Typological Analysis of the European Court of Justice: A Game-theoretical Approach to European Judicial Politics

Ph.D. Dissertation

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Table of Abbreviations

BVerfGE	Bundesverfassungsgericht (The German Constitutional Court)
CFI	The European Court of First Instance
COE	Council of Europe
CMLRev	Common Market Law Review
CRG	Constitutional Review Game
EC	European Community
EEC	European Economic Community
ECHR	The European Court of Human Rights
ECJ	The European Court of Justice
ECR	European Court Reports
EL Rev	European Law review
EPLR	European Public Law Review
EU	The European Union
ICJ	The International Court of Justice
Iran-USCTR	US - Iran Claims Tribunal Reports
JLE	Journal of Law and Economics
JCMS	Journal of Common market Studies
PCIJ	Permanent Court of International Justice
UNRIAA	United Nations Reports on International Arbitral Awards
TEU	Treaty on European Union

Table of Game Theoretical and Mathematical Notation

C-game	Complete information game
I-game	Incomplete information game
u_1	utility estimation 1 in Nash model
u_2	utility estimation 2 in Nash model
a_1	action for player 1 in Nash model
a_1^*	best response to a1 by player 2
a_2^*	best response to player 1 action of player 2
β	a measure of the brutality of public backlash
α	issue payoff for legislature
ε	institutional payoff for legislature
C	institutional payoff for the court in constitutional review game
I	issue payoff for the court in constitutional review game
C_{ECJ}	institutional payoff for the European Court of Justice
I_{ECJ}	issue payoff for the European Court of Justice
P	transparency threshold for legislature
P^*	transparency threshold for the Court
T_C	type space of Court
T_C^{EU}	type space of the Court in the EU
c	court's decision finding the bill constitutional
$\underline{c}$	court's decision finding the bill unconstitutional
c_{VAL}	unconstitutionality on grounds of 'validity'
c_{INT}	unconstitutionality on grounds of 'interpretation'
c_{APP}	unconstitutionality on grounds of 'applicability'
T	transparent
$\underline{T}$	not transparent
E	evade
$\underline{E}$	not evade
L	legislate
$\underline{L}$	not legislate
S_C	strategy space of court

A_C	action space of court
A^1_L	action of the legislature to pass the bill no 1
A^2_L	action of the legislature to pass the bill no 2
P(..)	probability of ..
r ..	*prior belief for the probability of ..*
∅	empty set
∈	is an element of
∪	union of sets
∩	intersection of sets
∑	sum of values..
=	equal to
≥	bigger than or equal to
>	bigger than
≤	smaller than or equal to
≅	equilibrant
$\underline{AP}_P$	Privileged applicant under art 234 EC
$\underline{AP}_{SP}$	Semi- privileged applicant under art 234 EC
$\underline{AP}_{NP}$	Non- privileged applicant under art 234 EC
L_{EU}	Set of Legislative Action in the EU
L_{DEC}	type of legislative act 'decision'
L_{DIR}	type of legislative act 'directive'
L_{REG}	type of legislative act 'regulation'
L_{REC}	type of legislative act 'recommendation'
L_{OP}	type of legislative act 'opinion'
$D_{234/4}$	decision of the Court under Article 234/4
f (EC_{234})	mathematical function for the decision of the court under Article 234/4
|XY|	line between x and y (also the distance between x and y

Ortalama bir doktora tezi, kemiklerin bir mezardan diğerine taşınmasından başka bir şey değildir.

J.Frank Dobie[1]

ÖZET

Ünlü matematikçi Thomas Bayes'in olasılık hesaplarına çözüm getirmek amacıyla kurmuş olduğu Bayes teoremi 1960 larda oyun kuramcıları tarafından geliştirildi. Oyun kuramcılarından en meşhur olanı Nobel ödüllü matematikçi John Forbes Nash, kendi adıyla anılan Nash modelini kurduktan sonra adeta bilimsel bir devrim yaşandı. Bayes teoreminin Nash modeli örnek alınarak geliştirilmesi sonucu elde edilen ve günümüzde extansif form oyun modellerinin başta geleni olan Bayes modeli, ünlü matematikçiden yıllar sonra oyun kuramı olarak bu şekilde ortaya çıktı. Daha önce siyaset bilimciler ve hukukçular tarafından kendi disiplinlerinde uygulanan normal form oyun kuramlarına karşılık Amerikalı siyaset bilimci ve oyun kuramcısı George Vanberg anayasal yargı denetimini ilk kez bir extansif oyun kuramı ile analiz etmiştir.

Vanberg tarafından ortaya konulan bu soyut analizin omurgası anayasal yargı denetimi yapan mahkeme ile yasa koyucu arasındaki etkileşimi, tarafların stratejisini ve yargı kurumunun tipolojisini belirlemek üzerine kurulmuştur. Bu doktora tezinin temel düşüncesi, özellikle anayasal denetim yapan yargı organı tipolojisini Bayes modeli ile analiz eden Vanberg'in soyut çalışmasını Avrupa Toplulukları Adalet Divanı kimliğinde somutlaştırmaktır. Böylece, Avrupa Birliği Hukukunda yargı denetimi yapan, Anayasal denetim yaptığı gibi hukukun genel prensiplerinden yararlanmak yoluyla boşluk dolduran, hepsinden daha önemlisi anayasal doktrinler yaratan Avrupa Toplulukları Adalet Divanı da bu işlevleri çerçevesinde Bayes modeli oyun kuramı kullanılarak ilk kez incelenmiş olunacaktır. Bu incelemede ayrı bir analiz yöntemi kullanılmadan Vanberg'in orijinal analizine yakın durulmaya çalışılmış, ancak Vanberg'in oldukça soyut kuramı her alanda somutlaştırılmış ve özellikle hukuksal ilişkilerde doktrindeki ana yaklaşımlar ile kişisel yorumlar harmanlanmıştır.

[1] Robert Day, *Bilimsel makale nasıl yazılır?* (çeviren Gülay Aşkar Altay) TÜBİTAK Yayınları, 2005 s.151

INTRODUCTION

Research Question

This study, under both political and judicial analysis, aims to lay out the action space and preferences of the European Court of Justice in its own environment. The Court derives the reason of its presence from a special mission given by Treaties. This mission might be described as monitoring, protecting and ensuring the Single Market and European Integration towards a single Europe. For this purpose, it became an institutional actor more than a judicial body. This result calls for a fundamental research question:

What is the character of the European Court of Justice as an adjudicatory body?

The purpose of this study is to make analysis of a character typology that might be conferred to such an adjudicatory body dealing with judicial review.

However, there are various points that have to be taken into account. Among them is the conceptual change of the mission of the Court. This mission is to be defined as 'judicial decision making' rather than 'judicial dispute settlement'. Moreover, the methodology used by the court extended to a point as far as an implicit 'constitution making' rather than constitutional review of acts by the community institutions. Consequently, the view of institutional standing pictures the Court as the most powerful actor of all institutions.

A second research question that follows the first is on the institutional character of the Court.

Is the European Court of Justice supreme over all institutions in inter-institutional debate?

The European Court of Justice is an institutional actor. The so called 'inter-institutional conflict' transforms to a game theory where the Court and other institutions remain as the players when the European Court of Justice becomes a party to this conflict.

The conclusion of dissertation is contentious on its claim of 'The ECJ is more powerful than the picture drawn from European public space regarding the fact that its function on constitutional doctrine creation and safeguarding the entire political process of integration as the strongest back sweeper of all other institutions as regards political preferences used by the Court'.

Approach

The dissertation will follow up a method including a triple comparative approach: laying out a constitutional picture of judicial advance and determining judiciary and legislature relations under the applicable theories of political science and game theoretical approach to analyze the role of the Court. The first approach starts with a conceptual analysis of the current scene on the international frame of judicial politics and various Court behaviours. The second one is the submission of political science theories such as separation of powers attached to game theoretical understanding where appropriate *constitutional review game* and *prisoners' dilemma game* are applied. The latter also concerns the enforceability of court decisions and the Court's accountability against the mentality of powerful member state governments. The legal dimension will also observe how the Court developed principles of law for the realisation of the political preferences.

Several decisions made by the Court provide examples of the Court behaviour in various conditions. Cases, such as 'Cassis', Van Gend en Loos, Les Verts, Van Kolson, and enforcement of WTO agreements, etc will be examined not only with the Court's observations and evaluations of the cases themselves under legal understanding, but also the political prepositions of the Court by these decisions and the results themselves and the effects on Court's priorities will be observed as well.

The dissertation also uses constitutional and extra-constitutional procedural issues used as materials granting a natural playground for the Court basing its acts on. Among them the following can be counted: the Member State enforcement action under article 226, preliminary reference to the Court under article 234, direct actions under article 230 and general principles of Community law.

The significance of the Game Theoretical Approach

The very fundamental question that one needs to consider at this stage is whether there is a form of analysis that lays out the Court's every possible action or the behavior in its entirety. Such actions and behaviors seem to possess a structure that allows multiple actors to respond. Therefore, this structure might be determined as and open ended environment where the assertive strategy of the Court balances the attacks on constitutional frontiers. This is, also a decision making problem concerning the Rational Behavior Theory. In this structure, the payoffs of each agent's final utility depend on the profile of the courses of action chosen by all agents. The set-up where all actions of the actors interactively affect each actor's payoff is called a *game*.[2] The dissertation uses this model to analyze the Court's behavior. The more sensitive point in this issue is lying out the players other than the Court and determining their preferences under a rational behavior. The criteria for this 'rational choice' speculation have to be the players payoffs. It is highly important to determine if the payoff for that player depends only on its own action or not.[3]

The first and the core part of the question is 'what type of game theoretical approach?' is to be applied for such a complicated case. In strategic games, a profile of strategies concludes in a profile of utility payoffs. If there is a certain payoff allocation or there is a final profile of last step moves of players, then it is called the outcome of the game. If there is a profile of strategies, where all players conform to the prescribed strategies so that none of the players is let to win unilaterally by switching to another strategy, it is not difficult to speak about a 'strategic equilibrium'. Another way of obtaining the strategic equilibrium is providing the strategies offering best response on one another.

For games, on the reason that there is always a player that might improve the game outside the equilibrium, it is generally accepted that equilibrium outcomes are real

[2] For various definitions of game see GAMBARELLI, Gianfranco & OWEN, Guillermo (2004); *Theory and Decision* Ch 1:The Coming of Game Theory p. 1-18, Kluwer Academic, Netherlands

[3] The essential of this case may be observed through a contrary sample, located in the form of 'the competitive market game'. In such a game, each player optimizes regardless of the behavior of other traders. The number of participants may also determine in this game that the payoffs to each of the players depend on the actions of the other players. Contrarily, in an oligopolistic or cartel market, the price or the quantity of the object is determined by the action of each player firm.

outcomes. There is an implicit assumption in game theories where then players might reproduce an equilibrium calculations of anybody else. Above all, these equilibrium strategies must be known to the players. Correspondingly, the whole structure of the game is assumed to be known to each player.

Therefore, the use of game theoretical approach to analyze a Court typology under a multi-optional extensive positioning based on vice versa set of strategies is very beneficiary for the purpose of this study. This methodology also gives floor to make assumptions through equilibrium outcomes determined for such a game. Consequently, the only difficulty remained may be the choice of appropriate type of game.

Types of game might be summarized as follows[4]:

Game Typology:	**Normal Form**	**Extensive Form**
	NxM Game	Game Tree
	Prisoners Dilemma	Normal Form v Extensive Form
	Coordination Games	
	Static games	Dynamic games

At this stage, there is a point of distinction among the game types when the setting up of a strategy of a player depends on prior beliefs which can be calculated. Moreover, this case comes through when beliefs have degrees. Thus, at this time, the theorems of probability calculus become criteria for the rationality of the sets of beliefs.

The necessity of selecting a Bayesian Model Game Theoretical approach

[4] This table is prepared under the categorization of 'normal form' or 'extensive form'. In normal (strategic) form games, the player moves simultaneously. The discrete strategy spaces in this type of game become an NxM game. Contrarily, in extensive form games, there is a complete order for the actions of players. A game tree is a typical extensive form game.

The game theoretical approach applied for the determination of Court's typology among the typology agenda laid out in the extensive form game is lacking one thing which is an essential of strategy preparation. Consequently, the lacking point 'prior belief' which is an essential of strategy preparation of players of a game theory can be formulized via the application of Bayesian model. There are two important points which submit the advantageous dimension of Bayes game for our purpose. These are:

1- The Bayesian Game provides type vectors such as t_1 and t_2 which is an essential to lie out a typology frame. The purpose of this study is to make such a reference to a typology selection to the European Court of Justice among three vector types: friendly, assertive and submissive.
2- The Bayesian Game provides at least one of the players is uncertain about another player's payoffs. This condition is also essential of constitutional/judicial review game where the European Court's payoffs are not known, neither the type vectors, which strategy to be chosen by the Court dominated by payoff functions.

The Bayesian model and prior belief equilibriums will be given in the description and outcome of the game under chapters 2 and 4.

The systematic construction of the dissertation

The first part of the thesis is a description of the game theoretical approach that the entire thesis is based on.

The second part mainly focuses on the conceptual sphere and comparative use of judicial politics. In this part Franck's formulation of neutral judge's behaviour 'decision = facts x rules' will be analysed.

The third analyses the institutional presence of the ECJ and its exercise of judicial review in different contexts

The conclusion part will discuss the findings of the study on the ECJ's effect on legal integration and constraints on the ECJ.

PART I

DESCRIPTION OF THE GAME

1.1. Mathematical Basis of Bayesian Model

"*In making our treatment of bargaining we employ a numerical utility of the type developed in* ***Theory of Games****, to express the preferences, or tastes of each individual engaged in bargaining. By this means, we bring into the mathematical model the desire of each individual to maximize his gain in bargaining.* "[5]

John Forbes Nash, 1950

The roots of *expectation* and *prior belief* emanates from a basic, classical and well-known concept in Economy: 'expected utility theory'.[6]This theory is produced from possible expectations which may appear before a *Utility estimation*. It has roots in a multi-disciplinary environment. However, the prominent 'Utility theory' concept of game theories is set out from the anticipation model of Nash. He explains the anticipation model as follows:

"Suppose Mr. Smith knows he will be given a new Buick tomorrow. We may say that he has a Buick anticipation. Similarly, he might have a Cadillac anticipation. If he knew tomorrow a coin will be tossed to decide whether he would get a Buick or a Cadillac, we should say that he had a ½ 'Buick' and ½ 'Cadillac' anticipation. Thus an anticipation of an individual is a state of expectation which may involve the certainty of some contingencies and various probabilities of other contingencies. As another example, Mr. Smith might know that he will get a Buick tomorrow and think that he has half a chance of getting a Cadillac too. The ½ 'Buick' and ½ 'Cadillac' anticipation mentioned above illustrates the following important property of anticipations, if: $0 \leq p \leq 1$ and A and B represent two anticipations; there is an

[5] NASH, John Forbes (1996) *The Bargaining Problem*, Econometrica 18 in Essays on Game Theory, Edgar Elgar Publishing, Vermount (US) p10.

[6] The concept might be described as the choice of decision maker between risky and uncertain prospects by comparing their expected utility values, the weighted sums obtained by adding the utility values of outcomes multiplied by their respective probabilities. (DAVIS, John Brian (1997), Expected Utility Theory, in Handbook of Economic Methodology, HANDS, Wade & MAKI, Uskali (eds), London, Edward Elgar, p.342-350

anticipation which we represent by pA + (1-p) B which is a probability combination of the two anticipations where there is a probability p of A and 1-p of B."[7]

Here, anticipation is a value, not only by economic means but also as mathematical action determining strategies. The end product of such calculation is a probability distribution in mathematical means. Thomas Bayes, who was known as a genius of Mathematics, developed a novel model to conduct these calculations.

The following example is a mathematicians understanding of Bayesian model of probability.

"Suppose we have a *random variable* which produces either a success or a failure. We want to consider a model M_1 where the probability of success is q=½, and another model M_2 where q is completely unknown and we take a *prior distribution* for q which is *uniform* on [0,1]. We take a sample of 200, and find 115 success and 85 failures. The likelihood is:

$$\binom{200}{115} q^{115}(1-q)^{85}$$

So we have

$$P(X = 115|M_1) = \binom{200}{115}\left(\frac{1}{2}\right)^{200} = 0.00595...$$

but

$$P(X = 115|M_2) = \int_{q=0}^{1} \binom{200}{115} q^{115}(1-q)^{85} dq = \frac{1}{201} = 0.00497...$$

The ratio is then 1.197..., which is "barely worth mentioning" even if it points very slightly towards M_1.

This is not the same as a classical likelihood ratio test, which would have found the maximum likelihood estimate for q, namely $^{115}/_{200}$=0.575, and from that get a ratio of 0.1045..., and so pointing towards M_2. A *frequentist* hypothesis test would have produced an even more dramatic result, saying that that M_1 could be rejected at the 5% confidence level, since the probability of getting 115 or more successes from a sample of 200 if q=½ is

[7] NASH, Op.Cit.

0.0200..., and as a two-tailed test of getting a figure as extreme as or more extreme than 115 is 0.0400... Note that '115' is more than two standard deviations away from 100.

M_2 is a more complex model than M_1 because it has a free parameter which allows it to model the data more closely…"[8]

The Bayesian model explains conditional probabilities. The classical conditional probability is

$$P(B|A) = \frac{P(A \cap B)}{P(A)}$$

Depending on three different cases such as A,B, and C, the conditional probability formula appears as

$$P(C|AB) = \frac{P(A \cap B \cap C)}{P(A \cap B)} \quad \text{where } P(A \cap B) > 0$$

The probability of C can be defined as

$$P(A \cap B \cap C) = P(C|AB)\, P(B|A)\, P(A)$$

And the probability for $P(A \cap B) = P(B|A).\, P(A) = P(A|B)\, P(B)$

What happens if there are two characters?

We have a matrix table in this case[9].

[8] see Manheim University online Glossary on http://www.sfb504.uni-mannheim.de/glossary/bayes.htm. Accessed on 10.01.2006. Bayes Factor, Wikipedia, online encyclopedia at http://en.wikipedia.org/wiki/Bayes_factors accessed on 11.1.2006

[9] This matrix and following formula development with the sample question is quoted from GÜRİŞ, Selahattin &BÜLBÜL, Şahamet (1995); Olasılık, Marmara Üniversitesi Nİhad Sayar Eğitim Vakfı; p.111

First Character

Second Character

Cases	A_1	A_2	Sum
B1	$P(A_1 \cap B_1)$	$P(A_2 \cap B_1)$	$P(B_1)$
B2	$P(A_1 \cap B_2)$	$P(A_2 \cap B_2)$	$P(B_2)$
Sum	$P(A_1)$	$P(A_2)$	1

Figure 1.1.Matrix for two character probability

According to this table, A_1 and A_2 may not exist at the same time. The same is true for B_1 and B_2. The previous equality found for $P(A \cap B)$ can be re-written as

$$P(A_1 \cap B_1) = P(A_1)\ P(B_1|A_1) = P(B_1)\ P(A_1|B_1)$$

The above leads to the following conditional probability formula

$$P(B_1|A_1) = \frac{P(A_1 \cap B_1)}{P(A_1)}$$

$$P(A_1|B_1) = \frac{P(A_1 \cap B_1)}{P(B_1)}$$

Where $P(A_1) = P(A_1 \cap B_1) + P(A_1 \cap B_2)$

And $P(B_1) = P(A_1 \cap B_1) + P(B_1 \cap A_2)$

As mentioned above

$$P(A_1 \cap B_1) = P(A_1).\ P(B_1|A_1) + P(B_1).\ P(A_1|B_1)$$

$$P(A_2 \cap B_1) = P(A_2).\ P(B_1|A_2) + P(B_1).\ P(A_2|B_1)$$

We substitute P (A_1) and P (B_1) with the following

P (A_1) = P (B_1). P (A_1| B_1) + P (B_2). P (A_2| B_2)

And

P (B_1) = P (A_1). P (B_1| A_1) + P (A_2). P (B_2| A_2)

Finally, the conditional probability formula in the beginning transforms as:

$$P(B_1|A_1) = \frac{P(B_1).P(A_1|B_1)}{P(A_1).P(B_1|A_1) + P(A_2).P(B_1|A_2)}$$

And

$$P(A_1|B_1) = \frac{P(A_1).P(B_1|A_1)}{P(A_1).P(B_1|A_1) + P(A_2).P(B_1|A_2)}$$

Another explanation of Bayesian Model can shortly be defined as follows:

If there are n numbers of cases such as a_1, a_2, a_3, …,a_n; in a group of S where the union of all members

$a_1 \cup a_2, \cup a_3, \ldots \cup a_n = S$

with the condition that

$i \neq j$ and $A_i \cap A_j = \varnothing$

and with the condition for a case of B ($B \subset C$)

$i \neq j$ and $(B \cap A_i) \cap (B \cap A_j) = \varnothing$

the formula for B can be expressed as

$B = (B \cap A_i) \cup (B \cap A_j) \cup \ldots \cup (B \cap A_n)$

$P(B) = P(B \cap A_1) + P(B \cap A_2) + \ldots + P(B \cap A_n)$

The definition of conditional probability leads us to

$$P(A_1 | B_1) = \frac{P(A_j \cap B)}{P(B)}; \quad j = 1, 2, 3, \ldots, n$$

With the assistance of above equalities, it becomes[10]

$$P(A_1 | B_1) = \frac{P(A_j).P(B | A_j)}{\sum_{i=1}^{n} P(A_i).P(B | A_j)}$$

Above is the finalized formula of conditional probability of Bayesian theorem for mathematics and statistics.

The following two examples show the calculation of conditional probability by using the Bayesian Formula.

The first example[11] is estimation of a product deficit in mass production in a three chambered factory: A, B and C. The total units of productions in these three chambers are (A) 800, (B) 700 and (C) 500 respectively. Chamber A has a nonqualified product ratio of 0,10, while for chamber B the ratio is 0,08 and for chamber C the ratio is 0,14. The daily production of the factory is 2000 units in total. We would like to know the probability of a defected product to be produced in chamber B.

The Bayesian Model that we explained above can be applied by replacing A_1, A_2, A_3 with A, B and C. Let X represent defected product.

[10] ibid. p.114

[11] This example is quoted from Güriş&Bülbül, ibid. p.115

Accordingly, the formula to be applied will be

$$P(B|X) = \frac{P(B).\,P(X|B)}{P(A).\,P(X|A) + P(B).\,P(X|B) + P(C).\,P(X|C)}$$

$$P(A) = \frac{800}{2000} = 0.40$$

$$P(B) = \frac{700}{2000} = 0.35$$

$$P(C) = \frac{500}{2000} = 0.25$$

The ratios of defected product according to the chambers are:

$P(X|A) = 0{,}10$; $P(X|B) = 0{,}08$; $P(X|C) = 0{,}14$

The placement of these variables to the formula will take the form:

$$P(B|X) = \frac{P(B).\,P(X|B)}{P(A).\,P(X|A) + P(B).\,P(X|B) + P(C).\,P(X|C)}$$

$$= \frac{(0{,}35)\,(0{,}08)}{(0{,}40)\,(0{,}10) + (0{,}35)\,(0{,}08) + (0{,}25)\,(0{,}14)} = \frac{0{,}028}{0{,}103} = 0{,}2718$$

The second example is from medical science.[12]

" The rate of women over the age 40 having breast cancer and not having breast cancer are known to be %1 and %99 and the rate of correct diagnosis is given as P(positive mammography/breast cancer)= 80%. When we apply the Bayes theorem here the normative prediction becomes as low as P(breast cancer/positive mammography)= %7.8. Thus, finally, it comes out that the probability of a woman having a positive mammography is less than %8.
B_1

$$P(H|0) = \frac{P(H) \times P(O|H)}{[P(H) \times P(O|H) + P(\text{non } H) \times P(O|\text{ non } H)]}$$

Where
P(H) = the probability to be assigned before the observation (what is called 'prior probability'
P(O|H) = The probability the observation would occur in case the hypothesis comes true.
P(non H) = the prior probability does not come true. 1- P(H)
P(O| non H) = the probability the event would have occurred even if the hypothesis does not come true. "

In other words, Bayes theorem helps us to calculate the probability that a hypothesis is true given an observation (the 'posterior probability') of the events in the model.

