

Towards a Common Immigration Policy for the European Union: The Role of the European Court of Justice

Kristina Grbich

Department of International Relations and European Studies
Central European University

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Supervisor: Marie-Pierre Granger

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Abstract

The question on which this paper sheds a small ray of light concerns the role of the ECJ in influencing the development of a common EU immigration policy. More specifically, this research seeks to understand the extent to which ECJ decisions that deviate from the status quo (previous case law) regarding Union citizenship, free movement, and family reunification have an effect on the development of a common EU immigration policy. Using process tracing, this research focuses on the controversial ECJ decisions in the *Akrich* and *Metock* cases, demonstrating a severe challenge to the status quo of the existing case law. Ultimately, this research looks for evidence of policy change as a means of coping with changes in the status quo at the member state and EU level.

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Introduction

On March 6, 2012, former French president Nicolas Sarkozy said in a televised campaign speech that France has “too many immigrants”, and that it would be best to reduce the number of immigrants received by half.¹ Though Sarkozy’s campaign for re-election in 2012 proved unsuccessful, his subsequent message to the European Union (EU) expressing the desire for stricter border controls and access to EU territory is indicative of the belief that France and Europe would stand to gain from greater restrictions on immigration from outside of the EU and Europe.² While Sarkozy’s campaign statements are not necessarily representative of the rest of France (as evidenced by his recent defeat by François Hollande) and the EU as a whole, his words reflect a concern regarding immigration in the EU that cannot be dismissed as negligible. The push for a more comprehensive (not necessarily restrictive as Sarkozy suggested) EU immigration policy long preceded former President Sarkozy’s remarks. The Commission’s 2000 communication to the Council and European Parliament (EP) first laid an official foundation for an EU/common Community Immigration policy drawn from the European Council’s meeting in Tampere in October of 1999.³ According to the Commission, a common EU migration policy, “built upon solidarity and responsibility” will help the EU to seize the opportunities and manage the challenges that come with greater mobility.⁴ A common immigration policy as proposed by the Commission, first in their 2000 communication and in subsequent communications and proposals to the Council and EP seeks to address these challenges and opportunities under the over-arching umbrella of further promoting European integration.

The existing legislation regarding immigration-related issues, such as the Citizenship Directive, the Directive concerning the status of long term resident third country nationals, helps manage migration within the borders of the EU’s territory, but the EU has yet to assert its shared competences with the member states in the area of immigration policy. These examples of immigration legislation also only focus on immigrants already present and residing in the EU and not on the potential immigrants wishing to enter. By way of lifting its internal borders and participating in the Schengen agreement, the EU is increasingly facilitating movement within its

¹Telegraph Article, “Nicolas Sarkozy appeals to far-Right saying 'too many immigrants' in France”, 6 March 2012. <http://www.telegraph.co.uk/news/worldnews/nicolas-sarkozy/9127441/Nicolas-Sarkozy-appeals-to-far-Right-saying-too-many-immigrants-in-France.html>

²BBC Article, Sarkozy statement regarding France’s belonging to Schengen zone, 11 March, 2012 <http://www.bbc.co.uk/news/business-17332458>

³(COM(2000) 757 final) <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0757:FIN:EN:PDF>

⁴Commission Website on Immigration Policy http://ec.europa.eu/home-affairs/policies/immigration/immigration_intro_en.htm

borders, which leads to the need for greater coordination in implementing the rules and procedures for guarding the external borders of the EU.

Member states' cooperation in developing a common EU immigration policy is crucial to maintaining security and economic growth domestically and within the greater territory of the EU. Differences in immigration policy across the 27 (soon to be 28, including Croatia) member states open a number of migration loopholes through which undesirable consequences for the EU and its member states could result, especially in border regions like Greece and South-eastern Europe. Given the free movement principle at the heart of European integration, member states with less-restrictive immigration policies could potentially serve as an easy entry point for migrants looking to eventually enter and reside in other member states whose immigration policies are more restrictive, presumably in a way that satisfies these countries' national interest or political preferences.

As it stands, an EU Immigration policy⁵ is in the works, but an official policy harmonizing basic immigration procedures for all of the has not yet come to fruition. The lack of cooperation among the member states in developing a common immigration policy is largely attributed to the traditionally domestic nature of immigration policy and the overall unwillingness of the member states to rescind their autonomy in this area to the supranational EU. Especially motivated by their desire for re-election and retention of power, national governments have a responsibility to their domestic constituencies for which immigration is often a delicate and controversial issue because of, in the Commission's words, the "challenges" that accompany it. Among the many challenges that immigration brings, national security and domestic economic concerns – both of which are also areas of common interest to the EU – appear most often in the literature and EU documents on the subject. Given the importance of controlling immigration at the national level and the shared security and economic interests of the EU member states, the lack of cooperation in developing a common immigration policy for the EU is an obstacle yet to be overcome.

Cooperation is simultaneously crucial and the biggest obstacle (on the part of the member states) to achieving the coordination necessary for a successful common immigration policy. Perhaps the most obvious demonstration of member states resisting cooperation regarding immigration was the Council's failure to adopt the Commission-proposed open

⁵The terms "Community" and "Common" when referring to EU-wide immigration policy are used interchangeably in the literature on this subject and by the Commission's website; likewise, they can be understood interchangeably in this paper. I would use common rather than Community, since the Community no longer exist with the entry into force of the Lisbon Treaty. I would thus avoid as much as possible referring to Community; use either common or EU.

method of co-ordination (OMC) in immigration policy in 2004.⁶ Even though the OMC's soft-law mechanisms seemed like the appropriate tool with which a common immigration policy could be built, it proved to be too great an obligation to which the member states were willing to adhere.⁷ In spite of security and other immigration-related shared concerns among the member states, their shared interest in preserving their respective national sovereignty prevailed in the debate surrounding the OMC as a path to a common immigration policy.⁸

Scholars concerned with EU immigration tend to focus on the policy-making process as a means for furthering European integration and neglect the role of one of the EU's core institutions: the European Court of Justice (ECJ). On the other hand, the literature surrounding the Court tends to overlook its influence in the policymaking process of the EU. Karen Alter's chapter regarding the importance of the *Cassis de Dijon* case in influencing the harmonization of the internal market with respect to goods produced and marketed in different member states has bridged the gap in literature concerning the ECJ and its role in the development and harmonization of EU policy.⁹

While legal scholars might be wary of delving into the ECJ's role as a policy-maker, some of the Court's often landmark, politically controversial decisions challenging the status quo of certain policy areas have resulted in policy changes in the EU that have furthered integration, often beyond legal integration alone. Alter's work focused on the *Cassis de Dijon* case and its impact on harmonization of policy concerning the internal market, a major integrative success of the EU that affects all of its citizens. Her approach concerning the Court is not limited to that of the *Cassis de Dijon* case and can be applied to other EU policy areas in an effort to fill in the gaps in the scholarship on harmonization and the development of a common immigration policy for the EU.

Political scientists and legal scholars alike have studied the Court as an institution and have developed competing theories of how its role in the integration process of the EU. Joseph Weiler's work was influential in developing the literature and scholarship on the constitutionalization of the EU vis-à-vis likening the EU to a federal state. Burley and Mattli in company with Stone Sweet employ neofunctionalist theory derived from Ernst Haas to understand and explain the legal integration of the EU, in stark contrast to the

⁶A. Caviedes. "The open method of co-ordination in immigration policy: A tool for prying open Fortress Europe?". *Journal of European Public Policy* 11:2 April 2004: 289–310, p. 306

⁷A. Caviedes, p. 306

⁸*Ibid.*

⁹K. Alter, *The European Court's Political Power: Selected Essays*. Oxford: Oxford UP, 2009. Print.

intergovernmentalist theory of integration, which severely downplays the role of the Court, as promulgated by Andrew Moravcsik.

Steve Peer's article, "Free Movement, Immigration Control, and Constitutional Conflict", illustrates the power of some of the Court's decisions concerning third country nationals and free movement in re-defining and dividing competences between the member states and the EU.¹⁰ Additionally, the Court's role in defining European citizenship in the 2001 Grzelczyk¹¹ case and the subsequent (Directive 2004/38 EC) adopted in 2004 serves as an example of the Court's potential influence in shaping the EU's legislative agenda.

