
Legal Integration: Theorizing the Legal Dimension of European Integration*

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Abstract

Drawing on the dominant themes of political science and legal literature to interrogate their images of law and courts, it is suggested that an instrumentalist image of law is often projected in which law is uncritically constructed as a medium of integration. The article argues that law as a medium must confront law as an institution which shapes external attempts at steering but also structures the element of agency possessed by legal actors, including the ECJ. The changing nature of EU governance is also highlighted, requiring us to provide more adequate accounts of complex relationships between EU law and politics.

I. Introduction

Political science has discovered the European Court of Justice (ECJ). But has it discovered law? The article analyses different images of law and courts contained in political science and legal scholarship. At the risk of oversimplifying a growing literature, it is argued that law has tended to be treated uncritically as an instrument of integration. Scholars may differ as to who controls the levers of

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law (e.g. the Member States, litigants or the national or Community courts) but, nonetheless, the role of law is frequently explored in terms of its use as a medium by agents. Where the image portrayed is one in which law is the instrument of political actors, law is constructed as occupying a space which is subject to more powerful forces from outside the legal system. In this sense, law as a system is dominated by the political system. But, even where academics seek to give a more independent explanatory role for law, all too often law is still constructed in instrumental terms, particularly as the medium by which the ECJ has pursued a pro-integrationist agenda. Allied to these instrumentalist images of law is an assumption of law's ability to deliver integration both in terms of the integration of the national and Community legal orders and in respect of law's ability to deliver social, political and economic integration.

My task in this article is to suggest the need for a more complex conceptualization of the role(s) of law in which attempts to use law as a medium must confront the role of law as an institution.¹ Forces from outside the legal order are mediated through law's institutional structure. By 'institution', I refer to the organizational, procedural, substantive and normative elements of law as an institution. The process of institution-building must itself be undertaken by actors. For present purposes, my focus is upon the role of the Court of Justice as an actor. I suggest that institution-building takes place as the ECJ mediates between law and its environment. Law as an institution, therefore, contains normative visions concerning the mix of relationships between the EU and the Member States (including the interaction between Community and national legal orders); between the ECJ and the other Community institutions; and between law and other social subsystems. Law must also recognize or ignore different 'identities'. Thus:

- ECJ action is not conceived of in terms of fidelity to a foundational Member State bargain nor to a preordained *teleology* of integration, but rather to an attempt to mediate between law and its environment;
- institution-building within law institutionalizes normative conceptions of law's relationship to other social subsystems from broad issues of constitutionalism to micro-level issues of what constitutes 'work';
- while the ECJ possesses agency, nonetheless, over time as processes of institutionalization within law become pervasive, the actions of the ECJ (together with those of other actors seeking to steer law) are themselves structured by law. Importantly, path-dependencies are created which both limit and facilitate action. Past action may create unintended or undesirable consequences which frame the possibility for further institution-

¹ I borrow the language of law as institution and law as medium from Habermas (1986) although the usage here is not exactly the same as that employed by Habermas. For a more general discussion of law as an instrument and law as autonomous see Cotterrell (1992).

building and future intermediation by the ECJ between law and its environment.

For analytical purposes, the article is divided into three parts. Part II explores the theoretical inheritance derived from intergovernmentalism and neofunctionalism. In Part III, attention turns to the connection between law and constitutionalism. In Part IV, the relationship between law and governance is explored. The broad institutionalist theme identified above is used to connect these three sections (for a more general institutionalist account of law and integration see Armstrong, 1998, forthcoming).

II. Law and Integration

It is in comparatively recent times that integration theories have sought to tackle the legal dimension of European integration. *How* law has been constructed has, of course, depended upon the microfoundations of such theories. Here, I explore intergovernmentalist and neofunctionalist accounts (including variations and departures from such accounts), to reveal their images of law and courts.

Intergovernmentalist and Neorationalist Approaches to Law and Courts

How does one square an explanatory role for EC law and the ECJ with theories of integration which take the dominant role of the Member States as the microfoundation upon which such theories are built? Moravcsik's liberal intergovernmentalist approach to European integration, in starting from the premise of a denial of supranational autonomy, originally simply reduced the role of the ECJ to that of an 'anomaly' (Moravcsik, 1993). However, in his response to Wincott's critique of this approach (Wincott, 1995a), Moravcsik deploys the language of 'delegation' to bring institutional autonomy back within a paradigm of Member State control (Moravcsik, 1995). What might appear to be autonomous action by the ECJ either turns out to be implementation of imperatives delegated to the ECJ in the first place, or *ex post* sanctioning of positions of which the Member States approve. Thus, the ECJ is viewed as acting within a space which is carved out and controlled by the Member States.

