8

Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration

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NATIONAL COURTS: THE CRITICAL INTERMEDIARIES IN LEGAL INTEGRATION

The European Court of Justice is one of the most influential legal and political institutions in Europe. While lawyers have followed the bold jurisprudence of the European Court for many years, the Courts substantial influence over national and European Community policy in the 1980s caught many political scientists (and politicians) by surprise. How had the European Court obtained the authority and the power to influence national policy? How had ECJ authority expanded to include issues thought to be part of the exclusive domain of national governments, including educational grants, advertising abortion services, mandating employee work councils, and government rules regulating equal pay for men and women?

These questions provoked an inter-disciplinary debate over the causes and consequences of legal integration, meaning the expansion and penetration of European Community (EC) law into the national legal and political systems (Burley and Mattli (1993); Garrett (1992); Garrett (1995); Garrett and Weingast(1993); Slaughter and Mattli (1995); Weiler (1991)). This debate has focused predominately on the role of the European Court of Justice in promoting legal integration, measuring advances in legal integration in terms of ECJ doctrine which extends the scope and reach of European law into the national legal orders. But this focus on the ECJ can be misleading. Legal integration is not simply the issuing of legal decisions which create new doctrine, but more importantly the acceptance of this jurisprudence within national legal systems and by national politicians.

While the European Court has played a decisive role in issuing expansive and important decisions on EC law, the linchpins of European legal system are really the national courts of the Member States. When the ECJ had to rely on the Commission or Member States to raise cases about EC Treaty infringements, the Court's docket was rather empty. With national courts sending

questions about Treaty infringements to the ECJ, numerous potential Treaty violations have been brought to the ECJ. National courts also present the ECJ with opportunities to expand the reach and scope of EC law, opportunities which in all likelihood would not exist if the ECJ had to rely on Member States or the Commission to raise broad infringement charges. Indeed, most of the ECJ's major decisions expanding the reach and scope of EC law were made in cases referred to the ECJ by national courts. Because national courts now apply ECJ jurisprudence directly within the national realm, even over the objections of national politicians and administrators, ECJ decisions have gained an enforcement mechanism.[1] Disregarding an ECJ decision in a preliminary ruling case would mean that a government was disobeying its own courts, and sanctions available under national law can now be applied in the enforcement of EC law creating significant financial liabilities for non-compliance with EC law.

Because of national court support the largest political threat against the Court—the threat of non-compliance—is largely gone. In the face of clear violations of EC law, national governments anticipate that a negative Court ruling will be applied by national courts so that even the threat of bringing a legal case to the European Court can be enough to encourage compliance with EC law. Given the fundamental role played by national courts in the EC legal system, the real question raised by legal integration is not why the ECJ seizes the opportunities presented to it to enlarge its jurisdictional authority and political power, rather why national courts give the ECJ the opportunity to expand its powers, even goading the ECJ to expand the reach and scope of EC law, and why national courts enforce EC law against their own governments.

The research project on which this chapter is based, "The European Court and the National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context" represented part of an emerging scholarship which shifts the focus to the role of national courts in the process of legal integration. The project examined legal integration of the ECJ's doctrine of EC law supremacy. The project sought to go beyond simply recounting and analysing national court jurisprudence and doctrine, actually trying to explain changes in national legal doctrine and national court behaviour. The contributions to the project offer important evidence which can be used to evaluate the prevailing explanations of legal integration and to move the debate forward.

This chapter classifies alternative explanations of legal integration offered in the EC legal literature, focusing specifically on how different theories explain national court participation in legal integration, and evaluates the explanations in terms of evidence presented in the national reports, supple-

[1] Until the recent Maastricht Treaty reform ECJ decisions lacked sanctioning powers and thus there was no mechanism to enforce or coerce compliance with European Court decisions. The new enforcement mechanism is yet to be used, but recently the Commission asked to fine Italy and Germany for non-compliance with ECJ decisions.

mented by evidence gathered in the author's own research. While arguments from the country reports are used to evaluate alternative explanations of legal integration, an important caution must be noted. Participants in the project were asked to go "beyond doctrine", by "speculating" on the causes of judicial behaviour. In general, the empirical evidence offered to support the causal inferences made by the authors was scant. A significant burden of proof is still needed to turn all of the speculations in the national reports into empirical evidence. While the evidence is not perfect, it represents some of the only empirical information we have on legal integration in the national realm. The national reports can help us refine hypotheses, think more systematically and critically about what type of explanations are being offered, and what type of evidence could more definitively support or refute different arguments. What emerges from this is a strong questioning of the dominant explanations of legal integration prevalent in the literature and often accepted at face value by both practitioners and scholars. The chapter pushes and challenges political scientists and legal scholars to offer precise arguments about both judges and politicians in order to increase the explanatory power of the different hypotheses, and raises agendas for future research.

By way of conclusion, examination is made of what the explanations of legal integration can tell us about the future of legal integration in Europe and about the prospects of generalising from the European experience to other international contexts. The conclusion asks two questions: (1) Can legal integration proceed in light of the heightened vigilance and lack of political support for ECJ activism? and (2) Can the experience of legal integration in Europe be generalised to other international contexts?

ALTERNATIVE EXPLANATIONS OF NATIONAL JUDICIAL BEHAVIOUR IN LEGAL INTEGRATION

The literature on legal integration has offered four types of explanation of legal integration: a legalist explanation, a neo-realist explanation, a neo-functionalist explanation, and an inter-court competition explanation.[2] This section summarises the explanations of legal integration offered in the literature, assessing them in light of the "evidence" offered in the country reports, supplemented by the author's own research. As the alternative explanations are reviewed, I focus on how each theory explains national judicial behaviour in the process of legal integration, that is when and why courts apply European law in the national context and when and why EC law expands into new areas of law and policy; and on what each explanation has to say about the role of politicians in influencing judicial behaviour and thus legal integration. The

[2] Included is the author's own explanation of legal integration developed in the dissertation *The Making of a Rule of Law: The European Court and the National Judiciaries* (M.I.T. Department of Political Science, June 1996).

methodology of the national reports does not allow for a systematic testing of alternative explanations, but the national reports do supply enough evidence to raise serious questions about the most prevalent arguments and to gain a greater understanding of the legal and extra-legal forces influencing the process of legal integration.

Legalism: legal logic and legal reasoning as the motor of legal integration

Legalist approaches explain judicial behaviour in legal integration based on legal logic and legal reasoning. EC law is seen as having an inherent legal logic which creates its own internal dynamic of expansion, compelling the ECJ to render legal decisions which promote integration, and compelling national courts to apply the ECJ's jurisprudence.[3] Legalist explanations see the European Court as driving the process of integration through key integrative legal decisions which, by virtue of their authoritative force, transform the context in which political and legal integration proceeds. According fundamental importance to the compelling nature of the ECJ's legal doctrine, legalist approaches see national judiciaries as having been convinced by legal arguments of the validity of the supremacy of EC law over national law, and of the importance of national courts applying the supreme EC law in their jurisprudence. Explaining national court refusal of ECJ jurisprudence as unintended mistakes, the legalist approach implies that misunderstandings or a lack of information on the part of national judges are really the only factors hindering the process of legal integration at the national level, the assumption being that once properly informed, national judges will dutifully refer cases and apply EC law as directed by the ECJ. While ECJ justices are the strongest proponents of this position, similar arguments have been voiced in the legal articles explaining ECJ decisions, national court decisions and national jurisprudence on EC law. Indeed most European lawyers are trained to examine EC law from the legalist perspective and legalism remains the dominant paradigm for analysing legal integration in Europe.

