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Iudex Calculat: The ECJ's Quest for Power

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Abstract:

Judicial Independence is a crucial aspect of the rule of law and the concept of separation of powers. It gives judges considerable leeway in interpreting – and thereby modifying – the constitution. In this paper, the role of the European Court of Justice (ECJ) as an actor in the strategic game played between the other actors on the European level as well as actors on the nation-state level (the respective governments, but also national courts, corporate actors and individuals) is inquired into. After describing the changes of the ECJ's competence that have occurred since 1953, an attempt at explaining them is undertaken. It is shown that the ECJ has been able to bring about implicit constitutional change because its members are constrained less stringently than most supreme court judges on the nation-state level. It is furthermore shown that lower court judges have incentives to cooperate with the ECJ – sometimes to the detriment of national supreme court judges.

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Iudex Calculat: The ECJ's Quest for Power

In a sense, the Court created the present-day Community; it declared the Treaty of Rome to be not just a treaty but a constitutional instrument that obliged individual citizens and national government officials to abide by those provisions that were enforceable through their normal judicial processes (SHAPIRO [1992, 123])

1. Introduction

Research on the European Court of Justice has been dominated by legal scholars (e.g. WEILER [1981], [1991], [1994]) and by political scientists who are, however, often using the rational choice approach (e.g. GARRETT [1992]). Over the last couple of years, an intense debate between intergovernmentalists (e.g. GARRETT [1992], MORAVSCIK [1995]) and neofunctionalists (e.g. BURLEY AND MATTLI [1993], SANDHOLTZ AND STONE SWEET eds. [1998]) has taken place, the first camp arguing that the European Court takes the (vital) interests of the important member-states (especially France and Germany) explicitly into account in its rulings and the second arguing that the European Court has become an actor with considerable competence and discretion not envisioned or planned by anybody. This debate has, however, led into an impasse and in the meantime some participants have sought for some sort of synthesis (MATTLI AND SLAUGHTER [1998]). An analysis from an economic point of view has rarely been tried (for a first step into this direction, see however TRIDIMAS AND TRIDIMAS [2002]).

This paper is another attempt to analyze the development of the competence of the ECJ from an economic point of view. From such a point of view, the separation of powers can also be interpreted as a power game in which the representatives of the various government organs play games of influence in order to maximize their own utility. Drawing on the original concept as attributed to Montesquieu, the stylized game on the level of the nation state has it that the members of the executive play against the members of the legislature as well as the members of the judiciary. To keep the analysis as simple as possible, one often assumes homogeneous actors, i.e., explicitly neglects the internal decision-making processes within the organs, by, e.g., exclusively focusing on the median member of the respective organs.

The power game in the EU is a bit more complex than the games played on the level of the nation state. Here, the number of actors that the members of the judiciary (i.e., the ECJ) are strategically interacting with can be meaningfully divided into two levels: (1) the level of the European organs, i.e., the Council, the Commission, and the Parliament, and (2) the level of the nation states, i.e., the

respective governments as well as national courts, national corporate actors, such as firms or interest groups, individuals, and even entities as fuzzy as the various “national publics.” On the first level, some actors could in principle react to the Court’s rulings by ignoring them or by changing the legal basis on which the court operates. Some actors on the second level such as governments but also national courts could also ignore the ECJ’s rulings.

In this paper, we can only deal with a small subset of these questions. The first hypothesis to be developed is that the ECJ has been able to considerably broaden its competence over time. Define implicit constitutional change as a changed interpretation of the constitution that occurs although the wording of the constitution remains formally unchanged. Elsewhere (COOTER AND GINSBURG [1996], VOIGT [1999]), the determinants of implicit constitutional change have been spelt out systematically. It is often assumed that the ECJ has been able to bring about relatively more implicit constitutional change than the highest national courts. It will therefore be asked whether the judges on the ECJ are subject to softer constraints than their national counterparts.

In the past, one has often assumed that more competence on the European level would go hand-in-hand with less competence on the nation-state level; if the ECJ is part of the European level and the national courts belong to the level of the nation-state, then this would imply that more power of the ECJ goes hand-in-hand with less power of the national courts. It has been shown (ALTER [2000]) that this might be too simple a conclusion: whereas the highest national courts might indeed lose power, the lower ones might even gain at the expense of the highest national ones. It is argued that this is due to the procedure of preliminary rulings, which will be dealt with at length in this paper. The second hypothesis is thus that the intra-national power game played between the various court levels has substantially changed due to the preliminary reference procedure.

Analyzing the development of the competence of the ECJ from an economic point of view could be potentially important if it improves our knowledge concerning the working properties of a central EU organ. In order to give qualified advice during the discussions of the European Constitutional Convention, such positive knowledge is indispensable. Relevant questions include the following: to what extent have the various treaty amendments (Single European Act, Maastricht, Amsterdam) led to an explicit change in the competences enjoyed by the European Court? What were the incentives of the member states to agree to such changes? To what extent has the European Court of Justice been able to extend the relevance of the EU by way of broadly interpreting the Treaties? Why have

these rulings of the European Court been implemented by the various organs on the level of the nation state? How much independence and discretion does the European Court enjoy in comparison with its national counter parts?

The paper is structured as follows: Section two describes the ECJ's changes of competence that have occurred since its founding. In section three, an attempt to explain some of these changes is made. Rather than offering a conclusion, section four spells out some of the future research questions.

2. The Development of the Competence of the ECJ

A constitution is defined as a system of rules that specifies the procedures according to which collective goods are produced and constituents are charged for their production. According to that definition, the European Union has thus had a constitution for a long time. Explicit constitutional change (ECC) entails an explicit change of these procedures. Implicit constitutional change (ICC) implies that the meaning of the constitution changes although the constitutional document itself remains unchanged. Analytically, ICC is thus more difficult to get at than ECC. It will not suffice to take a look at the constitutional document. Rather, one has to inquire into how a specific government branch might interpret a specific constitutional provision in a specific situation.

With regard to the European constitution, the analytical distinction between ECC and ICC will at times be difficult to make. Identifying the relevant "constitution" is never an easy task; with regard to the EU it is particularly difficult because it has been subject to far-reaching extensions over the last five decades. Nevertheless, we will try to keep the two types of changes apart as much as possible. We begin by having a look at the consequences that ECC has had for the development of the competence of the ECJ.