The aim of this thesis is to explore the role of the European Court of Justice's decisions in triggering policy changes in the EU. Specifically, this paper will look at the extent to which two landmark ECJ decisions regarding TCNs and the right to free movement and family reunification that challenge the status quo and act as a trigger for policy change. This paper will argue that these decisions have acted as triggers for policy change, even if the end result is not yet visible. Using a methodology of process tracing similar to that of Karen Alter's in her work regarding *Cassis de Dijon*, this paper will show how the ECJ's controversial rulings in the *Akrich* and *Metock* cases have sparked the interests of member states, encouraging cooperation in an effort to harmonize minimum standards of immigration in the EU, with the goal of eventually leading to a common immigration policy.

As was demonstrated by the Council's rejection of the Commission-proposed OMC for immigration policy, member states' cooperation and willingness to cede their authority in this policy-area is necessary, but thus far has been lacking. Have the Court's decisions in cases dealing with third country nationals, family reunification, free movement, and European citizenship challenged the status quo of immigration policy in such a way that has, or could, provoke increased cooperation on the part of the member states? What, if any, predictions can be made about future cases that might arise from gaps in the existing immigration policy or questions unanswered by the ECJ and how those cases might disrupt the status quo, prompting the member states to cooperate to create a more comprehensive immigration policy?

This paper will proceed with a chapter on the ECJ, engaging in the debate over the theoretical understandings of its role as an institution of integration in the EU. This chapter will be followed by an assessment of the current challenges of immigration facing the member states and EU, outlining the development of EU legislation and law that has thus far served as the

¹⁰S. Peers. "Free Movement, Immigration Control, and Constitutional Conflict". *European Constitutional Law Review* (2009), 5 :pp 173-196

¹¹ Case C-184/99 paragraph, 31 of the judgment

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=46599&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1336528>

EU's rules of immigration. And finally, this paper will discuss the Court's decisions in the *Akrich* and *Metock* cases (and the case law preceding and following them), arguing that these decisions have played a significant role in triggering the need for policy response, as the common internal borders increasingly complicate the EU's management (or lack thereof) of its external borders.

Chapter 1: The European Court of Justice: Legal Integration

In order to discuss the Court's role in triggering policy responses, it is necessary to understand its function as the judicial authority of the European Union and how the evolution of its case law has played a major role in European integration. This chapter selectively reviews the relevant theoretical and empirical studies addressing the Court's role in European integration and its influence on policymaking. It reveals that, despite increased attention given to impact of the EU courts on EU and domestic policies, we still have little insight into how ECJ decisions regarding immigration issues such as EU citizenship, freedom of movement, and the protection of fundamental and human rights (relating to immigration, this is often right to family life) have influenced the development of EU legislation in this policy area. This chapter ends on a critical appraisal of existing studies of the role of the Court in driving harmonization in a specific EU policy-area, setting the stage for reviewing empirical evidence that will ultimately support the conclusions of this research.

A Brief Introduction to the European Court of Justice

The European Court of Justice (ECJ), established in 1952 under the European Steel and Coal Community Treaty (Treaty of Paris, 1951) and located in Luxembourg, is the judicial authority of the European Union. Comprised of one judge from each of the member states, eight Advocate Generals, and consisting of the Court of Justice, the General Court, and the Civil Service Tribunal, the ECJ (often referred to simply as 'the Court') is charged with "ensuring that the law is observed in the interpretation and application of the Treaties" and acts as the judicial authority of the EU in cooperation with member state national courts.¹²

Just like the other EU institutions, the Treaty circumscribes the Court's jurisdiction; it may "act only within the limits of the competence conferred upon it by the member states in the Treaties" (Article 5(2) of the Treaty on European Union (TEU)).¹³ As the Court has the responsibility and authority to interpret the Treaties, its jurisdiction is also the result of its own

¹²European Court of Justice website, http://curia.europa.eu/jcms/jcms/Jo2_6999/, retrieved 10 May 2012

¹³Art. 5(2) TEU

interpretation – an issue that has sparked some debate among legal scholars.¹⁴ As per the Treaties, the Court’s jurisdiction includes several types of judicial competences. Among these, finding whether a member state has failed to fulfill an obligation under the Treaties, reviewing the legality of binding Union acts or failure of the institutions to act, and issuing preliminary rulings on cases (questions regarding the interpretation and validity of EU law) referred from national courts are the most relevant to this paper’s discussion of the Court.¹⁵ The ECJ’s power has undergone changes with the shift from a pillar organization of competences (Maastricht Treaty 1993 and Treaty of Amsterdam 1997) to the legal consolidation as established by the Lisbon Treaty (2009), and its role as an institution of European integration has also evolved, meriting further study by legal scholars and political scientists alike.

The ECJ is often at the center of discussion regarding the constitutionalization of the European Union, prompting further debate among those interested in European integration. Joseph H. H. Weiler, in his influential work on the topic, “Transformation of Europe”, describes the constitutionalization of Europe as an ongoing process “beginning in 1963 and continuing into the early 1970s and beyond” in which the European Court of Justice issued a series of landmark decisions establishing four doctrines that defined the relationship between Community law and member state law in a way that was unmistakably akin to that of a federal state.¹⁶

The doctrines established during the period that Weiler calls “foundational” because of its unprecedented impact on European legal integration are direct effect, supremacy, implied powers, and human rights.¹⁷ Direct effect refers to the capacity of EU norms, including the Treaties and secondary legislation, to impose legal obligations and create rights, which are directly enforceable before domestic courts, including against private parties.¹⁸ In other words, individuals can rely on EU law in state courts, which are expected to provide effective remedies to enforce those rights. The supremacy of EU law was not defined in the Treaties, but goes along with the doctrine of direct effect in establishing that EU law will prevail over national law in matters where the two might conflict. Finally, human rights were added as a Community doctrine in light of the lack of a Bill of Rights provision in the Treaty. In 1969, the Court determined that it would also take on the responsibility of reviewing EU measures for human

¹⁴See Hartley’s note from T.C. Hartley, *The Foundations of European Union Law* (6th ed., OUP, 2010), Chapter 2 The European Court, p. 54

¹⁵Mathijsen, *A Guide to European Union Law*, Section 3 of Chapter 9 ‘The Court of Justice of the European Union’ in 10th ed., 2010) pps 129- 155

¹⁶J. H. H. Weiler. “The Transformation of Europe.” *The Yale Law Journal*. 100.08 (1991) p. 2413-2419 (specific page quote needed)

¹⁷*Ibid.*

¹⁸J. H. H. Weiler, p. 2413

rights violations, adhering to criteria common the member states and the international conventions on human and fundamental rights to which the member states subscribe.¹⁹

In sum, "...the Community's 'operating system' is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles".²⁰ As exposed by Weiler, the constitutional doctrines established by the Court transformed the European Union in a way that much more snugly fit the mold of a federal state than that of the international organization for which it was perhaps originally measured.

European Legal Integration: Theoretical Perspectives

The Constitutionalization of the EU

Weiler's work, as Stone Sweet points out in his *Living Reviews* article, "The European Court of Justice and the judicialization of EU governance", was instrumental in attracting attention to the political impact of the Court's activities.²¹ Weiler's take on the transformation of Europe is represented by equilibrium between a supranational legal system and an intergovernmental legislative system: the Community increasingly resembled a federal state while the member state continued to resist the move to supranationalism within legislative processes.²² In light of the Single European Act (signed February 1986), Stone Sweet recalls Weiler's hypothesis, suggesting that the equilibrium of a supranational legal system and an intergovernmental legislative system was "shattered" highlighting that,

"...to the extent that the legitimacy of constitutionalization rests on a specific equilibrium between a supranational legal system and an intergovernmental legislative system, then the theory relied on the influence of the legal system on integration processes might be highly constrained, rather than expansive after 1987" (enactment of the Single European Act).²³

His argument demonstrating that the EU was evolving into a federal state vis-à-vis the Court's decisions creating doctrines closely resembling those of a constitutional government serves as the foundation of many other legal scholars who have drawn from Weiler's work to examine the role of the Court in European integration.

¹⁹ J. H. H. Weiler, p. 2417

²⁰ J. H. H. Weiler, p. 2407

²¹ A. Stone Sweet. "The European Court of Justice and the judicialization of EU governance." *Living Reviews in European Governance*. 05.02 (2010) p. 16

²² Ibid.

²³ Ibid.