The legalist account of legal integration implies that the Court's jurisprudence shapes national court behaviour because of its compelling nature and clear legal logic. But clearly many national courts and national judges have not been convinced by the ECJ's doctrine on EC law supremacy, despite having understood the reasoning, despite having been told of the importance of ECJ jurisprudence by Justices in Luxembourg, and despite the numerous arti-

[3] More nuanced legalist explanations acknowledge some voluntarism and activism in the ECJ's legal decisions, and allow for extra-legal forces to influence the process of legal integration including political considerations (Mancini (1989); Tomuschat (1989); Weiler (1994)). But even these legalist accounts cling strongly to a claim regarding a legal logic of EC law, if based only on a functionalist legal theory of *effet utile*, which implies that the ECJ virtually had to make legal decisions promoting the process of integration, lest the EC legal system become completely ineffective and unworkable (Cappelletti, Seccombe, and Weiler (1986) 30; Lecourt (1991)).

cles and lectures by legal scholars writing in support of ECJ jurisprudence. The significant and sustained challenges to European Court doctrine within national judiciaries imply that it is not just ignorance which creates national judicial reticence in participating in the preliminary ruling process and accepting ECJ jurisprudence. Indeed it is interesting to note that the national reports give very little credit to ECJ reasoning as having convinced national judges of the supremacy of EC law. Both the Belgium and the Dutch reports imply that the finding of a national constitutional basis for EC law supremacy was the culmination of long national doctrinal trends which pre-dated the ECJ's supremacy jurisprudence, thus the national doctrinal change did not come about because of the ECJ's legal argumentations *per se*. In the German report, Kokott says expressly that "German courts never really supported the theory that Community law flows from an autonomous source" (see Ch 3, Report on Germany, p. 86) and the Italian report notes that neither *La doctrine* in Italy nor the Italian judiciary have been convinced by the Court's *Costa* and *Simmenthal* jurisprudence (see Ch 5, Report on Italy, pp. 148, 152). Indeed every national judiciary examined in the study rejected the legal basis for EC law supremacy offered by the ECJ, insisting instead on a national constitutional basis for EC law supremacy.[4]

Formal legalism which uses only legal logic and legal reasoning to explain national court behaviour can be easily rejected given the evidence on national judicial experiences of legal integration. But more nuanced legalism is harder to reject. Clearly most ECJ decisions are seen as authoritative, and there is a great deal of respect for the European Court. Thus at some level the ECJ's jurisprudence has been accepted as being if not entirely legally convincing at least legally plausible and authoritative. At the same time, there remains much about the national experiences of legal integration within Member States which even a more nuanced legalism can not explain, such as the significant time lags in the acceptance of EC law supremacy by national courts, the significant variation in the national experiences in accepting EC law supremacy, and the continued variation in national court behaviour *vis-à-vis* ECJ doctrine. The legalist literature has offered a host of *ad hoc* "explanations" of this cross-national variation, such as the influence of dualist doctrine on national judiciaries (Bebr (1981)), the lack of a tradition of judicial review in some Member States (Maher (1994); Vedel (1987)), the lack of a federalist or constitutional model (Cappelletti and Golay (1986)), problems of diffusing information across national judiciaries, old habits embedded in judges not used to the new and strange EC law (Meier (1994) ; Pescatore (1970)), legal parochialism and judicial nationalism (Abraham (1989) 170–1). But none of these

[4] The one possible exception may be the Netherlands, but even there Claes and De Witte acknowledge that while academics insist the basis for EC law supremacy is the special nature of the EC legal system, most national judges are silent on the legal basis for EC law supremacy, and national politicians and the Council of the State explicitly reject an extra-constitutional basis for EC law supremacy.

conditions consistently holds true. Doctrinally dualist Germany had an easier time accepting EC law supremacy than doctrinally monist France. The Netherlands and Belgium, which also lack traditions of judicial review, have also had less trouble than France. Generational and information diffusion explanations fall short when accounting for the 1993 decision of the German Constitutional Court which was more reticent on the issue of EC law supremacy than its "*Solange I*" decision issued 20 years earlier.[5] And in France, despite common legal traditions, the three different branches of the legal system for many years adopted different doctrinal stances regarding EC law (Vedel (1987)). It is not a matter of the need to explain lags and variation for explanation sake, rather the variation in itself implies that there are important extra-legal factors influencing legal interpretation and legal integration in Europe which legalist analyses are not considering.

While national judiciaries clearly did not find ECJ doctrine inherently compelling, the national reports referred to a "dialogue" where the ECJ worked with national judiciaries to develop legal doctrine which both sides could accept, thus to accommodate each others' jurisprudence on key points. Clarence Mann was one of the first legal scholars to note that the preliminary ruling procedure provided an important mechanism for "judicial dialogue", allowing national courts to challenge and try to influence ECJ jurisprudence with which they disagreed and the ECJ to "seek support" for its jurisprudence (Mann (1972)). Legal scholars have noted examples where ECJ jurisprudence influenced national jurisprudence (Mann (1972)), and they have also found instances where dialogue with national judges influenced the ECJ to adjust its jurisprudence to what national courts were willing to accept (Mancini and Keeling (1992); Morris and David (1987); Rasmussen (1984)). Indeed the desire to "dialogue" with the ECJ and influence EC jurisprudence was seen as a positive incentive for national courts to work with the ECJ, and the goal of initiating a dialogue with the ECJ was used to "explain" some national judicial behaviour (for example see Ch 3, Report on Germany, p. 113 and Ch 5, Report on Italy, p. 149). While still within the legalist tradition, an argument about judicial dialogue and accommodation as the basis for legal integration challenges the notion that law develops from some internal and apolitical logic in the texts, and opens the possibility that multiple—although not infinite—legal interpretations and legal consensus points can exist. This raises the question of what makes consensus regarding EC law shift, and why consensus shifts differently in different countries? The question for this project is why did legal consensus in *all* Member States shift to doctrines compatible with the supremacy of EC law?

While many scholars mentioned the importance of judicial dialogue between national courts and the ECJ, most of the national reports analysed

[5] BVerfG "*Solange I*" 2 BvL 52/71 decision from 29 May 1974; BVerfGE 37, p. 271; [1974] 2 CMLR 540–69; BVerfG "*Maastricht decision*" of 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92.

national legal doctrine as an artifact of a national legal dialogue in the context of the larger domestic political system. Indeed the contrast between the national reports and the majority of writings by EC law specialists is noteworthy. EC law specialists tend to assume that ECJ jurisprudence will be accepted by national courts and dismiss incongruent national jurisprudence as unintended or misinformed mistakes. For EC law specialists, the national reports in the project on *Legal Change in its Social Context* point to the need to give greater consideration and significance to how national courts interpret, apply and challenge ECJ jurisprudence. But the national reports had their own version of myopia. They lost sight of the role of the ECJ in the process of legal integration, in some cases giving the ECJ almost no credit at all for influencing national doctrine. More work is needed to bridge this disconnection between a national doctrinal focus and an ECJ doctrinal focus. In other words, a promising direction for legalist analysis to go would be to investigate more this interactive "dialogue" legal scholars refer to. The snippets of evidence provided by legal scholars imply that a dialogue does exist and that it is important in facilitating legal integration and in shaping European Court jurisprudence. But it is unclear how the dialogue shapes legal interpretation at the EC level or at the national level. Examination of a sustained legal dialogue across legal cases and across national legal systems, could help us understand how legal interpretation and legal dialogue contribute to legal integration. In addition, by looking at how doctrine emerges and changes across time one can also gain insight into the extra-legal factors which shape legal interpretation.

Another weakness with the legalist approach is that legalist analysis often forgets that politicians are part of the process of legal integration, dismissing political objections as simply misinformed and seeing a very limited role for politicians in shaping legal integration. In the legalist paradigm, politicians influence the process of legal integration when they write legislation, thus politicians are credited with opening the door to expansive legal interpretation of the legislation. But politicians are given virtually no role in influencing legal interpretation of the legislation. Indeed Martin Shapiro called legalist analysis of European integration "constitutional law without politics" where the Community is presented:

> "as a juristic idea; the written constitution (the treaty) as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court (the ECJ) as the disembodied voice of right reason and constitutional teleology" (Shapiro (1980)).