Even a formally independent judiciary is never entirely unconstrained. Implementation of judicial decisions often depends on the cooperation of representatives of other government branches. It is assumed that judges experience utility from seeing their dicta implemented and from not seeing them overturned by other means, such as, e.g., fresh legislation. Judges will therefore not be assumed to be naïve utility-maximizers but strategic ones who anticipate the reactions of those actors they depend on for the implementation of their decisions. Depending on the anticipated reactions of these actors, the judges will publish decisions, which they believe have a chance of not being ignored or overturned as that decreases their utility. A court can be called powerful if it

commands a large area within which it has discretion over outcomes that will neither be ignored nor overturned by other means. Discretion alone, however, will not be sufficient to call a court powerful. The court needs cases to which it can apply its discretion. A necessary condition for being powerful is thus a high number of cases being brought to the court.¹

2.1. Explicit Constitutional Change

Four steps are made in this section of the paper: we first set out to give a short overview of the legal basis of the ECJ as provided by the original treaties and the changes that have been brought about by the treaty modifications. The focus is here on the areas in which the European Union has been granted competences by its members. Over time, new decision rules have been introduced often with the proclaimed goal of strengthening European Parliament vis-à-vis the other European organs. We will shortly analyze the consequences of these rules for the competence of the ECJ. This will be our second step. The third step is an attempt to test empirically some of the hypotheses derived. The fourth and last step consists of evaluating the formal independence which the judges of the ECJ have been granted.

2.1.1 Formal Competences of the ECJ

Functions and competences of the ECJ are described in art. 220 through 245 TEC. Often, a distinction between direct and indirect action is made (e.g. NUGENT [1999, 265-72]). In the first group of cases, the ECJ directly issues a judgment on the case that was brought to it. Direct action includes decisions on

- Failure to fulfill an obligation (art. 226/227); these are cases in which member states are accused of not having fulfilled a Treaty obligation. They are usually brought by the Commission. Since Maastricht, the Court has the power to impose penalties (art. 228) against a member who had previously been judged not to fulfill its Treaty obligations.
- Application for annulment (art. 230); under this provision, the Court has the competence to establish whether acts adopted by European Organs are compatible with the Treaty or whether they were passed although the

¹ Of course, the number of cases is not the only relevant input variable. Kind and nature of cases to be decided will also play an important role.

Organs did not have the necessary competence, or whether they entail an infringement of specific procedures etc. Under this article, the Court decides whether the use of a certain procedure in order to act is in accordance with the procedures laid down in the Treaty.

- Failure to act (art. 232); under this article, the Court has to decide whether a specific EU organ has failed to take action although it was obliged to do so under the Treaty.
- Others, such as the ascertaining whether state aid is legal (art. 88).

In cases of indirect action, the Court does not offer a decision on a concrete case.

- Preliminary Rulings (art. 234); national courts may, and in some cases must, ask the ECJ for a preliminary ruling involving interpretation and validity of Community acts. Due to its overwhelming empirical importance, the preliminary reference procedure will be dealt with in greater detail below.
- Appeals from the Court of First Instance (art. 225); these are not made on factual, but on legal grounds.
- European organs seeking an opinion (art. 300); here, the Court can be asked whether a prospective international agreement is in accordance with the Treaty.

Over time, member states have allocated more and more competence to the European Union. It is beyond the scope of this paper to enquire into the reasons behind this development. Three changes clearly stand out, namely the Single European Act, the treaty on the European Union (“Maastricht”) and Amsterdam. The Single European Act did not only nail down the completion of the internal market, but also led to the incorporation of a number of additional policy areas such as environment, research and technological development, and economic and social cohesion. The Community’s institutional system was modified by the introduction of the cooperation procedure, which introduced qualified majority voting for a number of areas in the Council. The Treaty of Maastricht is best known for its introduction of the European Monetary Union. Beyond that, the two additional pillars common foreign and security policy and justice and home affairs were established. The introduction of the co-decision procedure which gave the European Parliament the power to veto certain legislative acts for the first time as well as the further extension of the qualified majority voting in the Council are also part of the Maastricht Treaty. Amsterdam led to a modification of co-decision as well as its application to additional policy spheres (for a more detailed description of the changes brought about by the Maastricht and Amsterdam Treaties, see NUGENT [1999], chapter 5).

Even if none of these treaty modifications had explicitly dealt with the ECJ, it is safe to argue that its importance would still have increased due to the simple fact of the growing importance of the European policy level. On top of it, some of the Court's competences were only introduced by those three treaty modifications, such as the power to impose penalties on member states in cases in which they have failed to fulfill a Treaty obligation. We can thus conclude that the competence of the ECJ has been extended by (i) the incorporation of additional policy areas into the Treaties and by (ii) Treaty modifications dealing explicitly with its competences. But what about the changes in decision rules? Most of them were brought about to either strengthen the role of European Parliament (reduction of the "democratic deficit") or to make decision-making less cumbersome (qualified majority voting with regard to certain issue areas rather than unanimity). How did these changes affect the competence of the Court?

2.1.2 The introduction of new decision-making procedures

COOTER AND DREXL [1994] have analyzed the consequences of changes of the decision-making rules on the relative power of the relevant actors in the European Union, i.e., the Commission, the Council, the European Parliament, and the ECJ. They distinguish between four legislative procedures used in the EU, namely (i) unanimity, (ii) consultation, (iii) cooperation, and (iv) co-decision. According to the authors, two aspects in the changes of legislative procedures must be kept apart: the decision rule narrowly defined from the number of organs whose consent is necessary in order to pass fresh legislation. They identify two effects for changes in each of the two aspects: A change in the decision-rule from unanimity to qualified majority voting which has been introduced for decision-making in the Council with regard to a number of areas will make legislation more likely because it is less costly to get the required 62 votes (the minimum number of votes required to pass the threshold of qualified majority), instead of the 87 votes which make up unanimity in the Council. If passing "fresh legislation" has become less costly, the threat of the Council to correct decisions of the ECJ that deviate too much from the ideal point of its median member have become more credible. This means that the factual power of the ECJ has decreased as a consequence of the change in the decision-rule.