Neofunctionalism and the Court

Based on an analysis of the completion of the internal market in 1992, Burley and Mattli seem to reject Weiler's equilibrium theory. Recognizing the need for a theoretical framework that provides a convincing understanding of legal integration in the EU, i.e. the "gradual penetration of EC law into the domestic law of the member states" that should suit both lawyers and political scientists Burley and Mattli arrive at neofunctionalism.²⁴ The authors argue that it is indeed the best framework for understanding the Court in the context of European integration and specifically highlight its ability to account for both legal and political factors of integration.²⁵ Burley and Mattli further justify the use of neofunctionalism in their paper by going through some of the dominant theories of legal and political integration, pointing out the flaws, inconsistencies, and shortcomings when applied to the ECJ and its role in European integration. As Stone Sweet observes, Weiler, and also Burley and Mattli "combine doctrinal analysis and theoretically-informed descriptions of judicial politics in the EU", where the resulting data is the Court's jurisprudence, though pointing out that his own work (along with Brunell) was the first to test the hypotheses developed by these authors in a "social scientific sense" against data collected over time.²⁶ Burley and Mattli, noting the recent emergence of political sciences' interest for the ECJ argue that legal integration in the EU most closely fits the neofunctionalist model originally conceived by Ernst Haas.²⁷ Citing Haas' work on neofunctionalism, the authors define it for the purposes of their research,

"Neofunctionalism is concerned with explaining 'how and why nation-states cease to be wholly sovereign, how and why they voluntarily mingle, merge, and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts between themselves. More precisely, neofunctionalism describes a process 'whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities towards a new and larger center, whose institutions possess or demand jurisdiction over the pre-existing nation-states'".²⁸

For Burley and Mattli, neofunctionalism also identifies functional categories that are receptive to integration and the national barriers to overcome within specific functional categories once the integration process has already begun.²⁹

²⁴Ibid.

²⁵A. Burley and W. Mattli, pp. 45-53

²⁶A. Stone Sweet, pp. 17-18

²⁷A. Burley, and W. Mattli. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47.01 (1993): pp. 41-42, 76

²⁸E. Haas, "The Study of Regional Integration, p. 610 and Haas, E., "International Integration", p.366 See also, Haas, *The Uniting of Europe*. 12.as cited in Burley and Mattli, p. 53

²⁹Burley and Mattli, p.53-54

Neofunctionalism's view of the Court's role in European integration sees it as a driver behind the incremental nature of the spillover process, which is divided into three parts: functional spillover, political spillover, and upgrading of interests. Functional spillover refers to the idea that because different sectors of industrialized economies are so interdependent, once an integrative measure is adopted to achieve the goal of one sector, the other sectors will also adopt integrative measures so as to maintain the original goal.³⁰ Essentially, integration spills over from one sector to the other because the actors in each sector, in the pursuit of their self-interests, must adopt measures to keep up with the level of integration in other sectors. With regard to legal integration in the EU, the interests of private litigants, national judges, and the ECJ align to allow for the gradual penetration of EU law into domestic law.³¹ The political spillover happens at the supranational and national levels and describes a process that follows from functional spillover involving changes in expectations and values and a mingling of national interest groups and political parties at the supranational level responding to sectoral integration.³² This feature of neofunctionalist theory is especially helpful in gaining insight to the Court's influence on EU policymaking, and thus it will serve as the theoretical framework through which this paper analyzes the selected Court decisions concerning immigration.

Burley-Mattli and Stone Sweet study the role of the Court within the framework of neofunctionalism, both challenging Garrett's claims (drawing from Moravcsik's intergovernmentalism) that the Court's case law caters to the preferences of the powerful member states, classifying its impact on European integration as insignificant.³³ The next section of this chapter will explore this literature more closely, shedding light on the Court's role in the legal integration of the EU and setting the stage for a discussion of its influence in the policy-making process.

Intergovernmentalism: Underestimating the Court's role in European integration

This incremental process of integration as suggested by neofunctionalism addresses some of the outcomes of legal integration of the EU, and Stone Sweet joins Burley and Mattli in using neofunctionalism as their theoretical foundation. These authors agree on their understanding of integration as a self-sustaining process through which there has been a gradual increase in

³⁰A. Burley and W. Mattli, p. 55

³¹K. Alter. "The European Union's Legal System and Domestic Policy: Spillover of Backlash?" *The European Court's Political Power: Selected Essays*. Oxford: Oxford UP, 2009. 185. Print.

³²A. Burley and W. Mattli, p. 55

³³ A. Stone Sweet. "The European Court of Justice and the judicialization of EU governance." *Living Reviews in European Governance*. 05.02 (2010) p. 18

judicial authority and supranationalism.³⁴ Stone Sweet along with Sandholtz and Fligstein build on Burley and Mattli's neofunctionalism, demonstrating that "law and the courts were at the heart of European integration", adding that neofunctionalism "made predictions that were at odds with intergovernmentalism" as developed most famously by Andrew Moravcsik and used by Geoffrey Garrett in his work dealing with European legal integration.³⁵

Garrett questioned the member states' willingness to allow such an increase in the power of the Court, and offers a conclusion based on the claim that the Court's rulings tend to align with the interests of the powerful member states and thus warranting little or no opposition. Garret borrows from Moravcsik where his explanation rests on the assumption that the member states interests and power in intergovernmental bargaining are the most influential when it comes to EU integration, down-playing the role and capacity of the EU's "organs" to produce outcomes that ultimately stray from member states' interests.³⁶ Garrett's argument, suggesting that the Court adheres rather consistently to the interests of the powerful member states, lacks support of empirical evidence.

Many of the landmark ECJ decisions said to be influential in driving EU integration have actually gone against the political preferences of the powerful member states. In fact, Burley and Mattli, Stone Sweet, and Karen Alter all challenge Garrett's conclusions, resting on his claim that the Court's decisions cater to powerful member states, on the grounds that they have not been tested and lack empirical evidence to support his argument. The aforementioned authors all go on to further disprove his claims through their own research and theoretical understanding of the Court's role in European integration.

Stone Sweet and others showed that while intergovernmental bargaining was part of the larger process, it did not strictly fix limits to integration. Indeed, he and others effectively demonstrated that the Commission and the Court often generated policy developments that contrasted with powerful member states' preferences – an outcome that intergovernmentalists deemed an "unintended consequence" of the integration process.

Historical Institutionalism and the Court

While Burley-Mattli and Stone Sweet point out the short-comings of Weiler's equilibrium theory and fears regarding the stagnation or disintegration of the "judicial foundations of supranationalism and federalism as constructed by the courts", others have taken a more general

³⁴A. Stone Sweet, p. 19

³⁵ibid.

³⁶G. Garrett. "International Cooperation and Institutional Choice: The European Community's Internal Market." *International Organization* 46.02 (1992): 533-60. Print.

approach departing from Weiler.³⁷ Most notably, Karen Alter's work has focused on the Court becoming a policymaking organ of the EU when legislative processes are stagnant, analyzing the Court's role in filling the policymaking void through the lens of historical institutionalism. Alter's work builds on the existing literature and theory regarding the ECJ's role in European integration, focusing on specific questions concerning the emergence of the ECJ as a political actor and policy maker. In her chapter focusing on the judicial politics of European integration, Alter begins by referring to Weiler, explaining the basic assumptions underpinning the Court as the "hero" of integration, intervening when the political process is stalled:

"This intervention takes the form of judicial decisions that make law that transcends current policy. These judicial decisions are seen as setting the context of political integration by altering member state preferences through the creation of de facto policies, which themselves serve as constraints on the actions of member states."³⁸

Using process tracing, Alter's study of the *Cassis de Dijon* decision serves as an empirical example of the impact of ECJ jurisprudence in the political arena of the European Union. This section will go through Alter's approach to the *Cassis de Dijon* case as an example of an ECJ decision that led to policy development at the EU level, looking at both the Court's reasoning and specifics of the decision in relation to the political climate of the EU at the time. Alter's process-tracing of a case study of one of the Court's most famous cases influenced the methodology of this paper's research, and in a later chapter is mimicked in an effort to analyze the effect of ECJ decisions relating to EU citizenship, family reunification, and free movement on the development of a harmonized (common) EU immigration policy. The *Cassis de Dijon* case, while not relevant to immigration issues, provides an opportunity to understand the challenges of harmonization in policy areas that are traditionally classified as domestic affairs.