The national reports opened the door for politicians to influence legal interpretation and legal integration. The chapter 5, Report on Italy, notes that Government lawyers help shape legal interpretation through their participation in the legal process, and at different points the other national reports noted the effects of political influence on national court interpretation. But no

attempt was made to think systematically about how and when politicians influence legal interpretation and legal integration. Indeed, often in the legal literature positive developments in legal integration are explained in legalist terms, while "politics" is used as a residual category to explain the failure of a court to follow the logic of EC law or the refusal of ECJ jurisprudence by a national court. If political factors are influencing judges to contort sound legal reasoning, then we should be able to see the influence of these factors more systematically across cases. By examining when and why political factors influence some legal decisions and not others, we can gain a greater understanding of the conditions under which political factors will and will not influence judicial decisions.

Legalist accounts can provide rich and detailed commentary on the process of doctrinal change. While much of the Continental legal scholarship strips politics from legal analysis whenever possible, more nuanced legalist analysis—such as the country reports in the research project on "*Legal Change in its Social Context*"—examines law within a political context, thereby offering an account of the numerous legal, sociological and political factors influencing legal integration. But even these accounts could be improved by focusing on how national courts and the ECJ shape each others jurisprudence in the process of legal integration, by using variation across countries and across time as a tool to gain a better understanding of how extra-legal forces influence the process of legal interpretation, and by examining the influence of extra-legal forces more systematically across cases and across time.

Neo-realism: national interest as the motor of legal integration

Neo-realism explains judicial behaviour in terms of national political and economic interests. In its strongest form, the neo-realist argument claims that legal decisions at the EC level and at the national court level are shaped by national interest calculations (Garrett (1992); Garrett (1995); Garrett and Weingast (1993)). The ability of national governments to influence court behaviour comes from the tools politicians have to define the jurisdiction of courts, manipulate appointments, and ignore unwanted jurisprudence. Garrett and Weingast argue:

> "Embedding a legal system in a broader political structure places direct constraints on the discretion of a court, even one with as much constitutional independence as the United States Supreme Court. This conclusion holds even if the constitution makes no explicit provisions for altering a court's role. The reason is that political actors have a range of avenues through which they may alter or limit the role of courts. Sometimes such changes require amendment of the constitution, but usually the appropriate alterations may be accomplished more directly through statute, as by alteration of the court's jurisdiction in a way that makes it clear that continued undesired behavior will result in more radical changes. The principal conclusion

> . . . is that the *possibility of such a reaction drives a court that wishes to preserve its independence and legitimacy to remain in the arena of acceptable latitude*" (Garrett and Weingast (1993) 201–2 emphasis in the original).

Few would dispute that judges must keep their jurisprudence within some acceptable range, but this statement in itself does not mean much—after all there are political and legal limits for *every* public actor. The real questions are what defines the "acceptable" range of judicial behaviour and how much latitude do judges have. Garrett and Weingast see national interest as defining the acceptable range of judicial behaviour, and see all courts, and especially the ECJ, as having very limited latitude. Indeed Garrett goes so far as to assert that the need to elicit voluntary compliance with its decisions makes the ECJ strategise and calculate to ensure that its jurisprudence reflects and promotes the economic interests of the dominant Member States (Garrett (1992), (1993), (1995)).

Some national reports found a relationship between national interest and the acceptance of EC law supremacy. Claes and De Witte noted that in the Netherlands:

> "The traditional receptivity to international rules, and willingness to cooperate with foreign nations is clearly in the interest of a small trading nation that is too small to preserve its independence on its own, and needs open borders for its prosperity" (Ch 7, Report on the Netherlands, p. 189).

While not making a link to national interest *per se*, in the United Kingdom Report (Ch 7) Craig noted that in accepting the logical conclusion of EC law supremacy in the *Factortame* case, British judges were mainly bringing their jurisprudence "within political reality". But statements such as these are a far cry from the assertion that fickle national interest calculations directly shape national jurisprudence and ECJ jurisprudence (Garrett (1995); Volcansek (1986)). Such an inference is, however, drawn in the French Report (Ch 2) where Plötner saw a relationship between the changing identification of national interest by the French Government in the mid-1980s and the changing Conseil d'État jurisprudence on EC law supremacy (Ch 2, Report on France, p. 68). Plötner even speculated that certain economic interests could lobby to obtain legal outcomes which reflected their interest, although beyond the insight that interest groups used the legal process to promote their interests there is no evidence that interest group lobbying directly shaped legal interpretation or judicial behaviour in France. The author of the German report also saw changing political enthusiasm for EC integration as explaining in part the legal swings of the Federal Constitutional Court between the *Solange I* (1974), *Solange II* (1986) and *Maastricht* (1993) decisions.

Underpinning the different analyses of how national courts respond to political pressure is a fairly loose conception of how national interest is constituted, and how political pressure influences judicial decisions. Neo-realism as a paradigm conceives of states as unitary actors with given and definable

national interests which are systemicly defined (although how systemic forces translate into national interest is greatly under-specified, making the national interest definitions in most neo-realist work extremely fungible). The national reports did not assume such unitary definitions of national interest, nor did they assume that national interests *vis-à-vis* other international actors were the main force shaping judicial positions. Instead, at different times it was implied that public opinion and domestic political divisions were creating political pressures on national judiciaries. The German Report (Ch 3), for example, noted that public opinion played a role in the Constitutional Court's *Maastricht* decision and the Belgium report argued that the domestic conflict between the Walloons and the Francophones came to be a force influencing national positions on EC law supremacy.[6] But the variables of public opinion and domestic conflict were not examined across time and across a body of cases, so that the appeal to different political arguments was *ad hoc*.

While there are different anecdotal accounts of political forces influencing judicial decisions at different times, there is currently no consistent evidence which supports the neo-realist assertion that national interest or political concerns are shaping judicial behaviour. Indeed variation in national court jurisprudence on EC law is not easily or consistently explainable by political preferences, so that maintaining a neo-realist argument in practice requires very loose and fungible interpretations of national interest. For every action one can find a political rationalisation to "explain" an outcome. But in using an *ad hoc* approach, neo-realist arguments become nothing more than counter-factual re-interpretations of political interests, losing all predictive or explanatory power.

There is also considerable evidence that national politicians were quite upset with national court enforcement of EC law supremacy, and one can find quite a few examples where politicians actually tried to reverse national legal doctrine by political fiat, but failed. An examination of such an attempt reveals limitations to the neo-realist argument. In 1981 French politicians voted overwhelmingly to re-assert a ban on judges practising judicial review. The "Aurillac amendment" was a political reaction to an unwanted legal decision made by the highest French civil court, the Cour de Cassation. In the *Vabre* case, the Cour de Cassation had reversed historic national legal practice and refused to apply a Government law which had been passed in contradiction to existing EC law.[7] The Parliamentary debate surrounding the

[6] These propositions about the influence of public opinion and domestic politics on national judicial positions are not neo-realist *per se*, and in many ways they challenge the narrow internationalist conception of how national positions on international phenomenon emerge. But for our purpose here they can be seen as broadly conceived arguments about how political perceptions of national interest influence judicial positions. Indeed Mary Volcansek folded these numerous domestic political factors into her national interest calculations to explain changes in national judicial positions based on changes in national interests (1986).

[7] *Administration des Douanes* v. *Societe Cafes Jacques Vabre and J. Weigel et Compagnie S..r.l.* Cour de Cassation (France) decision of 24 May 1975, [1975] 2 CMLR 343.