But COOTER AND DREXL [1994] point out that the change in decision-rule should also produce a countervailing effect. If the production of legislation has become less costly, higher output can thus be expected. Higher legislative output will also increase the demand for adjudication, hence the potential of the ECJ for

influencing Union policies by its decisions has increased.² The authors expect this effect to be stronger in the short run, but the first effect (described before) stronger in the long run.³ This effect would thus mean that the power of the Court has somewhat increased.

Table 1: Effects on the Power of the Court

	Quantity	Threat to repeal
Decision-making from unanimity to qmv	↑	↓
From unicameralism to bicameralism	↓	↑

Arrows indicate whether the power of the Court is expected to increase or decrease.

The second aspect is the number of organs whose consent is required in order to pass legislation. The co-decision procedure is to strengthen the role of the European Parliament. In addition to the Council agreeing, the consent of the European Parliament is required. This amounts to the introduction of a bicameral system which makes new legislation less likely. Given that the ideal points of Council and Parliament are not always perfectly aligned, this is predicted to have two effects on the ECJ: it will be more difficult to “correct” decisions that either the Council or the Parliament do not like since two majorities are necessary. This is therefore equivalent with an increase in the factual power of the Court. On the other hand, since the passing of new legislation has become more costly, less of it can be expected. Therefore, the number of cases that will end up in Court can be expected to grow at a lower pace than had the respective change not been implemented.

² Implicitly, COOTER AND DREXL [1994] seem to assume that there is a constant ratio between the number of legislative acts and the number of cases brought to the courts. Only then can they equate more legislation with more demand for court rulings. This assumption seems, however, questionable: the propensity of a litigant to go to court will depend on his expected utility. It is unclear why that should increase with the quantity of legislation.

³ Remember that a positive caseload is a necessary condition for judicial power. There is some tradeoff between the number of cases (up) and discretionary powers (down). The exact shape of the underlying indifference curve is, however, unclear.

What will the net-effect that results out of these four effects be? COOTER AND DREXL argue that the quantity effect is more important in the short run and – by inference – that the threat effect is more pronounced in the long run. It would, of course, be intriguing to attach numbers to these effects in order to be able to calculate some net-effect.

The paper by COOTER AND DREXL was published in 1994, hence the modifications brought about by the Treaty of Amsterdam 1999 are not taken into account. We thus have a short look at these changes. Subsequent to the Treaty of Amsterdam, 23 areas were added to the co-decision procedure, “making this the ‘normal’ procedure in that it will apply to most EU legislation apart from agriculture and justice and home affairs matters” (NUGENT [1999, 87]). Use of qualified majority voting was somewhat increased and the co-decision procedure was modified. It has been argued (CROMBEZ [2000]) that the simplified co-decision procedure has led to a decrease in the importance of the Commission. Results are now determined by the bargaining power of Council and European Parliament. If the ideal points of European Parliament and Commission are assumed to be more closely aligned than those of European Parliament and the Council, the power of the EP might have been reduced. Due to the increased relevance of the bargaining game between the EP and the Council, some observers (CROMBEZ [2000]) expect indecision to increase. If this is indeed the case, then this should have two effects with regard to the *de facto* role of the Court: (i) it reduces the likelihood of fresh legislation in order to “correct” Court rulings that lead to lower utility levels of either the median Council or median Parliament member. This increases the power of the Court in the sense that it can vote on points closer to the ideal point of its median member. (ii) Since new legislation will, in general, grow at a reduced speed, this should also lead to a slower growth in the number of cases taken to the Court. If, as assumed by COOTER AND DREXL [1994], the first effect is stronger in the long run, then the Treaty of Amsterdam would not only have decreased the power of the Commission but would also have increased the power of the Court.

2.1.3 The effect of the modified decision-making rules on the competence of the ECJ

We now turn to the third step of this section, i.e. a short sketch of how the hypotheses derived as the second step could be tested empirically. In order to test the impact of the move to qualified majority voting in the Council, we propose the following very simple procedure. Legislative activity is measured by the annual number of legislative acts. Average legislative activity in the five years preceding

the change in the decision-rule is compared to the five years following the change. In order to control for possible changes in the overall legislative activity, we propose to look at legislative activity weighted by the entire number of legislative acts.⁴ The second part of the hypothesis concerning the change of decision-rule was that demand for adjudication by the ECJ should increase as a direct consequence of the increased level of legislation. This should entail an increased demand in adjudication with regard to the newly passed laws. In analogy to the first part of the hypothesis, we propose to look at the average number of times the ECJ was called upon to adjudicate before the change of decision-rule took place and the average number of times after the change.

The empirical test just sketched does, however, only cover part of the hypothesis with regard to the position of the ECJ, namely the demand for adjudication in quantitative terms. It would, of course, be interesting to know whether the COURT has really taken the ideal point of the median member of the Council more explicitly into account due to the increased credibility of the (implicit) threat to pass fresh legislation should the COURT'S decisions deviate too much from that point. The ideal points of both Court and Council are, however, not easily tractable.

With regard to the introduction of the co-decision procedure, i.e. bicameralism, the effects were predicted to be just the opposite of the effects induced by the change of the voting-rule. We can thus use the same concept for testing it empirically but would just expect the signs to be reversed. Unfortunately, the "daringness" of the COURT is, again, exempt from any meaningful empirical measure.

Unfortunately, the sketched empirical tests cannot be carried out here. Before dealing with ICC, we shortly turn to evaluate the formal independence granted to the members of the ECJ as compared with their nation-state colleagues.

2.1.4 Formal Independence Compared

It has recently been shown (FELD AND VOIGT [2002]) that *de facto* judicial independence positively influences real GDP per capita growth in a sample of 56 countries. The impact of *de facto* judicial independence on economic growth is

⁴ By looking at a number of years rather than a single one, we simply try to get rid off short-term fluctuations. That five years were chosen is, of course, simply a decision based on fiat.

robust to outliers, and to the inclusion of several additional economic, legal and political control variables. It is therefore interesting to ascertain both the *de iure* and the *de facto* judicial independence that the members of the ECJ enjoy. FELD AND VOIGT use 20 variables in order to ascertain JI. Here, we just focus on a small share of these.