The Bayesian[13] theorem is also a tool to measure of the degree of beliefs of an individual in a proposition and the effect of new information on these beliefs. It also provides a normative model to assess how well people use empirical information to

[12] The example below is quoted from Mannheim University Online Glosssary at http://www.sfb504.uni-mannheim.de/glossary/bayes.htm

[13] This theory is a work of Thomas Bayes (1702-1761) who created a special case for probability theorems what later became known with his name. However, the use of the name 'Bayesian' became common in 1950s. There is no further evidence that Bayes had the same broad use of this theorem in his era. Nevertheless, Laplace (1749-1847) proved a more general version of Bayes' theorem and put it into use in solving problems of the sample fields such as celestial mechanics, medical statistics, and in some special cases in jurisprudence. For further details see http://en.wikipedia.org/wiki/Bayesian_probability

update the probability that a hypothesis is true. There have been so many attempts made to operationalize the notion of 'degree of belief'. The most common approach is based on betting: a degree of belief is reflected in the odds and stakes that the subject is willing to bet on the proposition in question. The same is true for the bids in open ended price sales. In political interactions between institutions or between institutions and individuals, there are also propositions of policy on certain probabilities. For instance, in a system of separation of powers, a constitutional court has the opportunity to annul the legislature's bill and the legislature has the opportunity to evade the court's decision. Thus, both for the legislature and the court, there is a prior belief in terms of the counter part's possible response.

The prior belief concerned also is a determinant of what policy to follow for the party in question. The same is true for individuals and public opinion. In a sufficiently transparent environment, public opinion has the opportunity to follow up institutional responses. Thus, the public opinion also has a 'degree of prior belief'.[14]

1.2. Essence of Bayesian Game as an Incomplete Information Game

Back to Nash's anticipation model, a few important conclusions can be made using the Bayesian approach. The anticipation and the strategy for each player A,B and C are determined by Nash as follows:

"By making the following assumptions we are enabled to develop the utility theory of a single individual:

1. *An individual offered two possible anticipations can decide which is preferable or that they are equally desirable.*
2. *The ordering thus produced is transitive; if A is better than B and B is better than C then A is better than C.*
3. *Any probability combination of equally desirable states is just as desirable as either*
4. *If A, B and C are as in assumption (2), there is a probability combination of A and C which is just as desirable as Q. This amounts to an assumption of continuity.*

[14] It is more convenient to use the concept 'prior belief' since the probability expectation is ex ante, before the response of the outcome of the anticipated acts.

if $0 \leq p \leq 1$ and A and B are equally desirable then pA +(1-p) C are equally desirable. Also if A and B are equally desirable, A may be substituted for B in any desirability ordering relationship satisfied by B. "[15]

1.2.1. From Probability to Game Theory

The basis on which Nash has built his theory evolves further to a model founded on players' rationality. For instance, in a two player simultaneous move game, the elements of action set $\{a_1^*, a_2^*\}$ are called to be a Nash equilibrium in the case where a_1^* is a best response for player 1 against the a_2^* which is deemed as the best response for player 2 against player 1 when player one responds with a_1^*. Therefore, the utility payoffs of each player should meet the following:

$u_1 \{a_1^*, a_2^*\} \geq u_2 \{a_1, a_2^*\}$

Correspondingly, for every a_1 in A_1, and a_2^* must satisfy

$u_2 \{a_1, a_2^*\} \geq u_2 \{a_1, a_2\}$

There is a strict reality with this equilibrium of Nash; the motivation of the equilibrium is to find a unique solution to a game theoretical problem and the expectation to meet Nash's mutual best response requirement. In a game referred to Nash equilibrium, none of the single players wants to derogate from his/her own strategy while the choice of strategy is expected to depend on rational behavior. Moreover, there might be various pictures of the equilibrium in different games. For instance, while the Nash equilibrium is not efficient in a game like prisoners' dilemma, there exist several equally compelling Nash equilibria such as the 'dating game'.

It is also a necessity to lie out the issue of pure strategies and mixed strategies. We can shortly describe pure strategies as the actions in a players action space (A_i). A mixed strategy can be described as a probability distribution over some or all of the players' pure strategies. Any game with finite number of players having finite number of pure strategies has a Nash equilibrium possibly involving mixed strategies.

The next issue on the way to Bayesian game is the type of dynamic games with complete information. It is also possible to assume this type of game on two players'

[15] Nash, Op.Cit.

strategies. The first step is a choice of action a_1 by player 1 among the feasible actions from action space (A_1). The second step is the choice of an action a_2 by player 2 from his action space (A_2) in response to action a_1 chosen by player 1. The third step is appearance of payoffs u_2 $\{a_1, a_2\}$ to player 1 and u_2 $\{a_1, a_2\}$ to player 2. The summary of a complete information dynamic game is likewise, needless to touch on the 'noncredible threats'[16] points effective in some Nash equilibria.

A subgame is a piece of an original game that continues to be played at any point where the complete history of the original game is of common knowledge. The reflection of subgame in Nash equilibrium is the 'subgame Nash equilibrium'. In terms of its description, *Nash equilibrium* of the dynamic game is a subgame perfect Nash equilibrium if the players' strategies constitute a Nash equilibrium in every subgame.

If the game in question is a finite game, it has subgame perfect-Nash equilibria involving mixed strategies. Each sub game itself is also a finite game involving mixed strategies with subgame perfect Nash equilibria.

The issue is subject to change when it comes to a static incomplete information game, which is also known as the 'Static Bayesian Game'. Here, again there are three steps: First, nature draws a type vector t = (t_1, t_2), where t_i is independently drawn from the probability distribution p (t_i) over player *i*'s set of possible types T_i. Secondly, nature discloses t_i to player i, but not to player j. Finally, the players simultaneously choose actions, player i choosing a_1 from their feasible action set A_i and receive payoffs u_2 $\{a_i, a_j, t_i\}$.

In a Bayesian (incomplete Information) game, at least one player is uncertain about another player's payoff function (more precisely, about another players type). There's a common assumption that each player's beliefs are independent from each other. Consequently, a pure strategy for player i specifies a feasible action a_i for each of player i's types. In such a game, player 1's strategy is the best response to player 2, for each player, the action so called maximizes the payoffs of player 1 on a ground that beliefs about player 2's type and action rule is given. If the players' strategies are

[16] Noncredible threats are threats that the threatener would not want to carry out. On the other hand these threats are threats that the threatener will not have to carry out if the threat is believed.

deemed to be the best response to each others action in a Bayesian game, the Nash equilibrium in such a game is namely the Bayesian Nash Equilibrium.

The equilibrium provided for the game in this study is Perfect Bayesian Equilibrium that is also suitable for games with incomplete information but in dynamic nature. This equilibrium works to determine the prior beliefs by Bayes' rule from the equilibrium strategies. These strategies must be rational, and whenever a player has a move, that player's action must be optimal given the player's belief at that point. A belief over the set of feasible histories of play appears when a player is uncertain about the history of prior play while he prepares to move.

1.2.2. Bayesian Players by Harsanyi[17]

Bayesian Game, respect to its original form, is an incomplete and imperfect information game. There are two different categorizations here. The first one is the categorization depended on the information on the rules of game as to whether they are *complete* or *incomplete information games*. The second categorization is made under the information on players' strategies available to other players whereas the game is categorized as *perfect* or *imperfect information games*. The difference between *incomplete* and *complete information games* can be explained as follows:

The players have no sufficient knowledge on rules of the game in *incomplete information games* (*I-game*). Contrarily, in *complete information games* (C-games), the players have the sufficient knowledge of the rules of the game. However, one should be careful not to confuse this differentiation with *perfect information* and *imperfect information games*. The first categorization is made with regard to the existence of sufficient information on the rules of the game available to all players. Bayesian game is an *incomplete information game* where the players are not completely aware of the rules of game. Especially, the game in this study which picks

[17] See, HARSANYI, John C (1967) *Games with Incomplete Information Played by Bayesian Players*; Journal of Management Science, Vol. 14 No.3

up 'nature'[18] as a player, can present no pre-determined rules of the game for players regarding the continuously changing political sphere. For the analytical understanding of the problem it is necessary to underline the problematic elements of this type. At the centre of the incomplete information games lies a serious problem on the part of players that is the *infinite regress* in reciprocal expectations. [19] Therefore, finding the right equilibrium is more crucial than dealing with numbers. Upon the question of equilibrium we need to find about the elements. The analysis of incomplete information is based on the assumption that every player will use the Bayesian approach which means that every player is supposed to dispense a subjective probability distribution[20] P_i to all variables unknown to him. This type of probability distribution will lead the player to take a trial of maximizing the mathematical expectation x_i of this type of probability distribution P_i.

Regarding the interpretation of incomplete information as lack of information by the players of the game in a normal form game, such incomplete information may ascend from three possible major ways:[21]

"1- The players may not know the physical outcome function Y of the game which specifies the physical outcome $y= Y (s_1,\ldots,s_n)$ produced by each strategy n-tuple $s=(s_1,\ldots,s_n)$ available to the players.

2- The players may not know their own or some other players' utility functions x_i, which specify the utility payoff $x_i = X_i (y)$ that a given player *i* derives from every possible physical outcome *y*.

3- The players may not know their own or some other players' strategy spaces S_i, i.e, the set of all strategies s_i (both pure and mixed) available to all players *i*."

[18] There is no single and substantive definition to Nature. Nevertheless, for this game, it might be described as the up to date account of politics in global context. The concept will be analyzed in part II of this work.

[19] ibid. p. 163

[20] A subjective probability distribution differs from objective probability distribution on the basis of whom the probability distribution expectation is referred to. In subjective probability distribution, it is deemed to be Pi is defined on the players own choice behavior. In contrast, the objective probability distribution P is defined as the probability of frequent events observed by an independent observer.

[21] ibid. p.167

The incomplete information part of the Bayesian game applicable in this study is lacking the information incompletion under number 1 and 3. It is also suspicious to find out the clear utility payoff when the nature in an extensive form game is determined as a player.

One other point of the hypothesis of this should be considered as the prior belief for the Court's type. Thus, the value gained as an outcome of the game will be used to determine the activist approach of the Court. Specifically, the strategy and payoffs as *vice versa* effective factors are the outcome of the game that could demonstrate a Court-visional political positioning.

Consequently, what is to be set as a game for this type of outcome is to be determined. For the findings of a court strategy profile, we need to model the strategy profiles with the outer impacts of the players.

When there is an attempt to model a strategic, economic, legal situation, we need to capture as much concerned detail as possible. Under this context, a game is expected to have a complex and temporal information structure which is essentially to be understood to operate the game. This structure is not given in some games explicitly. However, the aim of the study is to give it including the elements:

1- the set of players
2- who moves when and under what circumstances
3- what actions are available to a player when the player is called up to move
4- what the player knows at the time of his/her/its movement
5- what payoff each player receives when the game is played in a specific way

Regarding point 3, there is a certain extensive form description. Including the complete information of this point, the game could rather be called an 'extensive forma game'. However, in extensive form games we may contribute to all of these points. Game tree is the foundation of the extensive form game, which the points can also be underlined inside the diagram.

In this study, the payoffs and related strategy will be determined. However, the payoffs are not only depended on environmental or self-constructing factors. In addition, one very crucial issue to be distinguished at this point is the prior belief of the players that forms part of player strategies. The only theorem that could be responding this research question is by Georg Vanberg where Bayesian model is applied under the framework of a game theoretical approach.[22] What was analyzed in Vanberg's work could be laid out on a more visible surface by defining the fragments of his approach.

1.3. Constitutional Review Game as a Bayesian Game

The interactions between courts and legislatures have become undeniable phenomena in political life. In terms of constitutional review, cases brought before the Constitutional Court become, more dramatically, a progress of legislative action towards legal development.

For the better understanding of this interaction, Vanberg offers a Bayesian model of Constitutional review with a game theoretical approach.[23] This model addresses legislative reactions to judicial rulings and the impact of expectation of such reactions on judicial conduct. Therefore, it is no surprise to call this interaction 'bilateral' and '*vice versa* effective'.

1.3.1. Background of the game and key issues

The theory of constitutional review concerns a constitutional court's monitoring duty over the political power supposed to act within or overriding the scope of constitutional space. The preliminary and main issue here appears as 'how to implement the theory of constitutional control?' The key problem convenes the

[22] VANBERG Georg, (2001) "*Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*" American Journal of Political Science, Vol.45. April, No. 2, p.346-361

[23] ibid.

concern of another dimension of the issue: the necessity of the willingness of branches other than judiciary to implement or execute the court decisions. In a situation where a piece of legislation is in conflict with the constitution, the first optional necessity for legislature is to redraft the conflicting piece.[24] Other possibilities are the non-implementation or wrong implementation of constitutionally non-problematic legislative acts may cause conflict with the literal meaning or spirit of constitution.

In a democratic society, an important issue that affects implementation of court decisions is the public support. If the constitutional court decision is backed with a strong public opinion, it is highly risky for the legislature to override the decision with new legislation. The possible negative public backlash may easily posit the accountability rating of legislature upside down. Subsequently, a hesitative approach against such a backlash may be an incentive for the legislature to respect the court decisions.

Another issue might be the ability of the voters to monitor the legislative response to judicial decisions.[25] This monitoring possibility can only be maintained through a transparent legislative action process.

According to Vanberg, the second issue is more crucial than the first one. Specifically, the existence of the first one is a lower doubted situation. However, when it comes to the second issue, a public censure might easily drive the legislature not to comply with court decisions. Therefore, monitoring legislative response is a more important issue.

In general it is easy to monitor the explicit legislative response to court decisions. Contrarily, sometimes, in some cases, the legislature's response may be 'implicit' which makes it impossible for the legislature to be 'caught' by the publicising action. There is no possibility of a public backlash punishment in this case.

Various ways may be counted for such an 'implicit' evasion. For instance, a legislative majority may initiate a legislative act but may fail to adopt it for long. This

[24] ibid. p.347

[25] ibid

type of sample is viewed by the German Federal Parliament (Bundestag) evading the decision of the Constitutional Court (Bundesverfassungsgericht) decision in 1980.[26] Another sample is the Court's 1975 decision to pass a prohibition against consulting contracts.[27] Bundestag has not yet adopted any legislation on this issue since then.

Another way of evasion is to revise the legislation reviewed by the court. However, this revision is not aiming to obey the court rule. Contrarily, revision will undermine some of the consequences of the court decision. The legislature may comply with the court decision in procedural means, but may not prefer to amend the essence of offensive provision. A similar example for this way is the decision of German Constitutional Court upon the request to annul political party financial aids.[28] After the decision the Bundestag passed a legislation revising the previous legislation. However, the revised legislation could only cover a very smaller fragment of unconstitutional financial loss. [29]

It is clear that legislative majorities prefer non compliance with the court decisions and they realise their preference implicitly. Regarding this position, Vanberg suggests the second position more important. As it was issued above, among the number of factors, transparency in legislation is crucial for the voters monitoring of the legislature's response to the court decision.

The other face of the coin, which is the central issue for this study, is the underlying intentions of judges to make a decision with the knowledge of a possible evasion by the legislative power. Judicial conduct might be controversial upon the expected response of the legislature. Thus, judges primarily have the knowledge of the approximate degree of evasion by the legislative authority and can shape their policy of judicial decision making regarding this point of legislative evasion.

[26] BVerfGE Vol 54, p. 11

[27] BVerfGE Vol 40, p. 396

[28] BVerfGE Vol 85, p. 264, 294

[29] VANBERG, Op. Cit. P.348

1.3.2. The Model[30] and Equilibrium of the Constitutional Review Game[31]

The reason of employing this incomplete and imperfect information game is to find out general evidence comparable with the practice of ECJ within the limits of well known considerations over the above mentioned constitutional review interaction between courts and legislative authorities. Therefore, the model will be used for general interpretation and evidential interpretation for the case at EU level and within the scope of power exercised by the ECJ.

The game is set up in a two dimensional-transparent and non-transparent-environment with three players: nature, legislature and a constitutional court. The outset of the game includes three types of court and two independent moves among different 'policy environment's. As the nature brings the necessary conditions, the legislature makes a preference whether to adopt legislation (L) or not to adopt legislation (L̲). The legislature must make its preference disregarding its policy environment and the type of the competent court. In case of not adopting the legislation (L̲), the game ends. Otherwise, the legislation is enacted (L) and it becomes subject to constitutional review. Consequently, the court, with the primary knowledge of its type, may decide the legislation (L) is consistent with constitution (C) or it is conflicting with the constitution (C̲). For the first decision of the court finding the legislation constitutional, the game ends. However, for the latter, the legislature again takes place: to evade the decision (E) or not to evade but to comply with the court decision (E̲).

The difficult and challenging part of the game is the incomplete information: policy environment and the court type. Among the first parameter, the 'transparent' type of policy environment (T) requires knowledge of the public of the evasion act by the legislature that will result with public backlash. Contrarily, a non transparent environment (T̲) is suitable for hidden operations of legislature against court

[30] For further information on Bayesian Model, see HARSANYI, John C (1967) "*Games with Incomplete Information played by Bayesian Players"*, Journal of Management Science Vol 14, No.3 p. 163

[31] The essence of game and the diagram is adopted from VANBERG, Op cit. P. 349-351. However, the application of game in the political system of the EU is given over the same assumptions of the original game varying in institutional definitions.

decisions and there is no possibility of public backlash regarding the fact that the public is lacking information and have no opportunity to monitor. The underlying idea for why the information on policy environment is incomplete is that the either of the players court and legislature does not know of the fact that an attempt of evasion might be successful *ex ante*. For this parameter, finally, held that the prior belief is that the environment is transparent is captured by the parameter: $p \in (0, 1)$. In general, in our case, it is assumed that the ECJ is acting in an environment that is less transparent in comparison with the constitutional courts at national level.[32] Moreover, its decisions are not also subject to public debate in the same degree with a decision of a national court. Finally, it has more technical trans-national economic and political issues and public support for the court is weaker.[33] Thus, it is rather to claim that electoral connection may not be effective at the decision making process of the ECJ.[34] Regarding the fact that rule makers of the supreme structure such as the commission and the council are more in administrative- institutional character than national legislator, ECJ decisions are more a ground for inter-institutional conflict.[35] However, the presence of the European Parliament as the representative of elected European citizen and the Council as the national agencies[36] construct the electoral wing and make it under a public monitoring of European public opinion. There are also alternative enforcement mechanisms in the EU to substitute electoral connection. Therefore, the institutional payoff is higher but not an absolute value: $1>C_{EU}>0$.

[32] ibid p.358.

[33] According to Weiler, it is valuable to focus on the fact that the positioning of the actors such as the community institutions and the Member States' governments are depended on the approach taken by the view. The doctrinal perspective of the Court implies that the Community institutions, the international-transnational organizations, the national agencies are objects of the Court's jurisprudence. Contrarily, in a political view based on the actors, these are subjects, interlocutors, partners to a dialogue See WEILER, J. H.H., A Quiet Revolution:" The European Court of justice and its Interlocutors", Comparative Political Studies 26;4 (1994, Jan) p. 516

[34] ibid.

[35] SCHEPEL &BLANKENBURG, Op. Cit. p. 18-21

[36] The national level confrontation can be observed in the court and Greece dispute. Greece failed to comply with a 1992 ECJ decision ordering Greece to implement EU directives on waste disposal. However, Greece had no enough space and power to evade the decision with a council decision.

The second type of incomplete information is the court:[37] the typology and preferences. In this model, there are three types of court: *friendly*, *assertive* and *submissive*. Thus the type space is as follows:

$T_c = \{Friendly, Assertive, Submissive\} \cong \{F, A, S\}$

At this point it is crucial to determine the court's payoffs and its components. The first component is the issue under review that is confined by an issue payoff which can be symbolised as:

$I_i > 0$ (where $i \in \{F, A, S\}$)

The Court must pay this cost in case of an outcome of the game as a result of a statute review in agreement with the court's preference over the bill. These preferences can be defined as constitutional aspects and/or policy preferences of the court.

The second component is the payoff over the institutional status of the court. Definitely, the evasion attempt, disregarding the success of this attempt, is a cost for the court on grounds of the challenge for its institutional status. Thus, the second component may be symbolised as:

$C_i > 0$ (where $i \in \{F, A, S\}$)

Regarding the interplay between these two parameters, below, the three court types are differentiated.

[37] It is one of the main themes of this study to find out how to categorise the ECJ among the mentioned types of courts. This prior step is to be taken in order to detect activist approaches.

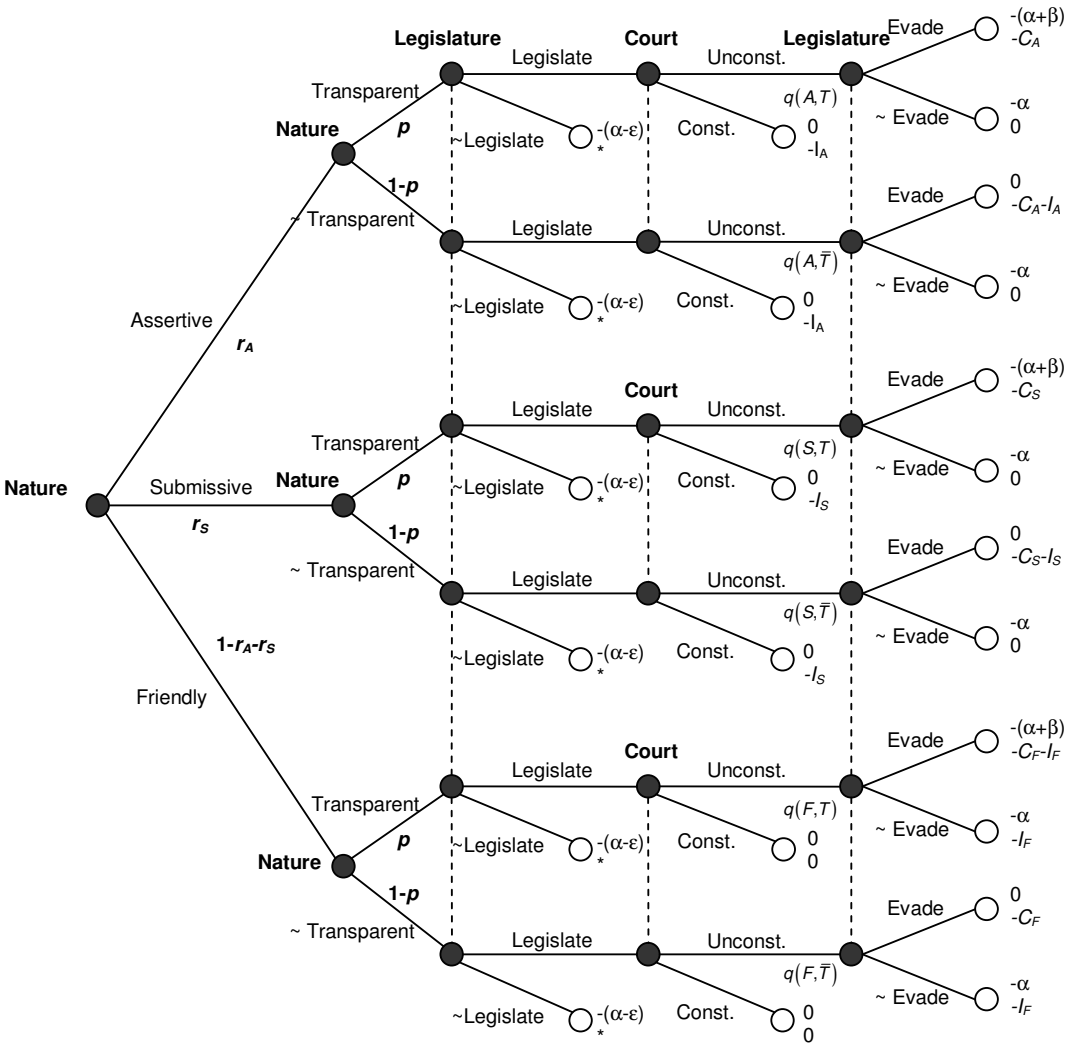

Figure1.2. Vanberg's Game Tree for the CRG

(The diagram above is designed on the idea of enlisting the payoffs of the legislature first and payoffs of the courts second.
For the court: C_F, I_F >0: C_S>I_S>0; I_A>C_A>0.
For the legislature α>ε>0; β>0)

a) Friendly court:

It is not that difficult to guess that a friendly court's approach towards the so called legislation under judicial review is similar to the legislatures approach in question. This type of court prefers to sustain the legislation instead of constitutionally annulling.

