Judicial policymaking in the supranational context
- the European Union and its experiences -

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To all the special persons that have inspired and motivated me.
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Abstract

Even though we are living in societies based on the principle of separation of powers, the current internal and international status quo develops mechanisms that depart from the traditional way of perceiving this idea.

By giving primacy to constitutional review instruments, executives and legislatives are no longer the only policy makers actors; the involvement of judges in policy issues dilutes the politicians’ powers in this resort and brings legal expertise into play; moreover, as nowadays states commit themselves on the international arena, ‘judicialization’ of politic’ is also happening as a result of the creation of supranational Courts.

The purpose of this thesis is to analyze what are the actual mechanisms through which such behavior is developed, which are the affected areas of interest and what kind of issues does the practice per se develop. In this matter, the result is a complex one due to the process’s dynamics and the fact that it is constructed on a particular decisional path that is composed of judicial decision-making and its subsequent political effects.
List of abbreviations

Court of Justice of the European Union – CJEU
European Union – EU
GC – General Court
GCC – German Constitutional Court
e.g. – for example
i.e. – that is
1. Introduction

1.1 Defining the concept

The connection between judicial mechanisms, politics and laws follows a dynamic and permanently modifying pattern. Furthermore, the level to which judicatures are involved in policy (i.e. executive/administrative) or law making (i.e. legislative), or the degree to which issues of social and political origin can be solved through judicial remedies differs depending on the country’s regime and on its international commitments.¹

Political scientists and public law scholars stress on the fact that democracy ‘is a prerequisite for the judicialization of politics’ and that this kind of phenomenon is hard to take place in societies that share dictatorial views.² In this matter, the political and the judicial ways of deciding are perceived as fundamental democratic cornerstones; on one hand, by emphasizing on the rule of reason, judicatures tackle behavior that has the potential of injuring lato sensu fundamental freedoms. On the other hand, legislatives have a collective role of taking care of the majority’s interests by enacting rules of general addressability.³

Defining the concept, ‘judicialization’ of politics is perceived as the phenomenon by which the influence of Courts’ rulings upon the political and social status quo increases at the detriment of the classical way of decision-making;⁴ furthermore, it can also be seen as the process by which political disputes are more and more resolved by judicatures.⁵ In this matter, fundamental freedoms, equality issues, privacy policies, definition of property, environment standards, labor regulation, immigration rules, commerce and trade are, at a policy level, being addressed through judicial mechanisms and know-how.⁶

⁴ Pilar Domingo, op. cit., p. 110.
⁵ Ibid.
Regarding the policy-motivated referral to judicial action, the most important reason to invest the Courts with the ability to decide upon legislation lies in the possibility to achieve a more advantageous policy results than the ones that would have occurred after a pure political decisional process.\textsuperscript{7} In this matter, courts may give more predictable rulings while the outcome of political bargains is always based on certain variables (e.g. strength in negotiations, parties implicated).

Besides the classical way of understanding the concept, ‘judicialization’ can also be perceived as a shift of decisional pattern; the usage of typical Courts’ decision-making mechanisms outside the scope of the judicial power has the effect of turning the areas in question into alleged ‘judicial processes’.\textsuperscript{8} For example, by introducing the ideas of constitutional review as part of the legislative development, politicians have introduced judicial expertise in a process that, not too many years ago was the artifact of pure politics.

Going further, this change of attitude can, for example, be seen in dispute resolutions mechanisms. Illustrating, between the 1970s and the 1990s, the decision making process inside the World Trade Organization shifted from classical negotiations between diplomats to more ‘aggressively’ juridical disputes due to the fact that each stakeholder had its own interpretation of the basic Treaty.\textsuperscript{9} In this matter, it can be said that ‘judicialization’ seen as a ‘shift of decisional pattern’ can occur where political arguments are no longer convincing.

However, this phenomenon emancipated and evolved to economic (e.g. trade) and social (e.g. labor) areas just recently; tracking its historical roots, it mainly started as a remedy against totalitarian regimes. It was after the Nazi regime ended that Germany enacted a new constitution (i.e. expanding individual rights), created the Constitutional Court and gave primacy to the idea of judicial review, all of them facts that strengthen the judicial powers.\textsuperscript{10} Moreover, after the Second World War, countries from Europe and not only have experienced a ‘multifaceted’ process of

\begin{itemize}
\item[8] Torbjörn Vallinder, op. cit., 91.
\item[10] Torbjörn Vallinder op. cit., p. 93.
\end{itemize}
judicialization meant to counterbalance the political monopoly\textsuperscript{11} and increase the control upon the political class.

In order to be clear in the analysis, it is very important to distinguish between the processes of judicial policymaking and the normal practice of the Courts. While the second one refers strictly to the decisions given by judicatures within the frames of the judicial power (e.g. contractual disputes, criminal law cases), the first one represents an expansion of the judicial authority beyond the judicial power and ‘invades’ areas that are usually dealt with by traditional policy makers (e.g. social security, foreign trade).

Summing up, in a game theoretic perspective, ‘judicialization’ of politics can be perceived as the dilution in the political decisional functions in the benefit of judicial authorities.\textsuperscript{12} As it will be seen in the further sections of this paper, even though starting at a national level, the idea of judicial policymaking also takes place at a supranational level. This happens as a result of the fact that independent states give up sovereign functions to autonomous non-national decisional actors.

\subsection*{1.2 Question and purpose}

The motivation of writing on this topic is first of all based on the idea of accommodating two domains that \textit{prima facie} share a vertical, ‘paternal’ relationship. In spite of the fact that there are theories that present laws as deriving from the divine will\textsuperscript{13}, it is the political actors that have shaped and codified social rules. In this resort, it can be said that the political consensus precedes the enactment of legislation and that even the function of the bodies applying it (i.e. courts) is regulated by political norms (i.e. constitutional).

Even though, \textit{prima facie}, the hierarchy seems to be a clear one, modern democracies have developed mechanisms that indirectly challenge the supreme political attribute of imposing social rules by policies; as a result, there is a need of understanding these phenomenon from a multidisciplinary perspective due to the fact

\begin{footnotesize}
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\item Torbjörn Vallinder, op. cit., p. 92.
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that lawyers and political science scholars can answer this fact only by combining their knowledge. In this matter, most of the times, the doctrine presents ether too textual judicial analysis or too broad philosophical assessment while the most desirable position is to be in-between these approaches.

In concreto, under the effect of the judicial review mechanisms, judicatures interpret already existing rules or, for example, give decisions in areas that are not regulated. By doing so, based on their intimate belief and independent from other decisional sources, judges involve themselves in the policy making process which, as a rule, exceeds their traditional area of competence.

Summing up, the purpose of the paper is to show the different ways in which judicial policymaking takes place and to highlight the areas that have experienced the Courts’ influence. Moreover, my aim is to also analyze the issues related to the legitimacy and accountability related to the fact of ‘judicialization’. Basically, the question can be summarized as: How and in which areas does it happen and also, which are the issues/controversies related to it?

1.3 Method and materials

The research is primarily based on qualitative analysis; in this resort, works attributed to reputed scholars and contemporary doctrinaires are being substantively analyzed with the scope of achieving a deep understanding about a phenomenon. Moreover, the approach on the judicial (i.e. case-law) or legislative sources (e.g. Treaties, Directives) is not at all a numerical or statistical one; it aims at ‘extracting’ the chore message of the judge or legislators’ will, with the scope of proving a hypothesis.

Having this way of reasoning as a start, it can be said that my method has an empirical character and uses already existing materials in order to deliver a clear outcome to a complex ongoing process. For this purpose, information present in books, articles or decisions are being relied on; they represent observations or experiences that are not necessarily having their sources on a theoretical type of system.

However, on the other hand, the theoretical section shall be framed from a conceptual point of view; developing, it will be mostly international relations and
constitutional aspects that shall be considered. In the same time, by using a cross method, theories and principles belonging to the political science (i.e. principal-agent, game theory) and the international relations sphere (e.g. neo functionalism, new institutionalism, multilevel governance, intergovernmentalism) will be combined with judicial concepts (e.g. the separation of powers), fact that will develop an interdisciplinary, cross field approach; by doing so, the scope is to compromise and give the reader a clear and argued perspective that is in between the abstract approach of political scientists and the very rigid analysis of law practitioners.

Moreover, when it comes to the law part of the paper, I will sometimes use the legal dogmatic perspective without however giving full effect to it due to the fact that the thesis is meant to belong to the international relations sphere. At the forefront of this approach shall be the teleological type of interpretation, as sine qua non condition for the idea of judicial policymaking.

The fact of supporting the theoretical part with concrete facts will give an analytical dimension to the paper. In this resort, in many of the situations, it will be the author’s contribution to interlink judicial and political behavior with the above-mentioned different theoretical frameworks.

From a structural point of view, in the second part, my research will encompass a case study (i.e. European Union) meant to exemplify the current status quo regarding the interaction between the judicial and political sphere that takes place within the international ‘arena’. It is in this section that all the theories mentioned at the beginning of the paper shall be correlated with material facts in what I previously called to be an analytical way; however, even though the outcome will be a subjective one, it will still mostly be based on the scholars’ and judges’ ways of reasoning.

1.4 Structure of Thesis

The thesis starts with a short introduction regarding the concept of ‘judicialization’; by focusing on new institutionalism, neo-functionalism and multilevel governance (as main paradigms) and on principles alike the separation of powers, Westphalia type of sovereignty, legitimacy, accountability and delegation of powers it afterwards pictures the international relations theoretical framework. Going further, it proposes a case study regarding the European Union (here and after, the
EU) and its experience regarding this process. When doing so, it firstly assesses on the general decisional framework and the judicatures’ roles within the Union ‘constellation’. It afterwards provides with actual examples about the way in which the Union Courts actually ‘judicialzie’ the supranational politics and in the last part, it considers issues like legitimacy and competence.

1.5 Delimitations

Even though the ‘judicialization’ mechanism mostly takes place at a national level, in this paper, by using international relations theories and principles, I will assess on the way in which supranational judicial bodies have a direct impact upon the decision-making political process that takes place inside autonomous entities and between them. Based on the fact that this is an international relations paper, I shall focus my attention on the European Union’s ‘judicialization’ experience and analyze the way in which this process takes place in the supranational area. Moreover, the European Union shall be my only example and I will not emphasize on other cases that can be relevant for this topic (e.g. the case of the World Trade Organization).