As was just shown, the competences of the Court are enumerated in the European “constitution”, i.e., in so-called primary legislation. There, the accessibility of the Court is outlined. The Court cannot only be accessed by other EU organs but also by individuals and firms. Every member-state appoints one judge to the ECJ. Judges to the ECJ are appointed for renewable terms of six years. Compared to the term length of many other supreme court judges, this is a rather short term. It can furthermore be argued that renewability decreases the independence of the judges because in order to be reappointed they will have to cater to the interests of those who have the capacity to reappoint them.⁵ The effective average term length has been 9.3 years. But this number does not tell us anything about the independence-reducing effect of the reappointment possibility: the mere possibility of non-renewal could already be sufficient for constraining the behavior of the judges.⁶

Formally, only those persons are to be appointed as judges “whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are juriconsults of recognised competence” (art. 223). NUGENT [1999, 272f.] observes that there is a certain gap between the formal rules and the practice. In particular, he notes that “because when making their choices governments have tended not to be overly worried about the judicial qualifications or experience of their nominations and have instead looked for a good background in professional activities and public service.”⁷

⁵ Accordingly, life tenure until a fixed retirement age would be most conducive to judicial independence.

⁶ The voting behavior of the judges is published nowhere and remains a very well-kept secret. It is thus close to impossible for an appointing government to sanction a judge for non-loyal voting. Still, it would be interesting to count the number of times in which the terms of a judge have not been renewed due to a change of government in his or her home country.

⁷ Still according to NUGENT, this is even worse with regard to advocates general: “At the same time, the judicial experience of advocates general tends to be even less than that of the judges; certainly few have ever served in a judicial capacity in their own states.”

It can also be argued that a law-based or standardized rule according to which incoming cases are allocated to judges reduce the possibility of a chief judge to influence the outcomes. Allocation rules are thus another aspect of judicial independence. In Germany, citizens enjoy the right to their “lawful judge”. An equivalent does not exist with regard to the ECJ. Another aspect where formal independence is not beyond doubt.

It can further be argued that the transparency of supreme court decisions increases with the necessity to publish not only the main reasons of the decision but an extended proof. This will make it more difficult for court members to take into account arguments unrelated to the relevant legislation. This, in turn, will make it less likely for other actors to put pressure on the court with arguments unrelated to the relevant legislation. It is hypothesized, in other words, that the necessity of an extended proof increases formal independence of a court. The same can be said with regard to dissenting opinions: the pros and cons of a certain decision become transparent for the interested public. The ECJ, however, guards the voting behavior of the judges as an almost sacred secret and dissenting opinions do not get published. What might be problematic within nation states could even lead to a higher degree of judicial independence within a supranational framework: due to the appointment process of judges (one judge per member-state), it can even be argued that this rule increases formal judicial independence as the governments of member-states are barred from putting any pressure on “their” judge, as his or her voting behavior is unknown to them.⁸

But the criteria that are sensible in order to ascertain the independence of the judiciary on the level of the nation-state might have to be modified on a supranational level: currently, there are 15 different governments sending off judges. If some of them send intellectually weak or servile judges, they will not have much influence in Luxemburg. On the nation-state level, given that government is responsible for the nomination of all (high-level) judges, sending judges who are servile with regard to government can make perfect sense.

Compared with the formal independence of many supreme court judges in the member-states, two peculiarities are noteworthy: the short term-length and the

⁸ The consequence of this rule on the quality of the decisions of the ECJ has been evaluated quite critically by NUGENT [1999, 275]: „... the use of majority voting, coupled with the lack of opportunity for dissenting opinions, has encouraged a tendency, which is perhaps inevitable given the different legal backgrounds of the judges, for judgements sometimes to be less than concise, and occasionally even to be fudged.“

non-publication of dissenting opinions. Both are connected to each other: because the individual voting-behavior of the judges is only known to their colleagues, their re-appointment by member governments will not depend on their voting-behavior as it is unknown to the governments. All in all, the formal independence of the members of the ECJ seems to be comparable with that of their nation-state colleagues. Should they have been able to become more powerful, this could not be attributed to the independence formally granted to them.

2.2. Implicit Constitutional Change

Today, roughly two thirds of all cases brought to the ECJ are brought to it under the preliminary rulings procedure. In a recent paper dealing with the procedure, TRIDIMAS AND TRIDIMAS [2002, 4] write: “The preliminary reference system has led, in effect, to transfer of powers at three levels, namely (a) from the governments of the Member States to the institutions of the Community; (b) from the executive and the legislature to the judiciary, and (c) from higher national courts to lower national courts.” Before dealing with the question of how the ECJ was able to use the procedure in order to constitutionalize the Treaties of Rome – and to greatly enhance its own powers – a short description of the procedure seems appropriate.

The preliminary rulings procedure is described in Art. 234 TEC (formally Art. 177). National courts can turn to the ECJ in order to get a preliminary ruling concerning the interpretation of EU law. More precisely, art. 234 grants all courts that are not last instance courts in that particular case discretion to turn to the ECJ, whereas it obliges last instance courts to ask the ECJ if Union legislation can be decisive for the judgment of the court. This means that lower courts have *de iure* discretion, whereas last instance courts have *de facto* discretion, deriving from their evaluation of the potential decisiveness of EU law for a specific case.⁹ With regard to the lower courts, private litigants can thus only suggest that a case be referred but cannot force the court to use the procedure.

No national court can establish the incompatibility of secondary EU legislation with primary EU legislation. The ECJ thus has a monopoly of interpretation with regard to European law. The ECJ will, however, not rule on a concrete case but

⁹ As many supreme courts believe their competence curbed due to the activities of the ECJ, they appear to have little interest of forcing other last instance courts to use the preliminary reference procedure.

will only interpret primary as well as secondary legislation in a generalizing fashion. In court, a private litigant who believes that application of EU legislation would further her interests can suggest that the court make use of the preliminary rulings procedure but does not have the power to force the court. The court has thus an important gate-keeping function in the use of the procedure that we will have to come back to later. In its decision, the national court having asked for a preliminary ruling is bound to it. The effect of preliminary rulings seems to be that they constitute precedent for a potentially large number of similar cases. This is why the procedure is so important in bringing about ICC.¹⁰

It is noteworthy that (i) the ECJ can even supply preliminary rulings in cases in which the questions have been termed in an inadmissible way by the national court and that (ii) the ECJ can test for reasons of invalidity that have not been named by the court asking for a preliminary reference. It is further noteworthy that (iii) the Court has established a number of strict guidelines that are to force national courts to demand references. On the other hand, mention must also be made of the fact that the ECJ has repeatedly turned down requests for preliminary rulings.