As it is clearly determined within the above mentioned figure, the court's highest payoff (0) comes out among the payoffs listed, when it sustains the legislation constitutional. Another option is the court's annulment of the legislation attached with the participation from the legislature reduces the payoff to $-I_F$. This conclusion is a reflection of the court's will to the implementation of the policy. Another option is the evasion of the court's decision. At this point, the court is entitled to pay the institutional cost C_F and the issue cost I_F in a position where the evasion attempt is unsuccessful. Thus, the friendly court's strategy is to uphold the legislation at the review stage.

b) Submissive Court

Contrary to the position of the friendly court 'submissive' court is hostile to the legislature's legislation. Again, contrary to the friendly court's behaviour, its preference is to declare the legislation unconstitutional and the legislature's compliance with the court's ruling. In a situation where the legislation is found unconstitutional by the court and it is successfully evaded by the legislature, the court remains with the highest payoff. This is the ever worst outcome for this type of court because the court is not successful to crumb the legislation ($-I_S$). Moreover, the court's institutional position is challenged ($-C_S$) in this case. The other branch is the unsuccessfully evasion by the legislator. Subsequently, the only payoff for the court is the institutional payoff ($-C_S$) with regard to the institutional struggle. However, this time there is no issue payoff; issue is survived by the court. In a situation where the court upholds the legislation at the review stage, it is entitled to pay the issue cost of not eliminating the policy (captured by $–I_S$). By this way, the court bars any opportunity of an evasion attempt. Shortly, it is rather a preferable option for the court to uphold the legislation at the review stage than creating a struggling position with the legislature. As a result, the assumption for a submissive court is $C_S>I_S$. The submissive court is not much interested with the issue of its institutional integrity.

c) Assertive Court

A single, special and crucial aspect varies the assertive court from a submissive court. The likelihood with the submissive court is its opposition to the legislation. However, the cost for institutional payoff (C_A) is not that much as in the submissive court's

position. Therefore, it would not be wrong to claim $I_A > C_A$.[38] Thus, this type of court concerns more about the issue under review and tries to bring the case to public confrontation with the legislature rather than an institutional prevalence. In addition, it is no surprise that this type of court has not much concern on debates of its institutional standing. Moreover, it should be noted that these assumptions are modest and general, albeit, not applicable to inherent institutional conflicts between the courts and legislature. Either the annulment of the legislation and overturning of it are by jurisprudential reasons or by policy preference of the court, the court would not prefer to be evaded by the legislator.

There are three types of courts and, therefore, three types of prior belief. However, among them, there is another classification: hostile or friendly. The formulas for probabilities and prior beliefs are subject to change with this classification. If the Court is hostile, it may either be assertive or submissive. However, it can not be friendly. The common prior beliefs over the courts types are evident as

$P(A) = r_A$, $P(S) = r_S$ $P(F) = 1 - r_A - r_S$

On the basis of

$r_A \in (0,1)$ $r_S \in (0,1)$ $r_A + r_S < 1$

(as it is mentioned above, if any of r_A and r_S is equal to 1 the typology debate ends)

Thus, the court action set is

$$A_C = \begin{cases} \{c, \underline{c}\} & \text{if } A^1{}_L = L \\ \varnothing & \text{otherwise} \end{cases}$$

Where denominators are:

[38] The general assumption for lawyers is the dominant weight of issue payoff. Institutional standing can not be an excuse to sacrifice the issue which is directly concerning the public interest. However, according to political scientists this type of approach is not a product of rational behavior. The institutional actors are expected to be rational enough to protect their institutional credibility.

A_C= action set of the court

S_C= strategy of the court

T_C= type space of the court.

As it is clearly seen above, the action set of the court is to decide over the legislation whether it is constitutional or unconstitutional. If there is no legislation, the action set is empty. The court has a strategy mapping from its type space into its action set. This strategy deemed to be: $S_C: T_C \rightarrow A_C$

The game lays out that upholding the bill dominates an annulment for the friendly court. There are four strategies to consider:

$S_C = \{(c \mid F; c \mid A; c \mid S); (c \mid F; c \mid A; \underline{c} \mid S); (c \mid F; \underline{c} \mid A; c \mid S); (c \mid F; \underline{c} \mid A; \underline{c} \mid S)\}$

Considering the action set A_C stated above, the action $\underline{c}$ is to be redefined upon the institutional parameters in the EU Thus in the EU, normally,

$\underline{C}$= {Art.230, Art.234}

T_C^{EU}= {ECJ, CFI}[39]

Among these assumptions the preliminary assumption on the intention of legislature is to have its legislation upheld by the court or a successful evasion of the overturning court decision. On the other hand, compliance of the legislature with a ruling of the court is $\alpha>0$ costly to the legislature. Then, failure of a possible evasion will also meet the public backlash (captured by $\beta>0$). The payoff parameter β can be interpreted as a measure of the brutality of public backlash. Thus, there is a direct proportionality with the increase of the brutality of public backlash with the payoff parameter 'β'. Regarding the position in the game tree, the transparent environment allows the public monitoring over any evasion attempt. If the policy environment is not transparent, it is possible for the legislature go without payoff parameter 'β'. Thus, in this position, the legislature must put up with the cost α if it prefers to enact the legislation. Finally, if the legislature may expect to comply with a non preferable court decision, it may not enact legislation that satisfies $\alpha>\varepsilon>0$ and $\beta>0$.

[39] This court type species due to art.230 and art.234 are after the Nice amendments. Before the Nice Treaty it should be assumed as T_C^{EU} ={ECJ}

The final issue for the lay out of this game is the compulsion of legislature to make a choice at two stages of the game. The first compulsory choice is the choice to enact the legislation or not. After having decided to enact the legislation and the legislation is subject to court ruling, then, the second stage of choice is to attempt to evade or comply with the court decision. The two actions sets for these fragments are:

$A_L^1 = \{L, \underline{L}\}$

$A_L^2 = \begin{cases} \{E, \underline{E}\} & \text{if } A_L^1 = \text{L and } A_C = \underline{c} \\ \varnothing & \text{otherwise} \end{cases}$

Considering these two sets of actions, the legislature has four pure strategies available:

$S_L = A_L^1 \times A_L^2 = \{(L;E); (L;\underline{E}); (\underline{L};E); (\underline{L};\underline{E})\}$

The only suitable solution for this game is Perfect Bayesian Equilibrium (PBE). The rule of this equilibrium is that every player's strategy has to be rational and must constitute an optimal response to the strategy of the other player.[40]

[40] The Bayes' rule and the players' strategies at information sets are in coherence with the equilibrium paths, either they are open or blocked.

PART II

THE PLAYERS OF THE GAME: NATURE, LEGISLATURE AND THE COURT

2.1. Defining the 'Nature'

This section of the dissertation aims to define the players of the game. For Bayesian extensive form game we always have nature to submit a typology. This is also true for constitutional review game. However, in some cases, it is not easy to define the nature in the same origin as everyone assumes. For this reason, it is useful to remind the two different dimensions of nature. Nature, itself is a self-complementary concept. Wherever it is placed, it has a complementary meaning such as in the examples of 'nature of law', or 'nature of social order'. These examples reflect the 'micro' understanding of nature. 'Nature' of political and legal order also represents the same face. However, in most cases, the game theories use the term 'nature' in its 'macro' meaning.

Nature may include everything including all micro meanings stated above. For instance, in an extensive form game played by genetic engineering, nature provides X^{23} different types of genetic differentiation. If X is a number, typology agenda will include 23 times multiplication of X by the sum of every multiplication up to the 23^{rd}. Consequently, as it is visible in typology works of aforementioned examples, in constitutional review game, there are three types of court provided by the nature. The nature in its macro meaning may only provide these three types of court. A court may only be friendly, submissive or assertive. The same is true for the probability of the sex of an unborn child. The child may only be a male or a female: a compulsory limitation to typology by nature.

In constitutional review game, it is the nature that provides three types of courts both in its micro and macro meanings. The nature of political order gives space to courts to behave in three different manners and nature and the nature of constitutional order empowers and legalizes one of three types of courts. For this reason and the reason of physical impossibility to recover issues of nature in its macro meaning, this section will only analyze the nature in its micro meaning: political environment and judicial politics.

2.1.1. Judicial Politics in General

While much has been written on judicial politics, insufficient attention has been paid to create a dominant paradigm modelling the relationship between courts, law and politics in cross-national or global context. Is it possible to develop a model by using this plain field? Not necessarily. However, useful material may be obtained from political science based and cross-national typology centred studies. Hix focuses on political science theories and how these theories influence the preferences in judiciary on a platform of European Polity.[41] Shapiro underlines the activities of courts on various dimensions in England, in civil law systems of Continental Europe, in imperial China and in Islamic States.[42] In some cases the issue is simplified as elaborating the definition of courts and concentrating absolutely on appellate body and high court judges' roles without any consideration on a link between judiciary, politics and institutions. [43] It is visible in Tate's study of present theories that focus on the constitutional courts do not attempt to clarify how courts fit into the dispute settlement commonalities of a society and how they handle the common disputes within the frame work of a triangle valley composed of courts, law and politics.[44]

The general consensus lays out the importance of the concepts like law, courts and politics over three sets of activities over the living mechanism of a modern state: policy making-social control and regime legitimation.[45] The mechanism works on a scenario where the practice of three powers of state exercise their powers in a context where policy makers not only make new policies but also alter the existing ones and the requirement of a stable economy and public security is maintained

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[41] see HIX, Simon (2000) *The political System Of Europe*: Palgrave: London

[42] see SHAPIRO, Martin (1981): *Courts: A Comparative and Political Analysis*: University of Chicago Pres: Chicago

[43] for details of such a work see BECKER, L. Theodore (1970) *Comparative Judicial Politics: The Political Functioning of Courts*: Rand Mc Nelly, Chicago

[44] TATE, Neal. C, "*Judicial Institutions in Cross-National Perspective: toward integrating Courts into the Comparative Study of Politics*" in John R. Schmidhauser (ed.) (1987) Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis, Butterworths. London

[45] JAKOB, Herbert / BLANKENBURG, Erhard / KRITZER , Herbert M./ PROVINE Doris Marie, &SANDERS, Joseph (1996): *Courts, Law &Politics in Comparative Perspective*, New Haven/London: Yale University Press , p.3

under social control while the legal, judicial and political elements in these activities has *vice versa* impacts on each other.

2.1.2. Understanding of Law

A state of legal formalism maintained by the practice of formal institutions is also challenged by another face of coin where informal institutions appear to be neutralising the public backlash conflicting the rules of legislatures' acts. Having its own strength and weaknesses, informal institutions are also extending state power while neutralizing conflict in an inconsistent process overlapping and complementing each other.[46] The approach of 'informalism' was born in minds as an alternative solution to the problem of 'accessing justice'. In the states of 'bourgeois' of late 18th and 19th centuries, the procedures of litigation reflected the vital individualistic attitude of rights existing. The theory was that access to justice was a 'natural right' which did not require affirmative state action for their protection. These rights were considered prior to the passive positioned state and could be secured by avoiding their infringement by the others. 'Legal poverty'[47] was not the concern of the state where justice like other products in a laissez-faire system, could be affordable to those who could pay it.

Back to the theories under legal formalism, the first issue to be clarified is the law as an initiator actor. The understanding of law both in civil law based systems and common law based systems is apparent in positivist terms where rules are documented as the commodities of social and political forces rather than as edicts of a divine power. [48] The positive laws, as a product of rulemaking process, come out through the legislatures who not only create laws but also continuously revise them

[46] ABEL, R.L.(1982): '*The Contradictions of Informal Justice*' in RL ABEL (ed) The Politics of Informal Justice, Volume 1: The American Experience: Academic Press: New York: p. 280

[47] This concept is defined as 'Inability of people to make full use of the law and institutions'.

[48] John Austin (1790-1859) a disciple of Jeremy Bentham (1748-1832) determines the province of jurisprudence, under the first step of a standard legal process, excludes everything which was not deliberately laid down as a 'command' and under the final stage excluded everything which are not 'positive laws' demarcated in a 'command' centred diagram. Within the scope of the diagram, the allocation of terms in the province states divine laws only be ' Commands of God' positive laws as 'commands of sovereign' and positive morality as 'Commands of Others'

and executive's officials issuing decree laws. In democratic political systems the main goal of governing powers is to influence the laws with their political values.

Ensuring the influence of these values on laws has been the ground of executive's tackling point to start the political clash mechanism. However, this may, in some cases, differ in different states disregarding the roots of their legal system whether it is common law based or civil law based. Apparently, the civil law systems finding their roots not only in Roman law but in French law as well are also variable among each other.

The distinction of civil code is in its design and body of legal prescriptions. The very common feature is its structuring sculpted very understandable to all citizens. Consequently, law, so complementary, contemporary, satisfying and simplified, is a social science rather than a political action. However, the non-perfection of legal designing in featured codes leaves gaps and need to be filled with judiciary's action, namely 'precedent'. However, the French traditions leave a very limited sphere to judiciary to produce precedent descended from the fact that the French revolutionists kept the old judiciary who had hatred to revolutionists after the revolution with a space limited with the texts of codes. While the revolution gave the people national sovereignty, democratic equal opportunities and political participation, the drafters of law did not grant the same sovereignty to judiciary. In this system, courts are state institutions rather than a battleground for public that is independent from state.

The second grouping of the Western legal systems is the systems based on common law. The design and body of legal prescriptions are quite different than civil law based systems. The main actor is the monarchy's judiciary that derived power from a duty to fill the gaps of laws as a product of the superior parliament's legislative action. [49] As the English settlers brought the sense of common law to American and British colonies, the traditional case law built up by the courts was established. Specifically, in the US, the adoption of a written constitution as a single text endorsed the judges to exercise constitutional judicial review which was non-existent in England of the

[49] This is mainly the tradition of English law which gave inspiration and drew guidelines to other common law based legal systems. However, the system in England lacking a constitution in the common narrow meaning is deemed to be weaker and for this reason is not a descended feature for other common law based legal systems.

same era. In this system, the drafters of law are lawyers, practitioners and politicians rather than academic scholars. Consequently, here, law is not a part of social sciences, instead a matter-of-fact enterprise.

The only non-descended common feature of these backgrounds of two different systems of 19th century is their sharp distinction from each other. By the last quarter of 20th century, members of judiciary began to quote their decisions as precedent in many civil code countries and even challenge the influence of rule-makers. However, the novel social and economic problems led to new laws and ruptures began to show up in civil code systems. At the same period of time, common law systems started codification works for the segments of their law although lacking the similar courtesy to basic principles such as in the civil law. The aggressiveness of civil law lawyers has been met with the activism of their common law counterparts at the same age.

The distinction between two types of law has also variable national practice upon the demand of people to settle their disputes within the scope of law or under the exercise of courts. The tradition in United States has a popular alternative dispute resolution dimension where people seeking to resolve their disputes act 'in the shadow of law'. Some authors claim that court precedents fall in the shadow of negotiation process where litigation is deemed as a strategic alternative. [50]

It is evident that the combination of all conditions that drew people to invoke the law does not solely vary with public attitudes toward law but also within institutional structuring. Specifically, prescribing law as a controlling mechanism on government action depends on the presence of some factors such as legal assistance, willingness of courts to accept jurisdiction, fair allocation of costs and risks between

[50] Many authors have already discussed the relationship between alternative dispute resolution and litigation. An article by O M Fiss can be counted a cornerstone among them. The casuistic understanding by Fiss can be read from the following paragraph:

"*…The dispute-resolution story makes settlement appear as a perfect substitute for judgment, as we just saw; trivializing the remedial dimensions of a lawsuit and also by reducing the social function of the lawsuit to one of resolving private disputes. In that story, settlements appear to achieve exactly the same purpose as judgment-peace between the parties – but at considerably less expense to societies. The two quarreling neighbor turn to a Court in order to resolve their dispute and society makes courts available because it wants to aid in the achievement of their private ends or to secure the peace.*" O M Fiss, (1984)Yale Law Journal, Vol. 93, p 1085-1086.

the parties and other perceived legitimacy of such a challenge. Government policy and social tradition are also other well-known factors as their presence in cases like personal remedies such as compensation from injuries or damages arising from contractual liability.

The common sense for all governments to use law is a mean to provide social control.[51] However, the practice and procedure vary from state to state. The governance of criminal justice administration by all states is different from each other in every stage such as police intervention and criminal prosecution up to the codification of punishments for typical acts. In this procedure, courts have considerable parts in determining the conclusion of legal pursuit or criminal prosecution.

Consequently, law has two different effects upon the categories of rules of which have different dispute settlement directions. The first direction is towards privates which empowers the citizen to receive an outcome over their private law disputes. The second direction which empowers citizens to challenge disputing the government agencies is against public power held by government.

2.1.3. Courts under highlights

The crucial point in here is the place of judiciary in society. How we define the court became almost very common as '*an institution authorized to settle disputes*'. The institution is not a mediator or a negotiator party, but a decision maker. In many countries there are different systems of judiciary and court structures. The majority of systems include a single and centralised system of judiciary. In such a system, there are judges and other personnel appointed and disciplined by and under the authority of the central government. All the administrative action building up the court system

[51] For the better understanding of Law and state relations it is as well to refer to Schepel and Blankenburg, who suggest two French concepts:*" 'L'Etat sans Politique' describing the process of withering ideologies and the disappearance of the idea of State as a collective political project. 'Le droit sans L'Etat' is Cohen-Tanugi's plea for the decoupling of law and state: for law to be understood and used as an instrument for the curbing of State power, not as the mere extension of Leviathan's arm.* "M Bouvier, (1986) L'Etat Sans Politique, quoted from SCHEPEL Harm and BLANKENBURG Erhard, (2001) Mobilizing the European Court of Justice in WEILER JHH / DE BURCA G.(eds) The European Court of Justice

and protecting its prerogatives are under the control of the central government and the court's approach to politics are directly related with the centralisation of governance under the political system. Contrarily, the decentralised systems of governance directly affect the independence of regional courts from national central authorities. In a sense, the inter-action between courts and politics comes out very obvious at the time when a single final court of cassation exercise the power of reconciling an inconsistent lower court decision. The hierarchical ranking in the judiciary as regards the conflict of decisions of higher and lower courts indirectly takes the colour of public policy pronouncements.[52] Evidently, higher ranking courts are known as policing the public policies in a way more responsible over nation wide.

Another important dimension in this relationship is the difference between judicial and quasi-judicial bodies which can only be named as 'courtlike tribunals'. This point may lead to sub-questions of specialisation and scope of competence. In some countries, quasi-judicial bodies have competence nearly overriding the powers of courts on the same subject in some other countries. The variation mainly concerns the issues of public law concerning the disputing citizen and public administration on one hand, and on the other hand major civil law disputes between individuals/private entities and/or individuals/ private entities such as issues falling within the scope of banking-insurance law or competition law. There are various fragmentations of judiciary in this context. The system of administrative disputes under the French *Conseil D'Etat* system can also be observed in Turkish legal system while in Anglo- American understanding administrative dispute settlement is not under the control of separate administrative courts. In addition, the judicial body 'audit' is a court in French and Turkish systems while they are not 'Court of Audit's in Anglo-American understanding. The first group deems audit as a fully licensed judicial body while the latter deems it as a quasi-judicial administrative body.

Thirdly, the accessibility problem appears. Some dispute settlement mechanisms are designed to be directly accessible by citizens themselves without any need to privileged elites, namely 'lawyers' or 'intermediaries'. In these forms of easy-access designs, generally oral procedures influence the whole process and include informal procedures with simple forms. However, systems of counterpart provide a ceremony

[52] SHAPIRO, Martin (1999) "*The European Court of Justice*" in CRAIG & De BURCA Grainne (eds.) *The evolution of EU law* : Oxford University Press

of technical approach requiring special training with scholar education. In this segment, a very simple mistake may cause the case to be defeated or dropped by courts. In order to make a clear understanding of accessibility, one has to find out the range of options with grievances and the response of the system of justice with legal advice and assistance. Another issue to be observed in this context is the number of lawyers and their workload. Sometimes, lawyers may not be central points for settlement of legal disputes in a society. The attitude towards the use of legal pursuit and litigation in a society is also effective.

Finally, the inter-action between lawyers and judges vary within courts. Judges also vary with regard to their background.[53] It is considerably a profile difference if a judge comes from a common law background or a civil law background. This also makes a difference in their appointment to service as a judge. In many civil law based systems, such as the Turkish system, judges are appointed after a university graduation and/or postgraduate study attached with special training. Understanding in these systems generally approves judges as civil servants and the opportunity of lifelong remainder is given. In some other states such as in the United Kingdom, judges come up to bench after considerable practice or political appointment. Thus, as an undeniable fact, courts are hand to hand with politics in some cases as a conclusion of the nature of judges' appointments.

2.1.4. Political Perceptions with Judiciary

When it comes to politics, there are a few striking points. Even though there has been many definitions,[54] definition by Easton's definitions seem more accurate and

[53] The concept 'judicial self-confidence' lays out one of the variations arising from judge's background. However, this concept is not just an American phenomenon. Apart from this, optionally, Antoine Grapon suggests 'gardiens de promesses' (Le gardiens des promesses: Justice et democratie, 1996) quoted from SCHEPEL & BLANKENBURG Op.Cit.

[54] Various considerable definitions of politics have been made. Among them a few considerable can be counted as follows:

- social relations involving authority or power
- the study of government of states and other political units
- the profession devoted to governing and political affairs
- the opinion you hold with respect to political questions

accepted. Easton defines it as 'the process that produces an authoritative allocation of values'.[55] The relationship between courts and law and the role of this vice versa interaction in allocation of status, money, freedom, status and such values, make these conservative actors more or less related with politics.

The narrower understanding of this relationship might be stuck within the borders of particular arenas such as political parties and elections and judges and prosecutors, justifiably, deny this relationship in this context. Nevertheless, the relationship in this context is minimised while there are considerable other ties such as the appointment, promotion and disciplining of the judges. In every state structure, judiciary has been a target of controlling for execution in a way. Instantly, it would not be a fault to claim this position in Turkey. The promotion, appointment and disciplining of the judges and public prosecutors are under the discretion of a constitutional institution, namely 'High Board of Judges and Public Prosecutors'.[56] One of the natural members of this board is 'general secretary of ministry of justice' who is personally appointed by the minister himself and the second man of executive under this ministry of the minister himself. Minister is a part of government and the cabinet who is supposed to work harmoniously with the politics of the entire government even he is not a member of the governing political party or parties. In this sample, payments, expenses and economic rights are also under the control of government through ministry of justice. In British system, the insurance point for the judges' allowances and other economic rights are maintained via the 'open check account' practice of secretary of justice. Thus, a British judge is free to determine his own allowance attached to expenses case by case.

Another issue related with the courts and politics relationship is the breadth of state power. The state power reflects the policies through judiciary, especially in high courts level. A suggestion by Damaska points the style of interventionist state characteristics is also to be reflected by judiciary.[57] This idea puts forth a correlation

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at http://wordnet.princeton.edu/ ; Princeton Cognitive Science Laboratory, lexical database for the English Language

[55] see EASTON, David (1953) *The Poltical System*, New York, Knopf

[56] Turkish Constitution, Art.158

[57] see DAMASKA, Mirjan R. (1986) *The Faces of Justice and State Authority*, Yale University Press

between the interventionist characteristics of the state and state policy reflected by the Courts.

Finally, one more interesting issue in this context is the affect of decentralised structure on the character of the judiciary. As much as the structure of government is decentralised the structure of judiciary is also decentralised. Consequently, in decentralised structures, disputes between regional people and regional governments are subject to a regional resolution system where the central judiciary in a very low level intervention. Thus, the response of central government and reflection of central judiciary is excluded from settlement of regional disputes.

As a conclusion of the debate on political dimension of judicial politics, there are considerable enormous variations among the relations of courts with politics. There are so many areas where courts and politics intersect. The political areas where courts and law is effected by are not only composed of appointment of judges and constitutional review but also of decisions which silhouette institutions and have power over social programmes as well.

2.1.5. The Evolution Process

There is no stable order of intersecting particulars between law courts and politics. Unlikely, there is constant change due to the social, economic progress and other effective elements. The construction of legal traditions also genetically included remarks of historical milestones. This had always been same in many European and World States.[58] In Europe specifically, the establishment of European Community and its transformation to a Union after 1992 have been milestones that had an impact on the majority of European Continent shortly. On the other end of Atlantic Ocean Unites States who could not stand without getting involved to this progress led to the North Atlantic Free Trade Agreement (NAFTA). Finally, another global organisation in

[58] In France, it was the French Revolutions which radically affected the evolution process of law. In Germany there are three milestones starting from Unification under the leadership of Prussia and Weimer Republic and finalised by democratic federal republic founded at the end of the World War II. In Japan, its emergence is Meiji Restorations in 19th Century and after Second World War In Turkey, two major changes have occurred where the first is 1912 legal revolution of Ottoman State and 1923 foundation of Turkish Republic after the end of First World War.

this sense was the General Agreement on Tariffs and Trade (GATT) which transformed to WTO later on and had inspiring and guiding affect on Members in legal evolution.