1.6 Challenges

The most challenging aspect of this paper is to transpose the idea of judicial policymaking, which is proper to the domestic and national scenes, into the supranational area, where, besides the typical separation of powers discussion problem, elements like legitimacy and accountability, that are typical issues for supranational actors, interlink in a very complicated logic.

Leaving the constitutional domestic area and ‘translating’ this phenomenon through international relations theories and language can also be a hard burden due to the fact that, besides the typical case-law discussion, elements like philosophic perspectives, organizational structures or paradigm influences will need to be explained in order to have a full perspective regarding what, on a daily basis, a lawyer would see as just pure juridical process.
1.7 Definitions

When describing the main process analyzed by this thesis *per se* I shall either use the terms ‘judicialization’ or judicial policymaking.

Moreover, within the paper, the Union Courts (i.e. Court of Justice of the European Union, here and after CJEU and the General Court, here and after GC) are to be found as either: Union courts/judiciary/judicatures, supranational courts or simply courts. Also, when I am referring to just one of them, there shall be mentioned either the Court (i.e. CJEU) or GC.

2. Literature review

The process of judicial policymaking has been on the scholar’s agenda ever since the creation of modern democracies as it is in this context that judicatures have attained a level of emancipation that allows them to act independent.

Ran Hirschl creates the general framework and assumes that in the modern times societies have experienced a shift of power from ‘representative institutions’ to judiciaries.\textsuperscript{14} Depicting this process, Alec Stone Sweet sees ‘judicialization’ of politics as a process by which *sui generis* judicial lawmaking gradually contours the strategic conduct of political individuals engaged in the daily decision making process.\textsuperscript{15} Hjalte Rasmussen has a similar definition regarding the concept but the term he uses in ‘judicial policymaking’.\textsuperscript{16} Sympathizing with this idea, Pilar Domingo considers that the fact of ‘judicialization’ has the attribute of increasing credibility when it comes to democratic ideals such as the rule of law.\textsuperscript{17} Moreover, in his book Daniel Kelemen considers some other incentives for the growth of this phenomenon;

\textsuperscript{14} Ran Hirschl, op. cit., p. 721.
\textsuperscript{15} Alec Stone Sweet, *Judicialization and the Construction of Governance*, p. 164.
\textsuperscript{17} Pilar Domingo, op. cit., p. 110.
in his view, the lack of support for parliamentary sovereignty and the stringent need for better rights’ protection determines such shift of paradigm.\(^\text{18}\)

With regard to internal affairs, scholars mostly focus on the role of Constitutional Courts in shaping domestic politics by reviewing legislation. While calling it a ‘constitution-making process’, they observe that when no political actor is involved, decisions are not taken under electoral pressure and follow a different pattern and methodology.\(^\text{19}\) Going further, by assessing on the intrusion of the judiciary into affairs belonging to the administrative power, Loren A. Smith talks about ‘the judicialization of the administrative process’; in this resort, ‘decisions of logic’ replace politically contaminated measures and come as a result of ‘extensive judicial review’ aiming at regulating governmental behavior.\(^\text{20}\) Summing up these two tendencies, Torbjörn Vallinder considers that judicial policymaking takes place ‘at the expense of politicians and administrators’ and that, by this, it interferes with both, legislative and executive processes.\(^\text{21}\)

On the other hand, when it comes to the international relations sphere, Alec Stone Sweet emphasize on the role that supranational courts have; it this resort, based on legislation that is decided above the national level, these types of judicatures have the role of ‘injuring’ typical Westphalia sovereignty, besides regulating areas that traditionally belonged to the political actors.\(^\text{22}\)

Focusing on the European Union’s case, Henry Farrell and Adrienne Heritier consider that even though the Union Courts have the power of interpreting in a binding way the Treaty provisions and implicitly secondary legislation, it is still the component states that decide upon the wording of such pieces of legislation. Moreover, in certain contexts national sovereignties set out the revision of the legislation that they have previously enacted fact that, in the scholars’ view, makes the judicial bodies look just like member states’ agents.\(^\text{23}\)

By shaping their reasoning on the principal agent theory, the two authors open the floor for a theoretical discussion about the process per se. In this resort,

\(^{18}\) Daniel Kelemen, op. cit., p. 12.

\(^{19}\) Pedro C. Magalhães, op. cit., p. 40.


\(^{21}\) Torbjörn Vallinder, op. cit., p. 91.


Giandomenico Majone states that the delegation of powers from member states to supranational institutions (e.g. the CJEU and GC) is meant to reduce political bargaining variables, improve the quality of decision-making and assure credibility based on long-term clear and predictable jurisprudence.\(^\text{24}\)

Moreover, this process is perfectly explained through the new institutionalism paradigm; in his work, Ben Rosamond considers that institutional configurations have a fundamental impact upon final political decisions and that the division of prerogatives by ‘institutional arrangements’ can lead to ‘path dependency’ that is hard to recast afterwards.\(^\text{25}\) This way of committing based on juridical ‘path dependency’ (i.e. harmonization) comes in line with the neo-functional theory. Exemplifying, Ernst B. Hass considers that the initiation of supranational authorities has the role of integrating more and more policy areas inside the ‘spill over’ effect, which can later take more radical forms as ‘integration at any cost’.\(^\text{26}\)

Summarizing, as it can be seen after reviewing relevant literature, ‘judicialization’ of politics can be extensively interpreted. It can refer to the impact that judicial decisions have upon executive or administrative bodies that can be of both: national or international manifestation. Furthermore, in the second case it is sometimes seen as an integration instrument that presents more efficiencies than analogous political mechanisms.

### 3. Theoretical framework

The preoccupation regarding the division of powers within the same state finds its roots long back into history. The first philosopher to consider this fundamental organizational mechanism was Aristotle, whom assessed on the three functions: executive, deliberative and judiciary.\(^\text{27}\) Developing on the subject, Montesquieu and Locke consider this separation to be an essential feature for the


avoidance of concentrating the power within the prerogatives of a single entity that, otherwise, might manifest dictatorial tendencies even in situations in which elections would take place on a regular basis.  

However, in the absence of effective and independent judicial review procedures, a parliamentary majority would have the option of ignoring acts of popular origin that are not in line with its political interests and, as a result, be in breach of its supporters’ will.  

When assessing on each and every of these functions it can be said that the legislative power (i.e. to elaborate) represents the supreme prerogative of parliamentarians, as representatives of the citizens, to edict legislation and to be able to delegate such attribute when the situation asks for. Afterwards, in completion of the prerogative of elaborating, executive and judicial authorities have the role of applying such provisions, in the first case by transposing them into administrative behavior and in the second case by enforcing them in case of litigation.

However, this democratic mechanism (i.e. idea of separation of powers) is ever since the early beginning of the twentieth century being completed by an autonomous function (i.e. attributed to Supreme, Constitutional or Supranational courts), deriving from the judicial power and which does not only apply the law as enacted by legislators but can also censor irregularities or abuses coming from such organisms. In this matter, it has been argued that the Constitutional Court has been a fundamental factor in many countries’ democratic path over the past fifty years.  

With regard to this, the fact of ‘judicialization’ can be paraphrased as ‘a counter majoritarian process for the injection into representative government of a system of enduring basic values’ that is based on individuals independent from political interests. Its purpose is to assess on ‘the qualities of law, its generality and
its neutrality’ without following any other type of logic such as ‘adjectives drawn from the political marketplace.’

Some scholars argue that, even though there is a great temptation to ‘bypass’ democratic malfunctions (i.e. lengthy negotiations, lack of consensus, imperfect agenda setting) by giving primacy to judicial policy-making, this represent a dangerous path that can develop in totalitarian tones. On the other hand, the view that judicial review is ‘undemocratic’ lies on the false idea that the Treaty/Constitution ‘should be allowed to grow without a judicial check’; in consequence, the democratic system would be deprived from a legit instrument meant to assure the correct institutional and social balance.

Widening the perspective from the pure case-law outcomes to the more abstract theoretical approach, jurists and scholars proposed what today we call Constitutional theory. When doing so, they have combined law institutions, political science concepts, historical experiences and philosophical views in order to have a complete picture regarding this new instrument called ‘judicialization’.

Moreover, schools of legal philosophy have enounced several theories (e.g. liberal, conservative, postmodern) that stand as cornerstones for the way in which judges orient their interpretations and decisions in relation with the purpose of the fundamental law (i.e. constitution or Treaty). In concerto, it can be said that if a Treaty is based on liberal values then the interpretation following it will pursue the same ideas with the purpose of giving full effect to the primarily (liberal in our subsequent case-study) political will. In legal scholars’ view, this is called the method of teleological interpretation and is used by judiciary panels when interpreting legal acts in the light of the ‘purpose, values, social and economical goals’ these provisions are intended to produce. Furthermore, judges are not interested in assessing the scope of a singular legal provision but analyze that rule in the light of a wider context

36 Ibid. pp.3-4.
37 Hjalte Rasmussen, op. cit., p. 46.
41 Teleological Interpretation seen on Freie Universitat Berlin’s webpage on 2014.04.08.
by embracing a panoramic approach that sometimes departs from the basic textual interpretation.  

To this extent, the teleological method can be perceived as an instrument that conserves the essence of the superior norm and does not allow subsequent acts to dilute it main intent; on the other hand, some scholars see it in radical ways and consider it to promote ‘judicial activism’ especially when it comes to international Treaties and their accommodation with national legal orders.

Developing on this issue, international relations scholars and constitutional law practitioners have furthermore develop on the idea of ‘constitutional pluralism’; seen as a pluralism of constitutional authorities (e.g. belonging to different states) of equal footing that claim ‘ultimate competence’ (i.e. the ‘kompetenz-kompetenz’ debate) when it comes to facts falling within their jurisdiction, the concept departs from the liberal principles on which nowadays international cooperation is mostly based and brings into play elements proper to a Westphalia type of sovereignty.

The rule imposed by this last concept emphasizes on the exclusion of external entities from the internal affairs of a sovereign state; to this extent, national sovereignties preserve ‘authority and control’ and the rule of nonintervention is perceived as an ‘absolute norm’ that does not allow to any concessions. Exemplifying, a convention can injure this model if it challenges domestic traditional legitimacy by creating ‘transnational authority structures’ and enabling them to exercise ‘external pressure’ upon internal entities (i.e. individuals and institutions). However, in such case, leaders might ‘compromise’ internal authority where there are enough commitments that other actors will act as such.