But the preliminary reference procedure is not only of far-reaching importance with regard to the quantity of the rulings, but also with regard to their quality. Many of the ECJ's decisions bringing about far-reaching implicit constitutional change have been based on the preliminary reference procedure: these include *Van Gend en Loos* 1963 in which the ECJ proclaimed that European Legislation takes "direct effect" in the EU member states without the necessity of national parliaments passing corresponding laws. They also include *Costa vs. Enel* 1964 in which the ECJ decided that should national and European legislation be incompatible, European law takes precedence. They further include *Francovich* 1991 in which the ECJ established that member states were responsible for damages emerging because a member state had not (or not correctly) enacted legislation according to EU directives. These examples for the far-reaching effects of the Court's use of the preliminary reference procedure all refer to procedural issues. But the Court has also used it in order to strengthen or extend EU policy. The case of *Barber* 1990 in which the ECJ ruled that occupational pensions are part of an employee's pay and must therefore comply with the Treaty article

¹⁰ It would be interesting to analyze the rulings based on art. 234 with regard to the areas, directions, and quality of ICC that they have brought about; this task is, however, far beyond the scope of this paper.

stipulating equal pay for women and men, is one prominent example for how the Court extended EU policy competence with regard to social security entitlements.

2.3. The Interdependence Between Explicit and Implicit Constitutional Change

It is possible that ICC will later be written into the constitution, i.e., be turned into ECC. In this section, we will ask whether there are instances in which ICC had been brought about by the ECJ that was later turned into ECC and – if so – whether any regularities in these changes can be observed. We will also ask whether there are cases in which ECC was brought about in order to curb the power of the ECJ or, in other words, to reduce its capacity to bring ICC about. We begin with the last case.

The Treaty on the European Union (“Maastricht”) promoted the principle of subsidiarity to constitutional rank. It can be interpreted as ECC that is to constrain the centralizing tendencies brought about by various European organs via ICC (and ECC). The subsidiarity principle has often been criticized for its vagueness and “Amsterdam” includes guidelines for the interpretation of the principle. The general question regarding subsidiarity is whether the apparent goal, namely to stop unreflected centralization, has been achieved. If somebody believes that the Council has violated the subsidiarity principle in its legislation, it is the ECJ who decides on the matter. Our general hypothesis is, of course, that the ECJ is interested in increasing its competence. The prediction is thus that the ECJ has little interest in a strict interpretation of the subsidiarity principle. Whether this can be empirically validated by analyzing the cases that have been brought to the Court involving issues of subsidiarity appears to be questionable: rational actors would, of course, anticipate the ECJ’s stance on the matter and might therefore forego to bring suit right from the outset.¹¹

As far as I can see, the interrelationship between ICC and ECC has never been systematically analyzed with regard to the ECJ. WINCOTT [1999] has argued that the influence of the Court should not be overstated. He conjectures that one of its major channels of influence would consist in its decisions having induced “the provocation of further legislation”. This would mean that the ECJ functions as an agenda-setter to the Council (and the other EU organs). It would be interesting to

¹¹ It could be interesting to analyze the cases that were brought to the Court on the basis of the newly incorporated principle and the way in which the ECJ has interpreted it.

test this conjecture empirically. In carrying out a test, one would have to take care to distinguish between (i) legislation passed in order to implement the court's rulings, (ii) legislation passed in order to correct the court's rulings, and (iii) legislation passed in order to confirm the court's rulings. With regard to (ii), it would be interesting to know (α) the subject areas in which override is most likely and (β) the speed with which the Court was overridden.

ESKRIDGE [1991] is such a study focusing on the US Supreme Court. He analyzed the attributes of statutory interpretation by the Supreme Court, which has subsequently been overridden by Congress and concludes that

...Congress and its committees are aware of the Court's statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported. Congressional overrides are most likely when a Supreme Court interpretation reveals an ideologically fragmented Court, relies on the text's plain meaning and ignores legislative signals, and/or rejects positions taken by federal, state, or local governments (*ibid.*, 344).

Congressional override was most in criminal law, antitrust, and civil rights cases and Congress chose to override the Court in almost half of the cases within two years after the Supreme Court decision.

3. Explaining the ECJ's Changes in Competence

In the last section of the paper, we tried to describe some important changes in the European "constitution" that have taken place since the founding of the European Communities. We were especially interested in their impact on the competence on the European Court of Justice. In the last section, we largely refrained from asking for potential explanations for these changes. This will be the main topic of this section. It is divided into two parts: first, possible explanations for ICC are inquired into. The second part consists of possible explanations for ECC. ECC is dealt with last because it could be used in order to correct – or to reinforce - developments that have taken place via ICC.

3.1 Towards Explaining Implicit Constitutional Change

3.1.1 Incentives of Lower Court Judges to ask the ECJ

As we have seen, the preliminary rulings procedure has been instrumental in bringing about implicit constitutional change. Yet, in order to use it, the ECJ depends on the input from national courts. In order to understand the mechanism leading to implicit constitutional change, two questions have to be answered: (1) what are the incentives of national courts to ask the ECJ for a preliminary reference? And (2) how can we explain the vast differences in (i) the source countries from which demand for preliminary rulings originate and (ii) the differences with regard to topic areas?

The tautological answer to the first question is that they will refer a case to the ECJ if that is connected with higher expected utility than if they decide themselves. In order to get to more meaningful statements, we will resort to some standard assumptions made in spatial models: the relevant actors are all assumed to have Euclidean preferences. They have an ideal point that is connected with their highest possible utility level; the farther they get away from it, the lower their utility. Judges will further be assumed to be strategic actors who do not naïvely choose their ideal point but who take the (imputed) ideal points of the other relevant actors explicitly into consideration.

Now under what conditions could strategic considerations as well as other arguments in the utility function of judges make referral to the ECJ the decision connected with higher expected utility than if that court were to decide itself? First, we have to assume that the court enjoys discretion of whether to ask the ECJ or to decide itself. As argued in section 2.2, this is a reasonable assumption. Further, we assume four relevant actors to be interacting: (1) the private litigants, (2) a low national court, (3) a high national court, and (4) the ECJ. In order to keep the decision tree as simple as possible, we assume the existence of a two-tier national legal system. The high national court can be appealed to if the litigants believe the decision of the low national court to be erroneous. Figure 1 contains a schematic description of the possible interactions of the four actors. We are primarily interested in making the decision of the low national court, i.e. its decision to decide the case itself or to refer it first to the ECJ, more transparent.