Garrett has developed an approach to the ECJ which originally viewed the ECJ as the agent of dominant Member States (particularly France and Germany), but now offers a more sophisticated neorational choice explanation of Member State–ECJ interaction (Garrett, 1995). While the ECJ is conceived of as a strategic actor seeking to push forward a pro-integration agenda, its scope for action is viewed as bounded by Member States' preferences. Equally, although Member States will seek to reflect strong domestic preferences, they are restricted in their decision whether to comply with judgments of the ECJ by the

need to ensure that EC law is uniformly enforced against all Member States. Thus, the rationalist language of strategic action is tempered by the recognition of the internal constraints of the game created by repeat-player interaction.

There are two key problems with Moravcsik's use of the language of delegation. First, as any student of the rise of the administrative state will attest, the 'delegation' of powers to agents is inherently fraught with problems of control, accountability and legitimacy (see Everson's contribution to this issue). As argued elsewhere (Armstrong and Bulmer, 1998), the creation of new EU institutions (including the Court) has been a simultaneous act of control and loss of control by the Member States (see also Pierson, 1996; Pollack, 1997). A theoretical model which overemphasizes grand bargains and Treaty revisions as *the* significant moments which define and shape the political and legal environment, overstates the ability of Treaty texts to provide a long-term control over actors like the Court. Law is uncritically constructed as contingent upon politics and unproblematically viewed as the instrument of political will (these criticisms are also made by Pierson, 1996).

The second problem with the metaphor of 'delegation' is that in placing action and choice by the ECJ within a political space controlled by the Member States, the legitimacy of ECJ action is reduced to the contract and consent of the Member States. This not only creates a loophole to permit the ECJ to escape responsibility for its decisions, it does so in a way which does not analyse the legitimacy of the founding bargain. One is left not so much with a loophole but a black hole for debates about legitimacy and the ECJ at a time when the 'quest for legitimacy' is very much at issue (de Búrca, 1996; see also de Búrca's contribution to this issue).

Garrett's analysis is equally flawed. His thesis of strategic-actor interaction rests on a fundamental contradiction. How can one reconcile the continual supply of judgments which conform to the different national matrices of social, economic and political interests with the Member States' demands for a legal system which continually treats all Member States the same as regards enforcement of the law? Garrett offers us an account of legal integration without law and an account of the ECJ that fails to recognize its function as a court within the institution of law. The paradox of Garrett's position is that as EU governance evolves (especially in light of issues of subsidiarity and flexibility), EC law may be forced to confront the tension between general legal rules and a desire for more localized governance, requiring a reassessment of structures and mechanisms of legal control. However, this constitutes a challenge to the legal order, not an explanation of it.

In summary, both Moravcsik and Garrett write off the agency of the ECJ through the reduction of ECJ action to either the *ex ante* rational delegation of power or an *ex post* subjugation of agency to an overriding logic of rationality

in which the actions of the ECJ are simply the necessary products of a sequential game of rational responses to anticipated consequences (on the structuralism of rational choice see Hay and Wincott, 1998 forthcoming).

Pollack has recently taken up the task of explaining the conditions under which supranational institutions may acquire autonomy and applies his hypotheses to the ECJ (as well as the Commission and the European Parliament) (Pollack, 1997). He brings to the fore the institutional hurdles which stand in the way of Member States should they seek to restrict the level of 'slack' in a principal-agent relationship. Pierson's historical institutionalist account also seeks to identify the conditions under which supranational institutions gain autonomy (Pierson, 1996).² Both of these accounts offer a critique of the endurance of institutions as rooted in the rational actions of those responsible for the creation of such structures.

Problematizing Member State control over the ECJ is a necessary corrective to simplistic principal-agent approaches (see also Alter's discussion, 1996, pp. 477–8). And, as Pollack suggests, one needs to disaggregate the policy process to look at issue-specific problems of control rather than engaging simply in broad claims. However, the continued use of the language of 'delegation' and 'principal-agent' theory is unhelpful insofar as it constructs loss of control as the deviant 'other' to the controlled 'self'. Problems of loss of control appear deviant only insofar as one starts from a simplistic premise about causal lines of control. Pollack himself seems more willing to accept a 'garbage can model' of the policy process than one characterized by 'comprehensive rationality' (Pollack, 1997, p. 125). If, indeed, the policy process is a series of organizationally, procedurally, substantively and normatively coupled streams, then it is unclear what continued function the principal-agent metaphor performs. It may be better to develop the institutionalist analysis in its own terms rather than as a corrective to intergovernmentalist approaches.

Neofunctionalist and Actor-Based Accounts of Law and Courts

One of the most interesting attempts to theorize the legal dimension of European integration has been Slaughter and Mattli's application of neofunctionalist analysis to conceptualize EC law.³ As originally formulated, they contended that a process of legal integration (the vertical penetration of EC law into the national legal orders) was brought about as the consequence of the strategic action of

² Pierson does not attempt to distinguish an 'historical' institutionalist account from a 'rational' institutionalist account, but rather views his approach as cutting across both rational and non-rational choice explanations. Given the importance which historical institutionalists have tended to place on the role of institutions in preference formation and the need more closely to integrate issues of structure and agency, Pierson may be sitting on a somewhat uncomfortable fence on this point.

