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Review of "The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe" by Tommaso Pavone

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Abstract:
A review and critique of Tommaso Pavone's recent book "The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe" (Cambridge University Press, 2022).

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Tommaso Pavone's *The Ghostwriters* demonstrates the power of an ambitious interview strategy to improve our understanding of that amazing phenomenon, the birth of the European legal order.[1] Based on more than 350 interviews with national court judges and lawyers in Italy, France, and Germany, including some of those involved in the earliest Preliminary References, Pavone contests the 'judicial empowerment' thesis first put forward by Joseph Weiler (and taken up by many others, most prominently Burley [Slaughter] & Mattli) that the transformation of the European Economic Community between the 1960s and 1990s from an ordinary treaty system to something akin to a transnational constitution was explained (among other factors) by the fact that 'lower' national courts had self-interested reasons – an incentive for self-empowerment – to cooperate with the ECJ through Article 177's Preliminary Reference procedure. As Weiler wrote in his landmark 1991 Yale Law Journal article, "Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and thus have de facto judicial review of legislation. For many this would be heady stuff."

Pavone's contribution is to demonstrate that lower court judges were – indeed still are – frequently deterred from making Preliminary References by workload pressures and contrary career incentives within their national judicial hierarchies. *Ghostwriters* gives the reader a sense of the 'lived experience' of these national judges worried about their case completion rate and the additional work associated with preparing a Preliminary Reference. Comments like "I didn't do anything else for two weeks" and even "[for] four months I never went out" indicate the burden involved. These interviews provide much evidence that lower court judges saw making use of the Preliminary Reference procedure as a hardship, an

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opportunity to make significant mistakes, and, for many, a task to be avoided as far as possible.

In place of lower court judges, *Ghostwriters* identifies as the "essential change agents" the litigating lawyers who pressed for the use of the Preliminary Reference procedure. Pavone makes much of "ghostwriting" – efforts to lower the 'costs' of Preliminary References to national judges by providing detailed draft texts which could be submitted to Luxembourg with little or no alteration. Indeed these lawyers' efforts to obtain Preliminary References often went well beyond such drafting, and included the detailed *ex ante* planning of business activities to deliberately violate national laws (with a clear paper trail) so as to prompt a Preliminary Reference and likely ECJ condemnation of a national law. For example, lawyer Fausto Capelli found an art dealer willing to export a painting to Germany and to pay the Italian tax on the export of artistic objects that Capelli contended was contrary to the Treaty of Rome, then sued for a reimbursement and obtained a Preliminary Reference from the Tribunal of Turin. Pavone further demonstrates that a considerable number of the earliest Preliminary References were generated by a small number of legal teams, such as Capelli and Ubertazzi in Milan (78 Preliminary References between 1970 and 2018), or Modest and his colleagues in Hamburg (140 between 1967 and 2014). Many of these appear to have been motivated by European idealism, or had previously worked for the European institutions. For all these reasons, Pavone argues that we need to "substitute the lawyer for the judge as the bottom up motor of the judicial construction of Europe".

Ghostwriters is well written and engaging, and essential reading for anyone interested in the history of the European legal order. The extensiveness and thoroughness of the interviewing and related archival work is frankly dazzling, on a topic where

speculation has so often outpaced concrete data gathering of any sort. Thanks to *Ghostwriters*, a reference to the limited number of lawyers, often with European commitments, who actively pushed for a large number of the early Preliminary References must now be included in any history of European law. The book will also be of great interest to those training as European lawyers who can get a much better understanding of the circumstances under which national courts may make use of the Preliminary Reference procedure, and how these have changed over the years. It can be wholeheartedly recommended.