Aurillac amendment made it clear that it was politically unacceptable for a court not to follow the will of Parliament, and that the *Vabre* jurisprudence should be reversed. In a debate, representative M. Aurillac argued that with the *Vabre* jurisprudence "the Cour de Cassation contorted one of the foundations of French law—the prohibition against tribunals getting involved in the exercise of legislative powers". Aurillac suggested an amendment to a law under debate which would re-assert the ban on judges conducting judicial review and send a clear message to the Cour de Cassation. The Minister of Justice agreed with the goal of the amendment, arguing:

> "if the judge takes upon himself the authority to refuse to apply a law under the pretext that he estimates that (the law) was contrary to an international accord, in the case where that law was subsequent to the accord in question, that would imply that the judge is assuming the right to disregard a law, thus scorning the will of the parliament . . . This could clearly not be accepted by the national representation".

It was also made clear that both the Parliament and the Government preferred the doctrinal position of the Conseil d'État as far as the supremacy of EC law over French law was concerned. The Ministry of Justice continued:

> "One could think that the Conseil d'État better respected the provisions of the law of 1790 . . . than the Cour de Cassation . . . The government could not be anything but favourable to the [Auriallac] amendment".[8]

The amendment passed overwhelmingly in the National Assembly (Buffet-Tchakaloff (1984) 343–4).[9] But it died in the Senate because it was seen as being clearly unconstitutional. Not only was the *Vabre* jurisprudence maintained by the Cour de Cassation, but the Conseil Constitutionnel and the Conseil d'État eventually came over to the Cour de Cassation's position.

How can we interpret this failed political attempt to shape judicial behaviour? It has been argued that the failure of politicians to use political tools to overrule ECJ jurisprudence means that politicians at some level support legal integration (Garrett (1995); Garrett and Weingast (1993); Rasmussen (1986)). But support implies an actual preference for a given outcome. Given the vote in the national assembly, and the Government's unconditional support for the amendment, clearly a majority of French politicians preferred the Conseil d'État jurisprudence and did not want the Cour de Cassation to continue accepting the supremacy of EC law. But the French legislative rules, including the requirement that the Senate also pass the amendment, and the likelihood that a Senate decision in favour of the Aurillac amendment would be appealed to the Conseil Constitutionnel, effectively killed the legislative attempts to reverse the Cour de Cassation's jurisprudence. Rather than encouraging national courts to adopt a legal interpretation which the politicians preferred, the failed Aurillac amendment revealed that politicians' threats against the

[8] J.O. Ass. Nat. Deb. 9 October 1980, p. 2644.
[9] J.O. Ass. Nat. Deb. 9 October 1980, pp. 2634–44.

national judiciary were empty and their formidable tools of judicial influence of little consequence. I have focused on one failed political attempt to sanction courts for behaviour they did not like, but there are numerous other examples where politicians failed to reverse unwanted national court and ECJ jurisprudence (indeed the Belgium Report (Ch 1) refers to an event very similar to the Aurillac Amendment).

The neo-realist scholarship relies a great deal on deductive reasoning to support its conclusions, but such reasoning is simply not supported by the evidence on legal integration. It is difficult to construct a consistent positive account of how national interest calculations influence judicial behaviour across cases, and the evidence that politicians have tried and failed to influence national judicial behaviour implies that there is much more autonomy for judges than neo-realist scholarship acknowledges. While there certainly is a great need for scholars to increase the focus on how political actors and political factors influence judicial decisions and legal integration, there is little to imply that focusing on national interest definitions *per se* will increase our understanding of how politics influence the process of legal integration. This points to the need to refine neo-realist hypotheses, and perhaps to focus more systematically on domestic political factors. The national reports raise a host of domestic political factors worth considering, such as public opinion, Parliamentary debates, and regional and inter-group politics. One could also consider how inter-institutional politics such as struggles between Parliaments and executives, as well as party politics, influence legal integration.

Neo-functionalism: self-interest of litigants, judges and legal scholars as the motor of legal integration

Neo-functionalism focuses on the interests of individual legal actors in order to explain judicial behaviour in legal integration. The neo-functionalist explanation claims that the EU legal system has expanded and prospered by creating individual incentives to motivate actors within EU institutions and within national legal systems to promote legal integration. Burley and Mattli argue that the ECJ put into place a structure which allowed the pursuit of self interest to drive the process of legal integration:

> "The Court . . . created . . . opportunities, providing personal incentives for individual litigants, their lawyers, and lower national courts to participate in the construction of the community legal system. In the process, it enhanced its own power and the professional interests of all parties participating directly or indirectly in its business" (Burley and Mattli (1993) 60).

The Court's incentive structure gave national legal actors a "direct stake" in continued legal integration, so that promoting legal integration advanced the financial, prestige or political power of national legal actors: individual

European citizens got new rights and legal tools to promote their own interests through legal integration; lawyers specialising in EC law got more business through the growth and expansion of EC law; legal scholars supported legal integration through favourable doctrinal writings which parenthetically increased the demand for university professors to teach EC law and enhanced individual career prospects within the legal services of the European Union and the ECJ itself; national judges referred cases to the ECJ because it offered them a chance to practice judicial review, a practice involving more interesting legal questions, and a practice which gives national judges more power *vis-à-vis* politicians, and which gives lower court judges the power to conduct the same type of review as higher court judges or constitutional court judges; and the ECJ enhanced its own prestige and authority through its far-reaching decisions. Haas's conception of neo-functionalism implied that actors' identities and loyalties would actually shift through the process of integration and that their interest would be permanently melded with the larger process of integration (Haas (1958); Haas (1961); Haas (1964)). Burley and Mattli do not explicitly go as far, although they don't offer any reason to think that actors might stop seeing an interest in further legal integration, and they do imply that national legal actors pursuing their interests within the EC legal framework will always lead to increasing legal integration.[10]

The main incentive for national courts to embrace EC law was the empowerment it offered them by allowing national judges to conduct judicial review. Some national reports imply that national judges embraced EC law because they gained new powers of judicial review through legal integration. In the French report Plötner claimed that the Cour de Cassation gained the right to control Acts of Parliament through legal integration, offering "exciting new perspectives on the work of France's judicial branch" (Ch 2, Report on France, p. 62). In the United Kingdom Report (Ch 7) Craig argued that the House of Lords gained a new power to attack primary legislation through EC legal integration. In the Belgium Report (Ch 1) Bribosia also argued that judicial review was a new power introduced by EC law supremacy. While these authors assert that national judges have been empowered through EC law, there is an empirical question of how we would know that national judges have been empowered by EC legal integration? In most of the general judicial politics literature, the increased role and influence of national judiciaries is explained by factors not relating to European legal integration—explanations such as the experience with Fascism in the Second World War (Cappelletti (1989)), the corruption investigations in Italy, and legislative politics in France (Stone (1992)). Indeed in the United Kingdom Report Craig argued that while EC law supremacy had

[10] Burley and Mattli argue: "In neo-functionalist terms, the Court created a pro-community constituency of private individuals by giving them a direct stake in the promulgation and implementation of community law. Further, the Court was careful to create a one-way ratchet by permitting individual participation in the system only in a way that would advance community goals" (p. 60).

some impact on the movement of British judges towards conducting judicial review, there was a much larger and ultimately more influential process of judicial consensus change going on in Britain, so that EC legal integration could not be credited with shifting judicial conceptions of national sovereignty so as to permit judicial review (Ch 7, Report on the United Kingdom, p. 215–16).