European Integration and the *Cassis de Dijon*³⁹ Decision: Exploring the Court's Role in EU Policymaking

Alter uses the landmark ECJ *Cassis de Dijon* decision and its consequences for EU's internal market to identify the role of the Court in the creation of a new approach to harmonization which later emerged as the cornerstone of the Single European Act. The *Cassis de Dijon* case, as it is commonly referred to, is mostly known for its role in establishing the principle of mutual recognition of goods in the EU's Common Market. Alter is quick to point out that

³⁷Ibid.

³⁸K. Alter. "Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision" *The European Court's Political Power: Selected Essays*. Oxford: Oxford UP, 2009. 139. Print.

³⁹ECJ Case 120/78 *ReweZentral AG v. BundesmonopolverwaltungfürBrantwein* ("*Cassis de Dijon*"), text of judgment: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61978CJ0120:EN:PDF>

the words “mutual recognition” did not appear in the language of the decision and that the decision itself did not mean that any goods produced legally in one member state had to be accepted in the market of another member state.⁴⁰ What makes this case so interesting, as Alter points out throughout her chapter dedicated to it, is not the legal reasoning behind the Court’s decision, but rather the Commission’s use of the Court-established principle as a jumping-off point for further European integration.

The *Cassis de Dijon* case was referred to the ECJ for a preliminary ruling to determine the legality of a German law that required spirits to contain a minimum alcohol level in order to be marketed and sold as such. The French liquor Cassis de Dijon did not meet this minimum alcohol content of twenty-five per cent, and therefore could not be marketed and sold as a spirit in Germany. The Commission had previously challenged this same German law with an infringement proceeding four years prior to the *Cassis de Dijon* case, though the case was dropped after a settlement was reached allowing an exception for French Anisette (whose alcohol content was also considered too low) but allowing the German law to stand. The import/export firm involved in the *Cassis de Dijon* case asked that an exception be made for the crème de Cassis in the same way a political settlement was reached regarding French Anisette, but was denied by the German administrative agency.

The original proceedings initiated in a German national court was referred to the ECJ for a preliminary ruling to interpret Article 30 EEC (now Article 28 TFEU) which prohibits customs duties on all “imports and exports and of all charges having equivalent effect”, in light of the German regulation.⁴¹ The German court tried to defend its regulation on the grounds of it being a health issue, arguing that alcoholic beverages, sold as such, with low alcohol contents could lead to an increased tolerance for alcohol than other, more highly alcoholic drinks. They also argued that lowering alcohol contents result in evading larger taxes, framing the case as an issue of consumer protection. The German government’s final argument suggested that forcing Germany to allow lower-alcohol content beverages from another member state into their market would lead to a lowering of standards within the EU (if one member state is allowed to set lower standards it would lead to other member states lowering their standards in a “race to the bottom” fashion).

The Court ultimately determined that the German argument suggesting that the sale of the French liquor threatened public health and safety was invalid. They also dismissed their consumer protection argument (concern over member states lowering standards) on the grounds

⁴⁰K. Alter, p. 140

⁴¹Art. 28(1) Treaty on the Functioning of the European Union (TFEU)

of legal proportionality, stating that the removal of alcohol limits was not necessarily a lowering of standards. The most notable outcome of the ruling was the Court's inclusion of a general principle in the language of its ruling: "There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any of the Member States."⁴² Dismissing the German arguments would have been sufficient Court's decision regarding the marketing and sale of the Cassis liquor, and the additional clause carried with it significant implications. This additional language indicating that goods produced and marketed in one member state should enjoy the same status in another member state was a clear message that recognizing an exporter's standards as equal to that of the domestic producers' was at the heart of this ruling. Alter points out that this clause did not carry any "legal weight" but that its effects were felt, and it suggested that the Court would be likely to use this general principle in future decisions.⁴³

This political weight of the *Cassis* decision is what distinguishes it from many of the other ECJ cases that typically win the attention of legal scholars. When it comes to the legal reasoning of this case, lawyers were not surprised – the *Dassonville*⁴⁴ case decided a few years earlier and already planted the seeds of the *Cassis* ruling.⁴⁵ What makes *Cassis* special is the Commission's use of the ECJ's decision in this case as a platform upon which to further European integration by completing the internal market. The previous resistance to harmonization on the part of the member states had brought further integration of the Community market to a standstill. Shortly after the *Cassis* decision was issued, the Commission took advantage of the general principle defined by the Court as a means to advance their harmonization agenda, issuing a communication that laid out its new approach to harmonization of the internal market, including the new mutual recognition principle: any good produced and marketed in one member state should be equally recognized as a marketable good in all other member states. The Commission also added that member states must not design their national commercial or technical rules in such a way that could potentially prevent the free movement of goods.

Alter notes that this was the first time the Commission had capitalized on an ECJ decision as a means to further their own political agenda by issuing a an interpretative communication.⁴⁶ The member states' reaction to the communication was less than favorable,

⁴²ECJ Case 120/78 *ReweZentral AG v. BundesmonopolverwaltungfürBrantwein* ("Cassis de Dijon"), text of judgment: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61978CJ0120:EN:PDF>

⁴³K. Alter, p. 143

⁴⁴ In *Dassonville*, case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville*, the Court ruled that requiring certificates of authenticity for the sale of Scotch whiskey had the effect of restricting free trade.

⁴⁵*Ibid.*

⁴⁶K. Alter, p. 144

with Germany and France most starkly opposed. The opposition of the so-called “powerful member states” is important to note, as it helps contextualize the Commission’s decision to ride on the coattails of the Court’s decision (and legitimacy) and also sheds light on scholarly debate regarding the Court’s lack of autonomy and penchant for catering to the member states’ preferences. The Commission’s strategy to make use of the Court’s *Cassis* ruling was not haphazardly developed; the resistance to further harmonization on the part of the member states prompted the Commission to seek a legitimate backer, or “sweetener” as Alter calls it, for the new harmonization approach in order to make the new approach more appealing.

Likewise, the fact that member states⁴⁷ were opposed to such a politically influential ruling calls into question the notion that the ECJ does not stray from the member states’ preferences in its rulings. Garret, believing that the Court’s decisions tend not to stray from the dominant member states’ preferences argues, with Weingast, that *Cassis* influenced policymaking by painting mutual recognition as a common goal towards which the member states’ preferences converged. Garrett and Weingast argue “this focal point explanation would imply that the Court is not an autonomous actor and that the ECJ decisions have policy implications only when they accurately reflect a policy consensus”.⁴⁸

Alter points out flaws in Garrett’s argument (like Burley-Mattli and Stone Sweet do), most obvious of which is that there was no policy consensus regarding mutual recognition of goods immediately before or after the *Cassis* decision.⁴⁹ The member states’ hesitance towards harmonization is precisely why the Commission even thought it advantageous and necessary to use the Court’s decision as a basis for the new approach to harmonization of the market. Because mutual recognition was so unattractive to the member states, it has been suggested that they ultimately embraced cooperation after the *Cassis* ruling for fear of de facto harmonization at the lowest common denominator.⁵⁰

The *Cassis de Dijon* case is special because of its impact on policymaking in the EU. The Court’s unprecedented impact on the harmonization of the internal market is an example of its ability to trigger policy responses at the EU level when cooperation is otherwise resisted by the member states. Examined within the larger framework of neofunctionalist integration theory, the Court’s role as an institution promoting further integration gives rise to the three areas of neofunctionalist spillover: functional - based on the interconnectedness of the economic and security related sectors of the member states; political - pressure at the domestic level for further

⁴⁷ Notably Germany, France and Italy due to their relatively high standards for their domestic products.

⁴⁸ Garrett and Weingast (1993) as referenced in K. Alter, p. 148

⁴⁹ K. Alter, p. 152

⁵⁰ Ibid.

integration that promote national interests; and cultivated or upgraded interests - as demonstrated by the Commission's use of the Court's *Cassis de Dijon* decision to boost legitimacy and cooperation among the member states for the new approach to harmonization of the internal market.