At this point, the transfer is being made between the Westphalian type of sovereignty to other paradigms that dilute states’ sovereign functions at the benefit of a better legislative, administrative or judiciary system. In this sense, the industrialization process has consistently hindered the possibility for ‘self-reliance’ of states, trend that is consistent at the time writing as well. This new status quo is being

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43 Ibid. p. 7.
46 Ibid. p. 33.
characterized by a shift from the monopolistic authority of governments and by the initiation of supranational bodies aiming at managing cross border policies.47

In other words, the shift of paradigm to neo-functionalism seems to be hard to challenge for the moment. Ernst B, Haas sees this process as one in which political entities from different states are being ‘persuaded to shift their loyalties, expectations and political activities’ towards a common horizon which itself has jurisdiction upon the already existing state actors.48 Moreover, a ‘common bureaucratic framework’ aims at influencing national behavior through mechanisms that also have the role of assuring commitment to previously set collective targets.49

It should be said that the transfer of attributes to supranational bodies has, most of the times, three ideas as core elements: the principles of conferral, proportionality, and subsidiarity. The principle of conferral ‘finds its support’ in the usage of the principles of proportionality and subsidiarity; it is in this context that sovereign nations give away functions at the expense of empowering supranational bodies. For example, it is only where things cannot be managed in an adequate way at the national level and where the measure does not exceed what is rigidly necessary to be reached that member states’ governments concede competences to the Union as sole entity.50

In this paradigm, major projects are being developed by ‘incremental decision-making’ taken at a supranational level; there is the presumption that most domestic political actors are not able to long term coherent behavior due to the fact of not being visionary and disciplined; in order to achieve a higher level of common efficiency, new-functionalism emphasizes on the elite’s adaptability in alignment with the roles’ specificities and needs.51

The chore idea of neo-functionalism is that integration within one area of activity will have as effect the expansion in other sectors. In this resort, the primacy given to supranational entities that are meant to administrate key sectors (including the Courts as ‘judicial militants’) also develops processes that foster more integration.

48 Ernst B. Haas, Limits and Problems of European Integration, p. 7.
50 The principle of subsidiarity seen on the European Union’s website on 2014.04.08.
Known as the ‘spill over’ or ‘the expansive logic of sectorial integration’, this process is understood and divided in functional, political and cultivated.\textsuperscript{52}

Functional ‘spill over’ is a system originating from the ‘inherent technical characteristics of the functional tasks themselves’.\textsuperscript{53} It occurs due to the factual interdependence that exists between certain integrated industrial areas and the impossibility of artificially separating them from other ones that are not yet sharing the same regime; moreover, the increase in technical development creates a frame in which there exists no isolated area as there is always another domain to be connected with.\textsuperscript{54}

Political ‘spill over’ begins from the negative premise that politics are dominated by conflicts between groups of interests that are deeply bureaucratized and lack efficiency. The remedy proposed to this view is that political elites, after understanding the benefits of seeking ‘supranational solutions’, should redirect locality to a ‘new center’ that most of the times takes the form of a more efficient umbrella organization.\textsuperscript{55}

Assessing on ‘cultivated spill over’, Haas and Lindberg develop on the fundamental role that ‘central institutions’ (i.e. supranational) have in the matter of fostering integration. In their view, classic diplomatic bargains are lengthy and ‘rarely move beyond the minimum common denominator’; this process can however be made more efficient by having a supranational entity mediating the process or even more, being involved in the final decision.\textsuperscript{56}

When it comes to the role of institutions in shaping supranational politics, deriving from neo-functionalism, scholars have developed the international relations theory of new institutionalism. Without nagging the role of both the social-political status quo politics and the motivation of particular actors, the new institutionalism emphasizes on a more autonomous role of political institutions, perceived as organizational bodies; when it comes to final outcomes, their view is that the design of political institutions and implicitly, political decision making, is as important as the

\textsuperscript{53} Ibid.
\textsuperscript{55} Jeppe Tranholm-Mikkelsen, op. cit., p. 5.
\textsuperscript{56} Ibid. p. 6.
social or economical conditions. If the doctrinaires belonging to this school of thought are right, a big part of the political behavior and decisional paths is an emanation of the procedures followed within that institution while the logic guiding the actors’ behavior is being shaped and sometimes censured by the internal norms and rules in effect at that time. In consequence, in a decision making process where several bodies are involved, the winner from the institutional environment will be the organization that has a decisional pattern that is more efficient than the others.

In this matter, theoreticians distinguish between the political actor type of decision-making (i.e. dominated by political negotiations, conflicting interests and uncertain outcomes) and the organizational type (i.e. lacking political struggle, emanating decisions with celerity and based on its internal rules). Correlating new institutionalism to game theory, institutions lacking legitimacy and accountability (i.e. judicatures) might be in the posture to increase their decisional weight in the detriment of other bodies that, even though popular validated, find themselves in a institutional algorithm and an internal status quo that does not allow them for more.

In this sense, game theory, by focusing on conflicts and cooperation, analyzes strategic scenarios that are or will happen in contexts in which entities’ actions are interdependent and, because of this, have the potential of influencing each other. Specific to international relations, cooperative game theory aims at analyzing the way in which independent players having relative amounts of power interact and deliver diverse outcomes that come in line with the sum of the group’s actions.

Continuing the discussion, game theoretic analysis applied to the political science area is framed by starting from the premises of actors having rational choices. Under this premise, all actions are fundamentally rational in form and individuals balance the ‘likely costs and benefits of any action’ a priori of taking any action. In other words, rational choice theory perceives social interaction in terms of social

exchange with accents on, for example, economic action; from this perspective, entities are motivated by the rewards and gains they can achieve.  

Having this state of mind as a start, rational actors have the tendency of creating instruments and organisms which are meant to represent their interests in areas in which they cannot directly represent themselves. Agency ties take place when one party called principal contracts with a second party called the agent, and delegates to the latter capacity for exercising a function on the principal’s (or principals’) behalf. Major motivations for such behavior can be to improve the policy quality in areas where the agent has superior knowledge or where it can accommodate divergent views, to avoid issues of collective action where the agent can assure long term commitments for cooperation, to ‘displace responsibility for unpopular decisions’ or to manage the problems of incomplete contracting which can appear in case where the synergy envisaged by a contract is lengthy and the negotiations difficult.

Having regard to the structural effects of agency contracts, political science theorists have developed systems in which overlapping competencies exist at multiple levels of governance. In this matter, the theory of multi-level-governance assumes that actors position themselves inside multi-level policy networks that create a very complex, most of the times two-layer, decisional environment. Exemplifying, subnational actors (i.e. states) operate in the same time in national and supranational dimensions fact that makes their sovereignty gently melt into a ‘multi level polity’. Furthermore, ‘disaggregating’ (i.e. by delegating power) the state into actors that rule on its diverse areas of interest can lead to situations in which the autonomous entities’ goals might not coincide with the ideal of projecting state sovereignty and priorities into future behavior.

Theorizing, policy networks are sets of formal and informal institutional linkages that take place between governments and other type of actors (e.g. supranational). Such interaction is most of the times carried between autonomous organisms and is structured around the idea of shared interests in public

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63 Ibid. p. 124


As a consequence, the outcome comes as a result of the interactions taking place between them.

In contrast with other theories, which picture a ‘state-centric’ perspective of governance founded on a sole authority, this theory conceptualizes the development of political entities that are defined by the idea of ‘governing without government’. As a result, these networks are far from being democratically accountable and lack Westphalian legitimacy.67

For example, problems of representativeness and asymmetric bargaining are typical for supranational bodies and models. As a rule, democratic states are representing their citizens coherent enough so the governments’ interests are a projection of the interests of the majority of they’re populations. Whenever a democratic government decides to materialize an idea, it is doing so by having the presumed support of a significant part of the people that, at the end of the day, are actually dealing with the burden imposed by the measure in question.68 On the other hand, international entities lack such qualities and, because of this, are most of the times not accountable.

In concreto, an entity of ‘continental scope’ shall look remote from the point of view of the average citizen; furthermore, having multinational character it ‘lacks the grounding in a common history, culture, discourse and symbolism on which most individual polities can draw’.69 However, even though activating in such hostile background, there are mechanisms to help things change. For example, indirect accountability via the use of legitimized national officials that also participate in the supranational decisional process can be a solution.70 On the other hand, ‘the bonds of accountability are tight’ as these agents can be restructured in another type of logic (i.e. become independent by being placed in an autonomous system) in which national interests are to be followed in subsidiary and only with the condition of not affecting the supranational objectives.71 Like in a game where many variables exist, the

70 Ibid.
71 Ibid. p. 614.
behavior of supranational actors may encompass elements such as ‘unforeseen contingencies, unknown states of the world and incomplete information regarding the choices of others’, all of them with the potential of leading to outcomes conflicting with certain member states’ view.\textsuperscript{72}

In response and as a solid remedy, states, in certain extreme cases, have the tendency to turn back to the classical way of intergovernmental cooperation, fact that has the effect of excluding the third-party supranational entities from the decisional process. Moreover, such institutions are replaced by arrangements in which states can cooperate in points of mutual interest. In this resort, the control prerogative lies with each sovereignty and allows all members taking part to decide the extent and nature of their collaboration, and this way avoid any injury caused to the internal sovereignty.\textsuperscript{73}

4. Analysis

4.1 The European Union and its judicial system

4.1.1 The Union in a nutshell

The European Union is composed by twenty-eight member states and represents a political and economic neo-liberal organization that bases its functioning on a scheme of supranational autonomous entities that interlink with the classical intergovernmental cooperation that takes place between the distinct sovereignties composing it.\textsuperscript{74} Because of this, the Union decision-making follows a complicated pattern meant to accommodate both, the states’ predilection to classical horizontal negotiations and the need for supranational coordination and coherence.