While empowerment is clearly a factor influencing judicial behaviour, it is not clear that all legal actors see themselves as empowered through EC law or EC legal integration or that all judges aspire to conduct judicial review. Many if not the majority of potential plaintiffs, lawyers and judges choose not to invoke European legal arguments, even though such arguments would arguably advance their interests. And although the French Conseil d'État lacked the power of judicial review of Parliamentary Acts, it nonetheless refused this new power by not embracing the supremacy of EC law for twenty-five years. To the extent that Burley and Mattli are right that actors can promote their interests through the EC legal process, a real question exists as to why many legal actors do not do so.

The insights that legal integration is not about "zero-sum trade-offs" between national judicial authority and ECJ authority (Weiler (1991)), and that numerous legal actors actually gain through legal integration is very important. But it is not the case that legal integration is strictly about mutual empowerment and "win-win" situations. Like all political processes, there are winners and losers in the process and to say that certain actors win is not to explain why the winners win over losers, or why the losers accept their loss. Many high courts have found their supreme influence over national law to have been diminished because of EC law supremacy, and politicians have also been angered by ECJ activism as well as by national court application of ECJ jurisprudence. That some actors gain through legal integration cannot explain why those actors which saw themselves as net losers in the process accepted the outcome of legal integration.

In many respects, the neo-functionalist argument of Burley and Mattli is legalist argument with a theory of interests of legal actors grafted on to it. In its reliance on legal logic and functional spillovers to explain the expansionary motor of legal integration, it suffers from the same problems as the legalist argument: it is unable to explain significant time lags, variation in legal integration within countries and cross-national variation in legal integration. It also cannot explain periodic reverse trends in legal integration, that is when legal integration is not a one-way ratchet of increasing expansion and penetration of EC law into the national legal realm and when national courts refuse to accept ECJ jurisprudence.

Unlike legalist analyses, however, neo-functionalism takes head on the issue of explaining political acquiescence to legal integration. Political acquiescence is explained through the incremental nature of the legal integration which "upgrades common interests" making little steps in integration seem tolerable, and refusing the little steps seem disproportionately severe. Burley and Mattli argue that the technical nature of law provides a "mask" and a "shield"

which limits the ability of politicians to influence legal integration, implying that in most cases the political process does not influence the legal process of integration because it is unable to pierce the shield of law. They acknowledge that in certain circumstances the mask and shield can be pierced by politics, and politicians can use legal terms and political tools to hamper and constrain the process of legal integration. But other than asserting that politicians can influence the process of legal integration Burley and Mattli provide little insight into *when* or *how* this may happen.

These weaknesses aside, neo-functionalism shifts the focus of legal integration to the various national legal actors involved in the process of legal integration, showing that the mutual pursuit of self interest fundamentally contributed to the process of legal integration. While underspecified in its account of why national actors pursuing self interest facilitated legal integration, neo-functionalist analysis represents a significant advance in the debate over legal integration.

Inter-court competition explanations: bureaucratic politics as a motor of legal integration

The author's own work has been developing an "inter-court competition" explanation of when and why judges participate in legal integration. This explanation is really a version of a bureaucratic politics explanation, drawing on the insight that courts—like all bureaucracies—have their own interests which they pursue within the constraints imposed by politicians and legal rules. The inter-court competition explanation claims that different courts have different interests *vis-à-vis* EC law, and that national courts use EC law in bureaucratic struggles between levels of the judiciary and between the judiciary and political bodies, thereby inadvertently facilitating the process of legal integration. This explanation differs from the neo-functionalist explanation in that national judges do not have a stake in promoting legal integration, so that their behaviour fluctuates between acting in ways which facilitate legal integration and acting in ways which undermine legal integration. Examining courts as bureaucracies and sub-bureaucracies with their own interests and bases of institutional support can offer considerable insight into why some courts more readily accepted EC law supremacy, the conditions under which certain courts will see an interest in further legal integration, and the conditions under which—and thus the extent to which—politicians will be able to control legal integration. Thus looking at courts as bureaucracies is also a good way to think about the origins of the current system as well as the limits on legal integration.

Like Burley and Mattli (1993) and Weiler (1991), the inter-court competition argument starts from the insight that some courts gain from legal integration, but it identifies different, indeed competing interests for lower and higher courts

with respect to legal integration. It is the difference in lower and higher court interests which provides a motor for legal integration to proceed. Lower courts can use EC law to get to legal outcomes which they prefer, either for policy or legal reasons, by using an appeal to the ECJ to challenge established jurisprudence and to circumvent higher court jurisprudence. Lower courts can also magnify the influence of their jurisprudence by making references to the ECJ, eliciting journal articles on decisions which otherwise would not be reported and making their legal decision binding on other courts. But lower courts do not always see appealing to the ECJ as in their interest. As I have argued elsewhere, the ECJ is like a second parent in a battle where parental permission wards off a potential sanction for misbehaviour—if the lower court does not like what it thinks "Mom" (the higher court) will say, it can go ask "Dad" (the ECJ) to see if it will get a more pleasing answer. Having "Dad's" approval increases the likelihood that its actions will not be challenged. If the lower court does not think it will like what "Dad" will say, it simply does not ask. Lower courts can also play high courts and the ECJ off against each other to influence legal development in a direction they prefer (Alter (1996a)).

Higher courts, on the other hand, have an interest in thwarting the expansion and penetration of EC law into the national legal order. Having supreme influence over both the development of national law and the execution of public policy in the national realm, high courts are threatened by the existence of the European Court as the highest court on questions of European law, and by the principle of EC law supremacy since the supremacy doctrine gave the European Court jurisdictional authority over national legal interpretation which would normally be the exclusive domain of national high courts. In general, high courts have a preference to limit the doctrinal and substantive expansion of European law so as to limit the areas where the ECJ will become a higher court and they will be subjugated. Thus high courts refer relatively few questions of interpretation to the European Court, and virtually no questions which could allow the European Court to expand the reach of European law into their own sphere of jurisdictional authority. High courts protest and challenge ECJ doctrine when it infringes on their own jurisdictional authority and hence implies a *de facto* subjugation to the ECJ on important aspects of national law, and when ECJ doctrine would undermine the influence of the national court within the national legal and political system. High courts also try to limit lower court references to the ECJ when these references will allow the ECJ to make a ruling with which the higher court disagrees.[11] So if an EC

[11] For example the Italian Constitutional Court ruled a reference to the ECJ regarding the supremacy of EC law to be invalid (Bermann et al. (1993) 193). The Bundesfinanzhof tried to limit the direct effect of EC law regarding turnover equalization taxes (Alter (1996b)). The Bundesfinanzhof and the Conseil d'État both overruled references to the ECJ based on the direct effect of directives (BFH Kloppenburg I V B 51/80, decision of 16. July 1981; *Europarecht* 1981, p. 442, [1982] 1 CMLR 527–31; *Minister of Interior* v. *Daniel Cohn-Bendit*, French Conseil d'État, 22 December 1978, [1980] CMLR 545–62. This strategy is limited in that not all decisions to make references are appealed to higher courts, so that references can and do slip through.

legal doctrine specifically subjugates a high court to the ECJ, the high court often refuses the doctrine and tries to block other national courts from incorporating the doctrine into national legal practice.[12]

These static judicial preferences create a dynamic propelling legal integration forward allowing lower courts, in the end, to cajole higher courts to accept the supremacy of EC law over national law. Briefly, the argument runs that lower courts made references to the ECJ to challenge existing jurisprudence or to challenge high court decisions. Because of the actions of lower courts, EC law expanded and EC law came to influence national jurisprudence. As the legal questions were appealed up the national judicial hierarchies, higher courts were put in the position of either quashing ECJ doctrine or accepting it. High courts freely accepted ECJ jurisprudence so far as it did not encroach on their own authority. When the ECJ encroached too far in their own jurisdictional authority, high courts rejected the aspects of ECJ doctrine which undermined their autonomy. But the actions of the lower courts came to actually shift the national legal context from under the high courts. Lower courts eventually ignored higher court attempts to limit the reach of EC law, making references to the ECJ anyway and applying EC law. Those high courts which did not find their influence diminished by certain aspects of ECJ doctrine also accepted this jurisprudence. At a certain point it became clear that obstructing higher courts had failed to block the expansion and application of EC law within the national legal system, so that continued opposition created legal inconsistency and limited the high court's ability to influence legal interpretation at all. Because so much national law touched on EC law, and so many lower courts were following the ECJ rather than their own high courts, opposition to ECJ jurisprudence lost all influence and effectiveness. National high courts repositioned themselves to the new reality, reversing their jurisprudence which challenged EC law supremacy and adjusting national constitutional doctrine to make it compatible with enforcing EC law over national law. But they did not accept the ECJ's legal reasoning, making the continued enforcement of EC law supremacy a national constitutional issue under the