The *Cassis de Dijon* case is an example of the Court's jurisprudence challenging the status quo of an EU policy area, triggering a political response from the Commission and eventually leading to cooperation on the part of the member states towards previously resisted harmonization in a policy area that was based almost exclusively on national interests. The disruption to the status quo and the pressure for cooperation in this situation forced member states to update their interests, as per the neofunctionalist understanding, in order to keep up with a pro-integration general principle established by the Court. The importance of this process for EU policymaking does not end with the internal market. Though *Cassis* serves as an interesting example and case study of integration resulting from the Court's decision, several other policy areas have surely witnessed similar effects. The purpose of analyzing this case in detail was to gain the theoretical and methodological insight to understanding the role of the Court in activating policy change in order to shed light on the current issues and challenges concerning the need for a common EU immigration policy.

Chapter 2: EU Immigration: Challenge to the Member States

Having discussed various accounts of the European Court of Justice's impact on policymaking in the EU, in particular in connection with the realization of the internal market, this paper will explore the construction of a common immigration policy in the EU. Harmonizing and coordinating different aspects of immigration policy, however, is an enormous undertaking that requires careful planning, monitoring, and cooperation, both among the member states and between them and the legislating institutions of the EU, the Commission together with the Council and European Parliament. This chapter will explore the challenges that member states and the EU face in light of the shared competence in an area traditionally regulated by states alone. Immigration-related EU legislation will be discussed with a focus on their implications for Union citizens and third country nationals (TCNs). Finally, this chapter will evaluate the merits and shortcomings of the Commission-proposed open method of coordination for immigration policy, gauging its potential as a path to a common immigration policy for the EU.

Defining Competences

In the shadow of such a long-standing tradition, heavy resistance from member states to cede their autonomy in this policy area to the EU is easily understood. Christian Joppke frames the challenge of immigration to the nation state in terms of sovereignty and citizenship: "Regarding immigration, which is located precisely at the boundary between domestic and international state, sovereignty is by definition in place as the discretion of states to admit or expel aliens".⁵¹ Even though the decision to admit or expel immigrants is at states' discretion, Joppke notes that their discretion is not absolute, but in fact limited by state interdependence in areas of human rights, security, and labor markets. This rings especially true in light of the division and sharing of competences in the EU.

One must stress that immigration control and management long remained a largely national competence, which is now shared between the EU and its member states. The Treaty on the Functioning of the European Union (TFEU) Article 77⁵² ensures the absence of internal controls, effectively lifting the internal borders of the EU's territory, defining aspects of the

⁵¹C. Joppke. *Challenge to the Nation-State: Immigration in Western Europe and the United States*. Oxford, England: Oxford UP, 1998. Print, p. 10

⁵² Article 77(1) TFEU, "ensuring the absence of any controls on persons, regardless of nationality, when crossing internal borders"

management of migration within the EU that are harmonized. Article 79 TFEU⁵³ clearly establishes that the Union shall develop a common immigration policy and outlines the goals of such a policy, which aims to ensure efficient management of migration flows, fair treatment of TCNs and preventative measures against illegal migration and migration-related crimes. Article 3(2) of the Treaty on European Union (TEU)⁵⁴ reads, “the Union shall offer its citizens an area of freedom, security, and justice without internal frontiers”, and Article 4(2)(j) TFEU⁵⁵ grants shared competence over this area. Member states’ national borders form the territory of the area of freedom, justice and security that the Union promises its citizens, therefore it is only logical that the competences in this principle area are shared between the member states and the EU.

Foundations of European Immigration Policy: Union Citizenship, Free Movement, and the Protection of Human Rights

The progression of European integration has brought with it certain rights and privileges promised to citizens of the member states including Union citizenship⁵⁶, freedom to move and reside freely within the EU⁵⁷, and the protection of human rights⁵⁸, including the right of EU citizens and their family members to move and reside freely within the EU as defined by Directive 2004/38/EC⁵⁹. The creation of Union citizenship has contributed to the sharing of competences between national and supranational authorities when it comes to free movement and immigration in the EU. Union citizenship was established by the Maastricht Treaty (1992) with the purpose of “strengthen(ing) the protection of the rights and interests of the nationals of its member states”.⁶⁰ According to Article 20 TFEU, “every person holding the nationality of a Member State shall be a citizen of the Union”. Almost a decade after Maastricht, the Court went

⁵³ Article 79(1) TFEU, “The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat illegal immigration and trafficking in human beings.”

⁵⁴ Article 3(2) TEU, “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”

⁵⁵ Article 4(2)(j) TFEU, “Shared competence between the Union and the Member States applies in the following principal areas: (j) area of freedom, security, and justice.”

⁵⁶ Article 20 TFEU, establishing Union citizenship for all nationals of Member States

⁵⁷ Article 20(2) TFEU, providing freedom of movement to Union citizens

⁵⁸ In the context of immigration, fundamental or human rights considerations usually have to do with asylum and refugee matters, which are not the focus of this paper. For the purposes of this paper, human rights refers to the right to respect for life as provided for by Article 8 of the European Convention on Human Rights which

⁵⁹ Directive 2004/38/EC (Citizenship Directive) on the rights of Union citizens to move and reside freely within the territory of the Member States

⁶⁰Y. Soysal. *Limits to Citizenship* Chicago, University of Chicago Press, 1994. Print p. 148

one step further in defining Union citizenship in the *Grzelczyk* judgment, declaring that Union citizenship is “destined to be the fundamental status of nationals of the Member States”.⁶¹

In the areas of asylum and refugee policy, measures to protect human rights typically gain the support of governments across the political spectrum because of their role in upholding internationally agreed-upon values of human life. Between 1999 and 2005 (partially in response to the war in Kosovo and the growing number of people from the Balkans seeking refugee status and asylum in Europe) the Directive on reception conditions for asylum seekers, the Directive on qualifications for becoming a refugee or a beneficiary of subsidiary protection, and the Directive on asylum procedures were adopted, harmonizing the standards for asylum within the EU. In 2008, the Commission’s Policy Plan following these Directives, outlined asylum policy priorities, which are organized into three pillars.⁶² Given its foundation in pre-existing international human rights conventions and agreements to which the member states already belonged and abided, the creation of an EU asylum policy via the aforementioned legislation was an act of harmonization that, in a sense, allowed the member states to maintain their autonomy and posed little risk to their sovereignty.

A Proposal for EU Immigration Policy Coordination: The Open Method of Coordination

In the last decade, the Council rejected the Commission-proposed Open Method of Coordination (OMC) as a means to get closer to a common immigration policy through a coordination of the member states’ immigration policies. This section will discuss this method, paying close attention to its potentially successful aspects and taking into consideration its criticisms in an effort to understanding why it was ultimately rejected by the member states in 2006. The OMC’s failure to gain the approval of the member states can give valuable insight as to alternative methods of immigration policy coordination. Overwhelming resistance to immigration policy coordination from member states continues to impede the development of a common EU immigration policy while the need for one will persist.

The OMC was ratified at the 2000 European Lisbon Summit, and has developed into a mode of EU governance, enjoying success as a policy-making method due the compromise it provides for those who support an increased role of the EU and those who oppose it.⁶³ In 2001

⁶¹Paragraph 31 of *Grzelczyk* judgment, C-184/99 Rudy Grzelczyk v. Centre publique d’aide sociale d’Ottignies-Louvain-la-Neuve <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999CJ0184:EN:PDF>, retrieved 20 May 2012

⁶²According to the Commission’s Home Affairs site, http://ec.europa.eu/home-affairs/policies/asylum/asylum_intro_en.htm retrieved May 18, 2012

⁶³S. Velluti. "What European Union Strategy for Integrating Migrants? The Role of OMC Soft Mechanisms in the Development of an EU Immigration Policy." *European Journal of Migration and Law* 9.1 (2007): 53-82. Print. p. 53

the Commission issued a communication proposing the OMC for immigration policy to encourage cooperation among member states through “non-binding yet common governance mechanisms”.⁶⁴ While this method of coordination appeared to be less of a threat to member state autonomy, (given its soft-law, non-binding nature) it failed to be officially adopted as the strategy for developing an EU immigration policy.