The ‘institutional set-up’ of the Union is configured to accommodate all the interest at stake; \textit{in concreto}, the Union's fundamental priorities are established through consensus by the European Council, entity that, sharing an intergovernmental

\textsuperscript{74} \textit{How the EU works} seen on European Union’s webpage seen on 2014.04.14.
logic gathers national and EU-level head representatives. In the same time, directly elected Parliamentarians serve the citizens of Europe in the European Parliament (i.e. supranational Parliament) while the interests of the Union ‘as a whole’ is articulated by the European Commission, body that is mostly composed by European-committed technocrats. Furthermore, national governments militate for their own countries’ agendas priorities in the Council of the European Union.75

This complex institutional ‘constellation’ reflects itself in the decisional pattern of the Union. For example, when it comes to the legislative procedure, a supranational institution (i.e. the Commission) has the initiative monopoly while afterwards the Parliament and the EU Council need to agree on the amendments (i.e. co-decision procedure) that will give the final form to the initial proposal coming from the Commission.76 As it can be seen, this procedure differs fundamentally from domestic legislative procedures where laws are usually being enacted by Parliaments and the process (i.e. proposal, amendments) is not divided between several institutions. Furthermore, through analogy with national legal orders and going at the top of the legislative pyramid, the Union Treaties77 are seen as constitutional documents and play the same role that domestic constitutions have at a below EU-level.78

By establishing a Union of ‘unlimited duration’ that procures its prerogatives from a limitation of national sovereignty by the transfer of functions (i.e. legislative, administrative and judiciary) from the member states to the supranational level, the domestic governments have limited, in certain areas, their sovereign powers, and, as a result, have tolerated the creation a body of law which is binding for their themselves, their citizens and the Union organisms.79

In a nutshell, the abovementioned description represents a summary of the chore European institutions and the most important aspects related to the legislative procedure. However, besides these bodies, very important actors with important powers when it comes to the decisional process are the Union courts, as representatives of the judicial power.

75 EU institutions and other bodies seen on European Union’s webpage seen on 2014.04.14.
78 Hjalte Rasmussen, op. cit., p. 5.
4.1.2 The Union judiciary

The creation of the CJEU goes back more then 60 years ago; the entry into force of the Treaty of European Coal and Steel Community in 1952 established, among other bodies, the Court of Justice. Its main task was to make sure that the law is observed within the Union.  

In this matter, the Treaty of the European Union (i.e. Lisbon Treaty) states that the Union judiciary shall include the Court of Justice of the European Union, the General Court and specialized courts’. Furthermore, its generic role is said to be to ‘ensure that in the interpretation and application of the Treaty (and its derivations: Regulations, Directives) the law is observed.’  

In this matter, the Union courts are supranational entities that, following the principal-agent principle (i.e. derived from rational choice institutionalism), are empowered with the authority of assuring that the Union legal order it is being respected by both, the member states and by the other institutions. However, things can move a bit further and develop the idea of a sui generis type of principal-agent relationship; in this matter, the task of purely applying the legislation is somehow exceeded due to the fact that judicial interpretation can itself create new rules that, depending on the situation, might depart more or less form the will of the primarily legislator (i.e. the principal).

Dealing with such an important role executed by the Union judiciary system, the purpose for the establishment of the GC was to relax the burden that had been imposed on the CJEU by the multiple requests it was facing and for assuring that the overwhelming load of work will not affect the quality of the supranational judicial decisions.

Looking at the structure, the Courts are being composed by judges - one for each member state in the CJEU’s case and at least one for each national government in the GC’s case. They are being appointed after mutual accord between the Union representatives and national governments. Exemplifying, the member states’ proposal

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is not enough for their assignation; a separate independent panel – mostly composed by former Union judges - has the role on assessing on the suitability of the individuals in the matter of performing as Union judges.\textsuperscript{85}

The demand that such persons need to be ‘independent beyond doubt’ and possess the ‘qualifications for appointment in the highest judicial offices in their countries or are jurisconsults of recognized competences’\textsuperscript{86} is in line with the neo liberal predilection for supporting elites and the need of centralizing and empowering them with supranational level attributes for the aim of achieving better efficiency for the process per se. Moreover, the fact that once appointed, the judges serve into office for six years and the fact that every three years there is a partial replacement of the Courts members\textsuperscript{87} represents another incentive meant to foster their already proven independence. As a result, the long mandate period has the role of censoring any tie that they might keep with their national states while the permanent replacement of judges aims at assuring that the institution is not being ‘stuck’ with the same panels;\textsuperscript{88} furthermore, this kind of independence is strengthen by the principle that the judges have the duty to exercise honesty and discretion as regard other positions or benefits they shall have after finishing their mandates.\textsuperscript{89}

Moreover, the same requirements stand for the Advocates Generals, which represent a \textit{sui generis} type of judicial actor; while being appointed by the big member states and through rotation by the smaller ones, their function is to deliver an ‘independent and impartial’ opinion to the court after the procedures have ended.\textsuperscript{90} In other words, the role is to offer an \textit{a prior} level of expertise on the debated issue and to improve the quality of the hall process, fact that must be perceived as legitimate and necessary due to the importance of the final outcome that the Courts deliver at a further stage.\textsuperscript{91}

The decision given by Courts are collegiate in nature due to the fact that, no matter what number of judges the panel consists of, the decisions are to be taken

\textsuperscript{85} Ibid. p. 58.
\textsuperscript{87} Ibid. art. 253
\textsuperscript{88} D.G. Valentine, \textit{The Court of Justice of the European Communities}, (London, Stevens & Sons 1965) p. 18.
\textsuperscript{89} Ibid.
\textsuperscript{90} Irmina Pacho, \textit{The Advocates-General in the Court of Justice of the European Union}, (2011) p. 1 seen on Human Rights House’s webpage on 2014.04.15.
\textsuperscript{91} Edward H. Wall, \textit{The Court of Justice of the European Communities – Jurisdiction and Procedure} (London, Butterworths 1966) pp. 190-191
preferably through consensus and if this cannot be achieved, the opinion of the majority will succeed. As the Court represents a last supra state ‘judicial layer’ the ‘single collegiate’ judgment system is meant to avoid the publicity of dissenting opinions (i.e. through separate opinion procedure) that, in subsidiary, would lead to controversies, uncertainty and would undermine the Courts’ authority by diluting its decisions’ effects.

Because of this and in the absence of classical political negotiations that are present in most of the other institutions’ decision-making process, the decisional pattern of the Union Courts pursues the form of the organizational process model. With regard to this fact, decisions are first of all based on the ‘intimate conviction’ of the independent judges and not on political negotiations while the correct application of the law prevails in front of national interests. In the same time, the primarily pattern of judicial decision-making is an ‘outgrowth of rational choice theory’; the judge represents a rational actor who, by assessing on facts embraces a logical reasoning based on previous case-law and legislation, fact that makes him deliver with celerity an outcome that is more predictable than what would be the result of political bargains.

This type of judicial decision-making is present in several supranational areas of interest. For example, the Court of Justice of the EU answers requests for ‘preliminary rulings’ (when domestic courts ask for clarification on points of Union law), assesses on actions ‘for failure to fulfill and obligation’ (brought in contradiction with member states that are not complying with Union law) and analyzes the possibility of annulling Union legislation that is conflicting with the Treaties or with recognized fundamental rights. Moreover, it decides upon ‘actions for failure to act’ (against Union bodies not taking decisions that they are required to) and reasons on ‘direct actions’ (brought by individuals, organizations or undertakings in opposition to Union acts). In the same time, the extensive interpretation of the role of ‘observer over the treaties’ makes the Courts extend its review to cover bodies

93 Ibid.
96 Court of Justice of the European Union, seen on European Union’s webpage on 2014.04.16.
which did not fall within the scope of Union law or assess on measure that the Union attributes did not provide with.\textsuperscript{97}

\section*{4.2. The early instruments for judicial policymaking}

\subsection*{4.2.1 Direct effect and supremacy – the main principles}

The revival of the integration process at the middle of the 1980s was continued by a resumption of ‘non–state centric integration theories’, which, regarding the integration process, gave primacy to supranational entities such as the European Commission and the Union judicatures. In this matter, some scholars assume that the Court of Justice had conducted the integration process in a way ‘beyond’ national governments’ control, fact possible because of a very efficient collaboration with the national judicial bodies.\textsuperscript{98}

Once having the wide attribute of interpreting the Treaty, the Court found itself in the privileged position of being able to use all of its actions in order to achieve the integrative purposes of the different Treaties that were in force during time (e.g. Rome, Amsterdam, Maastricht, Lisbon).

Scholars consider that the Union judicature has developed its judicial activist activity by 'constitutionalizing' the Treaties, fostering economic integration and protecting human right fact that, even though questions its legitimacy, is still in line with the democratic values on which the Union \textit{per se} is being built\textsuperscript{99}.

As already mentioned, by interpreting legislation, the Courts become themselves a type of legislator that, like in the common law case, develop law as a result of their own decisions (i.e. interpretations) and give ‘great precedential weight’ to previous case law, which is binding \textit{erga omnes}.\textsuperscript{100} Transposed this fact into a integration theory (e.g. neo-functionalism) it can be seen how the role of judges (perceived as elites) increases in the policy making area and has the scope of assuring

\textsuperscript{97}Paul Craig, Grainne de Burca, op. cit., p. 63.
\textsuperscript{100}Common law, seen on Princeton University’s webpage on 2014.04.27.
that the process of integration can continue even in cases where political consensus can not be reached.

In doing so, the Union judiciary used several methods of interpretation. For example, by engaging in an adjudicative law making course, judges interpret vague provisions that incubate at least ‘two equally defensible decisional alternatives’ and give preference to the one closest to their believes. In other cases, the judicature engages itself in a ‘gap-filling’ process of regulating areas where the legislation is silent or in extreme cases, rules ‘disrespectful’ of the textual indications (e.g. interpreting ‘or’ as ‘and’). 101

Developing, ever since the early 60s the Court has created the concept of a ‘new legal order’ (i.e. supranational) and ‘direct effect’; the first idea refers to the existence of a superior, supranational layer of regulation and jurisdiction while through the second one, individuals were able to enforce these new rules at a national level and basically, make them effective in their own states. 104

Scholars have argued that the judicial system did not matter in the Union decision-making logic before the 70s due to the fact that the rulings it gave were imposing principles lacking any reality. In this matter, without having a perceptible and important practical impact on one or more member states, its decisions were considered to be of marginal relevance and influence. 105

However, afterwards and as a consequence of this established legal precedential scheme, conflicts between national constitutional orders and Union rules started appearing more frequent. 106

In order to solve this issue and by having the same integrative and purposive approach, the Court developed what today scholars call the ‘supremacy’ or ‘primacy’ of EU law. Even in the absence of a clear provision stating such fact, the Union judiciary decided that in case of a clash between domestic and Union legislation, the one prevailing will be the second and any other provisions that would be in

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102 CJEU Case C-304-02 Commission v. France 2005 ECR-I 6263, para. 82.
103 Ibid. pp. 28-29.
contradiction with it shall be disregarded and eliminated. In other words, the Court gave primacy to a system where the principal legal system does not exist within the ‘framework of a sovereign state’ but it comes from a supranational dimension and severely injures the Westphalian model.