[12] While lower courts and higher courts in general have divergent interests with respect to EC legal integration, the classificatory distinction between "low" and "high" courts should not be drawn too starkly. Not all high courts share the same interests with respect to a given ECJ doctrine, and an ECJ doctrine which threatens one high court may not threaten another—it depends on the jurisdictional authority of each high court. In addition, there are some issues where an ECJ decision helps bolster the influence of national high courts; if a high court wants to challenge the validity of an EC law, a favourable decision of the ECJ bolsters their position with respect to EC organs and national governments. If high courts want to assert new powers within the national legal system, a statement by the ECJ that these new powers are consistent with EC law can bolster their position with respect to political bodies. Finally, if a high court does not want to be challenged by lower courts, a willingness to refer questions which clearly fall under the ECJ's jurisdictional authority can convince lower courts to rely on the court of last instance to refer relevant questions to the European Court, passing up opportunities to make a reference themselves. To bring back the analogy used earlier, such a tactic convinces the lower court that "Mom" and "Dad" will decide together so that there is no advantage to making the extra effort to appeal to "Dad" first.

control of national courts, and leaving open avenues through which they could refuse the authority of the ECJ in the future without contradicting their jurisprudence on EC law supremacy (Alter (1996b)).

The ECJ played an important role in the process of inter-court competition, by being a willing participant in challenges to traditional national jurisprudence and higher courts, even authorising and telling lower courts to ignore the jurisprudence of their higher courts. The ECJ also co-ordinated lower courts through its jurisprudence so that legal integration proceeded similarly in all national contexts. Through the bureaucratic struggles within national judiciaries, national courts created a basis of political power for the ECJ (Alter (1996a)), but national courts also created significant limits on the process of legal integration. The author's dissertation gives evidence to support this argument, explaining how competitive struggles between national courts, and between national courts and the ECJ shaped the process of legal integration in France and Germany. In this chapter, the focus will be only on the "evidence" made in the national reports to support this argument about the interests of national courts in the process of legal integration and about how competition between courts shaped judicial positions regarding EC law.

National reports note many examples where competition between courts was shaping judicial behaviour. In the German report, Kokott notes that national judicial behaviour is significantly influenced by the competitive position of national courts *vis-à-vis* each other and *vis-à-vis* the ECJ. She explains one Federal Tax Court decision challenging ECJ jurisprudence saying that "The Tax Court did not want to be turned into a mere assistant to the ECJ but tried to reserve its own independence through exclusive competences for itself" (Ch 3, Report on Germany, p. 117). Kokott also argued that the Federal Labour Court's recent challenge to ECJ jurisprudence "can be seen as an attempt by the Labour Court to establish its own 'co-operative relationship' with the ECJ . . . reflect[ing] an increased sense of self-consciousness by the Labour court, which does not see itself in an inferior position *vis-à-vis* the ECJ and which asserts its own right and obligation to ensure a coherent national legal system" (Ch 3, Report on Germany, p. 113).

In the French report, Plötner argued that the Conseil d'État's intransigence to EC law supremacy was shaped by its own interests, which in turn were derived from the Conseil d'État's institutional context within the French legal and political system. He argued that:

> "[u]p to 1958 the [Conseil d'État] had the monopoly of interpreting public and constitutional law in France. Furthermore it participated in the elaboration of all legal norms. This had placed the Conseil d'État in the very core of the French political system. From 1958 onwards, this predominance was under attack: the first assault consisted of the creation of the Conseil Constitutionnel . . . The [Conseil d'État]'s position was further threatened when it finally became obvious in Paris that there was court in Luxembourg which actually had the competence to intervene in what seemed to be French domestic affairs . . . This might have led its members to con-

> sider supremacy and direct effect as another threat to the *status quo* which for them was still, after all, quite favourable. Even if full enforcement of Community law was unlikely to substantially endanger their position, the awareness of a certain precariousness of their situation led the corps as such to defend their '*acquis*' in quite a static manner" (Ch 2, Report on France, p. 57).

Comparing the Cour de Cassation's institutional position *vis-à-vis* that of the Conseil d'État, Plötner argued that the Cour de Cassation has an inferiority complex from its training and background. "Given its feeling of being second to the [Conseil d'État], the Community level offered itself as an instrument enabling the judicial branch not only to accomplish its task even better but also to gain an advantage over the Conseil" (Ch 2, Report on France, p. 60).

In the Belgium Report (Ch 1), Bribosia was perhaps the most blunt of all. He argued that the latest changes on EC law supremacy doctrine in Belgium comes from a struggle between the three highest courts over their jurisdictional authority. The Cour de Cassation is jealous of the new powers of the Conseil d'État and the Cour d'Arbitrage, and wants to ensure that it can review national law in light of international law, and the Cour d'Arbitrage defends the supremacy of the Constitution over international law in order to protect its own authority (Ch 1, Report on Belgium, p. 34).

The Italian Report (Ch 5) discusses the varying lower court support for legal integration, and how lower courts pushed the Constitutional Court to change its opposition to EC law supremacy. Laderchi writes:

> "Lower courts in a number of cases cast doubt on the validity of the Community Treaties. Sometimes those doubts were only raised in order to present the Constitutional Court with some of the consequences of its previous statements and consequently to make the case more difficult for the Constitutional Court and oblige it to accept certain principles of Community law. In other cases lower courts seemed eager to exacerbate the conflict between the Court in Rome and the one in Luxembourg and require the Constitutional Court to defend certain national principles against the incoming tide of Community law" (Ch 5, Report on Italy, p. 149).

Finally, Claes and De Witte hypothesised that if there were a constitutional court in the Netherlands, Dutch legal doctrine on EC law supremacy might be different (Ch 6, Report on the Netherlands, p. 190). This observation lends credence to a point made at the workshop discussions in Florence—perhaps the largest determining factor on whether there exists national doctrine which challenges the ECJ's authority to expand its own jurisdictional authority at will (*Kompetenz-Kompetenz*) was whether or not there was a constitutional court in that country which was seeking to protect national constitutional guarantees and its own judicial independence.

The inter-court competition explanation offers a parsimonious explanation of national judicial behaviour in the process of legal integration, which can apply across courts and across borders. The explanation can also account for

why the actions of a few lower courts in the national context led to a fundamental change in the entire national legal context and a shift in national court jurisprudence *vis-à-vis* EC law throughout the national judiciary. By itself, however, it does not explain how politicians influence the process. I supplement it with an argument about the conditions under which politicians will influence judicial behaviour. This develops the argument alluded to earlier in discussion of the neo-realist explanation, and shows how institutional rules kept national politicians from being able credibly to threaten either national courts or the ECJ into obedience.[13] Each failure to sanction the ECJ or national courts for unwanted judicial activism only exposed political impotence, giving the ECJ and the national courts a "green light" to proceed with legal integration. But the institutional barriers are not insurmountable, and I develop an explanation of the conditions under which politicians have greater influence over judicial behaviour in legal integration, (Alter (1998)).