As Alexander Caviedes observes,

“this proposed application of the OMC evidences a calculating Commission aware of the parameters that states will insist upon in drafting immigration policy...recognizing that states are interested in the economic benefits that could accrue as a result of coordination, the Commission’s proposal highlights these aspects”.⁶⁵

While it was expected to promote best practices among the member states through soft law mechanisms, it ultimately proved to fall into the category of what Caviedes and others recognize as the “biggest frustration in European policy-making: agreement in principle that fails to blossom into obligation”.⁶⁶ Caviedes’ greatest criticism of the OMC for achieving a common immigration policy is the requirement of a strong commitment, which presents a greater obligation than the member states are willing to accept. He suggests, “apparently, member states trust in continued mutual solidarity – based upon common sovereignty concerns – that generally prevents policy from advancing at a pace that is uncomfortable for any single member”.⁶⁷

For some of the same reasons it received praise, the OMC has received stark criticism. Its soft-law mechanisms result in a lack of incentive for member states to meet these EU-determined goals and ensure enforcement, ultimately minimizing its effectiveness. While the OMC provides detailed guidelines as to how member states should pursue measures that will lead to a common immigration policy, it is based on a system of sharing best practices. The nature of this system is such that it requires a strong commitment from all of the member states: some who risk being asked to abandon their current system in favor of another’s. Understood this way, the OMC represents a threat to the member states’ sovereignty, which has always been at the heart of national immigration policy. The proposed OMC for immigration policy resembles a double-edged sword precariously positioned between the EU and the member state – with both sides on guard.

⁶⁴Caviedes, Alexander. "The Open Method of Co-ordination in Immigration Policy: A Tool for Prying Open Fortress Europe?" *Journal of European Public Policy* 11.2 (2004): 289-310. Print, p. 289

⁶⁵A. Caviedes, p. 290

⁶⁶A. Caviedes, p. 295

⁶⁷A. Caviedes, p. 305

Overcoming Obstacles to Coordination

The EU represents an unprecedented model of immigration in the sense that it contains within it two categories: immigration within the territory of the EU (member states) and immigration originating from beyond its borders, resulting in a division of immigration competences between the member states and the supranational institutions. In order to achieve the area of freedom, security and justice, and secure the rights of immigrants who have already established themselves in a member state (and in some cases those wishing to join them), and newcomers wishing to reside in the EU, a common immigration policy is necessary as confirmed by Article 79 TFEU. Harmonization at the lowest common denominator (in terms of rules and regulations for managing migration from outside the EU) would be instrumental in facilitating coordination among member states, both in the adoption and implementation of a common immigration policy.

Member states' desire for retention of sovereignty in immigration matters is undoubtedly the biggest obstacle to policy coordination and the development of a common immigration policy to date. This obstacle is likely prevent future initiatives proposed by the Commission as part of staying true to the Treaty's claim that a common immigration policy for the EU is a serious goal. National immigration issues are often highly politicized and delicate, inevitably varying across member states. Cases referred to the ECJ concerning Union citizenship, free-movement (of Union citizens and TCNs), and family reunification of third country nationals has put the spotlight on some of the inconsistencies of member state immigration policies, proving the necessity for a Community immigration policy to address incoherency and further integration in this policy area. The next chapter will examine the case law of the Court in two landmark decisions relating to third country nationals' status and rights.

Chapter 3: *Akrich* and *Metock*: Redefining the Status Quo of EU

Immigration Policy

The *Akrich* and *Metock* cases are often examined side-by-side because of the conflicting rulings that resulted from similar situations presented to the Court. Both cases deal with EU citizenship, freedom of movement, and the protection of an EU citizens' rights to be joined by their TCN spouse. The outcome of *Metock* essentially reversed the Court's ruling in *Akrich*, prompting loud reactions from the member states, particularly those whose national immigration policies suffered as a result (Ireland, Denmark, and more recently Belgium). The similarity of the situations presented in these cases and their "opposite" rulings provide an excellent opportunity to analyze the resulting dynamic between the Court's decisions challenging the status quo of a policy area and the response from the member states and EU legislative institutions (Commission, Council and European Parliament).

This chapter carefully looks at these two landmark cases heard by the European Court of Justice concerning EU immigration policy as it applies to Union citizens' exercising their right to freedom of movement within the EU and their right to be joined by their third country national family members (spouses). For this research, *Akrich* and *Metock* are examined as case studies of the ECJ's decisions regarding the aforementioned immigration and citizenship-related issues. Included as subjects of the process-tracing methodology of this research, other relevant cases predating and post-dating *Akrich* and *Metock* are included in order to establish the status quo of the Court's case law and the EU's legislation regarding similar immigration issues against which the *Akrich* and *Metock* were both scrutinized. The Court's decisions in these cases are analyzed within the framework of neofunctionalist integration theory, as elaborated on in the first chapter, in order to arrive at the final section of this chapter.

Akrich suffered a great deal of negative attention from legal scholars, while the member states seemed satisfied with the restrictive outcome on the rights to movement of third country nationals as a spouse of an EU citizen. On the other hand, though the ruling in *Metock* seemed more in sync with the case law preceding the *Akrich* ruling, it was also the subject of some criticism. Both the *Akrich* and *Metock* cases are best understood by first addressing some of the relevant Court decisions that helped contribute to the status quo within which first *Akrich* and then *Metock* were evaluated. The relevant EU legislation and Treaties were discussed in the previous chapter, and will be referred to when giving summaries of cases chosen for this research. Then, the facts and rulings of the *Akrich* case and *Metock* cases will be summarize and discussed in terms of their similarities and differences between previously decided cases, and

each other. An analysis of the Court's role in disrupting the status quo of the application of EU legislation and Treaty Articles on immigration policy and the subsequent reactions from affected member states are evaluated to determine the extent to which the Court's decisions provoke policy change in the EU.

Pre-Akrich Case Law: Assessing the Status Quo

According to the Citizenship Directive (Directive 2004/38/EC), regarding the rights of free movement, family reunion rules apply only to those EU citizens who have exercised their right to freedom of movement.⁶⁸ The situation of a TCN family member joining an EU citizen in their home member state was deemed by the Court to be a "purely internal situation".⁶⁹ What became known as the *Singh* rule comes from the ECJ's decision regarding "returnees" or those EU citizens who moved to another member state, later returning home with a third country national family member(s). The Court's reasoning in the *Singh* case rests on the notion that preventing EU citizens from returning home with TCN family members would be a deterrence to exercise their right to free movement.⁷⁰ In the interest of protecting this fundamental right of EU citizens, the Court ruled that Union citizens seeking to return home with TCN family members could do so under EU law if national immigration laws did not allow for this.

The Court's decision left several important questions unanswered, thus leaving the door open for their inevitable appearance in future cases referred to the Court: how long did an EU citizen have to spend in another member state in order for this rule regarding family reunification to apply; what if the family relationship is established in the second member state; does this rule apply if the EU citizen moved for reasons other than self-employment employment, such as providing goods and services; is economic activity even necessary to justify moving to another member state – what if the move did not involve any kind of economic activity; does the member state have discretion if a marriage is found to be an abuse of EC free movement law?⁷¹ As far as the timing of the establishment of a familial relationship, it is generally assumed that free movement family reunion rules apply regardless of whether the family relationship predated or postdated the EU citizen's move to another member state.⁷² While neither *Akrich* nor *Metock* speak to all of these questions, it is worth noting the absence of

⁶⁸ Directive 2004/38/EC

⁶⁹ S. Peers. "Free Movement, Immigration Control and Constitutional Conflict." *European Constitutional Law Review* 5.02 (2009): 173-96. Print. p. 173

⁷⁰ Case C-370/90 *Surinder Singh* [1992] ECR I-4265, paragraph 19-21

⁷¹ Peers, Steve, pp. 174-175

⁷² Peers, Steve, p. 176

the Court's answers, if only to illustrate that its case law can, at times be incomplete, usually invites more cases of similar nature.