³ Published as Burley and Mattli (1993).

litigants, lawyers and courts. This pursuit of self-interest resulted in the expansion of legal integration and the masking of a broader process of political integration (Burley and Mattli, 1993; Mattli and Slaughter, 1995).

As they now admit, a neofunctionalist analysis of legal integration is open to the same sort of criticisms that bedevilled neofunctionalism more generally (Mattli and Slaughter, forthcoming). It is open, in particular, to the charge of subjugating the role of actors (to which the theory intends to attach explanatory value) to a systemic functional determinism. In revising their approach, Mattli and Slaughter play down their earlier claim of law's ability to act as a medium of political integration and decentre the role of the ECJ in favour of a concentration on the process by which national courts have accepted EC law within their national legal orders.

Drawing on the work of a research team analysing different national case studies, Mattli and Slaughter recognize that national legal and political systems place their own imprint on the process of legal integration, creating (to use Alter's term, 1996, p. 464) 'a variegated pattern' of acceptance of the key structural doctrines of the ECJ (direct effect and supremacy). This interrogation of the complex interaction between Community and national legal orders is to be welcomed (see also Maher's contribution to this issue), and can be used to throw new light on the often ignored role of the national legal orders as distinct orders which interact, but are not coterminous, with the EC legal order.

My main concern with these actor-centred accounts is that, in concentrating on the *process* of legal integration and the variables which condition it, the legitimacy of the order which emerges is left unexplored. As I argue in Part III, the ECJ's claim to have 'constitutionalized' the Treaty cannot be viewed solely in terms of the accommodation of the ECJ's structural doctrine. The metaphor of the constitutionalized Treaty is itself a claim to legitimacy which must itself be interrogated or which, as Eleftheriadis puts it in his contribution to this issue, begs constitutional questions.

Further, while the shift in attention to the national level is welcomed, nonetheless, the decentring of the ECJ leaves its role open to question. The neofunctionalist imagery of the Court tended to reduce it to acting out the functional demands of integration in a way which tended to negate the very degree of agency that the theory sought to explain. It is not clear whether a different picture of the ECJ has replaced this neofunctionalist image.

In Part III, I seek to develop an imagery of the ECJ as a mediating actor within an institution of law. From this perspective, I analyse the iterative nature of this mediating role together with the more pressing difficulties of the normative dimension of law and institution-building.

III. Law and Constitutionalism

Academic lawyers have tended to construct EC law in instrumental terms. In this way, strong explanatory power has been given to the role of EC law and of the ECJ in European integration. The most enduring manifestation of this view has been the image of the 'constitutionalized Treaty'. Not only does this image portray law as an instrument in the hands of the ECJ, the language of constitutionalism also implies a broader claim concerning the possibility of social and political integration through law.

The Constitutionalized Treaty

The image of a Treaty transformed and 'constitutionalized' by the ECJ is one commonly portrayed by scholars of integration, but also by the ECJ itself which has described the EC Treaty as forming the 'basic constitutional charter'⁴ of a 'Community based on the rule of law'.⁵ As Weatherill has noted, the ECJ reached 'the zenith of ... [its] commitment to constitutionalization' in its opinion on the draft European Economic Agreement (EEA) (Weatherill, 1995, p. 220). For the Court, although the provisions of the EC Treaty and the EEA were *materially* identical in many respects, the EC Treaty had been transformed *structurally* through the doctrines of the direct effect and supremacy of EC law.

However, it is misleading to overplay the role of the ECJ. Revisions to the EC pillar of the Treaty, together with action taken by the Community institutions on a day-to-day level have also *prima facie* transformed the agenda of the Community beyond economic integration. Indeed, the extension of co-operation in the field of the Common Foreign and Security Policy (which itself must be considered as a 'high politics' transformation) has been to the exclusion of the role of the ECJ. As Weiler's work has long suggested, it is the interaction between legal and political institutions that is crucial to an understanding of the transformation of European integration (see, e.g., Weiler, 1981; see also Wincott, 1995c).

Nor can the evolution of the ECJ's structural doctrine be considered, to use Teubner's phrase, to be a product of 'blind legal evolution' (Teubner, 1993). How we conceptualize legal change is open to genuine debate in terms of the interaction between the legal system and its environment. But I want to avoid conceptualizations of legal change which generally consider law to be either wholly immune to developments outside of the legal system or wholly dependent upon exogenous change. Rather, we find a process of legal change in which institution-building within law (originally in response to environmental change) creates path-dependencies and routines which make long-term control over law by actors (including the ECJ) increasingly difficult. In other words, the forces

⁴ Case 294/83, *Parti Ecologiste 'Les Verts' v. European Parliament* [1986] ECR 1339.

⁵ Opinion 1/91, *Draft Agreement on a European Economic Area* [1991] ECR I-6084.

which originally give rise to legal change have no long-term control over legal development. Not only does this make attempts at external steering difficult, it may mean that legal doctrine becomes institutionalized in ways which create unanticipated consequences or prove to be insufficient or unstable in the long run.