Therefore, either in national or in international sphere there are various elements that comprehensively affect the law and court relations under the shadow of politics. It is sometimes trans-national affect and in some cases nationwide affect. The most witnessed samples are national law adjustments according to criteria created by trans-national, international or supranational adjudication and deriving rules and principles from national laws by international courts and tribunals.

There are three crucial separate perspectives that must be taken into account in judicial politics. These are the policy making process, social control and regime legitimation.[59] These perspectives are from areas where law, courts and politics intersect.

2.1.6. Three different dimensions: Jakob[60] and the so called 'judicial policymaking'

Policymaking stands at the hearth of political process. There is also policy creation in the decision making process of courts. The use of this concept with court activities might easily sound odd to a classical lawyer. However, the application of rules on new circumstances or situations in an original or sui generis way is a policy creation by a court. The decision making process of a court includes arguments of policy statements, which, after a time, might be a subject of a later precedent. Thus, different courts take inspirations from the past precedents of others. The policy created by a decision might be furthered by another court or reshaped in another way by interpretation of the latter's decision making process. Interpretation activity of the latter is an important facet of judicial decision making. The law is continuously applied to tangible situations and outcome is controversial upon the way of interpretation. However, in some cases, courts only cite the precedents in order to justify their decisions. This generally happens if the cited court is a high level one.

[59] JAKOB/BLANKENBURG/KRITZER/PROVINE/SANDERS Op. Cit. p. 11

[60] Ibid. p.11 (Jakob gives three perspectives of judicial policies:: social control, regime legitimation and policymaking)

Nevertheless, referring the previous cases of the same level courts is a well known characteristics in common law countries. This principle is known as 'stare decisis'. However, the referral of high level courts in some cases becomes a necessity such as the case in Turkey and some Continental European judicial systems. In this case, the higher court is also the court of review and challenging the high court's decision has no use in case of an appeal against the first instance decision.

Thus, policy of higher courts and central courts such as the US Supreme Court are effective policy participations in political process and mainly has an impact of nationwide.

One of the other aspects above mentioned is the role of judicial politics in social control. The concept 'public order' or 'law and order' meets the conservative theatre of 'social order', which is subject to be maintained by the use of criminal law enforcement. While using this power of enforcement there is a crucial necessity to legitimise the strict sanctions taken against criminal actions. On the other hand, the courts have the power to resolve the private disputes which are not subject to 'public order'. Among them are disputes over the commercial, economic or social behaviours of society. However, the range of disputes that might be brought before a court and the range of out come may differ in every legal system[61]. Thus, accordingly, the range of social control by courts varies.

There is also a legislature's participation in social control. The design of the legislation is essential for shaping the recovery of social control. There are exceptional protections and privileges in the context of legislations. Some parts of the society might feel more pressure of authority than the other parts. These acts of government determine the social policies of state ensuring social control over the society.

[61] Rawls makes a definition of legal system in a pluralist understanding of publicity in his work analysing the concept 'rule of law' : *"... the legal order is a system of public rules addressed to rational persons, we can account for the precepts of justice associated with the rule of law. These precepts are those that would be followed by any system of rules, which perfectly embodied the idea of a legal system. … The point of thinking of a legal order as a system of public rules is that it enables us to derive the precepts associated with the principle of legality…"* RAWLS J. (2000) *A Theory of Justice*, Oxford,p 206.

Finally, it comes to the regime legitimation function of judicial policy making. In world history only a few regimes could go further with brutal force disregarding legitimising. People's consent and recognition is a *sine qua non* of governance. Obedience to law is also a problem of people's feelings as their fairness. However, sometimes the political institutions themselves reinforce the problem of regime legitimation. In this case, for the typical continuation of the social absorption of legitimation, government has to take necessary measures.

2.2. 'Neutral Judge' and the Legislature: Political Interaction with the Judiciary

In order to explain the relation of 'judicial politics' and court and actions, it is crucial to underline constitutional, quasi-constitutional and doctrinal perceptions from institutional choices of national/local governors and court decisions. Specifically, constitutional establishment and the power of discretion of the courts form a considerable part of this issue.

Through an effective mechanism of law enforcement, each of the constitutional problems might be overcome. The understanding of social contract[62] combines people under the roof of binding sets of rules which have enforcement mechanisms. What became known as 'the rule of law'[63] is the tight enforcement of these rules over society.

However, the presumption in the context of 'implementation of rule of law' is the dependence of enforcers of law (judiciary) from legislative authority. Credibility of this

[62] It is a kind necessity here to refer SecondTreatise of Government by John Locke and the Social Contract of JJ Rousseau for the doctrine.

[63] '..the conception of formal justice, the regular and impartial administration of public rules , becomes the rule of law when applied to the legal system" RAWLS J. (2000) *A Theory of Justice*, Oxford,p 206. (In this book, Rawls focuses on the concept under principles of justice. For further debate of the concept see FULLER, Lon (1964) *The Morality of Law*, Yale University Press; WECHSLER, Herbert : *Principles, Politics and Fundamental Law*, Cambridge/ Harvard University Pres, 1961 and SHKLAR , JN: *Legalism*, Cambridge/ Harvard University Pres, 1964

implementation of rule of law must be ensured under a system of separation of powers.

It is well considered in texts such as the following statement of Madison, Hamilton and Jay:

"…..
If it be said that legislative body are themselves the constitutional judge of their own powers… the Constitution could… enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order… to keep the latter within the limits assigned to their authority.
…"[64]

The assumption that separation of powers work because judges are deemed as neutral actors who exercise objective laws instead of personal wills. Therefore, neutral judge simply follows the following formula:

Rules **x** Facts **=** Decisions[65]

This formula indicates the natural legal understanding which presumes a decision of a court is solely the application of rules to the facts. However, exercise of court decision making is not that simple. Judges do have wills. Today, legal systems and their vertebras constitutions are flexible enough to let the judges exercise giving judgement with their own wills. In this context, it is obliging to focus on what 'wills' constitute.[66] The evolution of judicial review of legislative acts has led the societies become more contentious and this affect has reflected by judges to make preferences among some political positions. By this virtue, judicial preferences and the court judgements which are the conclusions of these preferences are important fragments of the policy process. Thus, judicial preferences become part of judicial policy making. Judicial policy making is a process which legislature, executive and judiciary interact.

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[64] MADISON, James/ HAMILTON, Alexander /JAY, John (1987): The Federalist Papers, Penguin, London, p.438-439

[65] HIX, Op.cit.

[66] RAWLS, Op. Cit. p. 208.

The model illustrated by Weingast[67] based on the system of US governance might be observed under this correlation. This model assumes that the powers of state are unitary actors in a single dimension political sphere. This dimension requires ideal policy positions which are figured as follows:

Figure 2.1.separation of powers

In this diagram
L= position of legislature
E=position of executive
C= position of the court
X= position of a policy agreement between L and E
Y= a position of executive implementation which the Court brought closer to its ideal policy position

There are compromise points between the legislature and executive which is pointed as X. This point is a legislation point that pleased the both sides on a single policy agreement and it has the same distance to both Legislature and Executive. X is an agreement point. On the other hand Y is a court interpretation on policy implementations of Executive. Courts try to bring up the ideal policy position of executive towards C. However, politics is not stable but an ongoing bargaining process. In this process legislature and executive can evade the court's policy by enacting new legislation. This idea is also a challenge of Courts ideal policy position C. For this reason, the Court is really keen to bring the policy standings of executive at least to a point around Y.

One of the main issues in this context is that the distance between x and the ideal position of Executive is equal to the distance between Y and the ideal position of Executive. Another issue in this analysis is that a court's discretion is inversely changes due to the possibility of a new legislation by the legislature and executive.

[67] HIX, Op.Cit.

The increase in the practice of enacting new legislation will diminish the range of discretion of court. In case of multiple political actors which hold 'veto power' the Court considers a possible blockage to the repeal legislation. Thus, it becomes easier to the Court to give discretionary decision relying on a possible blockage of one of the political actors which might find the so called decision closer to its own ideal policy position. However, in circumstances where there are constitutional restrictions, there is an organic combination of judicial and legislative powers. In Britain, the name of this restriction is principle of 'parliamentary sovereignty'. According to this principle no legislative majority can adopt new legislation that is binding for a new majority. Therefore, parliaments are free to evade court decisions. In some different systems, such as the system in France, constitutional courts are composed of ex-politicians. Some traditions also provide state presidents who are former members of constitutional courts.

The short form of long story is that there is a double effect of judicial politics over judges and courts. The first dimension is the idealistic dimension where the social agreements adopted by citizens under democratic means are enforced by independent courts. The second dimension is the power of discretion and the judge's power to give ruling or create law rather than applying it. A central problem with this power conferred to judge is the limitation of this power. Constitutions have functions to limit this type of power; however, it is highly doubtful that the limits of power could be established in a true balance with the necessity of judge made rules.

2.3. Judicial Politics in the EU

> "*..like all other international organizations, the EC is founded on an international treaty. International law prescribes that all treaties- irrespective of their nature- are supreme over the laws of the states which are bound by them. The difference between the community and other international organisations that Keohane and Hoffmann identify does not, then, lie with the formal principle of supremacy nut, as they intuit, with its reliable and effective implementation. How has the community come to achieve that reliability and effectiveness?*"[68]
>
> JOSEPH WEILER

It is rather a difficult position to determine what type of a legal system has the EU. However, there are common views on its features such as its closeness to international law, law of international organisations, and legal systems of its Member States. Either its architecture is crumbling[69] or not, it has an unintended genius structure.[70] In this part, the purpose is to describe what the judicial environment is composed of. This is crucial for the determination of the 'nature' the first player of 'constitutional review game' and also referring to behaviour of third player 'the Court' with regard to the positions taken in a process like 'constitutionalization'

First, it is worthy to debate the nature of Community Law. The supreme law of EU consists of two main aspects of legal instruments. The first and primary is the Treaties acted between the Member States. These are numerous and sited at the core of the system: Treaty of Paris and Rome which were combined by the Merger Treaty, The Single European Act, the Treaty on European Union, Treaty of Nice, Treaty Establishing a Constitution for Europe, the Nine Accession Treaties, the Budgetary Treaties and Conventions reforming the basic institutional structure.

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[68] WEILER, J. H.H. (1994), *A Quiet Revolution:" The European Court of justice and its Interlocutors"*, Comparative Political Studies 26;4 p. 511

[69] RASMUSSEN H. (2000) *Remedying the Crumbling EC Judicial System*, Common Market Law Review Vol 37. p. 1071

[70] WEILER, J.H.H. (2001) *Epilogue: The Judicial Apres Nice*, The European Court of Justice DE BURCA/WEILER (eds) Oxford University Pres. p.215

Another aspect is the secondary legislative and executive Acts of the Parliament, the Council and the Commission. Article 249 TEU provides five different secondary acts:

1- *Regulations*: These types of acts have general application power and they are binding for all institutions and Member State agencies all over the land with direct application power.
2- *Directives*: They are addressed to a number of states and they are binding and must be transformed into internal law.
3- *Decisions*: Either Member States or private persons might be addressed in these type of acts and they are binding on their own
4- *Recommendations*: They could either be addressed to Member States or Private persons but they are not binding in any case.
5- *Opinions*: they have the same properties with recommendations.

The main written part of the legal instruments of nature of legal order is as stated above. However, it is too much limited and insufficient to describe the nature with legal instruments. Consequently, it is rather to focus on an expansionist view by Möllers who lays out the fragments of nature, our first player in the game set up, in his article.[71]

Firstly, "*neither aspirations of peace, nor economic freedom, nor a European legal Community, in its position can justify the European Integration*".

Secondly, the environment includes "*unifying motives such as common tasks, common paths, and common goals of peoples of Europe*". Among the common tasks the treatment of the weaknesses of each Member State deriving from current position of nation states in globalization process and the use of subsidiarity on its positive side.

The shared paths has two dimensions consisting of a shared past and a shared future. Shared past, leads to the basic values of the past of Europe such as the French Revolution and declaration of Rights of Man and Citizen. The concept

[71] MOLLERS Thomas M. J.(2000) *The Role of Law in European Integration*. The American Journal of Comparative Law, Vol 48 No.4 p.679-711

'Shared future' that is defined as set of assimilated interests, is composed of 'the social and environmentally benign market economy and fundamental community rights as a set of common values. Here, the author claims 'creation of identity through the exclusion of others', which is highly debatable and too much convicting on Community environment.[72]

Thirdly, one should focus on the elements of European Legislative Theory and legal Methods. This fragment might be classified in two different levels: The national and the European.

The European level includes European legislative procedures which include issues like Transparency of European legislation to European citizen and active participation of Member States to legislative bargaining.

2.3.1. The Legislature in the EU is a Key Player

It's gravely important to define the institutional structuring of the legislature in the political environment of the EU. The diagram below is assumed upon two different policy approaches and governance levels. The first dimension (vertical) is a line between the ends of functionalist/neofunctionalist and intergovernmental approaches. The second dimension (horizontal) determines the level of governance as whether government or citizen level policy production. The placements of the institutional players are according to their well-known standing at the current policy environment dimensions. The first dimension relates with the willingness of political integration progress and the second dimension on the socio-political position of players. Each player is placed on their ideal policy positions. The point COM represents the ideal policy position of the Commission as an integrationist, neofunctionalist, elites' position. EP represents the ideal policy position of the European Parliament that is closer to the citizen while standing in between neofunctionalism and intergovernmentalism. 'EC' represents the ideal policy position of the Council, which is intergovernmentalist government agency focusing on member state interests.

[72] There is no doubt that declaring a candidate country 'other' in such an article may affect the public opinion politically. This type of tendency is ethically inconsistent with academic behavior.

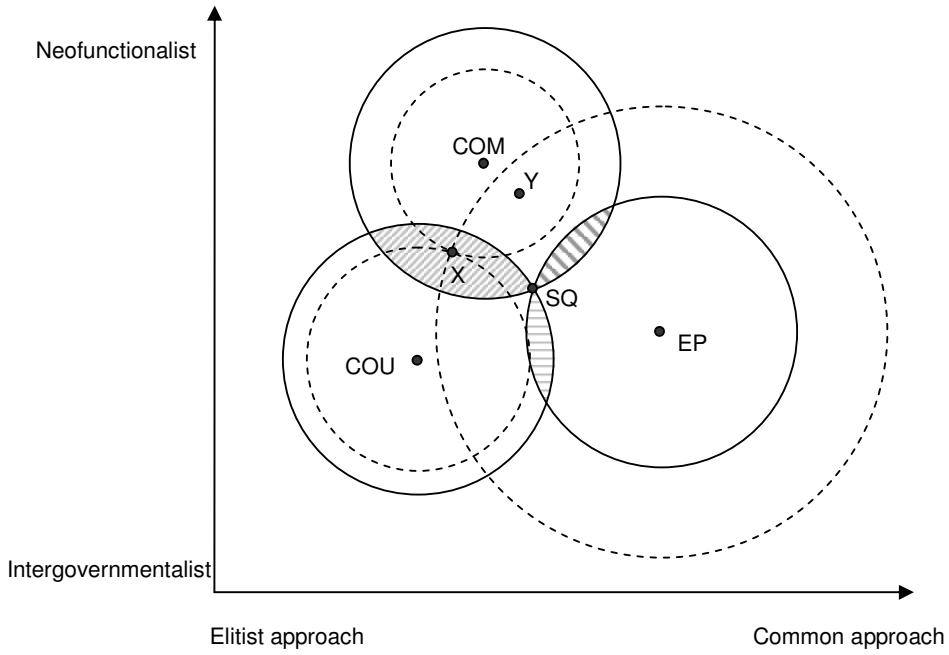

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Figure 2.2. Political standing of legislature

This diagram is not only classical policy compromise diagram of legislative decision making process, but also flexibility determinants shown over indifference curves upon institutional policy change. The point SQ represents the current *Status Quo* that is a compromise policy agreement between these three legislators. [73]

[73] Legislative instability is also shown in this diagram. The diagram is based on two dimensions determined through institutional policies of political institutions. The first one is the social representation dimension (see the horizontal line) where the institutions keep themselves with elitist approaches or non-elitist (common) approaches directly proportional with the social source of election. (for further information on institutional elitist choices see BELL, Jeffrey (1992); *Populism and Elitism: Politics in the Age of Equality*, chaps 6-7-12, Regnery Publishing) The second one is the policy preferences of institutions on political progress. On this dimension (see the vertical dimension) the intergovernmentalist or neofunctionalist approaches of institutions are determined. This dimension is also based on one of the central debates for European Integration. For more information on this debate, see ROSAMOND, Ben (2000); *Theories of European Integration*, chaps 2-3-6, Palgrave Macmillan. The diagram is a fix figure of legislative instability. However, it is also possible to talk about the indifference curves and vote-trading which results as 'unstable' standing of legislature in the European political space.

2.3.2 The European Court of Justice in 'Status Quo': The 'key player' in question

The Court of First Instance and the European Court of Justice forms the main judicial branch of the Community. These two, together forms the entire judicial branch, however, the participation of CFI to this framework has still been an 'infant'.[74] The infant branch, as it grew older, excluded the civil servants' disputes from its scope of competence as a conclusion of a strict judicial reform[75] that was expected during the Amsterdam Treaty. The scope of competence provided for the ECJ after the Nice Treaty is determined as below.

The EC Treaty Title IV has an essential consignment that is worthy to be debated.[76] The most interesting part of amendments in Treaty of Nice has been the provision concerning the third layer of specialised tribunals.[77]

Some of these radical changes which have surprised the authors of European law are still vague in implementation. However, there are strictly clear provisions which concerns amendments at the vertebra structure of judiciary within the EU. One of them is the provision under Article 225 which opens the door to Court of First Instance rule on the preliminary references referred:

"…….

3. The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.

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[74] Until the Treaty of Nice there has not been any significant change to the structure of judiciary except the establishment of CFI in 1988. Unlikely, there were non-significant changes such as the change in the number of judges of the ECJ

[75] The Civil Service Tribunal was established by a Council decision dated 2 November 2004 in terms of implementing the provision of Nice Treaty concerning the foundation of specialised tribunals.

[76] Articles 220-225a has significant importance.

[77] Art.220-1:

"…….

In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty.

……."

Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.

…….„[78]

The main Article 225 regulates the new form of competence designed for the Court of First Instance. There are three main aspects of competence determined for the CFI. The first one is the new area of competence which gives the court to exercise jurisdiction of articles 230, 232, 235, 236 and 238. However, this expansion of competence is limited by exceptions of special areas of competence assigned to special judicial panels and special reservations under the Statute of ECJ. Moreover, the last sentence of the paragraph[79] presumes another type of exception which might be provided under the new Statute of CFI in accordance with these amendments brought by Treaty of Nice.[80]

In addition, the above mentioned expansion of competence is, due to the design of the new vertebra, a first instance type of proceeding. The second paragraph provides opportunity of review of the cases on points of law before the ECJ. Thus, the jurisdiction of CFI within the context of first paragraph is first instance proceeding and the appeal to ECJ is regulated with the following paragraph of Art.215 where its limits are referred to the Statute of the Court.[81]

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[78] Treaty of Nice, Art. 225- 3.

[79] The entire paragraph 1 of the article 225-1 is as follows:

"1. The Court of First Instance shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 230, 232, 235, 236 and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. The Statute may provide for the Court of First Instance to have jurisdiction for other classes of action or proceeding.

…."

[80] A new Statute for the CFI is not only a presumption, but also a duty in accordance with the constitutional feature of the Article. The contrary is not presumed because of *de jure* impossibilities. The CFI must make a change in its Statute in order to design and clarify its new scope of Competence.

[81] Article 225 continues as follows:

"…..

Decisions given by the Court of First Instance under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute

Furthermore, the CFI itself, for the first time, by virtue of Art.225-2 becomes an appeal court.[82] The article refers to the judicial panels provided under Art.225a of the Treaty. The main issue which switched the single character of the CFI to a double character, which consists feature of both first instance and a review body lies at the breadth of the creation of third layer judicial panels under Art.225a.[83] The article provides two different procedures for the establishment of these judicial panels. In one of them, ECJ is a consulting body and in the other initiator. Thus, it would not be wrong to claim that this provision made ECJ a real policy initiator on judicial politics. However, this position of ECJ requires additional procedural regulations in the form of an institution government in respect to its institutional identity. In addition the CFI is also undertaking the review of cases tried by the above mentioned special judicial panels on points of law.[84] The decisions by the CFI as a review of these judicial panel decisions are final decisions and there is no way of appeal.[85]

Another issue is the provision which involves the CFI to the preliminary rulings procedure, a gravely important fragment of community legal procedures. This

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…."

[82] Article 225-2 reads as follows:

"…….

2. The Court of First Instance shall have jurisdiction to hear and determine actions or Proceedings brought against decisions of the judicial panels set up under Article 225a…"

[83] Article 225a reads as follows:

" The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas.

The decision establishing a judicial panel shall lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it.

Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance.

……"

[84] Art.225a-para.3

[85] Thus, the name CFI is not a good name for this judicial organ in terms of its duty in this context.

provision provides competence of ruling in preliminary questions only in a limited sphere.[86] The sphere of preliminary reference to the CFI is limited to specific areas determined under the Statute. However, the following paragraph provides an optional procedure which gives the CFI the opportunity to refer the case to the ECJ in situations where the final decision of the Court may affect the unitary and consistency of Community Law. This matter of fact and law is also a ground for the review of the case already decided by the CFI before the ECJ. [87]

Unless the decision establishing the judicial panel provides otherwise, the provisions of this Treaty relating to the Court of Justice and the provisions of the Statute of the Court of Justice shall apply to the judicial panels.

The Court of Justice is an institution sited in Luxembourg is created to settle the disputes arising from the application of community rules. The Court has one judge from each state and this number of judges is amended upon the accession of each new Member State. Under the provision of article 222 the ECJ is to be assisted by eight Advocate General and the number is subject to change by a Council decision. His duty, which seems to be descended from the French Conseil D'Etat, is to give reasoned opinion on the cases brought before the Court. [88] There are few issues -needless to be detailed- are weak points of this system: the disadvantages of fix-term appointment of judges and even though the EC treaty requires that the judges be entirely independent of the Government, Member State governments make their own selection.

The Court, as it is described under the Treaties, have specific and exclusive tasks to be performed. These various tasks may be counted as

1. The Courts general jurisdiction under EC Treaty Articles 226-243 and TEU article 46.
2. The TEU enhanced the Court's jurisdiction, under Article 228 of the EC Treaty, to impose a penalty for not complying with a previous Court jurisdiction.

[86] Art. 225-3

[87] Art. 225-3 para 3

[88] Turkish Appeal Court of Administrative Jurisdiction also has the same French based tradition of adopting an Advocate General in the judicial review system.

3. In accordance with Article 238, the Court can be given jurisdiction under an arbitral clause in a contract where Community is a party

2.3.3 Constitutionalization of the European Union

The most significant feature of Les Verts[89] trial is undoubtedly, the definition of founding treaties under 'constitutionalized' understanding. The use of the term 'constitution' has been a step forward that was first taken in Les Verts. However, academics preferred to claim 'constitutionalization under various headings. The most prominent argument on constitutionalization by Joseph Weiler held that the constitutionalization of the Union has occurred through the doctrines of direct effect, supremacy, implied powers and human rights by which the Court has transformed a treaty into the 'constitutional charter' of the 'New Legal Order'.[90]

Schepel, in his essay, makes the following comments on constitutionalization:

"The Court has fashioned a constitution of sorts from a relatively unpromising Treaty. On the one hand, 'supremacy' and 'direct effect' have turned the treaty into an instrument that grants rights to private parties, rights that can be asserted to national governments in national courts. On the other hand, 'the rule of law' and the 'institutional balance of powers' have opened up the courtroom for inter-institutional debate where the newly assertive European Parliament can protect its prerogatives vis-à-vis measures adopted by the Council and by the Commission."[91]

The difference of EC Treaty from other international law treaties appears here at the point Schepel strikes. Despite of its nature as an international treaty, The EC Treaty is eligible to confer rights to individuals at national level. The importance of 'direct effect' and 'supremacy' principles are undeniable in this process of constitutionalization.