FIGURE 1 AROUND HERE; PLEASE

In either case, it will eventually have to come up with a decision. The eight possible outcomes identified in figure 1 can be divided into two groups: those in

which the outcome of the low national court is either accepted by the litigants (outcomes I and VI) or is confirmed by the high national court (outcomes II, IV, and VII) and those in which the outcome of the low national court is reversed by the high national court (outcomes III, V, and VIII). We assume that the low national court prefers the first group to the second group.¹²

In order to come up with a precise rank order of all possible outcomes, we need to make a number of additional assumptions: Comparing outcomes I and VI we assume that the court prefers outcome VI because due to its initiative, a precedent that might guide a number of similar decisions on a Europe-wide scale has been created. Comparing decisions that are accepted by the litigants with decisions that are confirmed by either the high national court or the ECJ, we assume that the latter will be preferred. Comparing confirmed outcomes *inter se*, outcome VII seems to be connected with the highest utility-level for the court, since it got the prestige of EU law and the confirmation of its dictum by the high national court. Outcomes II and IV are difficult to rank: On the one hand, outcome IV seems to generate higher utility because it enjoys the prestige of being in accordance with EU law. On the other hand, by demanding a preliminary reference, the high national court indicated that EU legislation might be potentially relevant for its decision, which the low national court had not acknowledged (because it had not demanded a preliminary ruling but had, instead, decided itself). The judges of the low national court are therefore assumed to be rather indifferent between outcomes II and IV.

To be reversed is assumed to be connected with disutility. Yet, outcome VIII is assumed to be the worst because it means that the court was incapable of correctly interpreting the preliminary reference delivered by the ECJ. Comparing outcomes III and V, V is assumed to be worse than III because reversal is backed by an ECJ ruling, which had not even been demanded by the low national court.

We have thus identified the following preference ordering with regard to all possible outcomes involving the preliminary reference procedure:

¹² The decision tree is, of course, incomplete: in case the low national court has referred a case to the ECJ, the ECJ could declare itself as incompetent and return the case to the low national court which would have to decide on it. The litigant could then either accept or appeal and the high national court could either confirm or reverse the decision of the low national court. Having ones' requests for preliminary references turned down will supposedly not be conducive to the career prospects of the judges who have been turned down.

VII > II ~ IV > VI > I > III > V > VIII.

The final outcome will not only be determined by the low national court but also by the actions of the other three actors. Whether the private litigant appeals or not depends on a host of factors (private vs. corporate litigant, value of the case, legal significance of the case etc.). Appeal as such is, however, nothing to be aspired for because it can lead to outcomes connected with low utility for the court. It will therefore not try to induce the litigant to appeal. A very awkward decision might, on the one hand, induce the litigant to appeal, it might, on the other hand, also lead to the reversal of the decision by the high national court. Whether a case ever reaches the high national court depends on the propensity of the litigants to appeal the case. This was just shown not to be a meaningful variable to tinker with for the low national court. Much will thus depend on the ECJ: if the low national court believes that the ECJ's ideal point is close to its own, this will increase its probability of referring a case. Even if it does not anticipate the ECJ's decision perfectly, it still has some "*ex post*" control over the case because it is the low national court that will issue the decision whereas the ECJ only publishes a general interpretation of the acts in question. *Ex post* control is, of course, limited but there is some discretion on this stage.¹³

There might be additional variables influencing the decision of the low national court to refer a case instead of deciding on its own like „judicial empowerment“; this argument has played a very important role with regard to the preliminary reference procedure. According to it, lower court judges have a chance to contribute to important legal developments and can bypass high national court judges. It has implicitly been recognized by our rank order developed above. An empirical test of the hypothesis could consist in comparing the propensity of lower court judges to refer cases from countries that do not have constitutional review with that of judges from countries that have constitutional review. As the additional judicial empowerment and the connected additional utility are clearly greater in the first group of countries, we would expect a relatively higher number of cases from those countries.

Outcomes III and VIII are both reversals of a low court decision by a high court. Given identical decisions by the low court, we assume that the probability of reversal will be lower if the ECJ has issued a preliminary ruling on the case.

¹³ If the ECJ observes a decision that is being published after it has issued a preliminary ruling and the ECJ believes that the decision is incompatible with its prior ruling, then the ECJ does not have any legal measures at its disposal to make the lower court rethink its decision.

Involving the ECJ could then serve as an “insurance” against being reversed by one’s own high national court.

It could be argued that a low workload would lead to an increase in the utility of judges. *Prima facie*, this might seem to be an argument against referring a case, since judges can be sure that they will have to deal with the case again later. But the argument can also be reversed: referring a case can also be interpreted as “let others do the work” or even “let the specialists do the work”. And additionally, the referring judge can assume that “the others”, i.e. the ECJ judges, have incentives to do the work better than the low court judges: their decisions are supposedly subject to more public scrutiny and their decisions might become influential for a high number of individual cases.

In its decision to decide or to refer a case, the judges of the low national court will make some assumptions concerning the likely ruling the ECJ would offer were they to refer a case. If they expect the ruling to be close to their ideal point, then the judges could “leverage” their position by referring it. It is, of course, a question on what basis the judges of the low national court form their expectations concerning the likely ruling of the ECJ but suppose judges have some clues and their expectations are generally correct. Under this assumption, one court (out of thousands of courts) that expects the ECJ to supply a ruling close to its own ideal point is sufficient for providing the Court with the opportunity to extend its competence. Suppose 100 judges could anticipate the ruling of the ECJ with considerable precision. The ideal point of 99 of them was closer to the *status quo* than the anticipated ruling of the Court. They would thus be more likely to decide the case on their own, rather than to refer it. But if there is just one judge whose ideal point is closer to the ECJ’s anticipated ruling than to the *status quo*, this judge is sufficient for giving the ECJ the chance to change the status quo. We can thus observe a strong asymmetry favoring the ideal point of the ECJ.¹⁴ We have

¹⁴ This mechanism has a certain resemblance with the trend of the common law to evolve toward efficiency (as developed by RUBIN [1977] and PRIEST [1977]). There, the probability that inefficient law will be brought to court is higher than that of efficient law brought there which results in a tendency of the inefficient law being modified towards efficiency – even if the judges do not have efficiency on their minds. Here, we have a tendency that the ideal point of the judges will become the law in ever more areas. Suppose it is inefficient, will the invisible hand process work here? The process works due to the higher probability of inefficient law being taken to court. But here, the probability is assumed to be lower: if a low national court correctly anticipates the ruling of the ECJ and does not agree with it, it will rather decide on its own than refer the case. In that sense, one could even reverse the “efficiency of the common law” into the “inefficiency of European law”.

thus seen that lower court judges can have incentives to refer a case to the ECJ. We have also seen that the referral system has a built-in bias favoring the ideal point of the ECJ.