As Maher argues in her contribution to this issue, the legal system is subject to ‘perturbations’ from outside the legal system. We can see this in the way in which ECJ doctrine has had to react to political developments in the form, for example, of its extension of direct effect to directives and its creation of liability in damages for a Member State’s failure to abide by its obligations. What is important is to view these legal developments as attempts by the ECJ to mediate between law and its environment. Equally, each of these responses can be seen to have created its own problems in terms of the limitation of the direct effect of directives to enforcement against the state (vertical direct effect) and the problems associated with establishing the boundary between excusable and non-excusable breaches of obligations (and whether it is national or Community courts who should determine this). In short, the institutionalist critique which suggests that Member States face enormous problems of long-term control over EC institutions can also be deployed to explain why EC institutions – including the ECJ – may also encounter problems of long-term control of the legal structures that have been built.

But if we are to argue that legal actors like the Court do mediate between law and its environment, it must also follow that political actors must mediate between politics and its environment (including law as part of its environment). It is evident that political actors have either deliberately reacted to the development of EC law or have taken action which makes the application of legal doctrine more problematic. In particular, modes of EU governance have developed in ways which at least pose challenges for the EC legal order.

For example, while there has been an expansion in the material scope of EC competence, there has been less inclination to create directly effective Treaty prohibitions placing obligations on Member States (directly enforceable through the ECJ and national courts) and a greater willingness to vest legislative powers in the Community institutions. To be sure, once agreed, political actors lose control over the legal interpretation of legislative measures. Nonetheless, during the negotiation process, the ball is in the court of the political actors. It is noteworthy that when the Member States decided to extend EC citizens’ non-discrimination rights through the Amsterdam Treaty, they opted not for a directly effective ‘Bill of Rights’ but for a legislative competence which would *permit* the Council to enact legislative measures (new Article 13 of the renumbered EC Treaty).

Not only is there less inclination to create directly effective rights within the Treaties, but legislation may increasingly be concerned with Member States' *duties*; duties which may exist in the absence of directly effective rights. In environmental policy, for example, duties are imposed on Member States to implement waste management strategies and to carry out environmental impact assessments. The ECJ (as it did in the case of directives) may find ways of expanding its structural doctrine to ensure the decentralized enforcement of such obligations.⁶ But, if it cannot, then the Commission may be forced to rely on supranational enforcement under Article 169 EC. This tends to undermine the general claim of an international law treaty transformed by the doctrine of direct effect and decentralized enforcement.

One can also point to changes in the instruments of governance in the area of social policy (e.g. social policy agreements) and a more widespread desire (arising from subsidiarity and competitiveness concerns) to use different types of policy instrument (e.g. charges, taxes, permits). These new instruments pose new challenges to a structural doctrine fashioned in the context of instruments containing binding legal rights.

The governance of the EU has changed not only internally but also externally. By contrast with its extension of the scope of direct effect to EC legislation, the ECJ has stated that provisions of the GATT are not such as to create direct effects⁷ and, as Scott notes (1995, p.149) this renders the GATT's 'primacy largely illusory'. Thus, attempts to rely on the GATT to review and annul *Community* legislative instruments have proved to be unsuccessful. Nonetheless, and as the saga of German banana litigation testifies (see, e.g., Reich, 1996), the Court's insistence on denying direct effect to the GATT itself may erode the willingness of national courts to abide by the ECJ's structural doctrine, thus potentially undermining the constitutional metaphor in an even more serious way.

While political theories of the role of law have tended to construct law as contingent upon politics, the metaphor of the constitutionalized Treaty relies upon an image of politics under law. The reality is a more complex interaction of law and politics. The ECJ has been forced to confront political developments, some of which it can bring within its structural doctrine and others which may be more difficult to incorporate. The ECJ has had to make choices. As the discussion above noted, the actions of the ECJ cannot be reduced to the fulfilment

⁶ In 1996, the ECJ concluded that the duty imposed on Member States to notify the Commission of draft technical specifications under Directive 83/189/EEC was directly effective, preventing the enforcement of un-notified specifications as against an individual: Case C-194/94, *CIA Security v. Signalson and Securitel* [1996] ECR I-2201. This may be part of a more general judicial trend to seek to make provisions of unimplemented or unenforced directives justiciable, even where the provisions of the directive do not meet classic tests of direct effect. My thanks to Jo Shaw for highlighting this point.

⁷ Case C-280/93, *Germany v. Council (Banana Regulation)* [1994] ECR I-4873.

of a bargain struck between Member States nor to an inevitable working out of a pre-ordained teleology of legal integration (Wincott, 1995b). Rather, the ECJ must mediate between law and its environment in its process of institution-building and in its interpretation of EC law. As I discuss in the following section, the constitutionalization claim tends to construct this intermediation role in terms of a broader notion of social, political and economic integration through law, with law performing a transformative role. However, as the case study which follows indicates, this conceptualization raises normative issues of law's role in European integration.