It should be pointed out that the inter-court competition draws much from the insights of the other explanations of legal integration. But while it shares certain aspects in common with alternative explanations, there are important differences. Like the neo-functionalist explanation, this explanation argues that the EC legal system empowers some legal actors which helps explain why they act in ways which promote legal integration. But this empowerment is more limited than in the neo-functionalist explanation, and does not always work in the direction of furthering legal integration. This argument also sees bureaucratic politics as significantly influencing where, how and when EC law expands into the national legal realm. Because of these differences, the inter-court competition argument leads to very different conclusions about how legal integration works and how politics influences the process of legal integration. Spillover and legal logic is not seen as driving legal expansion, rather inter-court competition is seen as pushing legal expansion. The explanation also sees a real divergence between ECJ and national court interests. The ECJ is significantly constrained by national court willingness to apply its jurisprudence so that legal integration is by no means an ever-expanding process. The disconnection between the process of legal integration and the process of political integration also means that politicians will have limited influence and control over the expansion and penetration of EC law into the national realm.

CONCLUSION: LEGAL INTEGRATION IN A COMPARATIVE POLITICAL PERSPECTIVE

This chapter has sought to bring a theoretical focus to the task of explaining national court behaviour in legal integration, and thus to explaining doctrinal

[13] See Alter (1998).

change within national legal systems. While not claiming that judicial behaviour can be encapsulated by a single factor, a theoretical approach puts a premium on identifying the most important and generalisable factors shaping national judicial behaviour *vis-à-vis* EC law across cases. For the legalist explanation, the most important factor shaping judicial behaviour is legal logic and legal reasoning. For neo-realism, the most important factor shaping judicial behaviour is national interest, although how national interest is defined or measured is underspecified. For neo-functionalism and the inter-court competition explanations, the most important factors shaping judicial behaviour are the interests of the judges and the courts themselves, but each of the explanations defines court interests differently. To identify which factors are most important is not to say that other factors do not matter, and indeed if anything this analysis of alternative explanations of legal integration revealed that many of the narrow forms of the different explanations must be rejected and that none of the explanations can adequately explain all judicial behaviour on its own.

While all of the theories of legal integration examined here had significant weaknesses, identifying the most important factors is still necessary if we want to understand larger and more general issues raised by legal integration. By identifying specific and generalisable forces shaping the process of legal integration in all Member States, we can better understand the limitations of legal integration, as well as the possibility of generalising the experience of European legal integration to other international contexts. Furthermore, only by identifying the conditions which allowed legal integration to proceed in the first thirty-five years of legal integration, can we understand why legal integration is perhaps more polemic these days.

Two of the largest questions raised by legal integration today are: can legal integration proceed in light of the apparent lack of political support for ECJ activism and can the experience of legal integration be generalised to other international contexts? By way of conclusion, I would like to examine what the national reports and the different explanations of legal integration imply about pre-conditions or permissive conditions which facilitated legal integration in the first thirty-five years.

Political support as a pre-condition for continued legal integration?

Legal integration is necessarily an outcome of a political process. National governments drafted the initial Treaties which put the Court in place and which created rules to guide the process of economic integration. National governments also play a decisive role in passing legislation and co-ordinating the implementation of EC law in the national realm. At the same time, there are some aspects of legal integration which can proceed without positive political action, indeed at times despite the desire of national governments. There

has been an ongoing debate over whether or not continued positive political support is a necessary pre-condition for legal integration to proceed once the legal rules are put in place (Burley and Mattli (1993); Garrett (1992); Garrett (1995); Garrett and Weingast (1993); Slaughter (1995)).

The national reports note that judges are sensitive to political concerns in making judicial decisions, but this does not means that politicians must support judicial actions in order for legal integration to proceed. This chapter examined the experience of France in the Aurillac Amendment, and the Belgium Report (Ch 1) also discussed Parliamentary attempts to influence legal interpretation. In both France and in Belgium political amendments sanctioning national courts passed with overwhelming majorities in their assemblies. The fact that such attempts were made shows that there was a lack of political support for national courts controlling the compatibility of national law with international law. The fact that these attempts failed shows that national courts had significant room for manoeuvre, independent of the wishes or interests of political bodies.

At the EC level there have also been attempts by politicians to sanction the ECJ for its activism. Hjalte Rasmussen's work has noted quite a few cases—dating back to 1968—of political attacks against the Court in the Council, and failed political attempts to sanction the ECJ (Rasmussen (1986)). Politicians clearly are not helpless to influence legal integration, but the mere existence of tools of influence does not mean that politicians control judicial action (Alter (1998)). The failure of these political efforts to stem the legal integration tide implies that positive political support is not a necessary condition for legal integration to proceed. The question which remains is whether the current period is fundamentally different from previous periods of legal integration, so that a lack of political support today would have a different implication than a lack of political support twenty years ago.

It is also possible that while judges may not need political support to issue controversial decisions, they may need political support in order to have their jurisprudence transformed into policy. Judicial decisions apply to individual cases only, and while there is no hint that political bodies or administrators have ignored judicial decisions regarding EC law, there is also limited evidence that politicians and administrators are applying individual decisions beyond specific legal cases. As I have argued elsewhere, judicial decisions can not be assumed to create policy outcomes (Alter (1994)). Thus there is a need to investigate further the extent to which judicial decisions need political support to make the jurisprudence part of national policy, and when judicial decisions come to influence national policy.

Preliminary ruling system and the ECJ as a pre-condition for legal integration?

A new debate is bubbling up over whether legal integration in Europe is generalisable to other international contexts. Anne-Marie Slaughter and other scholars of liberal international relations theory have hypothesised about institutional and ideological conditions found in liberal democracies which could facilitate the creation of a transnational legal consensus on principles of international law, in contexts much broader than that of economic integration and of the European Union (Slaughter (1995)). Such approaches raise directly the question of what conditions in Europe made legal integration possible, or perhaps more probable.

The discussion of the *legalist* explanation, included discussion of the legal accommodation created through a dialogue between the ECJ and other Member States. The European legal system has mechanisms which greatly facilitate such a dialogue. The preliminary ruling procedure allows for national courts and the ECJ to interact directly with each other on specific legal issues. Furthermore, the European Court is an important co-ordinator and organising centre for a cross-national dialogue, allowing for controlled exchanges on specific and concrete issues as opposed to "free-for-alls" on an unlimited range of issues. It is unclear if the institutional mechanisms in the EC legal system and the existence of an ECJ are merely permissive conditions facilitating legal integration in Europe, or if they are actually pre-conditions for the increased expansion and penetration of international law into national political systems.

The inter-court competition explanation suggests that the institutional mechanisms of the EC legal system might indeed be a pre-condition for legal integration. European higher courts did not necessarily have an interest in promoting international legal integration, but the preliminary ruling system allowed lower courts to invoke the authoritative ECJ in their competitive battles with each other. References were often sent to the ECJ because the ECJ could lend credibility to the legal interpretations of national courts. Lower courts could use the preliminary ruling system to circumvent the higher courts because the ECJ gave them a legally defensible basis to do so. With ECJ support, lower court actions were able to shift the domestic political context so that opposition to ECJ jurisprudence no longer served the interests of higher courts, and so that higher courts gained an incentive to participate in the process of legal integration (though not necessarily through references to the ECJ). If there were not a preliminary ruling system, it is probable that lower courts would never have ventured into the uncharted legal territory as far as they did. Even if they had ventured, without the preliminary ruling mechanism, it is unlikely that lower court voyeurs would have been so successful in permeating the larger national—let alone transnational—legal context. Thus

lower court access to the ECJ might be an important pre-condition for significant expansion of ECJ doctrine, and for the permeation of this law throughout national legal systems. The absence of a mechanism to allow for inter-court competition in the international context, and the absence of the ECJ to confer authority and to co-ordinate this inter-court competition, might undermine if not preclude the emergence of a significant transnational international consensus on issues of international law.