3.1.2 Evaluating the Competence of the ECJ

In this part, we have thus far dealt with the incentives of national court judges to refer cases to the ECJ. We now turn to evaluate the competence that the ECJ has been able to acquire over the course of time. Many observers believe that the ECJ has been extraordinarily successful in this endeavor. NUGENT [1999, 277f.], e.g., writes: “In exercising their responsibilities the Courts, and especially the ECJ, sometimes not only interpret law but also make it. Of course judges everywhere help to shape the law, but this is especially so in the EU where the Courts have much more manoeuvrability available to them than is customary within states.” Suppose this observation is correct. Translated into the language used here, this would mean that the ECJ has been able to bring more ICC about than its national counterparts. We would hypothesize that the reason for this must be that the European judges are subject to less stringent constraints than their national peers. Since it seems difficult or even impossible to measure the extent of ICC brought about by the various courts empirically, we simply assume that the observations concerning the uncommon influence of the ECJ are correct.

With regard to EU law, a distinction between primary and secondary law is often made. Primary law encompasses the Treaties whereas secondary law is primarily composed of regulations, directives, and decisions. The impact of many ECJ decisions can be thwarted by appropriately changing secondary law. Some of the processes used to change secondary law have already been described above. Without going into any details here, it can safely be stated that the process of passing secondary legislation is on average more difficult than passing ordinary legislation – its nation-state equivalent - on the level of nation-states. Very often, a simple majority is sufficient for passing ordinary legislation. In the Council, the minimum requirement is qualified majority voting. This means that it is more difficult to directly correct the ECJ than it is to correct supreme national courts. This, in turn, will encourage the ECJ to broadly use its discretion.^{15;16}

¹⁵ Above, it has already been argued that the introduction of the co-decision procedure made secondary legislation, on average, less likely. It has been observed (COOTER AND GINSBURG [1996]) that parliaments with “dominant disciplined parties” can better constrain judicial discretion.

If some actors of the game played between the ECJ and various actors are very unhappy with a number of court decisions, trying to constrain the ECJ by changing the basis on which it operates is another option. This option consists in changing primary law. Again, it seems that changing this level of law is more cumbersome on the level of the European Union than it is on the level of most nation-states: There, two-third or three-fourth majorities are often required for constitutional change – the nation-state equivalent for primary law - which are difficult to organize. On the European level, changes of primary law are extremely cumbersome since they need to be ratified by the Parliaments of all member-states. Some member-states even demand approval in a referendum. The effects are identical as those spelt out with regard to secondary legislation. Since the constraints under which the ECJ operates are softer than those under which most national supreme courts operate, we can expect it to command more discretionary powers than most national courts.

Some additional factors might also play a role: it can be assumed that the less equivocally legislation is worded, the less discretion will courts have in bringing ICC about. On the European level, interests often radically diverge which can be expected to lead to “fuzzy” compromises. These will, in turn, give the ECJ broad discretion in interpreting them. Since passing fresh legislation in response to unsatisfactory interpretation practice by the ECJ is unlikely, the resulting discretionary power of the ECJ can be expected to be considerable. Under the assumption that legislation on the nation-state level will be worded more precisely, we have identified another constraint that is softer on the European level than on the nation-state level.

Although it can be argued that it is the current preferences of the other organs that constrain judges in their behavior, rather than the preferences of those who originally passed the legislation under consideration (VOIGT [1999]), it cannot be excluded that the intentions of the “constitutional parents” can constitute a certain constraint. In case of the EU, the *travaux préparatoires* have never been published. Compared to nation-states where they have been published, this would

It would be interesting to compare the European Parliament with national parliaments with regard to that dimension.

¹⁶ In his contribution to this volume, STEUNENBERG [2003] analyzes the consequences of the European Union having not one legislature but quite a few, namely the various specialized Councils. Additionally, he reminds us that agenda-setting within these Councils changes twice a year due to the fact that the presidency changes every six months. These could be two more factors explaining that the ECJ is constrained less stringently than its nation-state equivalents.

mean that one would *c.p.* expect a higher degree of ICC on the European level than on the level of the nation-state.

It cannot be excluded *ex ante* that the preferences of the population can be a constraint on judicial decision-making. If a supreme court's decisions consistently and radically deviate from the conceptions of large parts of the population, this could lead to demonstrations, riots etc. If the supreme court prefers not to provoke such reactions, its decision-making will therefore be constrained by the public at large. Chances that "the public" will act in such a way tend to be rather low (OLSON [1965]). But comparing the probability that outright opposition to Court decisions will occur on the European level seem to be even much lower than the probability that they will occur on the level of the nation-state: decisions of national supreme courts still get more media attention than decisions of the ECJ.¹⁷ Secondly, the existence of a "European public" has often been questioned (see, e.g., GRIMM [2002]). Concerted opposition against the decisions of the ECJ becomes thus even less likely. This means that a possible constraint to judicial decision-making on the level of the nation-state seems hardly present on the European level. Again, this points to softer constraints on the level of the ECJ than on the level of national supreme courts.

Courts do not have tanks at their disposal in order to implement their dicta. They depend on the cooperation of executive and legislature. We can assume that a high reputation of a court makes it more costly for the other government branches to ignore or correct its decisions. Since the function and the competence of the ECJ are largely unknown, this would make it less costly for the other government branches to interfere into its workings. We have thus identified one factor according to which the judges on the European level could be more constrained than their counterparts on the level of the nation-states.¹⁸

It can thus be concluded that the possibilities of the other EU organs to constrain the ECJ are less pronounced than the possibilities of executive and legislature to constrain supreme courts in most nation states. We would therefore expect the ECJ to command a lot of discretion. Supposing utility-maximizing judges, we can

¹⁷ It might be interesting to compare the number of times that leading national journals reported on the ECJ compared to the national supreme court.