Integration through Law? A Case Study of Non-Discrimination and Sexual Orientation

Scholars seeking to conceptualize the legal dimension have generally been concerned with the process of legal integration (i.e. the establishment and reception of structural doctrine – the integration of law). However, the claim of a 'constitutionalized' Treaty plays on a larger idea of social and political integration *through* law. Contemporary EU legal scholarship increasingly deals more directly with this relationship between law and constitutionalism in the sense of its interrogation of the nature of the order which is being created within the EU. One important focus for such scholarship has been upon the equality law jurisprudence of the ECJ. In this section, I consider the application of EC equality law to non-discrimination on grounds of sexual orientation.

EC law has opened up a new space for social and political struggles. Litigation strategies may emerge especially if pursued by advocacy groups (Barnard, 1995). Given the ECJ's strict rules on *locus standi* it is difficult to pursue public interest litigation directly before the ECJ. Resort must be made, instead, to the national courts, often with Article 177 EC references to the ECJ. National and EC courts have, therefore, become sites for social and political struggles generating constitutional conversations about the depth and nature of the rights of EU citizens.

Two significant cases are currently pending before the ECJ following Article 177 references from UK courts. In *ex parte Perkins*,⁸ the UK's ban on gays and lesbians in the military has been challenged in light of the Equal Treatment Directive. In *Grant*,⁹ the policy of a railway company to provide travel benefits to spouses or heterosexual cohabitantes of employees, but not to same-sex partners has been challenged as contrary to Article 119 EC. For present purposes, the *Grant* case will form the basis for discussion.

Stonewall – a UK organization which self-defines itself as 'working for lesbian and gay equality' – has been influential in its support of cases (including

⁸ Case C-233/94, *R v. Secretary of State for Defence ex p. Perkins*.

⁹ Case C-249/96, *Grant v. South-West Trains Ltd*.

Grant) seeking to extend the scope of EC equality law to cover discrimination on grounds of sexual orientation. It has placed much faith in the use of law and courts as instruments of social change. However, the use of legal action is not uncontroversial amongst gays and lesbians. While few would quibble with the legal action brought by Lisa Grant, for others the use of activist resources to support gay and lesbian employment in the military is less deserving. Two points are worth noting. First, the debate about what type of legal actions ought to be supported does not itself challenge the instrumentalist conception of law as a vehicle for social change. Secondly, the debate itself can be seen as important in energizing dialogue about priorities and strategies for reform among gays and lesbians. In this sense, the possibilities and pitfalls of legal action using EC law may be enough to trigger important constitutional conversations about gay and lesbian identities and their construction in law.

The use of law as part of social and political struggles can be seen as both emancipatory and constraining (see, generally, Herman, 1994). The problem is not merely one of the size of the legal space which is available for challenges to be made, but also of the categorical schemes institutionalized within law and their application to contested social and political claims (Stychin, 1997). I interrogate this theme in light of EC equality law and its application to discrimination on grounds of sexual orientation.

The crux of the issue is whether discriminating against a person because of their sexual orientation constitutes discrimination based on sex. The Court's jurisprudence has generally been concerned with discrimination as between men and women, with a biological and medicalized conception of male/female deployed to create the initial categorical scheme (see Skidmore, 1997). In 1996, the Court of Justice concluded that the scope of the Equal Treatment Directive did extend to the dismissal of a transsexual (*P v. S*).¹⁰ In that case, Advocate General Tesouro took the view that the directive was a specific expression of the general principle of equal treatment. He concluded that the use of criteria based on sex or sexual identity to situations within the scope of the directive was not lawfully relevant. The Court of Justice followed this line of reasoning insofar as it concluded that discrimination against a transsexual '... is based, essentially if not exclusively, on the sex of the person concerned'. However, the ECJ arrived at this conclusion by comparing the treatment of the transsexual before and after gender reassignment. In this way, discriminatory treatment could be constructed in terms of a male/female comparison.

Although the decision in *P v. S* can be seen as emancipatory, nonetheless the ECJ's approach to sex discrimination can be seen as a denial of P's *distinct* identity as a transgendered person (Stychin, 1997; also Skidmore, 1997). As Stychin argues (1997) the identity of P as a transgendered person does not serve

¹⁰ Case C-13/93, *P. v. S. and Cornwall County Council* [1996] ECR I-2143.

to 'trouble' or problematize the Court's categorical scheme based on a biological male/female comparison. Indeed, as Advocate General Elmer was later to remark in *Grant* (discussed below), from the perspective of the Court, discrimination on grounds of transsexuality was irrelevant.

