist periodicals that are solely focused on EC law. They are crucial in enhancing the credibility of the Court since they are prominent members of their respective national legal and political communities.

ii. Giving individual litigants a personal stake in community law

The history of the direct impact theory may be traced back to the "constitutionalization" of the Treaty of Rome and the subsequent "legalization" of community secondary legislation. Additionally, the history of the direct

impact doctrine is the tale of how a set of regulations that seemed to apply solely to states were transformed into a set of individually enforceable rights. By giving them a direct say in the creation and application of community law, the Court, in neofunctionalist words, established a pro-community constituency of private persons. Furthermore, by allowing individual engagement in the system only in ways that would enhance communal purposes, the Court took care to avoid setting up a one-way ratchet. The Court started by forbidding anyone from requesting the revocation of laws passed by the Council of Ministers or the EC Commission because they went beyond their authority under the Treaty of Rome. As previously said, it seems that the council, the commission, the member states, and private parties are all permitted to request such an order under Article 173 of the treaty. However, the Court ruled in 1962 that people may only file these lawsuits under very limited conditions. A year later, the Court issued its significant ruling in Van Gend & Loos, enabling a private Dutch importer to directly challenge the Dutch government's effort to levy customs taxes on certain goods. A new universe was revealed by Van Gend. Three of the member nations made express objections, but the Court declared:

The Community represents a new system of law for which governments have restricted their sovereign powers, although in some areas, and whose subjects include both Member governments and their people. Community law consequently not only imposes responsibilities on people but is designed to provide them rights that form a part of their legal inheritance, independent of the laws of the Member States. These rights result from duties that the Treaty imposes in a clearly defined manner on people, as well as upon the Member States and upon the institutions of the Community, in addition to where they are explicitly provided by the Treaty. By relying on the logic of mutuality to explain to community citizens that since community law would impose new obligations of citizenship flowing to an entity other than their national governments, which had now ceded some of their sovereignty, they must be entitled to corresponding rights. The Court effectively articulated a social contract for the EC. But below the high language, a far more realistic set of incentives was developed to encourage integration. From that point forward, importers from all across the community may use the Treaty of Rome to compel their governments to fulfill their obligation to establish a single market if they objected to having to pay customs taxes on their imports.

III. CONCLUSION

Weiler describes much of the "systemic development of Europe" as being the product of the self-created and internally maintained force of law in his most recent work. In the paper where he first challenged local legal experts to consider the wider political environment in which the Court was operating, Shapiro made a similar argument. On the grounds that "legal realities are realities too," he came to the conclusion that the legalist approach could eventually be the more "politically sophisticated one." Rasmussen would agree, but he worries that due to a lack of judicial authority, political realities would likely triumph over legal facts. This viewpoint, which may be referred to as the "sophisticated legalist" approach, acknowledges the presence of opposing political forces while nevertheless giving the independent authority of law a place in society. The neofunctionalist approach incorporates that understanding together with a clearly outlined theory of the personal motivations and decisions that law enforcement officers must make as well as a description of the procedures by which they further their own agendas inside a protected realm. Thus, even while we agree with Weiler's conclusion, we go much beyond his broad assertion that the legitimacy of the law within the community comes from the "mythical neutrality and religious-like authority with which we invest our supreme courts." A network of people who are highly driven and who operate above and below the state wield the power. They must uphold and re-earn the presumption of legitimacy of law by keeping approximately true to its canons in order to strengthen and maintain that authority.

REFERENCES

[1] Z. P. Zwane and N. G. Mtshali, “Positioning public nursing colleges in South African higher education: Stakeholders’ perspectives,” Curationis, 2019, doi: 10.4102/curationis.v42i1.1885.

[2] M. Christian, L. Seamster, and V. Ray, “New Directions in Critical Race Theory and Sociology: Racism, White Supremacy, and Resistance,” American Behavioral Scientist. 2019. doi: 10.1177/0002764219842623.

[3] M. Zakharova and V. Przhilenskiy, “Anti-rawls or the Russian way of Eurasian integration,” Russ. Law J., 2019, doi: 10.17589/2309-8678-2019-7-3-12-37.

[4] I. A. Tretyak, “The legal conflictology in constitutional and municipal law,” Law Enforc. Rev., 2019, doi: 10.24147/2542-1514.2019.3(1).55-61.

[5] P. J. Neuvonen, “Transforming membership? Citizenship, identity and the problem of belonging in regional integration organizations,” European Journal of International Law. 2019. doi: 10.1093/ejil/chz007.

[6] A. H. Zhang, “The U.S.-China Trade Negotiation: A Contract Theory Perspective,” SSRN Electron. J., 2019, doi: 10.2139/ssrn.3462241.

[7] R. V. Yengibaryan, “Is There a Need for the Modernization of Russian Federalism and To What Extent?,” J. Law

Adm., 2019, doi: 10.24833/2073-8420-2018-3-48-3-10.
[8] H. Rethimiotaki, "Cultural expertise in asylum granting procedure in Greece: Evaluating the experiences and the prospects," in Studies in Law Politics and Society, 2019. doi: 10.1108/S1059-433720190000078005.
[9] M. Keating, J. Jordana, A. Marx, and J. Wouters, Changing Borders in Europe: Exploring the Dynamics of Integration, Differentiation and Self-Determination in the European Union. 2019. doi: 10.4324/9780429492044.
[10] Des Delaney, The lived experiences of muslims in europe: Recognition, power and intersubjective dilemmas. 2019. doi: 10.4324/9781351017756.