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[89] Case C- 294/83 Les Verts v. The European Parliament [1986] ECR 1339

[90] REED, J.W.R.(1995) "*Political Review of the European Court of Justice and its Jurisprudence*", p.3, endnote 12 at http://www.jeanmonnetprogram.org/ . accessed on 01.05.2006

[91] SCHEPEL, Harm (2000) Reconstructing Constitutionalization: Law and Politics in the European Court of Justice, Oxford Journal of Legal Studies, Vol. 20 No.3 p.457-468

2.3.3.1. Direct Effect and Supremacy

Direct effect can be provisionally defined as 'the capacity of a norm of a Community Law to be applied in domestic court proceedings, whereas the inconsistent parts of national rules are overruled by virtue of the supremacy principle'.

In comparison with other international agreements, the Community Treaties vary as the 'invention' of direct effect and supremacy principles. The main issue with this 'invention' was, without any concern to formulate the principles, to teach the national interlocutors of the Court to apply strictly the Community law at national level. The idea of this invention was quite successful when the countries like Italy, Germany, the UK and Ireland and Scandinavian States. Because, the legal standing of 'international agreements' in these States are modest and the difference of Community Treaties are easily sensible. However, it is for now, true for all over the lands that law is presented as uniquely applicable by virtue of direct effect and supremacy. Thus, it is rather to make explanations about the impact of these two doctrines to the 'nature of community legal order'[92] Firstly, the doctrine of direct effect comes through. The most extraordinary point is that the EC Treaty itself contains directions as to its domestic applications. This is not a customized tradition of international law even though decisions of international organizations and their institutions might be, as usual, enforceable at national level. However, the perspective from supremacy does not totally cease the feature of the Community law to be international law.[93]

2.3.3.1.2. Indirect Effect

While an issue such as the 'direct effect' is on its way, another mean which the Court of Justice has encouraged the application and effectiveness of the directives was developed as a complementary part of the nature of community legal order. It is a principle of harmonious interpretation that requires the national law to be interpreted consistent with the directives.

[92] This is what we call the nature as the first player of this game theory.

[93] For the same view, see KARAKAŞ Op. Cit. p.25; DE WITTE, Bruno (1999) The Nature of the Legal Order, in CRAIG / DE BURCA , The Evolution of EU Law, Oxford

2.3.3.1.2.1. Doctrine of Consistent Interpretation

In its broad meaning, a rule of Community law is used as an aid to the interpretation of another rule where the former is enlightening the Court for the vague points in the latter. [94] The consistence is ensured with a hierarchically higher norm of community law.[95] On international fora, the application of the doctrine could be observed in Pinochet case. The House of Lords in Pinochet Case stated:

" …
those functions can [not], as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law. In this way, one can reconcile, as one must seek to do, the provisions of the act of 1978 with the requirements of public international law.
…"

In this decision of House of Lords, the immunity of general Pinochet is waived under the general context of international law with special emphasis to international criminal law.

2.3.3.1.2.1. Von Colson Principle

> "… *It was thus a highly political idea, drawn from a perception of the constitutional system of the community, which is at the basis of Van Gend en Loos and which continues to inspire the whole doctrine flowing from it.*"[96]
>
> P. Pescatore,

[94] BETLEM, G (2002) *The Doctrine of Consistent Interpretation- Managing Legal Uncertainty*, Oxford Journal of Legal Studies, Vol 22, no.3, p397-418

[95] This method basically differs in theory from the doctrine of direct effect where a court simply applies the subject matter norm of community law directly, if necessary, displacing any conflicting rules of its national law.

[96] PESCATORE, P (1983) *The Doctrine of Direct Effect: An infant Disease of Community Law* , 8 EL Rev. 155,158

Until the last decade of 20th Century the most popular principle of community law had been the doctrine created in Van Gend en Loos by the Court on the grounds of 'a highly political idea'. However, recently, the textbooks also appreciated to give place to the second way of effect of "harmonious interpretation" or consistent interpretations in other words. Although directives themselves have no such 'direct effect' via the possibility of direct horizontal enforcement, The European Court of Justice promoted the effectiveness of directives through this principle which ensures the interpretation of national law in the light of directives.

When compared with the direct effect doctrine, the consistent interpretation prevails. The interpretive obligation meets two distinct positions whereas the transposition of directive in national law is both in proper means or not. [97] The Court is obliged to determine the scope of admissible interpretation. However, if there is a traumatic position lacking a proper transposition or in case of a discrepancy between the literal design of a directive and national implementation legislation, Community Law needs the creative participation of the European Court of Justice.

"…

28 … It is for the national Court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, in so far as it is given discretion to do so under national law"[98]

The requirement of consistent interpretation in situations of transposition deficiencies starts by the above stated decision of the court in Van Colson case. In paragraph 26, the Court held that

"..

All the authorities of Member States must interpret their national law in the light of the wording and the purpose of the directive to achieve the result referred to in the third paragraph of Article 189 EC"

By the virtue of this decision, the Court has a very institutionalist approach that deems national courts as parts of member States' legal bodies, which are under the

[97] There have been several cases of preliminary rulings brought before the Court in this context. The Council directive 2001/23/EC of 12 March 2001 shortly became known as the 'Transfer of undertakings Directive' led to increase the number of case law.

[98] Case C-14/83, Von Colson and Kaman v. Land Noerdhein Westfalen [1984] ECR 1891 para. 28

obligation of interpreting the national legislation in conformity with directives. The purpose of this decision was to enhance the effectiveness of directives which have been remained ineffective with proper transposition.

The limits to Von Colson case were brought over the following questions:

1- Could the state ask a national court to interpret national law in the light of a misimplemented directive in proceedings against an individual?
2- Could the provisions of a directive be indirectly enforced by the State against an individual in this way?

The response, in the context of criminal proceedings, by the court was denial of the abovementioned requests. The rulings in numerous cases determined the limits of principle ".. by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity..." [99] However, these limits have not been clarified under objective criteria.

In Marleasing, the ECJ evaluated it as follows:

".. In applying national law whether the provision in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive.. …"[100]

The Court here prescribed that the doctrine itself goes further than 'reconciling interpretation'. Rather it becomes as "the community law precluding the application of national law"[101]

The view of Advocate General Van Gerven was subscribed as *".. the national court must, having regard to the usual methods of interpretation in its legal system, give*

[99] Case C-80/86, Criminal proceedings against Kolpinghuis Nijmegen BV[1987] ECR 3969

[100] Case C-106/89, [1990] ECR I- 4135 Marleasing SA v. LA Commercial Internacionale de Alimentaciaon SA

[101] Betlem, ibid. P. 400

precedence to the method which enables it to construe the national provision concerned in a manner consistent with the directive." [102]

The opinion of advocate General here provides the unimplemented directive to be effective in national legal system. In this context, advocate general suggests the use of national principles of interpretation by the national court taking all possible measures to ensure consistency and comply with Community law. The position and suggestion by the advocate general proposes a ground of political legitimacy by the means of intensifying national legal principles in the context of a community law influence creating decision of ECJ.

It is evident that general principles of law present limits on the interpretation obligation of national courts. In this context of criminal liability where the state relied EC Law the Court was obliged to give indirect effect. Consequently, cases concerning issues other than criminal liability have been a possibility where states seek to rely on direct effect against an individual.[103]

From Von Kolson to Arcaro there has only been a "general principles' limitation" under the context of criminal liability where legal certainty and non-retroactivity were favoured as general principles. However, in Arcaro, where the situation lays out a state suing a citizen position, the imposition of an obligation on individual by the virtue of a directive is set to be as a limit to interpretation lacking a reference to general principles of law.

2.3.4. Reference to European Ombudsman

Inside the environment of Community, there is an alternative dispute settlement mechanism where the Court is not involved even though the question brought before this umpire is a question of administrative legality. Thus, it seems it is useful to shortly analyse what this mechanism consists of.

[102] [1990] ECR I-4146 para 8.

[103] This type of direct effect is called 'inverse vertical direct effect'

An ombudsman is an official who intervenes in the bureaucratic and administrative process to investigate the complaints of citizens. The institution has been practiced in Scandinavia since the beginning of the 19th century (earliest, 1809 in Sweden)[104]

In 1992, by establishing the 'Ombudsman' by institutional means, European Union took a further step on the way to become a more democratic entity. After the break down of communist block and the end of 'cold war period', concepts such as democracy, human rights, consumer rights and better standards of living, environment and social welfare became more important for the Member States to the Union. These concepts, what became known as the basic minimum standards of the Union, named as Copenhagen Criteria.[105] The term 'European Citizenship' gained more attention and became significant. And finally, the preparation of the European Constitution shows us the way to a "Grand Europe State".

The European Ombudsman, appointed by the Parliament by virtue of Article 195 of EC Treaty, is an officer who is empowered to accept complaints from any citizen of the Union alleging maladministration by the institutions and bodies of the European Union except the Court of Justice and the Court of First Instance acting in their judicial roles. [106] Mentioned under two different paragraphs of the Article, it is visible that Ombudsman's scope of duty is out of the demarcations of judicial activity. Rather than an adjudicatory mechanism, the institutional standing of the Ombudsman is designed as a mediator between the state and individuals.[107]

As a matter of this institutional design, the procedure works as follows. Whenever the Ombudsman demonstrates an instance of maladministration, he must refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. Following this step, the Ombudsman is supposed to forward a report to the European Parliament and the institution concerned. The complainant shall be informed of the outcome of such inquiries. The time limit to take

[104]The Norton Dictionary of Modern Thought.(1999) W.W.Norton&Company, USA:,p. 608

[105] Alacaoğulları, Ombudsman in EU and Turkey, http://www.lightmillennium.org/newyear_03/maogullari_ombudsman.html , accessed on 10.01.2006

[106] The Foundations of European Community Law, T.C. Hartley, Oxford University Press,1998, p.32

[107] Ulrich K.Preuss, "Auf der Suche nach Europas Verfassung", Transit Europäische Revue, http://www.iwm.at/t-17txt6.htm, accessed on 12.01.2006

any matter to Ombudsman is two years. This being the case, the complainant has to have taken the necessary administrative steps before applying to Ombudsman[108]. Nonetheless, the Ombudsman also can investigate any maladministration he has noticed himself.[109]

There is a considerable point securing administrative accountability. The Ombudsman is entitled to submit an annual report to the European Parliament on the outcome of his inquiries (Article 195/1 EC). Referring special emphasis to the classical principles of alternative dispute resolution, the Ombudsman should have the same distance either to the citizen or to the complainant legal person and the institution as the subject of the complaint.[110] The Ombudsman investigates the complaints which are not already settled by a court or the complaints still pending before a court. Also, when compared to right to petition, the scope of an Ombudsman petition is narrow. Ombudsman may only inquire the maladministration of Community Institutions under Article 195/1 EC Treaty and its competence does not reach out to the other pillars.[111]

Finally, as regards the functionality of the procedure, the Ombudsman's work load increasing year by year proves that it is seen as reliable and practical by the individuals within the Union.[112]

[108] KOSTAKOPULOU, op cit, 57

[109] TEZCAN, op cit, 83

[110] KOSTAKOPULOU,Theodora (2001) *Citizenship, Identity and Immigration in the European Union*. Manchester University Press, p. 57

[111] TEZCAN, Ercüment (2002) , *Avrupa Birliği Hukuku'nda Birey*. İletişim Yayınları. İstanbul:, s. 81

[112] EPPINIG, Volker: " *Die Verfassung Europas?*". Juristen Zeitung, 58. jahrgang , 5 September 2003,17

PART III

Strategy Profile of the Court: Interpretation on Outcome of the Game

3.1. Rules of Constitutional Review

3.1.1. Preliminary Rulings:

The Community, as a supranational political entity, cannot function effectively unless a single judiciary empowered with shaping the unique implementation of constitutive issues of Community law is in charge. Consequently, The European Court of Justice must exercise jurisdiction over such questions when they arise from community wide national court proceedings. The authors of the treaties ceded the idea of allowing an appeal from national courts to the European Court and settled instead for a half way house: a preliminary reference[113]. The draftsmen of the EC Treaty acquainted a device into the Community legal system, which is known to Member States' legal systems as well, in order to supply uniform interpretation and application of the Community law in Member States[114]. Sweet and Brunell claim this 'device' to be functioning as a decentralized mean of enforcing community law in Member State territories and incorporating the community law into national law[115]. Above and beyond this main object, this 'device' is a way of ensuring and conserving the legal integration which is considerably an importance question for the European Union.[116]

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[113] HARTLEY, T.C.(2005), *The Foundations of European Community Law*, 4th edition, Oxford University Press, p:258

[114] SMIT, Hans, HERZOG, E.Peter, (1976) *The Law of the European Economic Community A Commentary on the ECC Treaty*, Mathew Bander, New York, p.541

[115] SWEET, Alec Stone / BRUNELL, Thomas L. (1997) "*The European Court and the National Courts: A Statistical Analysis of Preliminary References 1961-95*" reference to online jean monnet working papers at http://www.jeanmonnetprogram.org/papers/97/97-14-.html
Jean Monnet Working Papers, Jean Monnet Center for International and Regional Economic Law and Justice NYU School of Law

[116] DEHOUSSE, Renaud, (1998) *The European Court of Justice The Politics of Judicial Integration*, St. Martin's Press, NY, p. 79

3.1.1.2. Article 234: What is meant by 'Supremacy of Community Law'

Article 177(234) of the Treaty enables national courts and tribunals to refer questions of Community law that require to be decided in a case pending before them to the European Court for a ruling[117]. The article allows the ECJ to make the final decision on Community law as regards the validity and interpretation of fragments of this legal system. Obviously, the ECJ can not rule on the merits of the case in question raised[118] by national law since the ECJ itself is not a court of appeal holding the right to annul the decisions of national courts but may rule on matters of Community law.

Despite the fact that the scope of this text is remained exclusive to the meaning of Article 234, it must be emphasized that there are three types of procedures, including Article 234, for preliminary ruling[119]:

1) Procedure under article 234
2) Articles 61-69 of the new Title IV of EC Treaty
3) Article 35 of Treaty of European Union

Article 234 reads as follows:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

[117] WEATHERHILL, Stephen / BEAUMONT, Paul (1999) *EU Law* , Penguin , p314

[118] ARAT, Tuğrul, (1989) Avrupa Toplulukları Adalet Divanı, Avrupa Toplulukları Araştırma ve Uygulama Merkezi Yayınları, Ankara, p. 99

[119] CRAIG, Paul, DE BÚRCA, Gráinne, Eu Law Text, Cases and Materials, Third Edition, Oxford University Pres, 2003, p.433-434

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

It is clarified within the text of the article that there are three types of subject matter of a reference.

a) First category

Under the first category of the references that might be brought before the Court are the matters concerning the interpretation of Treaties.

In this context, the concept 'Treaty' does not refer to exclusively to EC Treaty. However, it refers to all treaties, annexes and protocols amending or supplementing the EC Treaty.[120] Accession and association agreements[121] all of which are integral part of the Community legal system are also within the scope of this concept. [122]The pleadings regarding the validity of founding Treaties are deliberately excluded since Treaties constitute the highest constitutional rules those cannot be reviewed by court rulings.

Specifically, the ECJ is not empowered to review the validity of national laws. However, it is entitled to interpret the Treaty. Even though the national court might come to such a conclusion under the influence of the ECJ's decision, it does not mean any change on the fact that the ECJ should not directly make any judgment on the validity of national laws.[123] The ECJ abstains to apply the proper Community law to the facts of the case in question and is insightful on issuing rulings of pure law. [124]

[120] TEKİNALP, Ünal / TEKİNALP Gülören (1997), *Avrupa Birliği Hukuku*, Beta Basım Yayım Dağıtım A.Ş., İstanbul, p. 212, , SMIT, Hans, HERZOG, E.Peter Op.cit.p.5-454, CRAIG, Paul, DE BÚRCA, Gráinne, Op.Cit.p.434,

[121] Ankara Agreement (1963) and Additional Protocol(1971) were considered to be an integral part of the Community legislation by ECJ in a number of cases, eg. Demirel (C-12/86), Kuş (C-237/91) and Sevince (C-192/89)

[122] SMIT, Hans & HERZOG, E.Peter, Op.cit.

[123] CRAIG, Paul, DE BÚRCA, Gráinne, Op.cit. p.435

[124] SMIT, Hans & HERZOG, E.Peter, Op.cit.

Thus,

$F_N \notin \{F\}$ in decision D_{234}= facts ($\{F_C\}$) x rules ($\{R_C\}$)

b) Second category

Second category of references concerns 'the validity and interpretation of the acts of the institutions of the Community. Regarding the scope of concept 'institutions', the meaning is broad including not only the core institutions such as the parliament, the Council, the Commission and the Court of Justice, but also bodies created by or pursuant to a treaty such as the European Social Fund, the European Investment bank, and Economic and Social Committee and the bodies created by a Community measure as well. [125]

The concept 'act' refers to decisions, regulations, and directives and despite their non-binding character opinions and recommendations. [126] It is of no importance whether the binding acts have direct effect or not. Treaties concluded with non-member states are also considered to be as acts of institutions[127] whereas national measures implementing the Community acts are excluded.[128].

The article 234/b gives the ECJ the opportunity to rule on the validity of the acts as well as their interpretation. This action of the court is a type of ruling on legality.

$$L = \{L_{DEC}, L_{REC}, L_{DIR}, L_{REG}, L_{OP}\} \qquad C = \{c, \underline{c}\} \qquad \underline{c} = \{\underline{c}_{int}, \underline{c}_{val}\}$$

Thus, in this case action set of the Court is

$$A_C\ 234/1(b) = \begin{cases} \{\underline{c}_{int}, \underline{c}_{val}\} & \text{if } A^1{}_L \in \{L_{DEC}, L_{REC}, L_{DIR}, L_{REG}, L_{OP}\} \rightarrow \underline{c} \\ \varnothing & A^1{}_L \in \{L_{DEC}, L_{REC}, L_{DIR}, L_{REG}, L_{OP}\} \rightarrow c \end{cases}$$

[125] Ibid p. 450-455

[126] CRAIG & DE BÚRCA, Op.Cit.

[127] Ibid

[128] SMIT & HERZOG, Op.Cit.

c) Third category

The questions referred to the Court under this category touch on to the interpretation of the statutes of the bodies established by an act of Council. It is rather to stress on the vague point which article 234/1(c) and 234/1(b) intersects. The validity of these statutes is not, however, evaluated within the scope of this subparagraph on the ground that this type of evaluation falls within the scope of 234/1(b) as "acts" of the "institutions of the Community" [129] The general understanding compromise on vagueness, despite there are suggestions which determine the intention of draftsmen of the provision is to limit the scope of article 234/1(b) in relation to Statutes of such type.[130]

The questions pertaining to the issues specified in Article 234 must be raised before the courts or tribunals of a member state. ECJ is to decide on whether a body of a Member State is a court or tribunal.[131] For a body to be regarded as a court or tribunal it must be a part of a structure defined by law (it must be established by law), must be independent, must adhere to an adversary form of procedure and its decisions must have the authority of a judgment.[132]Arbitral tribunals or courts are commonly not regarded as a court or tribunal for the purposes of the Article 234. In Nordsee case[133] ECJ held that "an arbitration tribunal which is established pursuant to a contract between private individuals is not a court or tribunal in the sense of Article 177 (234)"[134] and stated that there must be closer link between the arbitration procedure and ordinary court system.[135]

[129]CRAIG / DE BÚRCA Op.Cit p.435

[130] see HARTLEY T.C., Op.Cit. p. 262-265

[131] CRAIG, Paul, DE BÚRCA, Gráinne, Op.Cit p.436, see Case 43/71 Politi v. Italy [1971] ECR 1039, Case 246/80 C. Broekmeulen v. Husiarts Registratie Commissie [1981] ECR 2311

[132] SMIT & HERZOG, Op Cit, p.5-465

[133] Case 102/81 Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG and Co. KG [1982] ECR 1095

[134] PRECHAL, Sacha (1998) *Community Law in National Courts: The Lessons from Van Schijndel*, Common Market Law Review, Volume 35, Number 3, p.695-696

[135] CRAIG / DE BÚRCA, Op. Cit. p.437-438

There is not any distinction between the courts or tribunals which can submit a reference to the ECJ, as to their degrees. The only distinction is drawn on their discretion of referring a question. According to Article 234 (3) the courts and tribunals of a Member state against whose decision there is no judicial remedy under national law are obliged to refer the questions (with some exceptions) raised in proceedings before them[136] whereas second paragraph provides for a discretion to the courts or tribunals. This distinction will be scrutinized in more detail below.

The debate concerning the courts or tribunal circles around the meaning of the courts or tribunals against whose decision there is no judicial remedy under national law. In this vein there are two theories: Abstract Theory and Concrete Theory.

The first one is 'Abstract Theory'. According to this theory, the bodies whose decisions are never subject to appeal come within the Article 234[137].

Second one is the 'concrete theory' which lays out the important question of whether the court's decision in the case in question is subject to appeal or not. An example of this would be the case in Costa v. ENEL, where the sum involved in the case meant that there could be no appeal from the lower court within the Italian Court system.

The literal wording of the article 234/3 would seem to favor the abstract theory. Certainly Lord Dening was of the opinion in Bulmer v. Bollinger[138] that only the House of Lords came with the scope of this article. However the ECJ appears to favor the Concrete Theory when it suggests in Costa v. ENEL[139] case that Art. 234 (3) refers to the highest court in the case rather than the highest court in the member state".

3.1.1.3. Threshold : Van Gend En Loos

Before Van Gend en Loos the system was established on the good belief that parties to the Treaty are deemed to implement Community Law without any prejudice to the

[136] DEHOUSSE, Op. Cit. p.137

[137] CRAIG, Paul / DE BÚRCA, Gráinne, p.438

[138] Case H.P Bulmer Ltd. v. J. Bollinger SA [1974] 2 WLR 202

[139] Case 6/64 Costa v. ENEL [1964] ECR 585

rights arising from founding treaties. Consequently, the member States legislators are expected to automatically limit to legislate and evade strategy S_L {L,E}. Thus, the multi-level governance interplay was an autolimitation system which is founded on the strategy for national legislator S_L {L,E}

Focusing on the constitutional background of the case, there is a strict question of consistency over the application of the Article 12 of the EEC and the wording of Article 65 and 66 of the Dutch Constitution.[140]

Dutch "Tariffscommissie"[141], raised the question of whether the import duties under article 12 of the EEC are directly applicable.

Governments of Belgium and Netherlands intervened the case to submit their views. First, they had the view that the case be dismissed because the reference could only be made for the interpretation of the Treaty provisions, not for the applicability of the same provisions. Moreover, the Advocate General concurred this opinion.

Therefore, common expected reflex from the Court might be to act in a consistent and 'friendly' manner while there is no explicit provision of the Treaty on the 'directly applicability' of the provisions of Treaties in member State internal laws.

$A_C = \{\underline{C}_{VAL}, \underline{C}_{INT}\}$; $\underline{C}_{APP} \notin A_C$

The classic view laid out in Van Gend en Loos that combined all opinions consistently piled deeper within the non existence of possible Court action to decide the applicability of Treaty provision: $\underline{C}_{APP} \notin A_C$

Three possible moves exist under these conditions:[142]

[140] Article 65 reads as follows: "Provisions of agreements, which, according to their terms, can be binding on anyone, shall have binding force after having been published."
Article 66 reads as follows: "Legislation in force within the Kingdom shall not apply if thsi application would be incompatible within the provisions of agreements which are binding upon and which have been entered into either before or after the enactment of such legislation.

[141] The Dutch administrative court of taxation

First, the Court may act in a friendly manner. The understanding of this type of behavior constitutes that the application of a non existing rule is not possible. In a matter of a serious gap in law, judge may act as if he/she were the law maker with respect to constitutional limits and the lawmaker's intention. However, the legislature in the EU can not easily be referred an intention with this meaning.

Second, the Court may act submissively, overturning the perception of the legislature. If there is no rule, there is no perception of the legislature. Creating a new rule means to intend to conflict with the perception of the legislature who preferred not to enact such a rule. However, in this case, the court is under the suspect of conflicting the fragments of democratic representation where the principle-agent relationship occurs as follows:

- the citizens by the European Parliament
- the national agencies by the Council
- and the abovementioned two by the Commission.