Other possible mechanisms to facilitate transnational legal integration exist, however. Joseph Weiler has suggested that the acceptance of legal norms by courts in one country can create a sort of peer pressure on other courts which extends over boarders (Weiler (1994)). National reports noted examples of cross-national judicial influence, where national advocates or judges noted their international isolation as one of the reasons why they should change their jurisprudence. However, it is clear that some national high courts maintained opposition to ECJ jurisprudence for many years despite the acceptance of ECJ jurisprudence by courts in other countries, raising the question of how much cross-national peer pressure was a factor in national doctrinal change.

At the same time, if it is true that legal doctrine develops and changes through dialogues, the increasing dialogues of legal communities (including scholars, lawyers and judges) across legal borders could facilitate doctrinal change within different national settings. Slaughter's work implies that this transnational dialogue can facilitate a convergence of legal interpretation across borders, at least in liberal democratic countries. Increasingly, there are exchanges between high courts of democratic countries, and the process of integration, as well as the computer and information revolution, is making it easier to learn about the jurisprudence of courts in other countries on certain legal issues. Thus one could argue that other mechanisms of dialogue are being developed. But can these mechanisms fill the same dialogue role as the preliminary ruling system in the EC legal system? It is often joked that putting more lawyers in a room only creates more disagreement—can a transnational legal consensus on issues of international law actually emerge? How stable would such a consensus be? Where and under what conditions might we expect to see international legal consensus fray? This last question raises a real issue in the EC context, highlighted by the different national reports: does it matter that national courts continue to have divergent legal bases for EC law supremacy?

The success of legal integration within the international context of the European Union raises many questions for scholars more generally interested in international institutions and international relations. This chapter has suggested that the key to understanding legal integration in Europe is explaining the actions of national courts. It examined alternative explanations of national judicial behaviour in legal integration, and raised questions about the need of political support to facilitate legal integration and the generalisability of the European experience in legal integration to other international contexts.

While the chapter did not venture much beyond a review of the dominant literature on legal integration, it suggested avenues of research which could advance the theoretical debate and enhance our understanding of the legal and political forces shaping the application and adherence to European law within the European Member States.

REFERENCES

ABRAHAM, R. (1989), *Droit international, droit communautaire et droit français, Le Politique, L'Economique, Le Social* (Paris: Hachette).

ALTER, K. and AITSAHALIA, M. (1994), "Judicial Politics in the European Community: European Integration and the pathbreaking Cassis de Dijon decision." *Comparative Political Studies* (24), 535–61.

ALTER, K. (1996a), "The European Court's Political Power" 19 *West European Politics* (3), 458–87.

——(1996b), "The Making of a Rule of Law: The European Court and the National Judiciaries" (Dissertation in Political Science, Massachusetts Institute of Technology).

——(1998), "Who are the Masters of the Treaty?: European Governments and the European Court of Justice", *International Organization* (Winter).

BEBR, G. (1981), *Development of Judicial Control of the European Communities* (The Hague: Martinus Nijhoff Publishers).

BERMANN, G., GOEBEL, R., DAVEY, W. and FOX, E. (1993), *Cases and Materials on European Community Law, American Casebook Series* (St. Paul: West Publishing Co.).

BUFFET-TCHAKALOFF, M.-F. (1984), *La France devant la cour de justice des communautés européennes* (Aix-en-Provence: Presses universitaires d'Aix-Marseille).

BURLEY, A.-M. and MATTLI, W. (1993), "Europe Before the Court", 47 *International Organization*(1), 41–76.

CAPPELLETTI, M. (1989), *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press).

——and GOLAY, D. (1986), "The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration" in *Methods, Tools and Institutions: Political Organs, Integration Techniques and Judicial Process*, M. Cappelletti, M. Seccombe and J. Weiler (eds) (Berlin: Walter de Gruyter), 261–348

——SECCOMBE, M. and WEILER, J. (1986), "Integration Through Law: Europe and the American Federal Experience—A General Introduction" in *Integration Through Law: Europe and the American Federal Experience Book 1*, M. Cappelletti, M. Seccombe and J. Weiler (eds) (Berlin: Walter de Gruyter), 3–68

GARRETT, G. (1992), "The European Community's Internal Market", 46 *International Organization* (2), 533–60.

——(1995), "The Politics of Legal Integration in the European Union", 49 *International Organization* (1), 171–81.

——and WEINGAST, B. (1993), "Ideas, Interests and Institutions: Constructing the ECs Internal Market", in *Ideas and Foreign Policy*, J. Goldstein and R. Keohane (eds) (Ithaca: Cornell University Press), 173–206.

HAAS, E. (1958), *The Uniting of Europe* (Palo Alto: Stanford University Press).

HAAS, E. (1961), "International Integration: The European and the Universal Process", 15 *International Organization* (Summer), 366–92.

—— (1964), *Beyond the Nation-State: Functionalism and International Organization* (Stanford CA: Stanford University Press).

LECOURT, R. (1991), "Quel Eut été le Droit des Communauts sans les arrêt de 1963 et 1964?" in *Mélanges en Hommage Jean Boulouis: L'Europe et le Droit* (Paris: Edition Dalloz), 349–61.

MAHER, I. (1994), *The Common Law Courts as Community Courts* (paper presented at the 2nd ECSA World Conference, May 1994, Brussels).

MANCINI, F. (1989), "The Making of a Constitution for Europe", XXIV *Common Market Law Review* 595–614.

——and KEELING, D. (1992), "From CILFIT to ERT: The Constitutional Challenge Facing the European Court" 11 *Yearbook of European Law* 1–13.

MANN, C. J. (1972), *The Function of Judicial Decision in European Economic Integration* (The Hague: Martinus Nijhoff Press).

MEIER, G. (1994), "Der Streit um die Umsatzausgleichsteuer aus integrationspolitischer Sicht", *Recht der Internationalen Wirtschaft* 3/94.

MORRIS, P. E., and David, P. W. (1987), "Directives, Direct Effect and the European Court: The Triumph of Pragmatism" *Business Law Review* (April, May) 116–18, 135–6.

PESCATORE, P. (1970), "L'attitude des juridictions nationales à l'égard du problème des effets direct du droit communautaire", *Revue trimestrielle de droit européen* (2), 296–302.

RASMUSSEN, H. (1984), "The European Court's Acte Clair Strategy in C.I.L.I.T. or Acte Clair, of Course! But what does it Mean?" *European Law Review* 242–59.

——(1986), *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff Publishers).

SHAPIRO, M. (1980), "Comparative Law and Comparative Politics", *Southern California Law Review* 53.

SLAUGHTER, A.-M. (1995), "International Law in a World of Liberal States", *European Journal of International Law* 6.

——and MATTLI, W. (1995), "Law and politics in the European Union: a reply to Garrett", 49 *International Organization* (1), 183–90.

STONE, A. (1992), *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (New York: Oxford University Press).

TOMUSCHAT, C. (1989), "Les rapports entre le droit communautaire et le droit interne allemand dans la jurisprudence récente de la court constitutionnelle allemande", *Cahiers de droit européen* 163–78.

VEDEL, G. (1987), *L'attitude des jurisdictions françaises envers les traités européens* (Vol. Europa-Institut der Universitt des Saarlands).

VOLCANSEK, M. (1986), *Judicial Politics in Europe* (Vol. 7, *American University Studies Series X Political Science*, New York: Peter Lang Publishers).

WEILER, J. (1991), "The Transformation of Europe" 100 *Yale Law Journal* 2403–83.

——(1994), "A Quiet Revolution—The European Court of Justice and its Interlocutors", 26 *Comparative Political Studies* (4), 510–34.