¹⁸ With regard to this hypothesis, it might be interesting to compare the reputation of the ECJ with that of national supreme courts as well as with that of other European organs (check Eurobarometer).

expect them to decide according to their ideal points more often than supreme court judges on the nation-state level.¹⁹

3.2 Towards Explaining Explicit Constitutional Change

We are not interested in explaining ECC as it was brought about by the various Treaty amendments. We are rather interested in ECC referring to the competence of the ECJ. If the supranationalists are right that the founders of the EC did not in any way predict the emergence of the ECJ as an autonomous actor and that they would rather prefer it to be less autonomous, then one should expect that the competences of the Court should have been curbed by the various Treaty modifications. True, it has just been shown that modification of primary legislation is very difficult to achieve. Yet, if there was unanimous consent that the Court had clearly overstretched its competences, we would expect the member-states to constrain the judges more tightly. Formal competences of the ECJ have, however, not been curbed. We interpret that as preliminary evidence in favor of intergovernmentalism.

STONE SWEET AND BRUNELL [1998a, 66] write: “These moves integrated national and supranational legal systems, establishing a decentralized enforcement mechanism for EC law. The mechanism relies on the initiative of private actors. The doctrine of direct effect empowers individuals and companies to sue national governments or other public authorities for not conforming to obligations contained in the treaties or regulations or for not properly transposing provisions or directives into national law.” Assume that member states prefer not to be sued. If Stone Sweet and Brunell are correct, we should thus expect two developments: first, that the propensity to delegate additional competence to the European level should have diminished after the doctrine of direct effect was established by the Court in 1963. This has, however, not been the case.²⁰ Second, the competence of

¹⁹ Given that decision rules remain unchanged, the upcoming enlargement of the EU can be expected to further increase the discretionary powers of the ECJ. Assuming that enlargement will lead to more heterogeneous preferences in the Council, the leeway that results for the ECJ as a strategic actor is, correspondingly, further increased (STREIT AND VOIGT [1997], but see also KÖNIG AND BRÄUNINGER in this volume).

²⁰ Note that nothing is said about the welfare effects of delegation to supranational entities. All that is claimed is that a majority of nation-state politicians does not perceive a decrease in their utility levels. This does not preclude that for society as a whole, welfare-effects could be negative. If that were the case – and we do not claim that it is – then one would deal with ‘constitutional failure’ on the nation-state as nation-state constitutions make delegation to supranational entities too easy.

the Court to use the direct effect doctrine and to sanction member states that are not fulfilling their terms should rather be curbed. As described above, the opposite was the case.

Although we deem Stone Sweet's and Brunell's approach unconvincing, this does not mean that intergovernmentalists are necessarily right. In trying to explain the growth in power of the ECJ, the underlying rationality assumptions should be subject to explicit discussion. It seems obvious that the founders of the Treaties of Rome did in no way anticipate the evolution of the ECJ and its competence.²¹ But introducing bounded rationality often appears *ad hoc* and is therefore problematic.

4 Instead of a Conclusion: More Issues for Future Research

In this paper, ECC with regard to the ECJ and ICC brought about by the ECJ were described. It was attempted to explain ICC based on the toolkit of the economist. It was shown under what conditions low national courts have incentives to refer cases to the ECJ. It was further shown that the discretionary power at the disposal of the ECJ can be explained as a consequence of the constraints that the members of the ECJ are subject to. Compared to the constraints of nation-state supreme court members, these often appear to be less stringent.

Many questions remain open. Some questions for future research have already been raised in the course of the paper. These include (i) the effects of the inclusion of the subsidiarity principle into the Treaties for the factual competence of the ECJ, (ii) the interrelationship between ICC and ECC, but also (iii) more satisfactory explanations for the variance in the use of the preliminary reference procedure between the various national courts.

The economic analysis of the ECJ is, however, not confined to these questions. Other relevant aspects include the following:

The EU can be analyzed as a number of organs to which competence has been delegated. Yet, the EU itself has started to delegate powers internally as well as internationally, to independent agencies and to international organizations.

²¹ Sticking to the assumption of perfect rationality, one could even argue that national governments delegated competence on to the European level in order to bring domestic supreme courts in line. This would lead to a logical inconsistency though: they would only be interested to constrain the domestic judiciary more tightly if they had not perfectly anticipated its development, hence if they are subject to bounded rationality.

SALZBERGER AND VOIGT [2002] contain a number of criteria that can be used when analyzing the status that international delegation enjoys in a (national) legal order. One could now do a transfer and ask what status the international delegation entered into by the EU organs have (this would include factual questions such as the amount in which the EU delegates, the international organizations that the EU is a member of etc.). With regard to the ECJ, it can be expected to be critical of any further delegation of powers insofar as it expects its powers to be curbed by such delegation. This leads to a more general theoretical question: under what circumstances do judges have an interest in the delegation of powers, e.g. because the expected decrease in their workload would lead to utility gains? Delegation can also occur to lower courts; this could be utility-enhancing if the judges believe that they can monitor the behavior of lower courts at reasonable cost. *Prima facie* evidence seems to suggest that the ECJ has indeed been a firm defender of its powers with regard to the WTO. The original proposal concerning the European Economic Area had to be changed because the ECJ insisted on its monopoly of jurisdiction regarding matters of EU legislation. The ECJ has one established rival, namely the European Court of Human Rights in Strasbourg.²² It can be hypothesized that the recently passed European Carta will be used by the ECJ to gain a competitive edge over its Strasbourg competitor.

Other international bodies to which competence has been delegated also need bodies that can adjudicate. It could be interesting to compare the development of the ECJ with that of similar bodies and deal with the question why the ECJ has been so much more successful in extending its powers.

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²² It is noteworthy that all memberstates of the EU have signed the European Carta of Human Rights but that the EU as a supranational organization is itself not a member. This means that decisions of the ECJ cannot be taken to the European Court of Human Rights on the ground that they are incompatible with the rights laid down in the Carta.

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