Overturning the wills of this 'wide' public opinion will increase the institutional payoff C_i to the maximized level.

Finally, the Court may choose another option which may maximize the national behavior in inter-institutional conflict.[143]The Court may act on an assertive base so that it may take the incentive to overturn the will of legislature in cases which are classified as 'essential' such as pronounced within the literal structuring of Article 230 para. 2. The process of developing the 'fundamental rights doctrine' might be a sample of this 'assertive manner'. However, in the case of the recognition of 'direct effect', there is one flashing distinction from the process of developing fundamental rights doctrine: the non existence of an initial resistance by the court to take a new revolutionary step.

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[142] The environment is transparent at a maximized level. Because transparency refers not only to disclosure of information required openly, but also to the participation of public to decision making process. Article 38 of the Statute of the Court gives opportunity to the intervention of 3rd parties.

[143] BENGOETXEA Joxerramon / Mac CORMICK Neil / SORIANO Leonor Moral (2000), Integration and Integrity in the Legal Reasoning of the European Court of Justice**,** pp.43-82, in DE BURCA Grainne/ WEILER Joseph H.H. (eds) The European Court of Justice Oxford University Press.

The crucial point to be considered here is the various actors that put the Court in action.

Firstly, the position of interest groups is a big deficit in participatory justice. The national rules for standing before national courts are determinants for the opportunity of being a litigant to raise preliminary reference via the national court for potential litigants. Nevertheless, there is no such opportunity in community law if a national legal system does not grant right to public interest group or public interest litigation. Therefore, standing as an individual to raise a question in a national court differs from Member State to Member State.

Second, the position of Private Litigants has to be highlighted. While observing the private litigants before the European Court of Justice, the limits of accession is worth to be focused on. The only possibility of action that could be taken by private litigants before the Court is provided under article 230 of TEU. The article provides individuals and natural legal persons the right of direct action only in circumstances where direct and individual concern is observed. The accessibility of private litigant is limited objectively by the article while the private litigant itself has limits over a variety of expectations from the court litigation. The net gain of a private litigant from a case before the Court depends on the correlation between the award of the rulings and the cost of litigation. The private litigant expects the cost to be covered by the award in addition to a net gain.

3.1.1.4. Cassis De Dijon: Prisoners Dilemma Game for national governments

Prisoners Dilemma Game[144] is a popular member of Game Theories. It is possible to apply this game in many branches of social science. The same is true for law and politics. The underlying idea to employ this game is below.

[144] The prisoners' dilemma game is a constructive non-cooperative, nonzero-sum game containing interaction of two persons. It is non-cooperative because agreements are either not enforceable or not binding for parties. It is nonzero-sum because the case is not the type that one gains from other's loss. Assuming that two prisoners brought before the public prosecutor are separately interrogated without

The main reason for establishment of 'constitution' in a society is known as to secure the stability of collective action problem. A constitution is a device for society which works not only for a settlement of a compromise in the society but also for processing solutions to the so called well known problem: 'Collective action'. The question might appear herein as 'why collective action constitutes a problem in such a society?' A simply way of illustrating the understanding of this problem is a well known game theory which is 'the theory of prisoners dilemma game'.

The implementation of customs union is one of the founding elements of single market- the subject matter of economic constitution. There has to be a single, unique and substantive understanding of implementation covering all issues on the community territories. Before this standardisation was ensued, there had been problems of inconsistency and double standardisation arising from various national government policies. The significant cases have been Van Gend en Loos where the doctrine of 'direct effect' is approved by the Court and Cassis de Dijon which has been a central debate for most issues of single market.

In Cassis de Dijon[145], the position of German Government prohibiting the circulation of French spirit in German land was clearly a derogative act from implementing the

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information of each other's testimony. In case of both prisoners' non-confession both have the opportunity to have a year's sentence and spend that time in prison while confession of a single prisoner bringing the state case evidence lets him free at the cost of other non-confessing prisoner's ten years' heavy term. The third possibility which considers the confession of both prisoners will be sharing each of the prisoners 5 years of discounted heavy terms. The best option for both of the prisoners in a collective thought is not to confess. However, under these conditions it is unstable and the structure of the plan is forcing individual welfare prior to the interest of co-operator. The table of game should clarify their position as follows:

	Second Prisoner	
First Prisoner	Not Confess	Confess
Not Confess	1 / 1	10 / 0
Confess	0 / 10	5 / 5

The motivation to confess seems to be sufficient for each of them as regards the sole aim of the plan.

[145] REWE- Zentral v. Bundesmonopolverwaltung für Branntwein C – 120/78 [1979] ECR 649. In this case, it was held that a German law that demanded certain alcoholic beverages (without any regard to

rules of common market. The general view on the positive backlash from the German government with regard to the decision of the Court comes from a 'win & lose' account made by the German government. In this context, the Court, overturning the decision of German Authorities prohibiting the free circulation of Cassis, proposed a stabilised implementation of common market in cases where the states remain under the pressure of a prisoners' dilemma game. The realist approach to international relations mainly influences the act of states in such dilemmas.[146] Thus, States generally do try to dissipate from their undertakings where there is possibly an economic loss as a conclusion of implementation of the so called contract or agreement.

A diagram for the prisoners' dilemma game in Cassis De Dijon

The diagram below is designed upon a simplified, imaginary, approximate numbers of incomes for both France and Germany from market share in spirits[147]. Germany deemed to have a 5 bn euros of market share in France and France have a 4 bn euros of market share in Germany The common market state dimension of the diagram deems a limitation of common market area just in territories of Germany and France in order avoid a complicated scenario. Therefore these two states are bound under a project which requires common concessions and common advantages where any derogation in order to avoid a concession meant losing the advantage provided by this project as well.

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their country of origin) to have a minimum alcohol content of 25 per cent. This condition was restrictive and fell within Article 30 as it precluded the French alcoholic drink 'Cassis de Dijon' which had an alcohol content of under 20 per cent from free movement in German territory.

[146] Among other well known approaches to international relations are constructivist and liberalist theories. According to classical realism, states can never be sure of the intentions of other states in international fora. The prior purpose is to survive and secure sovereignty. State thought is rational and strategic upon this priority.

[147] Here, the word 'spirit' refers to soft drinks with low level alcohol inside.

		German Government	
		Implement Common Market	Not Implement Common Market
French Government	Implement Common Market	Position A 1- Cassis in Germany, a competitive foreign market challenge German=+5 2- German spirits have full access to French market France= +4	Position B 1- Cassis: not allowed in Germany, foreign competitive product barred German= +9 2- Legitimate ground lost to protect market share of German goods in common market France= -4
	Not Implement Common market	Position C 1- French market bans foreign spirit in France, foreign product barred from national market France= +9 2- Cassis and other products in foreign market German= -5	Position D Both sides do not implement common market, no win no lose inside common market area. Common market benefit is lost. Germany = 0 France = 0

Figure 3.1. Prisoners' Dilemma Game in 'Cassis De Dijon'

For our game the information set in Cassis can be set out as:

Legislature (Bundesverwaltungfürbranntwein) strategy:

SL= A_L^1 x A_L^2 = = {(L;E); (L;$\underline{E}$); ($\underline{L}$;E); ($\underline{L}$;$\underline{E}$)}

Ex. Art 177 (art.234)

For the court type

If the C_{ECJ}>I_{ECJ} or I_{ECJ}>C_{ECJ}

The issue payoff is the common market dilemma arising from 'cassis'. Thus, the issue payoff is a real threat for the working mechanism of common market. It is therefore a phenomenon that the court acted pretending an 'assertive' court regarding the fact I_{ECJ}>C_{ECJ}.

Strategy and Response from the European Court:

As regards the above stated scenario, each state in customs union system will try the opportunity of taking derogations from implementing the constitutional rules of customs union. The purpose for this action of derogation attempt is to maximise the economic profit from customs union economic system.

According to the diagram, this maximisation of profit realisation through common market comes out from Position C for France and Position B for Germany. However, the system could not tolerate such dissipations in such quiet frequencies. Otherwise, there might either be damage in reliability of the system or be an unfair conditioning for parties which would lead complications and internal conflict. Another face of the coin laid out a political blockage between parties in settling cases such as 'Cassis'. The Court took an important responsibility to come over these problems within the scope of its competence observing the law.

Regarding the point defining the Courts in systems like the European Union, the Court feels a duty to act interventionist against a political necessity under the pressure of interventionism, which also is a general policy of all institutional systems of separated powers other than judiciary. The idealistic design of the system in the EU provides position A whereas the both parties implement the common market. The other positions B and C are derogation of single party, while position D confers a situation of a multi-party derogation. However, idealistic system designs are not necessarily subject to implementation by parties especially on international plane. There have always been attempts of not de facto derogations from implementation. For this reason, the logic of international organisational practice always provides an insurance system for possible illegitimate overloads. Thus, it is the Court in the EU who has undertaken such a duty. As much as the Court stands to be a guard of Treaties, the position A in this diagram is the position designed by the Treaties. Therefore, the Court is the guard of position A which means it will not, normally, let another position to settle. Eventually, it is true for the up to date standing of the Court since its foundation and this is what has been named 'the integrationist and common market promoting policy' of the Court. As it is stated by Weiler and agreed up by unanimity of authors, the Court has gone farther than Commission, Parliament and Council of Ministers in limiting the national autonomy of Member States.[148]

It is evident that the Treaties themselves have exceptions to the general rule of implementation. The exceptions are numerously determined within the Treaties but there are still vague points. Cassis came out from a so called 'vague' point of interpretation but there were more issues to be debated in this case as regards the practice of German government. The constitutional point for the implementation of common market is blocking the freedom of movement for established for goods within the Community frontiers.

3.1.2. DIRECT ACTIONS IN THE EUROPEAN COURT OF JUSTICE

It is a crucial step to analyse the position of the Court in direct actions brought before the court which can be defined as 'contentious cases' analogically inspired by

[148] WEILER, J. H.H., Op.cit. p. 511

categorisation of cases brought before the International Court of justice other than advisory opinions. The EC Treaty, also with reference to the amendments under the Nice Treaty, provides for a number of different types of direct actions that can be brought before the Court of Justice and the Court of First Instance. Direct actions, as their name connotes, are actions that can be brought by private parties, Member States, or Community institutions directly before the Community Courts, without any requirement of a condition depended on the consumption of local / national remedies. The most crucial forms of direct actions in practice can be counted as:

a) Article 226 (ex article169): infraction proceedings brought by the Commission against a Member State for failure to comply with Community Law
b) Article 230 (ex article 173): judicial review of the legality of acts of the Community institutions
c) Article 241 (ex article 184): plea of illegality (despite the fact that it is designed as a way of action, this way, in its essence, is a procedure of objection plea.
d) Article 232 (ex article 175): judicial review of failure to act by a Community institution
e) Articles 235 and 288 (ex articles 178 and 215): action for damages for non-contractual liability against the Community.
f) Articles 242 and 243 (ex articles 185 and 186): interim relief (or interim measures) in the context of direct actions.

Because the system is a multilevel governance system and because the basic responsibility relation of state-private interaction becomes a cobweb of relationship between the community institutions-state-private persons, the liability deriving from torts (or delicts) of community or state legal entities is designed in a more complicated way than the international public law as the source of inspiration. First, under articles 226-229, actions against Member States on grounds of failure to comply with community law are provided. Second, under article 232 failure by the Commission, and under articles 235 and 288, non-contractual liability of Commission are provided. Consequently, these articles have special place worth to notice. Primarily, the consequences of articles 226-229 as a quasi-judicial procedure will be analyzed and the others, concerning liability of Commission as complementing the rest of coverage for liability will be explored.

3.1.2.1 Art-226-229: Actions about member states: ECJ as part of quasi-judicial process

State Liability under the community law is arising from the understanding of state liability in international law. International law, under a well balanced design, confers liability for states in unlawful international acts against other states. This simplistic understanding also appears within community law ascribing liability to Member States in breach of duties arising from community law. Obviously, a breach of community law by one of the member States means an unlawful act to other states in anticipation of a good command of implementation of liabilities under Community law, which is a compromised legal base for parties concerned. However, the scope of this liability is determined to be very wide and within vague boundaries in international law. This question is subject to serious variations as regards the standards of liability in community law. Thus, it comes out as a duty to focus the basis of state responsibility in international law and comparatively underline the reflection of the issue in community law.

3.1.2.1.1. State responsibility and international law

The concept of State Responsibility has deep roots in classical international law. The nature of international law and the doctrines of state sovereignty and equality of states led to the emergence of the concept 'state responsibility'. Progressively, an internationally unlawful act of a state against another state gives rise to responsibility between these two and this type of breach of an international obligation leads to a requirement of reparation.[149] Under this context, the first serious codification attempt, namely the draft articles on state responsibility, came from the International law Commission in 1975.

[149] See generally, Brownlie, I (1983): *System of the Law of Nations: State Responsibility*, Part I, Oxford University Pres // Shaw, M (1997) International Law, Chapter 14, Cambridge University Pres, United Nations codification of State Responsibility (eds. Spinedi, M / Simma, B.) (1987) New York

Article 1 of Draft Article on State Responsibility bears the basic principle: "every internationally wrongful act of a State entails its international responsibility".[150] However, an internationally wrongful act of a State may be composed of one or more actions or omissions or a combination of both.[151] The elements of an internationally wrongful act are: attribution of the wrongful act to the State under international law and a breach of an international obligation of the state caused by the wrongful act.[152] These two elements were specified, for instance, by the Permanent Court of International Justice in the *Phosphates in Morocco* case.[153] The Court explicitly linked the creation of international responsibility with the existence of an act being attributable to the State and described as contrary to the treaty rights of another State.[154] The International Court has also referred to the two elements on several occasions. In the *Diplomatic and Consular Staff* case,[155] it pointed out that, in order to establish the responsibility of Iran "First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State". Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.

a) A State has direct responsibility for its actions and inactions

Direct responsibility is incurred by a state for its own governmental actions and such actions of the lower agencies or private individuals as are performed at the government's command or with its authorization. As it is visible in the *Corfu Channel* case, the International Court of Justice held that "it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence".[156] Also in the *Diplomatic and Consular Staff* case, the Court concluded that "the responsibility

[150] International Law Commission, *"Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts"* (2001), para. 68(1)

[151] Ibid. para. 63(1).

[152] ILC Draft Article on Responsibility, Article 2.

[153] *Phosphates in Morocco,* Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74, p. 10.

[154] Ibid., p. 28.

[155] *United States Diplomatic and Consular Staff in Tehran,* I.C.J. Reports 1980, p. 3.

[156] *Corfu Channel*, Merits, I.C.J. Reports *1949,* p. 4, at pp. 22-23.

of Iran was entailed by the inaction of its authorities which failed to take appropriate steps, in circumstances where such steps were evidently called for".[157]

A state is responsible for its failure of taking, either generally or with respect to the conduct of individuals, duly diligent care or care to such other standard as the particular obligation requires.[158] The failure to adequately punish a person who has caused injury to an alien has been regarded as constituting a denial of justice to the injured alien.[159]

The 'Effective control' test is quite useful to find out whether the acts or omissions are attributable to a state. Definite case law in international jurisprudence broadly acknowledged the fact that a conduct which is authorized by a state is attributable to that State.[160] In such cases it does not matter that the person or persons involved are private individuals or whether their conduct involves governmental activity. In *Nicaragua-US Case*, the Court observed that "*for the conduct to give rise to legal responsibility of the United States, it would in part have to be proved that that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*". [161] According to the principle of objective responsibility, a state will be responsible from an unlawful act which is attributable to the state, irrespective of its *culpa*. It is therefore unnecessary to establish fault or intention on behalf of the officials alleged to have perpetrated the unlawful act. This is supported by a number of cases.[162]

b) A State has indirect responsibility from the conduct of a person or entity which is empowered by the law of that State to exercise elements of the governmental authority

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[157] *Diplomatic and Consular Staff Case*, I.C.J. Reports *1980*, p. 3, at pp. 31-32, paras. 63, 67.

[158] Higgins, Op. Cit. p.157.

[159] JENNINGS&WATTS (1992) *Oppenheim's International Law*, 9th edition Vol.1 Peace, Introduction and Part 1 p.544

[160] See, the Zafiro case, UNRIAA, vol. VI, p. 160 (1925); Lehigh Valley Railroad Company, and others (U.S.A.) v. Germany UNRIAA., vol. VIII, p. 84 (1930)

[161] *Military and Paramilitary Activities Case* (Nicaragua v. USA) (Merits), ICJReports (1986),14.

[162] See *Neer Claim* 4 UNRIAA, p.60 (1926); 3A D, p.213 ; *Caire Claim* 5 UNRIAA, p. 516 (1929); 5A D, p.146.

It is a generally accepted in international law that States can act only by and through their agents and representatives.[163] According to the article 5 of the Draft Articles on State Responsibility, the conduct of an individual or unit which is empowered by the law of that State to exercise elements of the governmental authority shall be deemed to be an act of the state under international law. The commentary furthers with the analysis of the concept 'entity'. *"The term 'entity' may include public corporations, semi-public entities, public agencies of various types and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs..."*[164]

According to the commentary an entity can be classified public or private with respect to the standards provided by the given legal system. It is also dependent upon the existence of a greater or lesser state participation in its capital or the ownership of its assets. The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser public participation. However it is neither subject to executive control nor "decisive criteria for the purpose of attribution of the entity's conduct to the state".[165]

If there was evidence that the state was even exercising public powers,[166] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[167] the conduct in question has been attributed to the State.

The Court divided the *Diplomatic and Consular Staff* case into two phases. In the first phase no direct responsibility was found on the part of the Iran with regard to the non-existence of an indication that the militants had any official status as "agents" of Iranian Government. However in the second phase the Court assumed direct responsibility to Iran with considering the public statements of Ayatollah Khomeini

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[163] See *German Settlers in Poland Case*, 1923, P.C.I.J., Series B, No. 6, at p. 22.

[164] ILC Commentary to the Draft Articles on Responsibility, Op. Cit, para. 92(2).

[165] ILC Commentary to the Draft Articles on Responsibility, Op. Cit, para. 93(3).

[166] *Phillips Petroleum Co. Iran v. Islamic Republic of Iran* (1989) 21 *Iran-U.S.C.T.R.* 79; Petrolane, Inc. v. Government of the Islamic Republic of Iran (1991) 27 Iran-U.S.C.T.R. 64.

[167] *Foremost Tehran, Inc. v. Islamic Republic of Iran* (1986) 10, Iran-U.S.C.T.R. 228; American Bell International Inc. v. Islamic Republic of Iran (1986) 12, Iran-U.S.C.T.R. 170.

condoning the hostage taking and the position of Iranian Government seeking to benefit from the situation and not taking steps against militants.[168]

3.1.2.1.2. Article 226

The Court for the first time analogized Member State liability to the type of state liability in international law as follows:

"[In] international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply a fortiori in the Community legal order since all State authorities including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals."[169]

As it is well-established within the above quoted Court decision, Member State Liability under the EC Treaty arises from the obligations of states under the Treaties founding the EU. It is very likely to be stemmed from the same concept of state liability of public international law. However, the difference is that in the EU, Member State liability is firmly connected to a procedural constraint. The essence of procedure emanates from the state responsibility requirements of international law and shaped very similar to the system of Council of Europe. State liability under Council of Europe is a tightened system of state liability of international law secured with a compulsory jurisdiction. Nevertheless, in public international law, compulsory jurisdiction is very limited revolving around regional organizations. Thus, the procedure in article 226 is more or less similar to the system of bringing a complaint under European Convention of Human Rights before the adoption of Protocol No.11. The likelihood and similarities of these procedures will be detailed below.

In the European Union, the Commission is given the duty to monitor proper application of community law by Article 211 (ex Article 155) of the EC Treaty. The

[168] MALANCZUK, Peter (1997), *Akehurst's Modern Introduction to International Law*, Routledge, p.260

[169] Joined cases C-46 and 48/93, *Brasserie du Pêcheur v. Germany* and *R. v. Secretary of State for Transport, ex. p. Factortame*, [1996] E.C.R. I-4845. par. 34.

right to compensation emanating from breach of Community law may arise from the article 226 that may have roots of liability in international law.

Article 226 of the EC provides:

"*If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."

The essence of this article lies at the hearth of an opportunity given to individuals to alert the Commission to start proceedings, although the exclusive right to start this procedure is limited with Commission action. Considering this fact, the Commission for the maintenance of a procedure that involves the citizen, issued and published a standard form for private parties to make complaint to it.[170] The advantage to a private party in such proceedings is cost regarding the fact that Commission brings the case before the Court. However, this type of proceedings has a disadvantage of being based on the discretionary act of the commission and the private party has no right to oblige the Commission to bring such proceedings against a Member State.[171] In other words, Commission has the right to decide on to bring the case before the Court or not.

If the Commission settles to start proceedings, it is under the duty to follow up the pre-litigation procedure established under Article 226. This procedure is composed of three stages:

a) letter of formal notice to the Member State concerned
b) reasoned opinion
c) application to Court of Justice

[170] OJ 1989 C 26/6 ; [1989] 1 CMLR 617

[171] See Cases Lütticke v Commission C- 48/65 [1966] ECR 19; Star Fruit v. Commission C- 247/87 [1989] ECR 291

It is rather to analyse this procedure in contextual means in order to identify with the procedure in general dispute settlement literature.[172] This process mainly has similarities to the former peaceful settlement procedure of European Convention on Human Rights. Under article 28 of the European Convention on Human Rights, one of the main functions of the European Commission is to "place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention"[173]

Merills strikes two crucial points under Article 28.[174] The first and the important one for this analogy is that this process is a type of conciliation procedure[175] despite it stands as a part of rights protection under the charter. It is no surprising that the same is true for Article 226 (ex Article 169) procedure. The pre-litigation procedure in the system of Council of Europe human rights protection has also three stages:

a) submission of complaint to the European Commission of Human Rights by the applicant
b) decision of admission by the Commission of Human Rights after having the view of Member State concerned for a possible friendly settlement
c) bringing the case before the European Court of Human Rights

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[172] There are alternative methods of dispute settlement that forms the part of dispute settlement literature other than court settlement. There are five main methods of alternative dispute settlement which are mainly known as negotiation, inquiry, mediation, conciliation and arbitration. For further details see PALMER, M ROBERTS, S (1998) *Dispute Processes*, Butterworths, p. 7-22, 62-223; MERRILLS JG, (1998), *International Dispute Settlement*, Cambridge, p. 1-120

[173] European Convention on Human Rights, Article 44; for equivalent provisions in other international instruments see International Covenant on Civil and Political Rights (1966) Articles 41 and 42; the International Convention on the Elimination of All Forms of Racial Discrimination (1965) Article 12; The American Convention of Human Rights (1969) Articles 48 and 49; the African Charter Human and People's Rights (1981) Article 52

[174] MERRILLS JG, Op. Cit. p. 76

[175] The definition of conciliation : " A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested" (quoted from Article 1 of the regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961, at MERRILLS JG, ibid. p.62)

It is so clear that there are two similar dispute settlement systems. Both have pre-litigation procedures attached to adjudication by a permanent court. This type of hybrid structures composed of judiciary and out of court settlement procedures are known as 'quasi-judicial dispute settlement procedures'.

Finally, it is a well established fact that the system has a docket control to access the Court for the complaints under Article 226. It gives the Commission exclusive right to bring the case before the Court of Justice. Thus, there is a strict monitoring system provided by the Commission for the prevention of a possible case-load against Member States brought by individuals. Nevertheless, there are two significant disfavours arising from this position of the Commission. First, the individual complainant is totally excluded from the procedure, either after the case is submitted to the Commission or on the judicial stage. The public monitoring of the case by the complainant individual depends on transparency conditions and personal efforts of the so-called individual. Second, the discretion of bringing the case before the Court is given to the Commission. The Commission decides the matter upon the conclusion of the view received from the Member State concerned. On the first dimension, the individual is not satisfied by the procedure because of being excluded from the procedure. He has no incentive to develop or co-operate with the Commission compelling the Member State concerned to comply with the Community law. The second dimension becomes a bargaining process between the Commission and Member State. The party to be satisfied is not the complainant himself. Contrarily, the party to be satisfied becomes the Commission and Commission has the right to control the rest of the procedure.

Back to the procedure under Article 226, it is a natural obligation to make short notice of crucial requirements of this procedure.