In the same time, deriving its reasoning from the abovementioned principles, the CJEU strengthen its powers even more in what the doctrine calls the Foto Frost case. In this decision it has ruled that national judicatures do not have any power of declaring acts enacted by the Union organisms (e.g. legislation) to be invalid and that such competence rests with the Union judiciary.

4.2.2 Accommodating supranational with national - different perspectives

Ever since 1975, in France for example, the Supreme Court (i.e. Court de Cassation), while dealing with a constitutional issue, accepted the idea of supremacy of Union legislation over the French legal order. Basing its reasoning on the French Constitution in effect at that time, it stated that when there are conflicting provisions between a domestic piece of legislation and an international agreement that has been ratified according to the internal procedures, the later shall have superior legal power.

As it can be deduced, the France Court based its ruling on the French Constitution and did not give primacy to the idea that the Union per se, without it relying on other legislation, develops a superior legal order. In consequence, the Court kept the situation within the frames of the principal-agent logic; by declaring that Union law can exist and have supremacy because of the Constitution permits so, the French Court placed itself in the role of the principal, as the one deciding the limits of the agent’s powers and attributions. Furthermore, from a game theoretic perspective it can be seen that the national court compromised and accepted the idea of primacy of Union law but, in the same time, alike other constitutional courts, kept for itself the prerogative of ultimate competences review.

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107 Ibid.
108 Ibid. p. 305
110 Paul Craig, op. cit., p. 37.
111 Ibid.
However, while not relying in their decision on a pragmatic behavior, other sovereignties accepted what the doctrine calls the ‘communautaire’ approach. In a case from 1972, the Belgian Constitutional Court admitted the idea of supremacy of Union law and ruled that its supremacy derives from the intrinsic nature of international law. As a result, the Belgian Constitutional Court released any string on the Union courts and, implicitly, gave birth to a supranational independent logic that gave the Union Courts the ability to invoke this precedent when evading the principal-agent framework.

In line with what has be said, nowadays, with the enactment of the Lisbon Treaty, the heads of member states have also adopted a formal declaration and validated what the Court has ruled years ago. By stating that ‘in accordance with the well settled case-law of the Union Courts, the Treaties and the laws of the Union have primacy over the laws of the Members States’, national politicians have embraced the actual legal-policy created by the judicature and transposed it in a declaration (i.e. pure political document) that represents the sum of classical, horizontal, intergovernmental negotiations.

In this matter, the abovementioned example represents a successful case of ‘judicial activism’. Usually, the concept is being understood as the willingness of the judicial power to establish public policies when the political actors ‘cannot or will not’. Particularly, it represents the surrendering of decisional attributes from the bodies that legislate to judicatures.

The doctrine has developed a growing controversy when it comes to the functions that judges accomplish; the result is that judicial activism ‘bears a pejorative tone’ due to the fact that many political scientists consider courts to be violating constitutional limits by engaging themselves in a informal process of law making.

However, the fact that Union members did not reverse the Courts’ decisions in the matter of the abovementioned principles proves that the Union judicature has not fundamentally depart from domestic interests and that, in a principal agent equation,

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rational nation perceive that their interests are being furthered and protected. In this matter, the apparent willingness of the entities responsible for enacting legislation to tolerate the Courts’ case law is for sure suggesting that the idea of an ‘implied political review of judicial decisions’ doctrine should be developed when assessing on the judicatures’ legitimacy. In this resort, the acceptance can be perceived as informal tacit ratification of the judge-made law.\(^{117}\)

Developing on the tacit approval doctrine, the ex post coding of a decision that was given in, for example, a ‘gap-filling’ situation, should add on the Court’s legitimacy to use its high technical capacity of creating ‘new law’.

*In concreto*, in two cases from the mid-90s the Union judicature has decided that European citizens benefiting form cross border healthcare should be reimbursed ‘at exactly the same rate as applicable in the home state’.\(^{118}\) As this practice was not provided by any piece of legislation, the Union legislature (i.e. Commission, Parliament and EU Council) enacted a Directive that basically uses the same wording as in the Court’s ruling;\(^{119}\) as a result, it can be said that this cross border healthcare policy had its primarily source the CJEU’s decision which was afterwards confirmed by the legislative bodies.

In many of the cases, the judicature’s ‘judicial activism’ or ‘integration at any cost’ endeavor is being ‘constrained’ by the expected feedback from domestic governments; however, the most desired rulings are considered to be those that, as in this case, expand the EU’s legal system and in the same time, constrain a big number of member states or just some of them but which are perceived to be powerful (e.g. Germany, UK, France).\(^{120}\) In other words, the aim of the Courts is to be legitimized through powerful precedents that have a major impact upon the Union environment and implicitly bound the member states without having them expressing any political will.

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\(^{116}\) Karen J. Alter, ‘Who are the Masters of the Treaty’: European Governance and the Court of Justice, p. 17.


\(^{118}\) Paul P. Craig, Gráinne de Búrca, op. cit., p. 804.


4.3. The practical application of the judicial principles

4.3.1. The external prerogatives’ case

Going further, the CJEU can become a policy maker even by solving what 
*prima facie* looks to be a banal inter-institutional dispute. In a case from the early 70s 
that was carried by the Commission against the EU Council, the CJEU, by giving 
primacy to a teleological and non-exhaustive interpretation - ‘the authority arises not 
only from an express conferment by the Treaty’— has developed the ‘implied 
competence doctrine’. It has basically stated that where the Union enjoys internal 
powers in specific areas (e.g. transportation, agriculture) it shall be entitled to extend 
them to external relations (i.e. negotiate and sign international agreements in these 
fields). In consequence, prerogatives that each and every state was able to exercise 
in an autonomous way were, after a process that lacked political will, been transferred 
to a supranational entity that would deal with them in a centralized and unitary way.

The case reflects the fundamental role that the CJEU has had in determining 
the boundaries between the national and the Union’s external powers and the fact that 
through solving an annulment action the Court actually involved itself in a policy-
making process. Moreover, nowadays, this decision has also been politically and 
formally validated; after member states have, in an intergovernmental manner, 
enacted the Lisbon Treaty, they have given the Union *per se* legal personality in order 
to easier ‘conclude and negotiate international agreements’. Furthermore, by 
recognizing that ‘consistency and complementarity between internal and external 
policies will foster trade and growth’ the member governments have built on the 
precedent initiated by the Court a principal-agent relationship in which they are the

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121 CJEU Case C-22/70 Commission of the European Communities v Council of the European 
Communities [1971] ECR – 00263 para. 1
124 Christopher Hillion, *ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of 
125 Legal personality of the Union, seen on European Union’s webpage on 2014.04.17.
principals and the European Union represents their interest when it comes to the interaction with third party countries/organizations.

During time, the Union judiciary has passed into being the architect of even more institutional innovations, many of which referred to its own attribute to engage in judicial review.\textsuperscript{127}

For example and in relation with the abovementioned situation, the Court is still present and has a profound influence in this equation; this happens due to the fact that, according to Union primary legislation, whenever a international agreement is envisaged, it cannot become effective if it does not have the approval from the CJEU and the only method to avoid the ‘advisory opinion procedure’ is by revising the Treaty.\textsuperscript{128} Furthermore, in what the doctrine calls the ‘open skies’ cases, the Court, by invoking that the principle of unity in international representation may be compromised, annulled seven bilateral aviation agreements concluded by Union members with the United States. In the same time, \textit{mutandis mutandis}, the Court decision invalidated all similar agreements that domestic governments had signed together with third countries.\textsuperscript{129} Looking at the implications that the decision had and will have over time it must be said that sovereign nations that nowadays are acceding to the Union have the duty to implement the Union Acquis (i.e. existing Union legislation and case law) and as a result, disregard any piece of legislation conflicting with it.\textsuperscript{130} Having this as a premise, states that were not in the EU at the moment when this decision was given will have to respect it once they become members of the organization and reconsider most of their international agreements.

Finishing with this example and transposing this into a syllogism, it can be interfered that external affaires prerogatives have not only been transferred to the Union’s decisional competences but were furthermore placed under the Court’s direct responsibility and surveillance. However, as mentioned before, this behavioral typology is considered to be accepted by member states if short run domestic costs of respecting a judicial decision are being outweighed by more important benefits (e.g. safer Union borders, more efficient internal market).\textsuperscript{131}

\textsuperscript{127} Henri de Waele, Anna van der Vleuten, op. cit., p. 645.
\textsuperscript{128} Paul Craig, Graine De Burca, op. cit., p. 351.
4.3.2. Explaining the phenomenon

Based on the situations described above, scholars have developed the ‘legal autonomy’ approach; it is argued that states did not pay enough attention to the Union judicature’s behavior in the 60s and 70s when there was created a ‘set of powerful supranational legal doctrines’ that were layer unsuccessfully challenged on ultra vires grounds. In this resort, the ‘legal autonomy’ approach is founded on the neo-functionalist school of thought; the idea of functional spillover is that the integration in certain areas leads to the fact of promoting deeper integration in neighboring fields (e.g. from internal to external competences).\footnote{Stephanie Bier, The European Court of Justice and Member State Relations: A Constructivist Analysis of the European Legal Order, (2008) p. 5 seen on University of Marlyand’s webpage on 2014.04.17.}

This status quo – the ‘spill over’ non-political mechanism – is in contrast with other scholars’ view about European integration. For example, other doctrinaires supporting the intergovernmental school of integration consider that the Union’s integration has developed through a number of glorious intergovernmental bargains carried between political actors that positioned themselves on equal footings.\footnote{Paul Pierson, The Path to European Integration: A Historical Institutionalist Analysysm, Comparative Political Studies, Vol. 29, No. 123, (1996) p. 130.}

Comparing, it can be seen that the two decisional patterns are based on different organizational fundaments that interact in the same context of multi level governance. As developed before in the paper, a specific issue can be regulated by both: a court decision or by political will (e.g. declaration, enactment of a Treaty provision). While the intergovernmental way of decision-making is based on the political bargains and compromise, which involves negotiators whom are loyal to their domestic governments\footnote{Roy H. Ginsberg, Demystifying the European Union: The Enduring Logic of Regional Integration, (Playmouth, Rowman & Littlefield Publishing, 2007) p. 70.}, the one adopted by the Court is based on the Union’s objectives and is the sum of individual judgments.\footnote{John N. Drobak, Douglass C. North, Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations, Journal of Law & Policy, Vol. 26 No. 131, p. 142.}