As to *Ghostwriters'* conclusion that litigating lawyers rather than judges have been the drivers of the EU's political development through law, however, a variety of reservations must be noted. The book avoids the explicit specification of 'variation in a dependent variable', 'observable implications of alternative explanations', different approaches to measuring concepts, criteria for testing/falsification, and so on, that is common in social science scholarship. Is the book attempting to explain why the European legal order differs from ordinary international treaties, which was certainly Weiler's purpose ? or is it focussed instead on explaining variations in the use of Preliminary References between different courts ? Neither the introduction or conclusion sets out a new narrative to contest prevailing accounts, or puts forward a detailed comparison, highlighting similarities and differences, between the 'judicial empowerment' argument for the development of the European legal order as previously elaborated and *Ghostwriters'* overall new argument. Any such comparison would likely reveal a lot of similarities. *Ghostwriters* accepts that the revolutionary novelties of European law were not explicitly set out in the Treaty of Rome but instead declared by the Court of Justice itself. That empowerment was not just of the Court of Justice, but also of the national courts via the direct effect and supremacy

principles which they were at times willing to make use of. A broad characterisation of the early years of European law as judicial self-empowerment therefore cannot be contested. Furthermore, there is nothing in Pavone's account to dispute Weiler's emphasis on the essential role of lower national courts in submitting preliminary references. On the contrary, *Ghostwriters* demonstrates the essential role of a wide variety of national courts, some of them very 'lowly' indeed.

Given the similarities outlined above, it is overstatement to claim that that *Ghostwriters* demonstrates that it is lawyers "rather than" national courts, or that lawyers "substituted" for national courts, in the development of the European legal order. The difference in Pavone's account comes down to a change of emphasis at most, because these national lawyers are producing change only within the context of all the judicial self-empowerment elaborated above, which created the national court litigation opportunities for the lawyers whose interviews fill the book. Similarly, *Ghostwriters'* claim to be advancing a revisionist "bottom up" explanation for European legal integration needs to take greater account of the fact that creating "bottom up" litigation opportunities for national lawyers has long been the ECJ's signature "top down" strategy. The distinction – and it is still a significant one – is that the 'judicial self-empowerment' argument proposed by Weiler has been taken to suggest that lower national courts were generally eager and enthusiastic users of the Preliminary Reference procedure, where *Ghostwriters'* interviews suggest by turn that lower court judges were often overworked and reluctant, and that to find any real enthusiasm (in the normal sense of that word) for the Preliminary Reference procedure one must often look instead to litigating lawyers with European commitments.

On this point, it would have been better if *Ghostwriters* had offered a fuller account of Weiler's original argument rather than the 'trimmed' block quotation included in the

book on page 40-41. Here is the passage as a whole, including in italics the sentences which *Ghostwriters* omits:

Noble ideas (such as the Rule of Law and European Integration) aside, the legally driven constitutional revolution was a narrative of plain and simple judicial empowerment. The empowerment was not only, or even primarily, of the European Court of Justice, but of the Member State courts, the lower national courts in particular. *Whereas the higher courts acted diffidently at first, the lower courts made wide and enthusiastic use of the Article 177 procedure. This is immediately understandable both on a simple individual psychological level and on a deep institutional plane.* Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and thus to have de facto judicial review of legislation. For many this would be heady stuff. *Even in legal systems such as that of Italy, which already included judicial review, the E.C. system gave judges at the lowest level powers that had been reserved to the highest court in the land.*[2]

If these sentences are included, it becomes clearer that the 'judicial empowerment' thesis as originally framed by Weiler was a comparative one – referring to the relatively more widespread use of and greater enthusiasm for the Preliminary Reference procedure by lower national courts in comparison with national constitutional courts, such as the Italian one, defined by their power of judicial review of legislation. The difference between these national constitutional courts and the rest of the national court systems was a vital one as the Italian Constitutional Court did not submit a first Preliminary Reference to the ECJ until 2008 and the German Constitutional Court not until 2014.[3] The European legal order could not have prospered as it did from the 1960s onwards had it relied on Preliminary References being submitted by these national constitutional courts.

In essence, Weiler's argument was that because of differences in their *ex ante* powers, national constitutional courts, already institutionally authorised to conduct judicial review of legislation, declined to make use of the Preliminary Reference procedure in its

[2] JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403-2483, 2426.
[3] Italian Constitutional Court order 103/2008, German Constitutional Court 134 BVerfGE 366.

early decades, but other national court judges, lacking the national power of judicial review, showed themselves willing to do so, rarely at first of course but then more widely over time. Stated in this way, admittedly without some of Weiler's flourishes, nothing in *Ghostwriters* disagrees with it, because greater enthusiasm of judges in lower courts defined in this comparative and structural sense is completely compatible with those same judges frequently feeling burdened and challenged by the actual work of submitting a Preliminary Reference.