First, the letter of formal notice, which should contain a summary of the Commission's complaints against the Member State concerned, will be the determinant of the subject matter of the infraction proceedings. Consequently, the

Commission is bound with the content of the letter so that new matters may not be introduced in subsequent stages.[176]

Second, the Commission issues a reasoned opinion if the Member State has not compiled with Community Law. Thus, the Member State concerned is made aware[177] of the breach of obligations under community law by the commission's reasoned opinion in a detailed text of non-compliance acts of Member State. The Member State concerned must be allowed a reasonable time to comply with Community Law.[178] However, the Member State, in order to avoid the case to be brought before the Court, is responsible for the treatment of the issue only within the time allowed.[179]

Finally, the Court, who has an exclusive right of competence to deal with infraction cases against Member States, exercises jurisdiction upon the final decision of the Commission. The Court of Justice is the only court that has jurisdiction to deal with infraction cases.[180]

Under this procedure, the following are not admitted as good for defence arguments:

a) the commitment of the same breach by other Member States[181]
b) the contention that the breach might be justified on grounds of the Member State's a national interest[182]
c) The member state was unable to comply with its obligations due to internal legal, political or financial problems, or etc.[183] or the breach was *de minimis*.[184]

[176] Such an attempt was denied by the Court in the case 'Commission v. Italy'. See C 193/80 [1981] ECR 3019

[177] Case 325/82 Commission v Germany [1984] ECR 777

[178]Other wise the case might be found inadmissible. See Case 74/82 Commission v. Ireland [1984] ECR 317

[179] Case 154/85 Commission v. Italy [1987] ECR 2717

[180] The former Article 225a of the consolidated version by the Treaty of Amsterdam secured this literally. However, there has been a sharp change in this Article by the Nice Treaty. Amendments introduced by the Nice Treaty have shifted the exclusive competence of the ECJ on many direct actions before the Court including 230,232,234,235 procedures. Nevertheless, Article 226 procedure was not counted among this radical shift. Thus, there is no change in the exclusive competence of the ECJ to exercise jurisdiction under Article 226.

[181] Case C-146/89 Commission v United Kingdom [1991] ECR I-3533

[182] Case C-128/78 Commission v United Kingdom [1979] ECR 419

Further, the ECJ may only exercise jurisdiction on the matter if the breach is within the time limit given by the Commission for compliance. The subsequent developments will not be taken into account.

As a conclusion to various dimensions of Article 226 procedures, the following diagnosis may be presented with regard to the above mentioned analysis of the issue. The procedure designed for Member State liability in EC Law stems from the well-known concepts of *state responsibility* and *state liability* of international law. However, for the better understanding of these concepts in EU Law, inspiration should be drawn from not only sources of public international law, but also from parallel regional traditions and court strategies. The Court's effectiveness has been limited in this case in terms of 'accession'. Individual's right to plea is not given under articles 226-229. The Court, although, has been very strict to implement the rules of state liability.

3.1.2.2. Article 230 of the EC Treaty: Review of the Legality of Acts of the Community Institutions:

Article 230 of the EC treaty provides:

" The Court of Justice shall the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission, and of the ECB other than recommendations and opinions, and acts of the European Parliament intended to produce legal effects vis-a vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State; the European Parliament, the Council and the Commission on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of his Treaty or of any rule of law relating to its application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

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[183] Case C-259/94 Commission v Greece [1995]ECR I- 1947

[184] Case C-209/89 Commission v Italy [1991] ECR I- 1575

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

There are three specified categories of applicants according to this article.

i) privileged applicants: Member States, the Council and Commission
ii) semi-privileged applicants: The European Parliament, and the European Central Bank
iii) non privileged applicants: natural and legal persons

With regard to this categorisation, privileged applicants have automatic *locus standi* for actions under this article. The semi-privileged applicants may have standing as a party only for the purpose of protecting their positions. Referring the cases such as 'Comitology'[185] and 'Chernobyl'[186], the literal picture of Article 230 has led to a series of actions brought by the Parliament.

However, when it comes to the question of non-privileged applicants there is a serious difficulty if the applicant is not the addressee of the decision. In this case, the applicant is expected to establish 'direct' and 'individual' concern. If the legislation in question is a regulation, the difficulty is a matter upon the nature and factual situation of the measure. If the legislation in question is a 'true' legislation which is a measure of general rules, it is highly competitive for the applicant to prove the case effective 'direct and individual concern'. Nevertheless, if the regulation has a structure which is of 'direct and individual concern' to the non-privileged applicant, *locus standi* will be granted. A non privileged applicant has no *locus standi* to challenge a directive. Thus,

[185] Case C - 302 / 87 Parliament v Council [1988] ECR 5615

[186] Case C – 70 / 88 Parliament v Council [1990] ECR – I 2041

Action of the Court A_C under this article is f(x) functioning as D = R x F

$\underline{AP_P}$	$\underline{AP_{SP}}$	$\underline{AP_{NP}}$
Member States	European Parliament	Natural Persons
Council	European Central Bank	Legal persons
Commission		

Legislation

Directive Regulation Decision Recommendation Opinion

$L = L_{EU}$ $L_{EU} = \{L_{DEC}, L_{DIR}, L_{REG}, L_{REC}, L_{OP}\}$

Especially here, the legislation type of recommendation and opinion are not subject to review under article 234 as it is expressed as:

$f(EC_{234}) \rightarrow \{L_{REC}, L_{OP}\} \notin L$

Therefore, for the functioning of European Court of Justice under article 234/4 directives are not possibly be annulled and within the context of article 234/1 both decisions and directives may be annulled as expressed below:

$D_{234/4}$; $f(EC_{234/4}) \rightarrow L_{DIR} \notin L$

$f(EC_{234/1}) \rightarrow L = \{L_{DEC}, L_{DIR}\}$

3.1.3. Developing doctrine or developing activism? Adjudication in a multi-cultural legal environment

In this section, the development of legal doctrine in the multi-cultural legal environment of community will be analysed. First, the community method will be

defined and how it gave inspirations to the Court to develop common principles in such a multi-cultural legal agenda. Second, the general principles developed by this virtue will be analysed and the focus will be on how the Court behaved upon the necessity of such developments.

3.1.3.1. 'The Community Method' and the general principles of European law in the making

The Treaty of Paris of 1953, which founded the Coal and Steel Community, was seen as a compromise point between Germany and France. The interests of balance for both parties were as follows: For Germany, it was the reconstruction and re-industrialisation and for France that was in return a framework for an effective use of its own coal and steel industrial resources. In order to secure the realisation of this purpose, parties proposed a higher authority's supranational power in charge. That supranational body was 'the high authority' what later became the 'Commission'. By this virtue, a common production and distribution of coal and steel could be governed through agencies of parties to the Treaty, however, as Schuman and Monnet argued, this will lead to a dispute between parties as every agency should prevail its national interest. Therefore, an independent supranational body was to be created for the means of enhancing the decision-making efficiency and day to day management of common policy. This type of combination of intergovernmental decision making and policy initiation by a supranational executive became known as 'the Monnet method'. The critical and inventive institutional approach of the system was a supranational body governing the intergovernmental decision-making mechanism.

This approach of the system by Monnet, has a reflection from the Court as much as a proof of the initial hypothesis which claims the Court's interventionist policy as a mirror effect of an interventionist institutional policy of state structure determined at the beginning of this study. Consequently, supranational governance of communalised and compromised national interests in political decision-making and policy initiation within the particular design of the political system is also visible as dispute settlement and system guards via legal elements of political structure.

The *Monnet method* was a political instrument. However, was insufficient to be applied at law. The practicing lawyers of community, later on, proposed to use a similar method for deriving principles common to member states. The concept is used for the institutional operating mode for the first pillar. It proceeds from integration logic. It has the following prominent features:

First, the Commission has the monopoly for the right of initiation. None of the other institutions may propose the use of method without the Commission.[187] Second, there is the qualified majority voting in the Council. By this virtue, the European Parliament is given an active role so that it may enter co-legislating frequently with the Council. Finally, the foremost significant issue is the uniformity in the interpretation of Community law is ensured by the Court.

According to Möllers "*optimal law can also be achieved by elevating the law of a single jurisdiction to be the European Standard'. He continues with a list of directives and where the sources are derived from. According to this list:*

- *The Product Liability Directive of 1985 is based on the US-American model.*
- *European competition law or the Commercial Agents Directive was largely influenced by German law.*
- *Environmental Information Directive and the legal institution Advocate General is derived from French law.*

Environmental Audit Regulation and parts of investment Services Directive follow English Law."[188]

Sometimes, the written rule is directly adopted from national sources as it is given above in Möller's statement. Various examples of such adoption might also be seen in different branches of community law. Apart from this, another use of method is deriving general principles as applicable from Member States' legal traditions. In a casuistic process, this type of adoption is proportionately visible with the impact of Member States' socio-political enforcement. For instance, Germany had a considerable impact on the development of fundamental rights with the German public opinion including the cases brought from Germany and decisions of German

[187] There is another method used for the second and third pillar is similar to the so called 'intergovernmental method'. The difference, here, is the Commission shares its right to initiate with Member States.

[188] MOLLERS, Op.Cit p.696

Constitutional Court. The same is true for the development of transparency due to the impact of Scandinavian socio-political enforcement that will be detailed in the following section about transparency.

3.1.3.2. Judicial review and General principles of EC Law

In addition to the formal, written sources of law, general principles of law are another source of law.

The ECJ has derived the general principles of law from the Member States' constitutions, from International Agreements and their applications for the purpose of constraining the powers of the community institutions. The overall standards of these rights were almost the same within the jurisdictions of all Member States since their values and legal understandings are not much different from each other. The existence of the unwritten rules, and their recognition as general principles of law as a part of the community legal order, has been a long process. Consistently with the context of article 220[189], in the earlier phases of case law, some litigation included attempts to invoke the general rules of law as they are recognised by the domestic laws of the Member States and international platform. The Court strictly resisted taking them into consideration since the limits of the community legal order were to be defined essentially based on the founding Treaties. The Court was not really keen to play the bad cop in not recognising the fundamental basic rights, but both the definition of the Community legal order and the fear of "incorporation within the domestic legal sources" made it hesitant in the application of these sort of rights. Consequently, the definition changed in a positive expansive way. The founding Treaties, the secondary legislation and the international agreements by the Community and the internal laws of Member States and international agreements by the Member States all have deemed to be part of the community legal order gradually. The Nold[190] case was the opening gate to recognise the fundamental rights by the European Convention on the Human Rights, where all the Member States are High Contracting Parties, therefore they are incorporated within the rules

[189] The article gives the Court a duty of the responsibility of ensuring that 'the law is observed' in the interpretation and application of Community law.

[190] Case 4/73, Nold v. Commission, [1974] ECR 491, [1974] 2 CMLR 338

of the Convention. Thus, regarding the point Member States laws are a part of community legal order automatically makes the Convention a part of the Community legal order. Naturally, the priority was in the recognition of "fundamental rights" whereas the Community did not have a charter of human rights. The long adventure had started by Stork [191] case and finalised by the declaration of "Charter of Fundamental Rights and Freedoms", where these rights have been granted in a written substantive mode. Consequently, the limits of the Court's judicial review extended including not only the Community actions and their application in the Member States, but also the Member States actions enforcing the Community policies and interpreting the Community law, and furthermore, Member States derogations from the requirements of Community law as well.

Considering the contents of the concept 'General Principles of Community Law', a short explanation is necessary to determine the material. Surely, "what the 'General Principles of Community Law' means" is the General Principles of law recognized by the Community legal order. Reminding that the Community legal order is not only a sum of the Treaties and other texts by legislation, but also the Courts' jurisdiction and Member States Laws makes the 'recognition' of general principles of Law by the Community legal order more complicated. These elements of Community legal order that take part in this procedure lead to a classification of these principles on the basis of the question 'who or which institutions did recognise them'.

In this context there are three types[192] of principles recognized by the Community legal order:

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[191] Case 1/58, Stork v. High Authority[1959] ECR 17

[192] Another categorisation of these principles are made by Hix. According to Hix, there are four types of Principles:

"*1 - Principles of administrative and legislative legality, which are drawn from various Member Stetes' legal traditions, such as 'legal certainty', 'proportionality' and 'procedural fairness'*

2 – Economic freedoms which are drawn from the EU Treaty, and include the four freedoms, the freedom to trade and freedom of competition

3 – Fundamental human rights, which are not defined in the EU Treaty, but are set out in most member states constitutions and in the European Convention on Human Rights (of the Council of Europe)

4 – Political rights, which have been introduced in 'Declarations' by the member states and are referred to in the EU Treaties, such as 'transparency' and 'subsidiarity' "

1. The principles recognized by the Treaties
2. The principles derived from the Member State Laws
3. The principles recognized by the Courts.

Before continuing to the principles derived from the sources other than the Treaties, a special emphasis to the constitutional meaning of the principles seems necessary. The similarity of European Integration with the American federalism gives inspiration to determine the constitutional questions of a multilevel governance system and its applicable constitution. One of the theories in this context is the 'constitutional orginalism' of David Lyons.[193] The concept 'originalism' refers to the adjudication in accordance with the authority of the original text and the 'intentions' of legislator. Consequently, the doctrine of originalism is also a plausible approach for judicial review explained reasonably in these words:[194]

"A Court can not decide whether an official decision conforms to the Constitution without applying its rules. The constitution was written down to fix its content, and its rule remains unchanged until it is amended. Courts have not been authorized to change the rules. So Courts deciding cases under the Constitution should follow the rules laid down. By what rights would courts decide constitutional cases on any other grounds?"

However, general principles of law may well have been regarded as not being a part of this written original text. In addition, the application of these rules may easily cause a constitutional dilemma, considering the point that these principles are independent constitutional points with regard to the normative text hierarchy. The author expresses the exceptional position of principles of political morality in this context. The doctrine of originalism gives an axiomatic authority to the 'original'. Contrarily, non-originalism provides that loyalty to the constitution also demands justification,

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HIX, Op.cit. p. 104 (as it is seen here, the EU Charter of Fundamental Rights and Freedoms was not yet among the Community legal documents at the time Hix drafted his book).

[193] LYONS, David (1987*): Constitutional Interpretation and Original Meaning*, in COLEMAN Jules / ELLEN Frankel Paul, Philosophy and Law, Basil Blackwell , Oxford,p.75-102

[194] Ibid.p.75

which might cause to a deviation from it in case of non-justification or in case of justification for deviation. The author puts forward another doctrine to clarify the difference between these two, simplified as labelling a rule "constitutional" and "extraconstitutional"[195]. The progress made by the general principles in the EC Law, in this sense, evolved from an "extraconstitutional" point to "constitutional" point by virtue of the Charter of Fundamental Rights and Previous Treaty legislations.

The Article F of the TEU, what had long been the Article 7 of the EEC Treaty prohibiting any 'discrimination on grounds of sex and nationality', requires the Union to respect the principles of European Convention on Human Rights and the fundamental rights by the national constitutions of the Member States. Among these principles, respect to fundamental rights and the principle of equality are presented both within the context of the community treaties and the national constitutions of the Member States.

The Principle of proportionality also has been conferred a Treaty power by the 1997 ToA.[196] There are also some other principles exclusive to community law such as 'the principle of direct effect' and the principle of 'primacy'. On the other hand, legal certainty, legitimate expectations and the right to defence are derived from the Member States laws

General Principles of Community law have various functions within this context. Some of them like "right to be heard", "right to legal or professional privilege", "right to fair trial" etc. are directly related with the judicial process, and other principles of community law having constitutional affect are "respect to fundamental rights", "equality" or "non-discrimination", "legitimate expectations" "transparency", "subsidiarity", "proportionality". Subsidiarity is also counted as a general principle, considering the functional points since the essay is built on the functions of general principles of law in terms of the modernism-postmodernism classification in the political modernisation of Europe under the roof of EU.

In the functionalist view, the general principles that function in the judicial process like 'right to defence', 'right to be heard', 'right to legal professional privilege' and other

[195] Ibid.p.84

[196] Articles 5(3)3b(3) added by the TEU also made a reference of this principle.

procedural rights will not be analysed in this essay, since these rights do not have a considerable effect on the alleged 'modern' structure of the EU.

In teleological means and functionally, these principles may be observed in various groups:

The first group includes the principles balancing the right of administration and the individual, the second group covers the principles for the public benefit, and the third group consists of the principles in the European government and the Member States.

Respect to fundamental rights, equality and proportionality, transparency and proportionality are in the first group and subsidiarity is in the second group. The classification with respect to the functional performance of the principles is set up parallel to the logic of central authority and the balance arguments.

3.1.3.3.1. Doctrine of The Protection of Fundamental Rights

3.1.3.3.1.1 Historical perspective of the development of Fundamental rights doctrine

As far as the EU wanted to transpose to a 'political' Union, it had to cover the gaps that was necessary for this progress. One of the gaps had been the non-existence of human rights protection in the Treaties. Although there was no place for human rights among the configuration of Treaties, it gained importance since the late 1960s. One of the considerable evidence is the decision of European Council in Cologne stating:

"[P]rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy…There appears to be a need to establish a Charter of Fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens"[197]

[197] Quoted from BOGDANDY, Armin von (2002) Common Market Law Review; Volume: 37, November, p. 1307

Since the concept 'human rights' refer to be rights of individuals against the major power of state, the era where the focus of the concern of Community is on 'peoples' rather than 'individuals' had been a poor protection era in terms of human rights. In this primitive era the purpose was "to create, by establishing an economic Community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and lay the foundations for institutions which will give directions to a destiny henceforward shared", subsequently, realisation of economic purposes entailed the establishment of the political union.[198] Conversely, in time, the ECJ has developed the doctrine of fundamental rights which equally was in force as much as an unwritten Charter of Fundamental Rights. This development has led the political powers of the EU amend the Treaties.[199] On the other hand, the doctrine developed by the ECJ was more extensive than creating an unwritten bill of rights:[200] relying on the progress of human rights development by Strasbourg institutions.[201] Aftermath of long period that the Court has denied the existence of Human Rights rules within community law, it changed approach and started a period of progress towards the level of strict protection by Strasbourg institutions. The question appears here as 'why has the Court developed a doctrine of human rights acting as the principle guardian of human rights in the field of Community law?'

3.1.3.3.2. The need for a doctrine of Fundamental Rights

Undoubtedly, the ECJ, through its case law, has formed the most valuable fragments of the Community legal protection process, among which the fundamental rights doctrine forms an important part. Since the Constitutional foundations of the European Communities include no clear provisions protecting basic rights[202], ECJ,

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[198] DUPARC, Christiane (1992); *"The European Community and Human Rights"*, Brussels: Office for Official Publications of the European Communities, p. 11

[199] CRAIG, P Paul & DE BURCA, Grainne (1998); *"EU Law: Texts, Cases and Materials"*, 2. Edition, Oxford: Oxford University Press,, p. 296

[200] ALSTON, Philip (1999); "*An Ever Closer Union in Need of a Human Rights Policy: The European Union and the Human Rights"*; *"The EU and Human Rights"*, Philip ALSTON & J. H. H. WEILER (eds) 1. Edition, Oxford: Oxford University Press, p 53

[201] This process has started by Nold case before the ECJ: Case 4/73, Nold v. Commission [1974] ECR 491

[202] M.A.Dauses, (1985) *The Protection of Fundamental Rights in the Community Legal Order*, European Law Review, Vol 10, p.398

through a precedent making process, developed an "unwritten Bill of Rights" for the community. The Treaty establishing the European Economic Community (1957) contained only a couple of rights. [203] This right protection embraced the discrimination based on grounds nationality and the discrimination based on grounds of sex.

There had been a transformation period of the ECJ case law approach which the Court had, in the first phase, denied to recognise the fundamental rights as a part of Community legal order.[204] The latter phase it was adopted recourse to two methods. The first one is the prominence of constitutional traditions common to member states providing the protection of fundamental rights to the Community level. The second one is a common international document for all member states drafted outside the legal personality of the Community: The European Convention on Human Rights. The remarks at case law could be traced back to 1969 *Stauder* Case.[205] The ECJ has an affirmative response to an applicant's contention of breach of individual dignity through the implementation of a Community scheme. ECJ ruled that: "fundamental rights are enshrined in the general principles of Community law and protected by the Court"

What had been the inspiring developments in this context could be traced from *issue payoff test* in our game analyzed as follows:

As regards the transformation period:

The Court, within its initial policy, resisted to attempts by litigants to invoke rights or principles of law recognized by national laws, as principles part of Community's legal order. The hesitation by the Court was the fear of subordination of EC law by national constitutional law.[206]

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[203] Lenaerts,K and Smijter,E, (2001) *"Bill of Rights" for the European Union*, Common Market Law Review, Vol. 38, no.2.

[204] See cases C 1/58, Stork v High Authority [1959] ECR 17; C 36-37-38 and 40/59, Geitling v High Authority [1960] ECR 423; C 40/64, Sgarlata and others v Commission [1965] ECR 215

[205] Case 29/69, Stauder v. Ulm, [1969] ECR 419

[206] Craig/ De Burca, Op.cit p.320

The first case, noteworthy to consider, is the *Stork* case[207], where a coal wholesaler complained of a decision of the High Authority governing the sale of coal. The main concern of the applicant was that the rights granted in national constitutional law were overridden by the legal order of Community.

The Court of Justice persistently refused the issue. The issue payoff I_{ECJ} seemed to be sum of a coal wholesaler's interest, and it was not estimated as a crucial point of a barely economic entity. Thus, it was the institutional payoff C_{ECJ} leading the Court policy and prevailing abovementioned inessential issue payoff.

Another case in which fundamental rights were not recognized is *Geitling*[208] where again a coal wholesaler challenged not only a principle of German Constitution but also a suggestion that Community may give rise to similar protection. However, the Court persistently denied both issues. In terms of the balance between institutional payoff and issue payoff, nothing has changed up to Geitling. For the Court, institutional payoff was dominantly prevailing profiled as $C_{ECJ} > I_{ECJ}$.

In Sgarlata[209], which was brought before the cases after a five years time from Geitling, the Court ruled that the express provisions of the Treaty could not be overridden by a plea on grounds of 'other principles' despite the fact that those principles are fundamental principles common to the legal systems of all Member States. Even though the position of the Court is same with the position in the previous cases, this time, the distance between institutional and issue payoffs are closer. At this stage, issue payoff is increasing since the plea of challenging fundamental principles to Community law became an issue which is of crucial point for the community.

Thus, in this case issue payoff $\dfrac{C_{ECJ}}{I_{ECJ}} \leq 1$

[207] Case 1/58, Stork v. High Authority [1959] ECR 17

[208] Cases 36,37,38,40 / 59, Geitling v High Authority [1960] ECR 423

[209] Case 40 / 64 Sgarlata and others v Commission [1965] ECR 215

It is highly doubtful to prove the case that $I_{ECJ} \leq 0$ or not, before Sgarlata. If it was, it is no surprise to determine the Court's typology was 'friendly' within that period of time, whereas the issue payoff was $-I_{ECJ}$.

After some years, the change in the Court's attitude became visible by the Stauder[210] case where the Court for the first time admitted that implementation of a Community scheme constituted an infringement of right to dignity. Thus, it was the development stage taking part after the transformation process. For the Court, in Stauder, it was an unnecessary way of implementation to identify the name of recipient of subsidized butter breaching human dignity. However, the provision of secondary legislation in question constituted no breach to fundamental rights.[211] The Court did not annul a bill of legislature directly on the grounds that the provisions or contextual understanding of the bill is in breach of fundamental rights. That is what the Court stated in paragraph 7. Nevertheless, by this virtue, the Court confessed the existence of fundamental rights as part of community law for the first time. This confession was intended to be a soft and unattractive way of 'admitting the presence of fundamental rights in Community Law'. This theory of 'soft shift' is also confirmed by the Court's position taking no further step either in this case[212] or in another case until Handelsgesellschaft[213] case, which was before the Court in a year's time. It seems the way that the Court was hesitant to face the institutional payoff C_{ECJ} that might be costly. Nevertheless, the Court's reasoning was quite practical to make analogy[214]

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[210] Case 29 / 69, Stauder v. City of Ulm [1969] ECR 419

[211] The 7th paragraph of decision that gives reference to fundamental rights is as follows: "*Interpreted in this way, the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.*"

[212] Advocate General Roemer commented that the Court's ruling was not based on reviewing the Commission's decision on the ground that it was conflicting with fundamental rights in national constitutions but it was based on 'general principles of community law' informed, by this virtue, by a comparative evaluation of fundamental rights concepts existing in national laws.

