Fritz W. Scharpf

Community and Autonomy

Institutions, Policies and Legitimacy in Multilevel Europe

Max Planck Institute for the Study of Societies

campus

Contents

Introduction
Community and Autonomy in the European Union

The essays in this volume record a quarter-century of reflections on the multilevel European polity and its impact on the effectiveness and legitimacy of democratic government in Europe. Re-reading them in the order in which they were published, I find it interesting to see how themes that were mentioned as an aside early on evolved over time, and how the overall view of the institutional structure and its empirical and normative implications has become progressively wider and more complex, even though the individual articles focus on a relatively narrow range of specific issues. Thus my present map of the overall terrain would include

– a view of policy making at the European level that distinguishes between its "political" and "non-political" modes and that focuses on the specific problem-solving capabilities and legitimacy conditions of each of these modes. It would also include
– a view of the impact of European integration on the problem-solving capacity, democratic legitimacy and the socioeconomic orders of EU member states, and, finally, it would include
– a view of the mechanisms that may (or may not) adjust the balance between the equally legitimate concerns of European integration and of democratic self-determination in EU member states.

In this introduction, I will roughly follow the sequence in which I came to pay attention to these themes.

Problem-solving Effectiveness

My first contribution, and one of my most cited articles, focuses entirely on what I would now call the "political mode" of EU policy making, and it presents a very skeptical view of the Community's problem-solving capacity. Though published in 1988, it was written in 1983/84 (i.e., before the adoption of the Single-Market program), and it compares the effects of intergovernmental bargain-

ing on policy outcomes in German federalism and in the European Community. In Germany, we had explained the blockades and suboptimal policy outcomes (which our policy studies had identified in certain fields) by the dependence of national programs on the (nearly) unanimous agreement of *Länder* governments. Taking the state of the Common Agricultural Policy as an example, the article suggested that similar institutional conditions would also create a "joint-decision trap" (JDT) at the European level. With the benefit of hindsight (cf. Chapter 10), it was easy to show that the basic explanatory model (which anticipated George Tsebelis' [2002] theory of "Veto Players") remains valid wherever its assumed institutional conditions are in force. But the popularity of the article on the citation index owes probably even more to the fact that it was also easy to show that these conditions do not exist everywhere, and that even where they exist, they will not always generate policy blockades or compromises on the lowest common denominator.

Legislative and Judicial Policy Making

In my subsequent work (beginning in Chapters 2 and 3, and fully developed in Chapter 7), I have clarified the domain and the limits of the JDT model by distinguishing between the "political" and the "non-political" modes of policy making at the European level. Political modes are defined by the fact that member-state governments retain significant veto powers. This is not only true of purely "intergovernmental" negotiations over Treaty revisions and unanimous policy choices, but also of European legislation in the "Community Mode"—which requires an initiative of the Commission and a majority in the European Parliament. But since the agreement of at least a qualified majority of member-state governments in the Council of Ministers remains necessary in all cases, the constellation continues to fit the analytical category of a "joint-decision system" (Scharpf 1997: 143–145; Chapter 7 in this volume). In other words, European legislation in the "political mode" does depend on very broad agreement among a wide variety of veto actors—and hence the mechanisms suggested by the JDT model may apply.

This is not so where European policy choices can be adopted in the "non-political mode" by supranational agencies. Within specific policy domains, the European Central Bank (ECB), the European Commission and the European Court of Justice (ECJ) have the power to act without the involvement of national governments (or of the European Parliament, for that matter). For most purposes, moreover, these agencies can be modeled as a unitary actor (rather

than as a constellation of internal veto players). Within their fields of competence, in other words, the institutional preconditions of the JDT model do not apply—and hence there will be policy areas where the European capacity for effective action is not impeded by the mechanisms specified in the first article.

Thus the ECB has full competence over monetary policy for the Euro area, and it is more completely shielded from political directives or interference than any national central bank (Articles 105, 108 ECT). The same is true of the European Commission when it is defining and applying competition rules for private companies and public enterprises and when it is controlling state aids that might distort market competition (Articles 81–89 ECT). But while the policy areas and policy goals that are to be served by these mandates are reasonably well specified in Treaty provisions adopted by intergovernmental agreement, there are no similar substantive purposes circumscribing the Commission's power to initiate Treaty infringement proceedings against a member state (Article 226 ECT), let alone the Court's power to interpret and apply Community law (Articles 220–234 ECT). Both of the non-political powers have been used to massively undermine the position of member states.

Since the power to apply implies a power to interpret the law and thus to define the domain of its application, the normative dividing line between legitimate interpretation and illegitimate judicial legislation is difficult to define even in national polities. But there, the unquestioned normative priority of democratically legitimated rule-making over judicial rule interpretation is matched in practice by the ability of parliamentary majorities to correct judicial decisions that misconstrue the legislative intent. And even in countries where the judiciary may also review the constitutionality of legislation, its choices are politically constrained by intense public debate, and they may generally be corrected through qualified majorities. In other words, judicial law-making occurs in the shadow of democratically legitimated political authority. In the relationship between the European Union and its member states, by contrast, ECJ decisions based on an interpretation of the Treaty can only be corrected by the unanimous adoption of a Treaty amendment that has to be ratified in all twenty-seven member states, and attempts to correct the interpretation of directives and regulations are impeded by all the obstacles implied by the JDT. In other words, the potential range of politically uncontrolled judicial legislation is far wider in the EU than it is in any national constitutional democracy (Chapters 3, 4 and 7).

The foundations of this awesome power of the judiciary were already laid by two famous ECJ decisions in the early 1960s that postulated the direct effect of European law and its supremacy over all law of the member states. Their policy-making effectiveness, however, did not become manifest before the end of the 1970s. When harmonization directives were blocked in the Council,

judicial authority was able to simply disallow national regulations by defining them as non-tariff barriers that interfered with the economic liberties of importers and exporters. While the effectiveness and the normative ambiguities of this "integration through law" were soon recognized by politically sensitive students of European law (Weiler 1982; Cappelletti/Seccombe/Weiler 1985), many political scientists continued to focus exclusively on political action on the European level and ignored the power of judge-made law to constrain and selectively empower and shape political choices at the national and European levels (Chapters 12, 13).

Negative and Positive Integration

In my own work, the effectiveness of judicial policy making first came into view when I reflected on the upsurge of European liberalization directives under the 1992 internal-market program (which to my shame had not been anticipated in the JDT article). What struck me now was the considerable difference between areas where European policies seemed to be surprisingly effective and others where the low expectations derived from the original JDT model still seemed to be confirmed (Chapter 3). My first attempt to parse these observations relied on a distinction, introduced in economic theory in the early 1960s, between "negative integration," defined as the removal of national obstacles to trade, and "positive integration" creating a common European regulatory regime. Since the former appeared generally more effective than the latter, I found it important to note that it could also be achieved by judicial action, whereas positive integration would necessarily depend on European legislation.

By itself, however, that distinction did not account for all of the variance since there was also a considerable body of common European regulations. So in order to deal with differences in the domain of positive integration I resorted to a second distinction, between "product" and "process regulations," which I had borrowed from the literature on environmental law. The underlying argument assumes that international free-trade law would generally tolerate national regulations that excluded harmful products, but would not accept regulations of production processes as grounds for the exclusion of imports. And even though this legal distinction would, by itself, only affect the reach of negative integration, it would also have important secondary effects on the bargaining over positive integration. If imports could be required to comply with national product regulations, differing standards would still constitute barriers to trade. Presumably, therefore, all member states shared an interest in harmonization,