Approximately a decade later, the Court, referring to the *Singh* rule, ruled in the *Carpenter* case that EU citizens residing in their home member state and providing services in another member state *could* rely on the right to joining their spouse on the grounds that a separation of spouses, in this case, could be considered (and apparently was so by the Court) an obstacle to exercising the fundamental right to family life as provided for by the Treaty, and thus limited the previous “purely internal” rule, whereby the lack of a cross-border element means that it is outside of the Court's jurisdiction.⁷³ The *Carpenter* case also brought up the issue of irregular migration status of the TCN family member seeking to join their Union citizen spouse. In this case, the Court ruled that it would be a breach of the Union citizen's rights to expel a family member based on their previous migration history.⁷⁴ A similar issue was considered in the *MRAX* case in which the Court confirmed that penalties charged to TCN family members of EU citizens for breaching national immigration laws had to be proportionate⁷⁵ to their offense(s), and could not result in their being expelled.⁷⁶

Akrich Case: Existing Case Law Reversed

Mr. Akrich was a Moroccan national who repeatedly breached UK immigration law before he married a United Kingdom national in the UK. After they were married, the couple moved to Ireland, where Mr. Akrich's wife (the EU citizen) took up employment, thereby exercising her freedom of movement as an EU citizen. Relying on the *Singh* rule regarding returnees, the couple later sought to return to the UK, but Mr. Akrich was denied admittance on the grounds of his previous breach of UK immigration law. The UK authorities considered the couple's move to Ireland a deliberate attempt to “manufacture a right of residence for Mr. Akrich on his return to the United Kingdom and thereby to evade the provisions of the United Kingdom's national legislation and that Mrs. Akrich had not been genuinely exercising rights under the EC Treaty as a worker in another member state”.⁷⁷ The case was referred to the Court of Justice, whose judgment began by re-stating the *Singh* judgment, but continued with the following conflicting reasoning:

⁷³ Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279, paragraph 39.

⁷⁴ S. Peers p. 177

⁷⁵ The same applies to EU citizens who breach national immigration laws of member states (such as reporting their status or obtaining residence permits) but maintain legal status under Community law; they can be penalized by the state in a manner proportionate to their breach of that state's immigration law, but not expelled. See Articles 5(5), 8(2), 9(3), 25, and 26 of Directive 2004/38/EC per Peers' citation regarding this point.

⁷⁶ S. Peers, p. 176

⁷⁷ S. Peers, p. 177, citing paragraph 37 of the *Akrich* judgment

“However, Regulation No 1612/68 covers only freedom of movement within the Community. It is silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the Community.

In order to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.”⁷⁸

While the Court ruled that the couple’s motive for moving to Ireland was irrelevant to establishing abuse of EC law, paragraphs forty-nine and fifty of the judgment essentially overturn prior case law dealing with irregular immigration status (*MRAX* and *Carpenter*) as related to free movement family reunion rights. The *Akrich* case differs from *Singh* in that the TCN family member was already lawfully residing in the UK before his leaving and returning, but the Court’s lack of further explanation as to the relationship of the *Akrich* judgment to the prior case law lends itself to much-deserved scrutiny. This will be discussed further in the last section of this chapter along with the judgment of the *Metock* case.

The Aftermath of *Akrich*: *Metock*

Cases concerning prior lawful residence of TCNs wishing to join their EU citizen spouse in exercising free movement arising after the *Akrich* ruling referred to both *Carpenter* and *MRAX*, but not *Akrich* – a clear testament to the contradictions contained within the ruling: a confusion of member state and Community competence when it comes to determining a TCN’s eligibility for entry (UK competence in this case) and the prior lawful residence requirement of TCNs (which was not provided or in the Citizenship Directive on which the case was based).

The *Metock* case combined the disputes of four male TCN spouses of four EU citizens in Ireland. All four cases were based on similar situations: Union citizen spouses (not possessing Irish citizenship, and thus exercising their right to free movement) residing in Ireland married TCNs. The TCN spouses in this case were already present in Ireland prior to the marriage, awaiting decisions on their asylum applications. None of the TCN spouses were lawfully resident in Ireland (awaiting approval of asylum) and none of them had been previously lawfully resident in another member state. The Irish government denied a residence permit to the TCN spouses on the grounds that they did not meet the conditions of the Irish rules transposing Directive 2004/38/EC, which includes prior lawful residence in another member state.⁷⁹

⁷⁸ Case C-109/01 ECR I-9607, paragraphs 49 and 50

⁷⁹ S. Peers, p. 186, referencing paragraph 16 of the judgment from C-1127/08 *Blaise Baheten Metock & Others v. Minister for Justice, Equality and Law Reform (Metock & Others)* [2008] ECR I-6241

The national court referred the case to the ECJ asking, “whether Directive 2004/38/EC precludes national legislation which requires a third country national spouse of an EU citizen who has exercised free movement rights to have previously been lawfully residing in another member state, before benefitting from Directive 2004/38/EC”.⁸⁰ The Court ruled that the Directive did *not* contain a requirement for TCN family members to have been previously lawfully resident in another member state *before* benefitting from the Directive itself and admitted that the conclusion of the *Akrich* case (which *Metock* effectively overturned) “must be reconsidered”.⁸¹ The Court went on to reference *Carpenter*, *MRAX*, and *Eind*⁸² in the judgment, showing the previous case law that argued that a link between the protection of family life and the elimination of deterrence and obstacles to free movement rights of Union citizens exists and that the enjoyment of these rights cannot be contingent on prior lawful residence of a TCN family member.⁸³

With respect to the division of competences between the member state and the community in matters of immigration, the Court reiterated the Community’s “competence to enact the necessary measures to bring about the freedom of movement for its citizens”.⁸⁴ Given that the Community is responsible for enacting these measures and protecting its citizens’ right to free movement, it is also responsible for ensuring that it rules in a way so as to eliminate obstacles to the freedom of movement. In the event that a Union citizen’s TCN family member cannot join them in the member state they wish to reside, the Court ruled that the competence of regulating the entry of TCN family members, “even if they are not lawfully resident in the territory” also lies with the Community.⁸⁵

The Court also answered two other questions referred by the national court regarding immigration control and specifics regarding TCN spouses and the details of when and where marriage takes place (establishment of family relationship). To the member states’ concern about increased number of TCNs seeking residence rights in the EC as a result of this ruling, the Court replied that the impact of this case on immigration control would not be as great as member states’ worried, recalling that the application of Directive 2004/38/EC would only benefit those TCNs seeking to join EU citizen family members who had exercised free

⁸⁰ S. Peers, p. 186

⁸¹ C-1127/08 *Blaise Baheten Metock & Others v. Minister for Justice, Equality and Law Reform (Metock & Others)*, [2008] ECR I-6241, paragraph 49, 58

⁸² Analogous to the *Singh* case except that sponsor of TCN family member did not take up employment upon returning home

⁸³ C-1127/08 *Blaise Baheten Metock & Others v. Minister for Justice, Equality and Law Reform (Metock & Others)*, [2008] ECR I-6241, paragraph 56

⁸⁴ Paragraph 61 of the *Metock* judgment.

⁸⁵ Paragraph 65 of the *Metock* judgment.

movement.⁸⁶ This was not the answer that popular migration-receiving member states might have been hoping for, but the Court simply restated a fact to calm their worries by grounding their perspectives in the current situation and number of immigrant TCNs seeking residence rights.

The ECJ gave a three-part answer to the national court's final question concerning the Directive's applicability regardless of time and place of the establishment of the family relationship and the circumstances of the TCN spouse's initial entry into the host member state.⁸⁷ First, the Court mentioned the *Eind* ruling, showing that "the provisions of (the) Directive must not be interpreted restrictively and must not in any event be deprived of their effectiveness".⁸⁸ Because the purpose of the Directive is to facilitate the movement of EU citizens within its territory, the Court also pointed out that the Directive does not require that family had to be founded before Union citizens exercised their freedom of movement means that they can also establish a family after having moved.⁸⁹ On the circumstances of the TCN "joining" an EU citizen family member, the Court answered that the TCNs' status upon entry does not matter once the relationship is established. At that point, the TCN's relationship to the Union citizen is taken into account when considering potential obstacles to free movement, and therefore a refusal to permit a TCN family member residence is a possible deterrent to an EU citizen's choosing to stay in that member state.⁹⁰ Finally, the Court also pointed out that the Directive does not contain any requirements as to where the marriage between a TCN and EU citizen takes place in order for the Directive to apply.⁹¹

Member states' concerns regarding the reverse discrimination that results from *Metock* were all but ignored by the Court with a reiteration of the fact that free movement law only applies to cross border situations and that any sort of reverse discrimination would not fall within the scope of EU law.⁹² Reverse discrimination, in this situation, refers to the fact that EU citizens who take up residence in a second member state (in this case, Ireland) may rely on EU free movement family reunification provisions to have TCN family member(s) join them, while EU citizens living in their home member state (in this case, Irish nationals living in Ireland) do not have the same right (to be joined by a TCN family member) unless they also exercise their

⁸⁶ S. Peers, p. 189 referencing paragraph 73 of the judgment from C-1127/08 *Blaise Baheten Metock & Others v. Minister for Justice, Equality and Law Reform (Metock & Others)* [2008] ECR I-6241

⁸⁷ S. Peers, p. 189

⁸⁸ Paragraph 84 of the *Metock* judgment.