Nonetheless, the decision in *P v. S* was considered both by academics and by activist groups as opening up a legal space for extending the scope of EC equality law to cover discrimination on grounds of sexual orientation. The first test of this claim came with the legal challenge brought by Lisa Grant to the refusal of her employer to grant her lesbian partner a free travel pass when such a benefit accrued to heterosexual partners of employees (whether married or not). Advocate General Elmer concluded¹¹ that the refusal to grant the travel pass constituted 'gender' discrimination contrary to Article 119 EC. Applying the principles elaborated in *P v. S*, he argued that the discrimination was based essentially if not exclusively on the gender of the person concerned.

Although the ECJ is yet to rule finally in the *Grant* case, the Advocate General's opinion has already been heralded by Stonewall and the gay press as an emancipatory judgment. There is no doubt that if the opinion is followed by the ECJ it will have important consequences for gays and lesbians (not least of all Lisa Grant and her partner). The decision also has consequences beyond the interpretation of Article 119 to include EC equality legislation in general. However, as in *P v. S*, the Advocate General's approach is also problematic. If the problem with *P v. S* is that P's distinct identity as a transgendered person is irrelevant, then in *Grant*, her distinct identity as a lesbian is also hidden. Although the Advocate General is careful in changing his language to talk of 'gender' discrimination in recognition of the expansion in scope of sex-based discrimination, it is not apparent that this expansion 'troubles' the existing classificatory scheme by recognizing Grant *qua* lesbian rather than *qua* female. While Grant's identity as a woman is affirmed,¹² her identity as a lesbian lurks somewhere in the shadows.

As this case study illustrates, attempts to frame broader social struggles in legal terms remove such struggles from their social context and place them within an institution of law which imposes its substantive rules and normative visions. In this sense, law projects itself upon the individual as object, while claiming to recognize the individual as a subject of the Community legal patrimony. As I argue below, this dual identity of the individual suggests limits to law's transformative potential, raising important questions as to law's ability to act as a bridge between the citizen and European integration.

¹¹ Opinion of 30 September 1997.

¹² Of course, Grant's identity as a woman is recognized only insofar as she is a 'worker'. The concepts of 'work' and 'worker' are themselves gendered concepts (see, e.g., Hervey, 1995).

Citizenship, Rights and Legitimation: Just Dancing?

As the EU tries to find an identity for itself which is distinct but also an evolution from the E(E)C, the extension of legal rights beyond the economic sphere has become an important element in this attempted transformation (especially if the language of 'constitutionalism' is to mean more than economic integration through law). The pursuit of legitimation through the need to be responsive and closer to the citizen has resulted in the search for a bridge between an inter-institutional system of governance and the citizens of the EU (for a discussion of responsive law, see Scott's contribution to this issue). One normative vision for the EU lies with law and legal rights providing such a bridge. Indeed, this connection has been made by the ECJ in its discussion of the relationship between citizenship and direct effect (de Búrca, 1996, p. 358).

One problem with this vision is that we tend to think of constitutional rights operating at the level of the nation-state and acting as a bulwark against state power. These rights are the *quid pro quo* for the constitution of state power. In the EU context, the level at which these rights are created (the EU level) is different from those in which the rights tend to be applied. For example, in terms of the creation of the economic 'constitution', the economic rights of the four freedoms have the status of fundamental law as against the exercise of *national* regulatory autonomy (hence the image of national political choices constrained by EC law). While economic actors may be the subjects of law utilizing law as a medium through which to enhance economic freedom, they are also legal objects upon which the Community goal of trade liberalization projects itself. The description of what economic agents do in using legal rights to bring national regulatory choices within the gaze of the Community cannot answer the question as to the legitimacy of the EC's policy goal. That certain individuals dance tells us little about the quality of the tune, the possibilities for a different band or why some cannot get into the dance hall or decide to stay at home.

Similarly, when we come to the extension of rights beyond the economic sphere to include, for example, non-discrimination rights, these rights will be enforceable within the national arena. While many of us would consider such a step to be admirable from the perspective of respect for human rights and dignity, the extension of such rights as part of a process of seeking legitimation for the EU relies upon a passive conception of citizenship, if not, indeed, a neofunctionalist transfer of loyalty. Through dancing, those citizens admitted to the dance hall will increasingly like the band's music (even though the band was booked by someone else).¹³

¹³ Of course, the administrative law of the EC does entertain the use of legal rights as against the EC institutions themselves. Nonetheless, attempts to use fundamental rights and general principles of EC law to challenge the validity of acts of the institutions have generally been unsuccessful.

My point is that the exercise of rights by individuals cannot in isolation confer legitimation upon the EU when the system which produces such rights (the revision of Treaties, the agreement of EC legislation and the interpretation of these sources by the ECJ) is rooted in a system of inter-institutional dialogue from which the citizen is either excluded or her voice limited and small. The full transformative potential of rights can only be achieved when the transformation of EU governance is itself called into question. In this way, to talk of the use of legal rights begs the question as to what role such rights are intended to fulfil in a broader normative vision of the EU, rather than providing an answer to the question. As discussed in Part IV, the need for more responsive law and governance raises its own forms of problems in terms of the identities and interests recognized in law and the normative vision which supports their recognition.