Pavone's account loses sight of Weiler's original focus by moving – without sufficiently noting the deviation – to a much more general, 'common sense', account of 'lower' and 'higher' courts, the latter of which in his account include appeals courts and 'top courts of specialised jurisdiction' such as the German Federal Fiscal Court that nonetheless lack the power of judicial review of national legislation. Weiler's original argument in fact makes no claims about how the use of the Preliminary Reference procedure would be distributed among the many and varied national courts that lacked judicial review powers in their national legal orders, only that these would be more receptive to using Preliminary References than national constitutional courts which no amount of prodding or furnishing of draft References would (at that time) have budged. Furthermore, *Ghostwriters* takes some pains to demonstrate that courts of first instance have a lower individual propensity to submit referrals to the ECJ than appeals courts and 'high courts' more broadly defined. All this is true of course, but the normal understanding of the importance of the Preliminary Reference procedure is that it provided a system porous and open to use by all national judges, even courts of first instance, and that a substantial number of Preliminary References have come from first instance courts. That understanding, and indeed the distribution of Reference-making courts as set out in Figure 2.2 on page 46, is entirely

compatible with Weiler's original argument, which had said nothing very detailed to say about the exact differences in use between first instance and appeals court (etc) judges.

As for other aspects of the book's argument, there are important similarities between *Ghostwriters* and previous explanations for the early development of European law. The accounts put forward by Weiler, Burley & Mattli, and others have emphasised an strikingly limited range of actors and institutions – the ECJ, various national courts, litigating lawyers, their clients, national governments, and sometimes European law professors. Pavone puts more emphasis than these previous scholars on the litigating lawyers and their 'European' motivations, overall however, his circle of actors and institutions is similarly paltry. There is no effort here to engage with the argument that substantial legal reforms occur only when largescale political, social, and economic forces outside the courtroom have already substantially facilitated change. The literature review on pages 40-43 is thin, focussing only on the 'judicial empowerment' thesis without engaging with the many alternative perspectives on the early history and politics of EU law, which frankly gives the book a somewhat dated feel. Despite *Ghostwriters*' endorsement of the claim that the 'judicial empowerment' thesis became the dominant explanation of Europe's political development through law (page 13), this was only ever one part of Weiler's longer account, which also for example emphasised the interaction between the ECJ and national constitutional courts on fundamental rights issues. More importantly, the state of the art has moved on, as scholarship in the past decade has put forward a range of factors completely overlooked by Weiler and his followers, including the astonishingly close (often family) connections between early ECJ judges and leading national politicians, as well as the 'intra-industry' trade and generous welfare states that helped make binding trade

adjustments politically acceptable in postwar Europe as they do elsewhere.[4] Anne-Marie Slaughter, one of the major original proponents of the 'judicial empowerment' thesis, has acknowledged that a wider range of economic factors and state interests needs to be fitted into explanations of the development of European law, but there is little trace of that in *Ghostwriters*.[5]

In short therefore, the interviews in *Ghostwriters* are outstanding, a remarkable effort that stands head and shoulders above the data gathering in many previous social science contributions to the study of the European law. All readers will a great deal about the lives of the national judges and lawyers whose Preliminary References have built the European legal order. As a contribution more specifically to debates on explanations for the development of European law in its first crucial decades, its findings make for an very interesting if in the end modest adjustment to a scholarly approach that has focussed narrowly on judges' and lawyers' relationships, without engaging with the many wider political and economic conditions in post 1945 Europe that facilitated that extraordinary event – that wonder of the world – the birth of the European legal order.

[4] V Fritz, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972) : une approche biographique de l'histoire d'une révolution juridique* (Klostermann, Frankfurt 2018); W Phelan, *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies* (Oxford UP, Oxford 2015).

[5] Anne-Marie Slaughter "A Euro-American Union: Reflections on an Academic Marriage", https://jcms.ideasoneurope.eu/2018/11/01/136/.