⁸⁹ Paragraph 88 of the *Metock* judgment.

⁹⁰ Paragraph 92 of the *Metock* judgment.

⁹¹ Paragraph 98 of the *Metock* judgment.

⁹² S. Peers, p. 189, referencing paragraph 79 of the *Metock* judgment

right to freedom of movement (adding a cross-border element, thus their inclusion in the scope of EU law).

The potential for reverse discrimination is a result of the Court's decision in *Metock*, but it is also partly due to the Irish rules transposing Directive 2004/38/EC not including a provision that would allow its citizens to appeal to EU in situations where national law happened to be more restrictive. The Court's answer essentially implies that, while it is aware of the reverse discrimination that might result from this ruling, the issue falls outside of the scope of EU law because it lacks a cross-border component. The member states' concern about the creation of reverse discrimination as a residual effect of the *Metock* ruling will be discussed in more detail in the next section of this chapter.

Analysis of Reactions: Legal Perspectives, Member State Response, and the EU

Reactions to the *Akrich* and *Metock* judgments and the implications they carried regarding immigration policy can be evaluated across legal and political disciplines to help inform the extent to which these rulings disrupted the status quo, and the extent to which this disruption triggered policy change. Through process-tracing, this paper was able to identify the status quo of immigration issues as they appeared before the ECJ, and in tracing the Court's interpretation of the rights and privileges of EU citizenship and the provisions of the Citizenship directive, was able to determine that the status quo had certainly been challenged. Between the *Akrich* and *Metock* judgments, one might say that the status quo of the Court's case law on the immigration issues brought up by the two cases was completely flipped: from a relatively liberal situation prior to *Akrich*, followed by a very restrictive interpretation, and back to a more lenient understanding which resulted in reverse discrimination against nationals of a member state – the Union's very own citizens whom it sought to benefit by expanding the rights of free movement family reunification through the *Metock* decisions. The division of competences between member states and the EU, the technicalities surrounding EU citizens' right to free movement family reunification, and the emergence of reverse discrimination based on EU law all appeared in the cases (or as a result of them) this paper examined using process-tracing, and all had their respective status quo shaken, if not shattered.

From a legal standpoint, Steve Peers very openly criticized the *Akrich* ruling, calling it “the worst judgment in the long history of the Court of Justice”.⁹³ He praises the Court's ruling in *Metock*, using its reversal of the *Akrich* case law to further legitimize the weakness he sees in the *Akrich* ruling. Regarding *Metock*, Peers applauds the Court's ruling regarding the

⁹³ S. Peers, p. 178

competences of the member states and the EU with regard to the entry of TCN family members, arguing that a narrower interpretation would not have really limited TCNs' ability to enter and join their EU citizen spouses because they could still rely on the Directive.⁹⁴ He dismisses the concern over reverse discrimination resulting from *Metock*, again cheering on the Court, which he believes had a good point in “remind(ing) the member states that they cannot have their cake and eat it too – i.e., they cannot insist upon national competence and then complain about the results which they themselves created by the exercise of that competence.” The member states' “cake” is the exercise of their discretion in transposing Directive 2004/38 into national law, in some cases failing to include a provision that allows its citizens to rely on EU law when national law is more restrictive. The “too” for the member states is their discontent with the ruling's exclusionary effect regarding their own nationals, barring them from enjoying the same rights at home that foreigners are allowed to enjoy in a host country. Advocate General Sharpston issued her opinion on the *Zambrano* case in 2010, expressing her concern over the Court's recent trend in disrupting the balance between legal certainty and the protection of fundamental rights, placing more weight on the latter.⁹⁵

What Peers mentions but doesn't connect to his criticism of the member states' selfishness in this area is the fact that Directive 2004/38/EC was adopted two months after the *Akrich* ruling was released. In the eyes of member states, this ruling may have seemed to directly serve the purpose of restricting TCN immigration, while allowing their own nationals to benefit from the rights as provided for by the Directive. One can only speculate as to how the member states' preferences and transposition of the Citizenship Directive might have changed, had *Metock* been released in place of *Akrich*. In light of the *Metock* decision, relying on *Akrich*'s restrictions, has left some member states citizens with fewer guaranteed rights in their home country than TCNs in a host country.

Metock's aftermath was felt more harshly in some member states whose national immigration rules were affected by the ruling (Ireland, Denmark, and the UK most notably). In light of the *Metock* ruling, Ireland's judiciary was forced to re-open almost 1,500 cases for review, while Denmark's national immigration rules regarding TCNs' rights and the family reunification rights of Danish nationals were almost completely invalidated by *Metock*.⁹⁶ All three have had significant problems with their domestic immigration policies and rules in light of the *Metock*

⁹⁴ S. Peers, p. 191

⁹⁵ See Advocate General Sharpston's Opinion on the *Zambrano* case C-34/09, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0034:EN:HTML#Footnote107>, last accessed 30 May 2012

⁹⁶ S. Peers, 193.

decision. The challenges brought about by reverse discrimination are not only felt by the citizens who got the short end of the deal, but also by the member state who, perhaps inadvertently) dealt them a bad hand and must redesign their immigration policies because of it. Between the *Akrich* ruling and the *Metock* ruling that subsequently reversed it, the status quo of TCNs access to free movement was changed. *Metock* reversed a judgment that had come to be the status quo (*Akrich*) around which the member states' preferences were arranged regarding immigration and movement of TCNs vis-à-vis family reunification rights of EU citizens.

Viewed through the lens of the neofunctionalist theoretical framework used in this paper, *Metock* serves as a case that certainly did not reflect the preferences of the member states, adding to the existing empirical evidence disproving Garrett's intergovernmentalist minimization of the Court's autonomous role. As Advocate General Sharpston pointed out, the Court has lately demonstrated a trend of placing greater value on the protection of the rights of the Community's citizens as opposed to fostering legal certainty. If we situate the member states in the neofunctionalist model as applied to this research, their governments are charged with reacting to the functional spillover that results from Court decisions that challenge the status quo of EU and member state policies. In a choice between fundamental rights and legal certainty, the latter would surely best serve the interests of member states who could rely on legal certainty to avoid problems like the ones posed by the case law reversal of *Akrich* and *Metock*. While the preferences of the member states gravitate toward stability, problems that arise and challenge the status quo in policy areas where competences are shared between the member states and the EU, the member states might be more likely to coordinate with each other in order to avoid future disruptions to their national preferences.

Conclusion

This paper has explored the theoretical frameworks for studying the Court's role as an institution of integration in the European Union in an attempt to understand to what extent its decisions challenge the status quo of immigration policy, acting as a trigger for policy responses.

The findings of this paper show that the ECJ's decisions certainly challenge the status quo and spark policy responses, even though the process can be slow. Since little evidence of significant progress in the way of developing a common immigration policy has surfaced since these rulings, it is rather difficult to assess the impact of these cases on shaping member state interests as they relate to a common immigration policy. The problem with relying on the judicial system of the EU to spark policy change is that the process is often very long and very costly.

Anticipating the kinds of cases that will make their way to the ECJ in light of the existing case law is very difficult, and the Court's rulings, as this paper has shown, are not always consistent with the existing precedents. The additional limitation of this research was the lack of access to information regarding member states interaction at the EU level in response to these rulings and whether they've influenced policy or procedural (transposing Directives) in a way that deepens their EU integration. Aside from one article (not scholarly) indicating that the Commission was excited about the *Metock* case, I had a difficult time finding literature that significantly discussed these cases in terms of the EU's legislating institutions' reactions to them. My research sought to fill this gap, overlapping legal integration theory with political understandings of the Court's decisions. As these cases were relatively recently decided, policy reactions might take longer to build. While the case law concerning TCN immigration in the EU will continue to expand as a result of many unanswered questions and the continued lack of a common immigration policy, it will be interesting to monitor the trajectory it follows and the extent to which this influences EU immigration policy development. If member states continue to stand by their national preferences instead of ceding the minimum amount of autonomy in this area, a common EU immigration policy might take much longer than anticipated to develop. As this paper has argued, however, it is possible for ECJ cases that make big enough waves among the member states to trigger speedier policy responses.

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