Framing the analysis on both, the new institutionalism and multi level governance theories, it can be said that in situations where an overlap of competences...
in the same area occurs, the ‘inter’ and ‘intra’ institutional configuration shall have an impact on the final political outcome.\textsuperscript{136}

With regard to the examples given above, it can be said that the distribution of powers between the Union institutions can lead to situations in which a decision can be either imposed through political or through judicial means. In this resort, the way in which such institutions are designed to decide is fundamental in the matter of which one is going to act first and, in consequence, create path dependency.\textsuperscript{137} Also, the choices made by rational actors under conditions of institutional interdependence are of equal importance when we are considering a multi-level governance system.\textsuperscript{138}

Exemplifying, at an early stage of the Union’s existence, the Court of Justice, by developing doctrines such as a ‘new legal order’, ‘direct effect’, ‘supremacy’, ‘implied competence’, took a leading role in shaping the integration process and implicitly, became a policy maker by deciding on what sovereign functions are to be transferred to the supranational level.\textsuperscript{139}

This took place in the Union’s first years of existence, time when most political supranational institutions were ‘inexperienced’ and domestic governments were still tributary to the intergovernmental classical way of interacting; in consequence, these circumstance correlated with the complexity of political negotiations made the attainment of important measures look hard to be accomplished.\textsuperscript{140}

The fact that the Union judiciary had a clear role in observing and interpreting the Treaty provisions in line with the Union politically established objectives was a solid base for the idea of ‘judicialization’. Moreover, its organizational structure, which involved very few decisional actors (i.e. the panel judges) in comparison with the more agglomerated political negotiations and also, its decisional pattern that, in

\begin{itemize}
\item \textsuperscript{136} Ben Rosamond, Theories of European Integration, (Houndsmills, MacMillan 2000) pp. 113-114.
\item \textsuperscript{137} Ellen M. Immergut, op. cit., p. 8.
\item \textsuperscript{138} Ibid. p. 13
\item \textsuperscript{139} CJEU, Case C-6/64 Flaminio Costa v E.N.E.L.[1964] ECR 585, CJEU, Case C-26/62 van Gend & Loos v Netherlands Inland Revenue Administration, [1963] ECR 1, CJEU, Case C-22/70 Commission v Council [1971] ECR 263.
\end{itemize}
opposition to the political bargains, is based on non-conflicting interest, made the Court come in front of that time’s politicians.

Moreover, the effects of these decisions had and will have implications for the long run as well. To be more precise, they have created what the doctrine calls path dependency; in academicals perception path dependence means that actual and future actions or decisions taken by states/international entities are dependent on the path of previous decisions or actions that were taken before by other similar entities. With regard to this fact, political science scholars consider that, in the Union’s case, if no severe or major changes appear (e.g. ‘atavistic nationalism, ethnocentrism’) the path dependency will increase the ‘spill over’ process in line with the Treaty objectives.

This concept started from the idea that that ‘a small initial advantage or a few minor random shocks along the way could alter the course of history’. This can be a good metaphor to describe the European Union’s experiences. First, following the new institutionalism logic, the advantage can be seen in the less rigid and complicated way in which courts rule, in opposition to the lack of political efficiency. Furthermore, the change of decisional paradigm, from political to judicial can be perceived as a shock that afterwards lead to a change of the traditional decision making status quo.

However, as jurists emphasized, the decisions must not be perceived as political but they should be seen as only having political consequence. In order to do so, judges must be able to persuade that the ‘teleological inevitability is a legal inevitability’ and not the result of an ongoing policy process. If the Court is able to position itself within the legal area’s frames and support its decisions through juridical instruments then the idea of lacking legitimacy should not be an issue. However, if it evades this safety net and gets to be perceived as a political entity, the change of paradigm from judicial to political will reveal many weaknesses.

142 Scott E. Page, Path Dependence, Quarterly Journal of Political Science, No. 1, 2006, p. 89.
143 Andrew Moravcsik, Sequencing and Path Dependence in European Integration, (2005), p. 24 seen on University of Notre Dame’s webpage on 2014.04.21.
144 Scott E. Page, op. cit., p. 87.
145 Hjalte Rasmussen, op. cit., p. 25.
146 Ibid. p 36.
4.3.3 Judicial lawmaking inside a game theoretic approach

Form a very early stage, the Union’s Courts influence on legislation increases when proposals on secondary law (i.e. Regulations and Directives) are facing the co-decision procedure. Exemplifying, when the Commission, Parliament and the Court of Justice embrace the same view and when national governments cannot agree, constitutional review precedents can force domestic governments to comply under the same dominator, due to the fact that those decisions always address the fundamental objectives of the Union Treaties.\textsuperscript{147}

Going further and looking at the casuistic typology, this process takes place in the negative integration area where parties sharing a cross border link litigate with the scope of removing domestic legislation that impedes their commercial activities. On the other hand, European Union bodies (e.g. Commission), which aim at promoting harmonization, also appeals to the Union judiciary in order to impair measures that are considered to breach on Union legislation.\textsuperscript{148}

From a game theoretic approach, the interaction that takes place between the individual governments and the European judicatures can be analysed considering different variables. First of all, if the line of case law coming form the Union courts is foreseeable and respects the principle of legal certainty, the chance that future decisions will be ‘tailored’ depending on alleged reactions from member states will be low; however, if a ruling taken by the Court of Justice has important costs on national governments, there might be chances that the respective sovereignty will challenge it; furthermore, if the actions provided in the last case have impact on more than one member state, the possibility that, through political will, a change of legislation (i.e. contradicting with the Court decision) may occur.\textsuperscript{149}

In cases where the sectors affected by a Court decision are large and essential for a specific state, that otherwise gains just few advantages on the short term from the Union (e.g. internal market), it would be ready to try and evade or even ignore such a decision due to the fact that the internal costs of complying with it would outweigh alleged gains deriving from the status of being part of the Union.\textsuperscript{150}

\textsuperscript{147} Fabio Wasserfallen, op. cit., p. 1134.
\textsuperscript{148} Alec Stone Sweet, The European Court of Justice and the judicialization of EU governance, p. 23.
\textsuperscript{149} Geoffrey Garrett, R. Daniel Kelemen and Heiner Schulz, op. cit., p. 174.
\textsuperscript{150} Ibid. p. 177.
Member states can launch a threat against an unfavorable ruling by invoking the fact of initiating Treaty revisions, changing secondary legislation (i.e. Regulations, Directives) or by voluntarily lacking compliance, if they consider the ruling to be groundless or too harmful for the internal affairs. However, the first option is seen by most of the doctrine as a veritable ‘nuclear option’ due to the fact that is the most effective but, in the same time, it is very hard to put into practice due to the fact that member states need to unanimously agree.

In the same time, change of secondary legislation is often used in order to overrule decisions that are not in line with member states’ expectations. This was the case after the CJEU delivered its reasoning in two cases from the mid 80s that involved social security issues. In a nutshell, the Court of Justice ruled that social benefits can be exported and that even though individuals move to another Union country, they are still entitled to such benefits.

In this context, France refused to implement the Court rule and the Commission against it brought an infringement procedure; on the other hand, in order to avoid a situation contrary to its sovereign interests, a proposal for the revision of the Regulation – imposing ‘territoriality’ instead of exportation – was negotiated and unanimously adopted in the EU Council by the member states. However, years later and even with that piece of legislation in effect, the Court in some other cases, ruled that ‘it would not accept the ‘territorialization’ of social benefits at any rate’ due to the fact that it would severely injure the free movement of workers. In this matter, the Court referred to primarily legislation (Treaty provisions) in order to overrule a possible outcome that would have been dictated by a piece of secondary legislation which, in turn, was meant to change a line of non-national friendly case-law.

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152 Fabio Wasserfallen, p. 1132.


155 Fabio Wasserfallen. op. cit., p. 1130.
4.3.3.1. Public pressure

In spite of this case and referencing to game theory, some very courageous political scientists, in opposition with jurists, have assumed that Courts will most likely avoid ruling against sovereignties from which they expect or anticipate that their domestic governments will not accept such negative decision.\footnote{Geoffrey Garrett, op. cit., pp. 180-181.}

However, this assumption may be true to a certain extent. The cautious behavior of the Court is, for example, being illustrated in the Campus Oil case. Even though, in line with its consecrated case law, the Union judiciary had declared that domestic regulations forcing importers of petroleum oils to procure a certain part of their required products from a domestic factory constituted a ‘measure having equivalent effect to a quantitative restriction on imports’\footnote{CJEU Case C-72/83, Campus Oil Limited and others v Minister for Industry and Energy, [1994] ECR- 02727 p. 53} (imperatively prohibited by the internal market provisions) the Court tolerated the Irish government behavior for the sake of the State’s public security (i.e. exception allowed by the Treaty) that, otherwise, would have been severely affected. Without this help (i.e. equivalent to State aid), the National Oil Company (i.e. refinery) would have not survived the market fact hard to tolerate by the Irish government who previously nationalized it.\footnote{Ibid. p. 55}

With regard to our case, the Irish government’s interest was a strategic one; it was based on an important policy, more precise the one of having a functional national oil capacity that would be reliable in case of an energetic crisis.\footnote{\citet{inanlig:2008} Derogation from the Free Movement of Goods in the EU: Article 30 and 'Cassis' Mandatory Requirements Doctrine, Ankara Bar Review, No. 2, (2008), p. 108.}

When assessing on the case the Union judicature used a proportionality test; it considered the costs and benefits’ of the measure imposed by the Irish government and took into consideration their suitability for the Union’s interests.\footnote{A. Rosas, E. Levits, Y. Bot, The Court of Justice and the Construction of Europe, (Prague, Asser Press 2013) p. 492.} By admitting that ‘petroleum products […] are of fundamental importance for a country's existence […] and even the survival of its inhabitants depends upon them’\footnote{CJEU Case C-72/83, Campus Oil Limited and others v Minister for Industry and Energy, [1994] ECR- 02727 para. 34} it gave primacy to these criteria at the cost of injuring the free movement of goods. As a consequence, the Court ruling introduced the idea of energetic security within the frames of the
public-security grounds of evading the free movement rules. On the other hand, it opened a Pandora box for the idea of ‘buy local’, which has been further developed in other cases.\textsuperscript{162}

Summing up, it is for sure that politicians are usually interested in the short-term negative implications of the decision’s outcome, while on the other side, the Union courts attentively considers the long-run consequences of the overall legal decision;\textsuperscript{163} in this resort, once the precedent acquires binding force, that line of reasoning shall produce effects \textit{ex nunc} and will have to assure that integration shall not be injured by a favor made to a certain government at a certain time in the Union’s existence.