IV. Law and Governance

In this final part I explore the imagery of 'law and governance'. The term 'governance' has acquired a degree of popularity among scholars of the EU (e.g. Armstrong and Bulmer, 1998; Caporaso, 1996; Jachtenfuchs, 1995; Kohler-Koch, 1996; Marks *et al.*, 1996). This theoretical 'turn' is important in moving beyond debates about the relative roles of Member States versus supranational institutions (in terms of the construction of macro-theories of integration) towards explorations of the dynamics of integration in a differentiated and multi-level system of governance. Central to the governance imagery is the contemporary reconfiguration of governance beyond the state.

The state has been a central reference point for the development of images of the EU. In the intergovernmentalist imagery, the language of delegation is deployed in order to maintain the centrality of the nation-state as the defining variable of EU integration. The idea of a constitutionalized Treaty, on the other hand, reconstructs the EU as a form of state. Neither image, however, challenges our contemporary understanding of the state and tends to reduce the EU's legitimacy to something which is either parasitic upon the nation-state or implicit within the EU's own state-like constitutional order.

One can, instead, argue that the EU is neither the agent of the nation-state nor its simple displacement but rather constitutes a more fundamental change in the exercise of state power. It marks a more radical shift in the configuration of state power away from the conflation of (nation-) state and government and embodies a structure of *governance* that has elements of continuity with the nation-state while also possessing new qualities of its own.

Jachtenfuchs has averted to 'reflective' approaches to international relations in which the state not only reproduces the international system but is also

reproduced by it and, in this way, the state is 'at stake' (1995, p. 121). In a more radical turn, Jachtenfuchs notes that systems-theoretical approaches may even make a break with the state to the level of the political system with the functional differentiation of society leading also to the internationalization of the political system (1995, p. 123). In this way, the language of governance can be seen to be a reference to a more fundamental transformation of state power in which the emergence of the EU is not simply as the nation-state's other, but indeed as part of its changing self.

Viewed in this way, attempts to model processes of legitimation premised upon nation-states fail to recognize the elements of discontinuity as well as continuity with nation-states. Rather, the need is to develop processes of legitimation which are appropriate to the nature of EU governance. The difficulty which this poses for us is the need to reconcile the often opposing demands of expert knowledge with popular opinion, representation with participation and efficiency with responsiveness across different policy domains (see Scott's contribution to this issue). However, the difficulty of this task can be used productively insofar as we then stop looking for overarching solutions which often miss the mark and, instead engage with the reality of EU decision-making.

In a similar vein to Jachtenfuchs, Ladeur argues that conceptions of hierarchical, centralized and unitary states ignore the extent to which processes of differentiation and pluralization in decision-making have transformed the state from within (Ladeur, 1997, p. 43; a comparable analysis can be found in Rhodes' description of the 'hollowing out' of the British state: Rhodes, 1997). Ladeur instead adopts the metaphor of the 'network' to analyse differentiated forms of order which are based *inter alia* upon (1997, p. 46):

heterarchical coordination and linkage between actors and institutions, upon cooperative procedures which draw on the production of technical and scientific knowledge, and a process of political and economic experimental design rather than the simple acceptance of generally accessible experience.

As Ladeur highlights, the concept of a network is not invoked merely to locate an arena of regularized contact between actors who control the network's operation, but rather (Ladeur, 1997, pp. 47–8)

The interest in using the concept lies in the complementarity and interdependence of its components and a synergy effect which produces new options which are accessible through the network as such, and are not the mere products of actors bargaining with each other.

Governance within the EU cannot, therefore, be reduced to simple dichotomies and oppositions between a supranational layer of decision-making and a national layer. Rather, governance is differentiated and multi-level. As Joerges and Neyer highlight in their study of comitology (1997), this more complex picture of

governance raises practical and normative problems for law in constitutional and administrative law terms. In short, as governance evolves and as actors within different governance regimes or networks seek to recast their conflicts in legal terms, how ought law, as an institution, to approach such issues?

Positive law takes us little further than recognizing the formal legitimacy of legal rules enacted by governments duly elected by their constituencies. In the EU context, this positivistic image of law (derived from an image of the nation-state) leaves us in a world of EC treaties, legislation and legal rights, but says little about the processes by which such laws are negotiated and different voices heard in rule-making processes.

It is possible to discern changes to the EU model of governance as Scott's discussion of partnership in regional policy discloses (see her contribution to this issue). In the post-Maastricht era, we can also see in the area of social policy the use of agreements negotiated between 'social partners' as a new mode of governance in which regulation is negotiated outside of the formal structures of the EU and nation-states. Yet, as I note below, this may in turn create its own problems for law as an institution as courts are forced to adjudicate conflicts between a broader range of actors engaged in rule-making processes.

