

< Week 7 >

Europe Before the Court: A political Theory of Legal Integration

Anne-Marie Burley and Walter Mattli

International Organization 47, 1, Winter 1993

Jiyeoun Song

- The main argument is that neofunctionalism can explain the role and the development of The European Court of Justice (ECJ) in the process of European integration.

<Introduction>

* Goals in this article are combining the insights of legal scholars and the theoretical framework developed by political scientists. (p. 43)

- The theoretical framework: neofunctionalism (by Ernest Haas)
- The basic assumption of neofunctionalism
: “The need for a functional domain to circumvent the direct clash of political interests” (p.44)

* Independent variable: supranational and subnational actors pursuing their own self-interests within a politically insulated sphere

* Dependent variable: legal integration in the dimension of formal penetration as well as the dimension of substantive penetration

1. Legal and political theories of juridical contribution to European integration

1) legal approaches

(1) legalism: pure law

Since legalism only cares about the aspect of law itself, it does not pay much attention to the existence of ideological and sociopolitical influences on the Court’s jurisdiction.

(2) contextualism: law and politics

Contextualism substitutes a law-politics duality for the “rule of law.” However, it underspecified the relationships between laws and politics.

2) political science theories

(1) Realism

Basically, realism does not admit the role of supranational organizations such as the ECJ since “realism asserts the primacy of national politics over community law and emphasizes the limits that the member states have imposed upon their involvement in community affairs.”(p.49)

(2) Neorationalism

The basic assumption of neorationalism is that it admits the basic assumption of realism such as “sovereign and unitary actors” but it can be distinguished with realism in the aspect of accepting “a role for institutions based on rational choice a game theory.”(p.50)

Ex) the EJC is monitoring compliance with community obligation or to create shared belief system about cooperation and defection.(p.50)

(3) Other approaches

2. A return to neofunctionalism

1) Neofunctionalism in historical perspectives: a theory of political integration

* The first work about the neofunctionalism is Ernst Haas’s “The Uniting of Europe.”

* Neofunctionalism describes the political integration as “ whereby political actors in several distinct national settings are persuaded 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.” (p.53)

* The contribution of neofunctionalism is that it overcomes national barriers.

2) Neofunctionalism as a theory of the integration process: overcoming national barriers

(1) The actors: circumventing the state

The primary players are the nation-states. Yet, there are other important actors such as interest groups and political parties (below the state) and supranational regional institutions (above the state.)

(2) The motives: instrumental self-interest

* An unambiguously utilitarian concept of interest politics that stands in sharp contrast to the notion of unselfishness or common goods.

(3) The process: incremental expansion

- * functional spillover: Since many different sectors of a modern industrial economy are highly interdependent, changes in one sector can be easily spilled over to other sectors.
- * political spillover: “ the incremental shifting of expectations, the changing of values, and the coalescing at the supranational level of national interest groups and political parties in response to sectoral integration.”(p.55) Yet, not automatically cumulative integrative process.
- *upgrading common interests : swapping concessions in related fields

(4) The context: nominally apolitical

* A key assumption: functional cooperation must begin on the relatively low-key economic and social planes and Haas replaced the dichotomous relationship between economics and politics in functionalism by a continuous one.(p.56)

3. A neofunctionalist jurisprudence

1) Actors: a specialized national and supranational community

* Actors: the thirteen ECJ judges, the commission legal staff and the six advocates-general, official members of the court assigned the task of presenting an impartial opinion on the law in each case.

* Two important facets for the judges to be free from their accountability to the home governments are 1) secrecy of deliberation and 2) the absence of dissenting opinions.

* Crucial subnational actors: community law professors. As a leading figure in their own national legal and political communities, they play a critical role in bolstering the legitimacy of the court. (p.59)

2) Motives: the self-interest of judges, lawyers, and professors

The element for binding community of supra-and subnational actors is “self-interest.”(p.60)

(1) Giving individual litigants a personal stake in community law

* *Van Grend & Loos* is a landmark decision because it imposed new duties of citizenship as well as corresponding rights for the people in the community.

(2) Courting the national courts

* The entire process of increasing the use of the Article 177 procedure was an exercise in convincing national judges of the desirability of using the ECJ. (p.62)

* The process occurred through seminar, dinners, and regular invitations to Luxembourg. It helped that the ECJ judges could put a human face on the institutional links they sought to build.

* The European legal system transformed into a split system which has two authorities: one is their own national supreme courts and the other is the ECJ

(3) Reciprocal empowerment

The empowerment of EJC caused to empower all those who make their living by analyzing and critiquing decision. (p.65)

3) Process

(1) Functional spillover: the logic of law

- The effects of many cases judged by the ECJ were not limited to one area. They exerted influence on some other subnational cases and laws. It means that the evolution of community law also has manifested the substantive broadening typical of functional spillover.

(2) Political spillover: transnational incrementalism

* A major function of a legal rule is to provide a clear and certain standard around which expectations and can crystallize. .

* National governments have rarely raised the objections against the decision of the ECJ.

(3) Upgrading common interests

* Upgrading the common interest is process of reasserting long-term interest, at least as nominally perceived at the founding and enshrined in sonorous phrases, over short-term interest. (p.68)

4) Context: the (apparent) separation of law and politics

1) Maintaining the fiction

* The court itself has cooperated in burnishing this nonpolitical image.

2) Transforming the political into the legal

3) Law as a mask

- Law functions both as mask and shield. It hides and protects the promotion of one particular set of political objectives obtain contending objectives in the purely political sphere. (p.72)

4. Implication and Conclusions

1) The Maastricht treaty

It was a determination on the part of the member states to limit to the ECJ. However, there are two areas which the ECJ was excluded. One is foreign and security policy and the other is cooperation in the spheres of justice and home affairs.(p.73)

2) The sources of judicial autonomy

Related to this issue, the scholars have argued about the role of institutions. In the reflectivism, it underlines that culturally conditioned operation of shared belief system. In the rationalism, it claims the importance of the cool calculation of exogenously determined interests. (p.75)

3) A return to sophisticated legalism