However, it can be interfered from this judicial practice that the Courts will try – on a case-by-case situation - to compromise stringent national interests with the free movement rules by placing them within the Treaty exceptions (e.g. public morality, public policy or public security\textsuperscript{164}). Moreover, in order not to loose credibility by tolerating individual concessions, the Union judicatures show the same availability in accepting similar behavior in analogous situations in which national governments prove great interests.\textsuperscript{165}

### 4.3.3.2 Private pressure

As an answer to the constraints imposed by Court decisions, domestic governments are in the posture to also be pressured by the commercial interests of private companies, which most of the times have the capacity to influence internal policies. Depending on their particular interests, domestic undertakings may deliver strong incentives for market liberalization or, on the other hand, try to limit it in certain areas of interest.\textsuperscript{166}

\textit{In concreto}, once the market liberalized for imported products, domestic companies can ask for protectionist measures in order to avoid market loss in the benefit of more competitive foreign producers that have the potential of replacing local products in the consumer preferences. This was the case in Belgium where the


\textsuperscript{163} Clifford J. Carrubba, op. cit., p. 12.

\textsuperscript{164} Treaty of the European Union, art. 36.

\textsuperscript{165} Henrik Bjørnebye, op. cit., pp. 79-80.

\textsuperscript{166} Andrew Moravcsik, Sequencing and Path Dependence in European Integration, p. 5.
legislation provided that certain products (i.e. margarine) can be imported and sold only if they were packed in a recipient having certain form (i.e. cube-shaped blocks).\textsuperscript{167}

The Court gave a prompt and energetic answer and declared the incompatibility of the provisions with the internal market rules without any hesitation.\textsuperscript{168} In doing so, besides relying on an already established line of case law annulling measures hindering the free movement of goods, it had the support of the big Union producers (e.g. Germany) that wanted their companies to be able to export goods without being anyhow discriminated.

In this matter, the Court gave full effect to a logic based on neo-liberal values, which stands as cornerstone in most of its reasoning. It aims at cooperation, market liberalizations, open borders, free trade and it militates for an increased role of the private actors in administrating services and goods (i.e. by promoting privatization and deregulation).\textsuperscript{169}

Emphasizing on the single market (especially on free movement of goods), it is seen as ‘a key tool to achieve long-term vision of a highly competitive social market economy’. Its role is to strengthen the Union’s competitiveness in a global context by fostering ‘more choices at lower prices’ (i.e. best value for money), fact that happens by giving the European companies full access to the approximately 500 million European citizens.\textsuperscript{170}

In this matter, the Court has a strong and firm position when it comes to the idea of not allowing any hindrance when it comes to the free movement principles and implicitly, of the single market.

However, by comparing the two cases, it can be said that, even though trying to maximize the gains of such economical construction by its activist policy making rulings, the Court cannot afford to see these neoliberal values in an idealistic and absolute way. This happens due to the fact that, event though member states gave up sovereign functions in certain areas\textsuperscript{171} they still give primacy to a Westphalian way of

\textsuperscript{167} CJEU Case C-261/81 Walter Rau Lebensmittelwerke v De Smedt PVBA, [1982] ECR- 03961 para. 2
\textsuperscript{168} Ibid. para. 20
\textsuperscript{171} Treaty of Functioning of the European Union, art. 3-4.
understanding sovereignty when it comes to their national, economic-strategic interests.

In consequence, the Union judicatures, even though sole interpreters of the treaty are in the position of diluting their impetus and accept national solutions that are _per se_ in breach of Union legislation and principles and, this way, preserve a cautious relationship with member states.

### 4.3.3.3 Union interests versus domestic policies

Besides the free movement rule which stand as cornerstones for the efficiency of the internal market, the Court is also very attentive at the ways in which competition rules are respected within the common trade area. In order to assure economical effectiveness, based on the Commission’s findings, it reviews state measures giving governmental aid to domestic companies, decides upon proposed mergers, acts against any tendency of imposing monopolies, punishes public undertakings that abuse their market dominance and annuls legislation that hinders competitions.\(^{172}\)

Even though, according to the Treaty provisions, competition rules inside the internal market are within the exclusive competence of the European Union\(^{173}\) the decisions taken by the Court in these areas have a severe impact upon national economical, financial and even social policies.

Exemplifying, even though a national government will offer state aid to an uncompetitive domestic company in order to preserve some jobs and avoid unemployment which would affect them in an election context, the Courts will, on a regular basis, assess the market competitiveness context and allow such help only in the case in which the undertaking has realistic chances to redress itself and not waste money in an ‘economical’ black hall\(^{174}\) that would lead to artificial competition and in consequence, internal market distortion.

In other words, domestic decisions that might give preference to social issues can be overruled by solutions coming from the supranational judicatures and which, in contrast, are based on purely economical assessments. To this extent, it is a clear

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\(^{172}\) Ibid art. 101-109

\(^{173}\) Ibid., art. 3.

clash between policies, one belonging to the internal policymaker who takes into consideration the domestic needs and one coming from the Union judicature which is not politically based (but has political implications) and which supports, in a holistic way, the Union’s interests.

The same thing might happen in case of a national policy of privatization. For example, if a government decides to privatize an undertaking through a merger with another one (e.g. the one absorbing it). In this matter, even though the political will is in line with a potential buyer and a consensus is reached, the Courts will, based on the Commission’s findings, have a last say regarding this transaction. Their assessment will once again, with few exceptions, be based on the anticompetitive impact that a concentration might have on the market and not on other national policies (e.g. preserving jobs, getting finance for other projects).\textsuperscript{175}

Moreover, in certain cases, the Court involves in a ‘gap-filling’ process just to make sure that competition within the common market is efficient. The decision in \textit{Continental Can} case provides with an important example; in this case, the lack of any primarily or secondarily law provision regarding the merger control ‘presented no bar’ to the enactment of judiciary law.\textsuperscript{176} In this resort, the first piece of legislation regarding this important area of interest was enacted many years later and was in line with the precedents created by the Union judicatures.\textsuperscript{177}

Drawing a conclusion, it can be said that the Union judicature has an ‘orbital position as the ultimate rule-maker in the competition galaxy’ which has been achieved through the preliminary reference procedure and through litigations that firstly took place first before the two Courts.\textsuperscript{178}

\textsuperscript{175}\textit{Why are mergers examined at the European level?}, seen on European Commission’s webpage on 2014.05.02.
\textsuperscript{176}Henri de Waele, Anna van der Vleuten, op. cit., p. 648.
\textsuperscript{177}\textit{Mergers legislation} seen on European Commission’s webpage 2014.04.30.
\textsuperscript{178}Nicolas Petit, \textit{The Future of the Court of Justice in EU Competition Law - New Role and Responsibilities}, (2012) p. 4 seen on SSRN’s webpage on 2014.05.03.
4.4 Legitimacy and accountability

4.4.1 Legitimacy deficit

Judicatures are usually blamed for usurping legislative prerogatives due to the fact that such actions are seen as undermining democratic customs and ‘thwart majority will’ in representative democracies.\(^{179}\)

It can be said that the Union judicatures are facing a double layer legitimacy issue. First of all, the Union’s \textit{per se} democratic deficit is reflected in the perception regarding each and every institution (i.e. including the Courts)\(^{180}\) while, in subsidiary, this issue is increased by the fact that, in specific cases, Union judicatures replace domestic organisms (e.g. Parliaments, Constitutional Courts) in the decisional process;\(^{181}\) moreover, this practice has been defined by the doctrine as the ‘weakening of judicial control’ problem, and refers to the way in which national powers are being reduced in their scope in the benefit of the supranational constitutional review and interpretation.\(^{182}\)

This gives birth to different conflict scenarios, some of them of severe intensity (e.g. review of legislation, diminishing of attributes), other of them of lower level (e.g. public positions). Regarding the last category, when assessing on the idea of judicial policymaking Margaret Thatcher had, in 1993, declared that ‘some things at the Court are very much to our distaste.’ Her thoughts were completed by other, more vehement doctrine voices that considered that the Union judicature was ‘running wild’ by engaging itself in judicial activism.\(^{183}\)

On the other hand, the Court has a high level of autonomy due to the separation of laws and politics and the intrinsic legitimacy of judicatures as legal actors, fact that allows them to consider the objective purpose of the law and not the selfish interests of the states that compose the EU.\(^{184}\) Moreover, in line with the theory of institutional dialogue, judicatures and legislative bodies develop a dialogue

with the purpose of achieving the ideal balance between constitutional values and public policies; the existence of this dialogue is to be seen as an important argument for not considering judicial review to be ‘democratically illegitimate’.  

Deriving from this logic, it must be said that the Courts enjoy a *per se* legal legitimacy that derives from the very nature of giving law-based objective judgments. On the other hand, the legitimacy issues appear when Courts’ activist decisions have major political implications and thus, have implications upon domestic policies.

Democratic political legitimacy is constructed on the idea that citizens voluntarily and rationally cede to their representatives (e.g. by voting) the authority of taking decisions in a polity. Furthermore, most of the times, political legitimacy is being equated with political support, fact that makes representativeness and accountability decisive factors when using the legitimacy test; as a result, institutions with a high grade of legitimacy are more efficient at asking for acquiescence to their decisions.

In contrast with this view of democracy, judicial policymaking is indirectly representing the domestic governments through very few individuals that are appointed to office for a long period of time and not chosen by direct, secret, free, equal and universal elections. The idea that the ‘court room’ government/legislative obeys, after being appointment, to supranational values – that can sometimes differ from the domestic ones and ‘embed public policies in legal interpretations’, fact backed up by difficult removal procedure, develops the idea of lack of accountability. For example, in comparison with representative democracies where elections represent sanctions that create an accountability relation between the voted and the voters, in judicial policymaking things are different and the only popular legitimacy results from the governmental support that judges have at a first stage.