Conflicts arising out of integration and its operationalization are, of course, not new. The tendency has been to focus on conflicts between the Member States and the EC arising either in respect of the negotiation of EC legislation or in terms of adjudicating on substantive rights and duties. Yet, even at the formal level of rule-making, the extension of the powers of the European Parliament, and the possibilities for Member States being outvoted in the Council have resulted in a distinctive form of *inter-institutional litigation* as actors seek to gain what they have lost in the political arena or more generally play for rules. In this way, the ECJ has been called upon not to supply or interpret substantive rules with which to deliver economic or political integration, but rather to construct the legal frameworks in which processes of decision-making take place. In this way, the Court has had to develop a normative vision of the institutional balance.

However, governance is frequently exercised beyond such formal institutions. The point is not merely that there is a different set of actors to contend with, but rather that there are different sets of interests and issues to be balanced for which the Treaty may provide little guidance.¹⁴ For example, the possibility that social dialogue between the social partners may result in binding agreements as an alternative to legislation proposed by the Commission and negotiated by the formal institutions, raises crucial questions as to the representativeness of the social partners. It is understood that the European level representative of small and medium-sized enterprises (UEAPME) is considering legal action which

¹⁴As is often the case, formal legitimation through the Treaty (insofar as it exists) lags well behind the actual operation of EU governance.

questions UNICE's right to represent their interests in negotiating the Parental Leave Agreement and the Part-Time Work Agreement. Insofar as agreements between the social partners have to date been formalized as Council directives, there is a recognized 'legal act' to review under Article 173 EC. Nonetheless, the ECJ may be forced to adapt or develop procedural rules on legal standing and constitutional norms in respect of representation to deal with these problems. The point is that the ECJ is, once again, forced to confront the evolving political realities of EU governance.

However, the discussion above simply highlights the more visible tip of the governance iceberg. Governance is a pervasive phenomenon. As Joerges and Neyer highlight in their comitology study (1997), there is a whole network of actors engaged in governance activities, giving substance and meaning to the frameworks of rules established by the formal institutions. Once again, as Everson suggests in her contribution to this issue, to attempt to construct the legitimacy of such actors in terms of a simplistic notion of 'delegation' is to ignore the real power held by such networks. In terms of how law engages with conflicts which might arise from such networks, Joerges and Neyer (1997, p. 282) argue that:

... the committee system must be based upon and controlled by, constitutional provisions favouring a 'deliberative' style of problem solving.

The problem for the ECJ will be in establishing a normative framework which will not merely be asked to ensure participation, but also to establish some balance between expert knowledge and public opinion, between representation and participation, and between responsiveness and efficiency.

V. Conclusions

When we come to conceptualize law we are faced with parallel images of law as a medium and law as an institution; actors as subjects of law and actors as objects of law. Of course, we are seeking to tackle one of social theory's more enduring problems, namely the reconciliation of agency and structure. Through the lens of institutionalism I have argued that forces directed towards the legal order must, nonetheless, be refracted through the organizational, procedural, substantive and normative elements of law as an institution. Yet, it is not just the actions of agents which are exogenous to the legal system which are so structured. The ECJ, while possessing agency in its mediation between law and its environment, nonetheless is constrained by its role as an actor within the institution of law. As the EU legal order has developed, processes of institutionalization within that order may also produce unintended or unacceptable consequences which frame future legal developments.

I have argued that attempts to construct grand narratives of integration revolving around issues of delegation, teleology and constitutionalization all too often have the effect of smoothing out the blemishes, blurring the nuances and concealing the complexities of EU governance. Rather, EU governance is a differentiated and complex system of inter-linked regimes or networks. This form of governance 'beyond the state' poses new challenges to law as an institution, requiring actors like the ECJ to seek to develop a normative vision of integration that is responsive to the shifting contours of power. It is suggested that a normative vision premised upon a passive conception of the citizen as possessor of legal rights is inadequate to this task. Rather, EU law must turn its attention towards policing access to and participation within governance regimes.

As each of the articles in this issue indicates, there is no single legal dimension which scholars simply need to incorporate. What unites each of these articles, however, is an attempt to develop a more critical approach to law, in which the normative dimension of law and its role in EU governance are interrogated beyond assumptions of a simple instrumentality.

VI. Postscript

On 17 February 1998, the ECJ gave judgment in *Grant v. South-West Trains*. Contrary to the Opinion of the Advocate General, the Court found that discrimination on grounds of sexual orientation did not fall within its conception of sex discrimination as defined by its previous case law. The Court noted that the (unratified) Treaty of Amsterdam would permit the Council to adopt anti-discrimination measures in this area, signalling that the ECJ was, therefore, unwilling to step in and extend the scope of protection under EC law when this could be left to the political institutions. The paradox is that if Grant's distinct identity as a lesbian is ignored (as in the Advocate General's approach) she wins. If her distinct identity as a lesbian is recognized, she loses because such an identity is one which does not fit within the categorical scheme utilized by the Court. This case is illustrative not only of the role played by the ECJ in mediating between law and its political environment, but also in highlighting the application of institutionalized categorical schemes to affirm or deny the identities of EU citizens.

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