As a result, in this supranational dimension legitimacy and accountability should not be assessed in an interdependent way due to the fact that nowadays-

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187 Ibid. p. 460.
188 Hjalte Rasmussen, op. cit., p. 42.
189 Ibid.
political systems are in a permanent dynamic and develop quite complex decisional paths. Some scholars consider that a mature democracy cannot just simply be ‘reduced to a majoritarian idea’; it is said that a judiciary that is independent from a political majority has the role of strengthening democratic values. In this resort, by engaging itself in a process that is ‘rationally argued’ in relation to legislation already into force, courts have a positive effect on the functioning of the society.\textsuperscript{191}

For example, it can be said that the Union Courts have been themselves promoters of democratic practices within the Union. By protecting the rights of the European Parliament (i.e. representative of the people of Europe) in the inter-institutional disputes, by providing Union members with instruments to enforce their right in the light of European values (i.e. direct effect doctrine) or by assessing on the law and respecting general democratic principles (i.e. fundamental rights), the Courts became an emanation of democracy, even though not representative.\textsuperscript{192}

\textbf{4.4.2 Ultimate competence issue}

When analyzing on the interaction between Union judiciary and domestic constitutional organisms, it can be said that there exists a ‘continuous tension’ due to the fact that both claim the prerogative of having ultimate legal competence and of being the primarily source of law from which further legal mechanisms can be initiated and developed.\textsuperscript{193}

Some scholars argue that when assessing the idea of sovereignty ‘in the context of the internal structure of the political society’, there exists a growing tendency, especially supported by the integration activists (i.e. Courts, Commission), which involves the idea that there exists an absolute power within the EU.\textsuperscript{194}

Having this as a premise, the threat of non compliance represents the biggest reserve for the Court as failure to implement its binding casuistic would severely

\textsuperscript{191} Hjalte Rasmussen, op. cit., p. 45.
\textsuperscript{193} Paul Craig, Graine De Burca, op. cit. p. 268.
undermine its legitimacy and mutandis its position in the whole Union political process.\textsuperscript{195}

However, most of the times these disputes are solved by looking back at the basic EU law principles. In this matter, it can be deduced from the conferral principle that the national executives remain ‘the masters of the Treaties’ because they possess the natural attribute which they use to define their own powers and those that will be transferred to the Union. In consequence, the basis for the primacy of Union legislation ‘do not stem from the autonomous nature of Union law’ but in national constitutions and international conventions that find their source in the compromise of the states.\textsuperscript{196}

The German Constitutional Court (here and after, GCC) ruling in Solange case represents a cornerstone; the decision basically reserved the authority to scrutiny Union legislation as long as the organization did not encompass a set of fundamental rights equivalent to the ones provided by the domestic constitution. However, this radical position changed during time\textsuperscript{197} due to the fact that the Union achieved such standards.

However, more actual, Eastern European countries that have just recovered from a limited sovereignty period (i.e. imposed by the Warsaw Pact), by being able to freely exercise their intrinsic attributes, have the tendency of perceiving sovereignty in Westphalian tones. This happens in contradiction with the big part of the Western view that, in line with the Union Acquis, consider such traditional standard to be obsolete.\textsuperscript{198}

Most of the times the cause for such behavior is that domestic Constitutional Courts can get frustrated by the fact that judicatures that are lower in the hierarchy can cooperate directly (i.e. through preliminary rulings) with the Union judiciary and avoid their review.\textsuperscript{199}

\begin{itemize}
\item \textsuperscript{195} Karen J. Alter, ‘Who are the Masters of the Treaty’: European Governance and the Court of Justice, (1997) p. 1.
\item \textsuperscript{197} Ninon Colnerie, Protection of Fundamental Rights through the Court of Justice of the European Communities, (2001) p.9 seen on Oxford University’s webpage seen on 2014.05.03.
\item \textsuperscript{198} W Sadurski, ‘Solange Chapter 3’: Constitutional Courts in Central Europe – Democracy – European Union, in Paul Craig and Graine de Burca, op. cit., p. 296.
\end{itemize}
Exemplifying with a very recent case, the Czech Constitutional Court is the first one to declare that a Court of Justice decision, in the matter of the application of a Regulation regarding social security schemes, acted *ultra vires* (beyond its powers). However, after the Union Court ruled that the ‘special financial increment’ added only to Czech citizens (in the context of the rules regulating the pay of pensions after the division of Czechoslovakia) was to be seen discriminatory, the Parliament - aware of the CJEU monopoly in interpreting Union law and realizing that as result of the CJEU judgment more pensions must have been increased (i.e. the one of non-Czech citizens as well), enacted a law that ruled out the possibility of paying the special increment to everyone.

On the other hand, following a contextual and behavioral analysis, there are extrajudicial, non-substantive details when assessing on the Czech Constitutional Court’s decision. The fact that most of the judges had very few time left from the mandates, fact correlated with the already explained internal frustration and the idea that they were appointed by an Eurosceptic president, are all aspects that lead to this unique ruling.

Analyzing, the abovementioned example has a double function; first, it illustrates the tension existing between supranational and domestic entities that, in a multi-governance system have difficulties in administrating the overlapping prerogatives. In the second time, as in the institutional environment the main purpose of organizations is to survive by fulfilling important tasks, the case resembles the way in which entities, by following a logic of consequences rather than one of appropriateness strive to conserve their influence in areas that give consistency to their status and implicitly justify their existence.

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200 The Constitutional Court of Czech Republic, Constitutional Court Insists on its previous case law concerning the so called Slovak pensions (2012) seen on The Constitutional Court of the Czech Republic webpage seen on 2014.04.22.


202 Jan Komarek, op. cit., p. 327.

203 Ibid. p. 332.

204 Christer Jönsson, Jonas Tallberg, op. cit., p. 4.
5. Conclusion

As it can be seen, from an early stage, the CJEU had been one of the ‘chief architects’ of the supranational order imposed by the EU. In operating such fundamental and discrete duty, it involved itself in an extensive interpretation of the law provisions and as a consequence, it reasoning had effects upon the policy process.\(^\text{205}\) Moreover, some scholars even considered that judges had ‘une certaine idee de l’Europe’ of their own that in complex situations of choice, prevailed in front of other state-based orientations.\(^\text{206}\)

While neo-functionalists consider that the Court, as a legal authority, has enough autonomy in order to take decisions going against the interest of member states, neo-relists are more skeptical and emphasize on the member state’s option to sanction the court and, as result, diminish its autonomy in a considerable way.\(^\text{207}\)

In this second paradigm, the Court is perceived to be the agent of member states whom would develop its activity only within the boundaries imposed by the agent. However, as it has been exemplified in this paper, the Union judicature escapes the classical principal agent framework\(^\text{208}\) and manifests itself in an invasive and autonomous way.

It can be said that, in certain situations, (i.e. external powers, industry, social security, trade) it became an a priori policy maker due to the fact that it gave solutions and interpretations in contexts in which the political will din not regulate or, if it did so, it was too vague or general. This happened due to the fact that, having a broad power of assuring that the law is observed within the Union, the supranational judicatures, by relying mostly on primary legislation (i.e. Treaty provisions), give primacy to a very extensive teleological approach that has the role of broadening the Union’s powers and attributes in areas where it already has competences and also in neighboring domains that can be easily ‘conquered’.

\(^{205}\) Hjalte Rasmussen, op. cit., p. 3.
\(^{206}\) Ibid. p. 14
\(^{207}\) Karen J. Alter, ‘Who are the Masters of the Treaty’: European Governance and the Court of Justice, p. 1.
\(^{208}\) Ibid. p. 10.
In this matter, the classical way of seeing sovereignty (i.e. Westphalian model) is being injured not just by the fact that member states give up sovereign functions but also by the fact that some of them are *ex officio* being taken by the Union Courts.

Reviewing, the Courts have first of all developed principles of law (e.g. supremacy, direct effect, implied competence) that, once tolerated by domestic governments, were later transposed into decisions with real implications at a national level. Transforming this context in a game theoretic situation it can be said that the lack of reaction of member states to the first decisions given by the Union judiciary (i.e. the ones regarding principles) had the effect of cementing a very solid foundation for the judicial autonomy and for the power that the supranational judiciary enjoys nowadays. On the other hand, if there had been a clear reaction of disapproval the process of ‘judicialization’ would have been more difficult to realize.

However, in my perspective, the fact that the Court goes beyond the classical principal-agent relationship and, where in a divergent position with the principal (i.e. national governments), does not abstain from imposing measures against it, should not be perceived as lacking loyalty, accountability, being *ultra vires* or having legitimacy deficit. In this matter, its role is to assure that, despite political changes and lack of coherence, the main functional purposes of the Union *per se* are respected and that political actors stick to their primarily will (i.e. Treaties) and do not involve in severe sideslips that can injure the existence of the supranational organization.

In order to describe this situation in metaphoric terms, I consider the Court to be the member states’ common consciousness that, above all, places the interest of the Union on the first place and exercises that in an independent and objective way. This way, even though *prima facie* it looks that it engages in conflicts with the principal, the Courts, by assuring coherence in spite of the political fluctuation, are actually of major help, especially on the long term, for the principal.

Furthermore, the imposition of high standards for the allowance of exceptions (e.g. public policy) and the idea that the judicial power is immune at stakeholders’ lobby, election agendas or other forms of pressures creates the premises that the Union judicature will be a useful institution in further developments of the EU. In this matter, combining the neo-functional predilection for elites based decision making and the new institutionalism idea that the organizational design influences decisional outcomes, it can be said that the trend already established, in which the Union judiciary is in many cases, one step ahead of the political actors, shall be preserved.
This will for sure rise further controversies regarding the legitimacy of having judicial supranational decisions that develop political implications and also, ultimate competence disputes. In this matter, preference should be given to a functional (and not organic) approach on the idea of separation of powers; the different functions (judicial, legislative and executive) must be distributed to different institutions, but at the same time ‘still considering the interplay between them’. Moreover, the supremacy of Union law should be tolerated in a better way, especially by Easter countries due to the fact that the supremacy doctrine has nowadays-political recognition as well.

Finally, I consider that the Union judicatures have and will play an essential role in the functioning and integration process of the EU. As nowadays we are facing a complex supranational environment, the interlink between politics and judiciary will be more and more evident. In the same time, a political class that will know how to use the growing powers of the Union judicatures in achieving its own agenda will potentially be the winner. However, it is only a political group that will wish to foster integration, enhance democracy and protect human right that will be able to gain benefits on behalf of a Court system that is nowadays having its own agenda – achieving the EU Treaties objectives.

209 Mari Amos, op. cit., p. 22.
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