[213] Case 11/ 70; Internationale Handelsgesellschaft v Einführ und Vorratstelle für Getriede und Futtermittel [1970] ECR 1125

[214] The wording of paragraphs 3 and 4 of the Court's decision is "…. *The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either to fundamental rights as fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.*

4. However, an examination should be made as to whether or not analogous guarantee inherent in Community law has been disregarded. In fact, respect to fundamental rights forms an integral part of

with the rules of internal law that could lead to diminish the effect of institutional payoff.

The Court did not undermine the lack of protection in community law. Consequently, it tried to fill the gap taking a gradually assertive manner. However, the development of fundamental rights doctrine, by itself, was not sufficient in a democratic society. There has to be a bill, a legally enforceable document, including an agenda of rights securing the fundamental rights of European citizen.

Moreover, a charter of fundamental rights and its placement in binding- enforcable-judicial dynamics would be the final phase of this initiative approval of the doctrine. In terms of legitimising the ECJ's functional use of 'unwritten' fundamental rights in its jurisdiction, some of these rights were to be transferred into 'written' form by the virtue of "hard approval".

The functional necessity of fundamental rights can be examined under the meaning of the concept 'ever closer union'. Individual rights and the need to enforce them are elements of post-war constructionalism. In the post war period, the dominant tendency in European politics was to ensure that Europe would not descend into Nazi barbarism again. The 1948 UN charter and 1950 European Convention for the protection of Human Rights and fundamental freedoms have been leading initiations to secure human rights, which were to be complemented by the above-mentioned articles of the Treaties founding the European Union. However, in the EU system, the granted rights do not have a codified enforcement system. The only process that the European citizen can rely on is the 'fundamental rights' doctrine of the ECJ, which the ECJ used it in its own initiative-discretion within the context of the case law.

Andrew Duff[215], EP's co-rapporteur on the Charter put forth three reasons that necessitated a charter of fundamental rights.[216] The first one is the inconsistent rights

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the general principles of the Community Law... it must be therefore be ascertained… whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system. "

[215] Andrew Duff is the liberal democrat MEP for Eastern England and Constitutional Affairs Spokesman of the European Liberal Democrats (ELDR).

regime of the EU. Either the ECHR or the others like the social policy convention of the European Council and International Labour Organization are not applicable in the same level in all the Member States. For instance, all the Member States are not parties to the same protocols of the ECHR. In addition, the above-mentioned other forms of social policy protecting systems have variable application. Secondly, as to the context of article 6(2) TEU, the EU itself is not a contracting party for the ECHR and a part of the system that forms constitutional traditions of Member States. However, the EU institutions should not be allowed to stand irresponsible for securing the fundamental rights granted for its citizens. Thirdly, after having completed fifty years of integration, the EU is responsible to clarify its relationship with the European Citizen. The consolidation of the rights granted for the citizen will enhance the democratic legitimacy of the Union and come over the lacking clarity and precision.

In this respect, the European Council in Nice declared a codified Charter of fundamental rights. The Charter, however, does not have binding force yet. Moreover, not only the legal status, but also the content of the Charter is subject to many debates as well. Nevertheless, many principles became written principles by the virtue of this charter. The scope is designed in the "general provisions part" articles 51 and 52. Article 51 is granting the 'scope of charter' whereas article 52 provides the 'scope of rights granted' within the Charter.

The principle of proportionality and again subsidiarity were set up as principle reference within the scope of article 51. This article charges the community institutions and member states with the responsibility against any violation within the context of the charter. The conditions for this responsibility are limited to the actions deriving from the implementation of Community rules and the responsibility is charged with regard to the principle of subsidiarity.

Article 52 of the Charter is granting a standard of rights referring not to be lower than the standards of rights secured by the European Convention on Human Rights and the implementation of this convention by the European Court of Human Rights.

[216] The EU Charter of Fundamental Rights by Federal Trust for Education and Research, 2000, Article by Andrew Duff, Towards a Federal European Society,p16-17.

Moreover, the article grants a discretionary right to the Community to determine a higher level protection.

3.1.3.3.3. The Charter of Fundamental Rights and Freedom: Expectations and conclusions

The Protection of Fundamental Rights is one of the essential points of EU law. Article 6(2) of the TEU implies a provision generally referring to the protection of the fundamental rights in the community sphere. The Treaty of Amsterdam formally clarified that the ECJ has jurisdiction under the treaty of the European Community in the context of this article with regard to the actions of the institutions.[217] It was an action for the purpose of giving ground and calming down the ECJ decisions built on the protection of fundamental rights rather than a primitive codification attempt.[218] In other words, a more legitimate effect of this Article is surviving the ECJ from giving full discretion and making law.

The reason seems to be indeed rational, since just before the Treaty of Amsterdam was signed; there had been a persistent conflict between the scholars about the ECJ's use of fundamental rights. Some authors contended that ECJ used 'fundamental rights' as a 'justification' point to extend its scope of jurisdiction.[219] Contrarily, some other authors argue that the ECJ is not keen to strike down the Community acts for the sake of Human Rights; however, the Court's sensitivity is its own position in the eyes of the public opinion and the national Courts in protecting Human Rights.[220]There were several others on the midway of these two[221] or on

[217] LIISBERG, Jonas Bering,(2001) Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?, Jean Monnet Working paper 4/01,p.2

[218] See contrary ibid.p.3.

[219] COPPEL, J / O'NEILL, A. (1992) *The European Court of Justice: Taking rights Seriously*, Common Market Law Review.vol.29,p.669

[220] WEILER J.H.H. / LOCKHART, N.J.S. (1995) '*Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence*, Common Market Law Review Vol 51. p.579

[221] CRAIG /De BURCA Op. Cit. p.341

other ways of interpretation.[222] The development of the doctrine of fundamental rights by the ECJ was a leading movement towards the declaration of a fundamental rights charter.

The Union approved the doctrine and Craig makes a classification of this approval, in the sense of initiative incorporation. The codification in Maastricht and Amsterdam were a sort of "hard approval" of the doctrine of fundamental rights developed by the ECJ.[223] The "soft approval" was already implied by the political institutions in the structure of EU.[224]

The Charter offers a definition of the 'human rights and fundamental freedom' upon which, according to article 6(1) of the Treaty of European Union (TEU) the Union is founded, and which according to article 6(2) the Union is bound to respect. Furthermore, the Charter can be seen as clarifying the obligations of EU institutions and as providing a definition of fundamental rights on which to base the power of the Council to suspend one of its members under title 7 of the Treaty. It is also clear that the institutions that have proclaimed the Charter, have committed themselves to respecting it.

There are several important aspects of the Charter's content. First, it puts an end to the distinction between civil and political rights on the one hand and social and economic right on the other. The Charter is broken up into 7 titles which are preceded by a Preamble. The seven titles are headed 1.Dignity 2.Freedoms 3.Equality 4.Solidarity 5. Citizen's Rights 6.Justice and 7.General Provisions Governing the Interpretation and Application of the Charter. Each of the first 6 titles is broken into separate articles protecting specific rights.

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[222] PHELAN, D.R. (1992), *Right to life of the Unborn v. promotion of the trade in Services: The European Court of justice and the Normative Shaping of the European Union*, Modern Law Review, vol 55, ,p.70-686

[223] TEU Art.F2, Art J1(2), Art K2 (1); ToA Art.7, Art.177,

[224] see Craig/De Burca; A joint declaration of the three institutions in 1986, various declarations and resolutions on racism and xenophobia by the European Council, a Declaration of Fundamental Rights and Freedoms by the European Parliament in 1989, a Charter of Fundamental Social Rights and references in SEA to the ECHR.

Dignity is a section that contains five articles. A number of these articles cover very familiar provisions from other international instruments such as the right to life and prohibition of torture, prohibition of slavery. The rest of the section that grants rights to human dignity and the right to the integrity of the person are less familiar as a separate right for common international instruments. In the fragment of latter, there are also specific provisions prohibiting eugenic practice, cloning and making the human body and its parts a source of financial gain.

Under the heading ‘Freedoms‘, there are fourteen articles with a leg on each side of a range of familiar civil, political, economic and social rights. This section includes rights to liberty, right to privacy, right of marriage, right to education, right to property and right to asylum, as well as freedom of thought, conscience, religion, expression and assembly.

Equality is another section that consists of seven articles. It also requires the Union to respect cultural and linguistic diversity. There are specific provisions promoting equality between men and women, a well as the right of the child, the rights of the elderly and the rights of the disabled.

Solidarity, which is a separate heading, contains twelve articles. The first set composed totally eight articles of this section make relatively detailed provision on the right of workers and the unemployed. A new innovation is that ‘The family shall enjoy legal, economic and social protection’. The rest of the section is composed of four articles can be broadly classified as social right; health care, access to services of general economic interests, environmental protection and consumer protection.

Some of the rights specifically extend to legal persons. These are: the rights of access to documents, the right to petition to European Parliament and the right to refer complaints of maladministration to the European Ombudsman.

Justice contains four articles. These are concerned with the administration of justice. Interestingly, given that the Union does not have a criminal code or distinct criminal procedure. It guarantee the presumption of innocence and the rights of the defence of anyone charged with a criminal offence, require proportionality prohibiting retroactive criminal laws and double jeopardy. And also, the right to an effective

remedy and a fair trial for anyone whose rights and freedoms under Union law have been violated is guaranteed. This includes a right to be advised, defended and represented, a well as a right to legal aid.

The seventh title contains 4 articles which make general provision for the interpretation and application of the Charter.

The Charter is important for the democracy also because it contains the core political rights of European citizen; the right to stand and to vote in European elections. It also includes the right to petition the European Parliament and European Ombudsman. As it is stated above, the building of a political Union to shape the economic and monetary Union is one of the reasons of those rights. As the Europe must be democratic and it can only be democratic if the citizen can participate in creating the EU of the future. The right to vote and be elected in any EU Member State, regardless of nationality, is the first basic condition for a European political debate to emerge.

One of the most striking features of the Charter is the style in which the individual right are drafted. They are presented in absolute term, with no exceptions. There are no qualifications permitting restrictions in the interest of public morality or public order etc. As it is stated in Article 52(1), any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms subject to the principle of proportionality, limitation may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the right and freedoms of others." Clearly limitation may be permitted only if their objective is to protect the general interests of the Union or the rights and freedoms of others.

Another striking feature of the Charter is the broad scope of the rights covered, coupled with the innovative character of some of them. It is meant to be no more than a consolidating catalogue of the rights which already form part of the general principles of Community law. The drafters of the Charter quite correctly did not confine themselves to the specific rights which have already been recognized in the jurisprudence of the ECJ. Instead they undertook the much more ambitious task of trying to catalogue all the rights contained in the international human rights treaties to

which member state are parties together with other unwritten rights which form part of the common constitutional traditions of the Member States. The result is a catalogue of rights which, in terms of the scope of the specific rights covered, far exceeds any single compilation in national or international law.

3.1.3.3.3.1. Some perceptions on the scope of the Charter

Chapter VII is concerned with limitations on the Charter by the treaties, especially by European Convention of Human Rights, other sources, and the Charter itself. These limitations, done by other sources of law create sufficient doubts to the Supremacy of the Community Law.

Article 51 of the Charter is related with the addressees of the Charter and their tasks. First paragraph of the article states that the provisions of the article are addressed to the institutions and bodies of the Union and to the Member States "only when they are implementing Union law" From the definition of Union law we understand that Charter covers the entire range of Union activities, including the sensitive questions of second and third pillars[225]. The necessity of forcing Member States to use this Charter when they are only implementing Union law is raised after the judgment of European Court of Justice in Karlsson Case. The court ruled that: "the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules[226]" By this ruling the court states that The Charter's impact on Member States' freedom of action is naturally restricted. It is not intended to enhance the powers of Member States outside the field of Union law to pursue whatever policies they choose. The Charter is in other words applicable to the Union's institutions and not the activities of Member States falling outside the scope of Community law. In the Wachauf case, the ECJ stated that the requirements to respect fundamental rights are also binding on Member States when they implement Community rules[227].

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[225] Jacqueline Dutheil de la Rochere. *The EU Charter of Fundamental Rights*, online papers of 'Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004'. p.44 http://www.ecln.net/elements/constitutional_debate/perspective2004/part1/1_04.html

[226] Case C-292/97, [2000] ECR I- 2737, at para 37.

[227] Case C 5/88, Wachauf v. Bundesamt für Ernährung und Forstwirtschaft judgement of 13 July 1989, ECR 1989, p. 2609, para. 19.

With the term, “institutions” is meant the institutions as referred to in article 7 Treaty of European Community and the term “body” is referring to all the authorities set up by the Treaties and secondary legislation. In other words, the Charter is addressed to all the institutions created by the Union under all of the three pillars and not merely circumscribed to EC law.

In addition, the principle of subsidiarity is mentioned in the first paragraph of the article. What is subsidiarity then? The term ‘subsidiarity’ refers to the principle that decisions should be taken ‘at the most appropriate level’. This means that if it would be more effective to take a decision at the European level rather than the national level, the decision should be taken at that level. This also applies to the regional and local levels. So what should subsidiarity do with fundamental rights protection against secondary Community law? By including the principle of subsidiarity to the article, Member States were deemed to be the primary guarantee of fundamental rights. The application of the subsidiarity principle to the Charter implies a non-interference of the Union in the relationship between the nationals and their own state authorities in matters falling outside the scope of Union’s competence[228]. According to this principle , cases solved in the Community level is justified only if it would produce clear benefits by reason of effects in comparison with action on Member State level. But in practice it is difficult to apply subsidiarity principle because there are different opinions about the extent of the community actions. So in brief, the principle of subsidiarity is only applicable where the Community has a consensus with the Member States with regard to the question of competence.

In the second paragraph of the article, it is stated that the Charter does not create new powers and tasks for the Community or the Union. Moreover, it does not change the powers and tasks defined by the treaties. That Article was the subject of much discussion in the Convention Working Group and the text of the Article has been changed to strengthen it[229]. So, what was the conflict related with this paragraph. The

[228] LINDFELT, M. (2001) *The Implications of the Proposed EU Charter of Fundamental Rights*, Abo Academy, Institute of human Rights, Online Working Papers http://www.abo.fi/instut/imr/degree_programmes/norfa/mats2_implications.pdf p.75

[229] House Of Lords , Session 2002–03 6th report, The future status of the EU Charter of Fundamental Rights , p. 19

problem is that there are no Community or Union powers to promote many Charter rights. From this point, Union, Community, and the Member States can fall outside from the scope of the Charter. For example, Article 137/6 of the EC Treaty excludes the right of association and the right to strike. On the other hand, freedom of association and the right to take collective action are explicitly guaranteed in Articles 12 and 28 of the Charter. So the dilemma is clear. There is a clash between the EU competences and the EU Charter's of fundamental rights. This fact shows us that the Charter does not occupy a broad and effective area. The values shown in the Charter are only protected to the limit of the EU competences. Therefore, the EU shall ignore fundamental rights where they come up against the limitations of its competences.

Article 52 of the Charter is related with the scope of the guaranteed rights, which is the subtitle of the Chapter VII. The wording of the first paragraph is based on a ruling of the Court of Justice. In its decision, the Court ruled that: '… it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights[230],

In the first paragraph of the article, the ways of restricting the rights and the freedoms in the Charter are expressed in general. Initially, the article states that any restrictions subject to the rights and the freedoms must be exercised by law. The term "by law " means that not only the provisions of a country but also the decisions of the courts shall be considered as a legitimate source for restrictions[231].While limiting these rights and freedoms, legislators shall not to interfere with the core of the freedom / right. Secondly, there are some other criterions to limit the rights and freedoms in the Charter. Proportionality is one of them. In Constitutional law, what we understand from the proportionality is the evaluation of the rights, which are contesting in the same issue. For example, when the authorities intend to limit the right of expression, they need a reasonable motive for their intention. Usually the

[230] Judgment of 13 April 2000, Case C-292/97, paragraph 45

[231] BERCUSSON, Brian (2003); European Labor law and the EU Charter of Fundamental Rights, ETUI Publishers, Brussels, p.83

provisions of the country gave the administrators quite significant discretion area for their implementations. As the limitation is a kind of an implementation, the administrators shall not use their discretion area broadly. So they must have serious reasons, like pubic security, to restrict these rights. The second aspect of the proportionality is the methods that are used in the progress. While stopping a demonstration, although it is illegal, the administrators must not use fire arms until they are against that kind of assault. The other criterion is the necessity and the requirements of the general interest in the Union. Truthfully, these criterions are too much vague and general. From this definition I understand that the discretion areas for the administrators are expanded excessively. Although it is a framework Charter, the definitions might be more definite, or the Charter might refer to another specific provision for these criterions.

The second paragraph of the article 52 is one of the horizontal provisions of the Charter. This paragraph is enacted to subordinate the Charter to the Treaties. So the second paragraph clarifies that where rights were already expressly stated in the Treaty establishing the European Community and have merely been restated in the Charter, they remain subject to the conditions and limits for which provision was made in that Treaty. The Charter does not alter the system of rights conferred by the EC Treaty and now taken over by Parts I and III of the draft Constitution. As we consider this paragraph with the second paragraph of the article 51, we can probably assume that the Charter does not provide a new competence in the human rights field and it also it gives member states a lot of scope[232].

Finally, the third paragraph of the article 52 states that the rights which are guaranteed in the Charter, do not conflict with the rights accepted in Convention for the Protection of Human Rights. However, this situation does not prevent the Union law to provide broader protection. This means that that the legislator, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the Charter without seriously affecting the competence of Community law and the Court of Justice of the European Communities. Third paragraph covers both the Convention and the protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-

[232] FOSSUM, John Erik (2003), THE EUROPEAN CHARTER – Between deep Diversity and Constitutional Patriotism? ARENA Working Paper 5/03, p 11 http://www.arena.uio.no/

law of the European Court of Human Rights and by the Court of Justice of the European Communities. The last sentence of the paragraph is accepted to allow the Union to guarantee more extensive protection.

Finally, as a conclusion, there is a crucial point to be debated is if the Charter of Fundamental Rights and Freedoms, and narrowing the Court created doctrine is an evasion attempt for the court rulings or not.

The strategy of the legislature of the EU had the following strategy space in terms of 'fundamental rights' interplay with the Court:

$S_L = \{L, \underline{L}, E, \underline{E}\}$

The legislature has this strategy over two levels of action set. The first one is whether legislate (to pass the bill) or not; and then accordingly, to evade or not.

In complete and perfect information games the action set of legislature will be

$E \rightarrow \underline{c}$ and $\underline{c} \rightarrow L$ if $S_i = \{L\}$

$\varnothing$ if $S = \{\underline{L}\}$

According to the set above if there is legislation the game continues with the possible counter attack of the court which may overturn the bill or not. Inversely, if there is no legislation at the first level, there is no response from the court, which means the game ends in such a case. However, this is not true for this incomplete and imperfect information game. Remembering the fact that in incomplete and imperfect information games the players are not completely aware of the other player(s)' possible strategy space and the rules of game.

Therefore, here, in this game of incomplete and imperfect information, the issue is just the same as described above. The legislature made no attempt to pass a bill of fundamental rights. $S = \{\underline{L}\}$; However, the Court filled the gap with its case law. The doctrine of fundamental rights has been developed sincerely by the Court in response to the requests of Community political environment. This was not an

expected act; an unknown rule of the game especially when the initial resistance of the Court has been taken into account. What may the legislature do in such a case? It is so obvious that the existence of rules which legislature itself did not even try to pass is by virtue of the counter player Court. The expectation in such situation seems an evasion attempt by the legislature might come into view or not. The very crucial point here stands as the difficulty to evade a rule created by Court especially if the rule concerns fundamental rights. What could have been done in such a difficult position by the legislature is to evade through an implicit compromising act. In such an environment of high transparency, invisibility or any implicit act seems risky for institutional costs. Therefore, it is for sure that the Charter of Fundamental Rights comes through as the first document of its own type within the legal sphere of the Community. There is no other

3.1.3.4 Evolution of equality

The EC Treaty contains various rules on equality. Among them can be counted the prohibition of discrimination on grounds of nationality (Art. 12 EC) prohibition of discrimination as regards the free movement (Art. 28, 39, 43 and 49, 50) regarding competition law (Art. 81.82 EC) and internal taxation (Art. 90). Focusing these provisions forming a part of design of law in contextual understanding, the underlying intention is to stabilize an integrated internal market well functioning inside the community. Therefore, national markets should be opened to goods, services, capital and workers coming from the other member States. The principle of equality was to be considered as an important instrument to realize these purposes.[233]

The Article 6 of the EC Treaty provides “any discrimination on grounds of nationality” is prohibited. The provision is directly related with the provisions regulating the free movement of the workers. There have been many cases going on in connection with the free movement of persons. *Cowan v. Tresor public* is one of them in which a British citizen who was mugged on a visit to Paris claimed for compensation under

[233] MORE, Gillian (1999) “*The Principle of Equal Treatment: From a market – unifier to a Fundamental Right?*”, in CRAIG, P / De BURCA, G (eds) *The Evolution of EU Law*, Oxford University Pres p. 522 and De BURCA, Grainne (1997) “*The Role of Equality in European Community Law*” in DASHWOOD, A / O’LEARY S (Eds) *The Principle of Equal Treatment in EC Law*, Sweet and Maxwell, London, p.24

the French Criminal Injuries Scheme. Another case was held by an Italian national living in Belgium who claimed discrimination on grounds of nationality in educational and vocational training.[234]

Gillian More specifies three main roles of the principle in community law[235]:

The first one is market-unifying role. A principle of equality provides equal access for the products, services and persons in the single market. The circulation of free movement is the purpose of unifying the markets and establishing a single market. Equality for access and circulation of every product, service and person regardless of their national origin ensures market unification with this purpose. The principle is the product of ordoliberal influence in the law of European Communities. [236] Ordoliberalism was a school of economic thought in 1930s-1950s that grew up in the conditions of that period's economic crisis and Europe's reconstruction. In this system of thought, the concept 'economic constitution' emerges and the market order involves intervention with the purpose of liberalisation. Equality is in another sense, a principle of this economic constitution.[237] The emergence of the principle was unifying the single market; thus, the single market is established. Does that mean that the role of the principle of equality as a market unifier does not exist any more? The single market has made an important process since its establishment by the founding Treaties but the emergence of the European Union with its furthering enlargement is still an ongoing process. On the one side, the new Member States accession figures out a new necessity for the unification of the present market and the new members' market, and on the other side new questions of discrimination arises so that this role is still within the meaning of the principle.

The second role of the principle is the regulatory role. In this respect, the principle acts as a rule of administrative role and a control mechanism on the legislator for the means to ensure that the intervention by the government should not distort the competition in the market. The administrative role is the government's dependency

[234] Case 152/82 [1983] ECR 2323.

[235] MORE, Op.Cit.p.517-553

[236] Ibid.p.518

[237] Ibid.p.535

on the so called 'constitutional parity'[238] between the protection of economic freedom and the intervention to secure the free movement, competitiveness and like market elements. The intervention is both a questions of proportionality and equality. These two principles may apply at any time. While in proportionality, the allocation of duties and margin of appreciation is considered between the administration and the market citizen, in principle of equality, only the allocation between the market citizens, the citizens of Member States are considered.

The third role is the constitutional role. The principle becomes a constitutional principle with respect to non-discrimination of men and women. Considering the principle acting as a constitutional principle other than economic purpose and prohibiting every type of discrimination on the grounds of sex and nationality, this role is the evolved form of basic market unifier into the context of Human Rights.

The Court's standing seems very complicated with regard to the fact that the discrimination cases that The Court has to deal with vary so much in character. Discrimination on grounds of nationality which strongly forms the first group of More referred above have strong affect to stabilize the market by protecting the approaches of Member States to put forward blockage sanctions to the mechanism of internal market.

3.1.3.5 Transparency: an issue of European Administrative Law

> "… *the Community intends to conduct this crusade for democracy in close co-operation with the European Parliament. It will seek a reasonable way of applying subsidiarity to new legislation and existing instruments, of making Community action more transparent and … working with the European Parliament on a pertinent communication policy.*"

[238] Ibid.p.520

Jacques Delors, Strasbourg,10 Feb.1993[239]

Does the principle 'transparency' with the political concept 'democracy' play a role for the community institutions to comply with the requirements under article 5[240] of the EC Treaty? Neuwahl puts forth this question for the ongoing experiment upon the erection of the principle transparency into the vertebra of Community legal system. [241]

It is a well known fact that the ECJ has an activist role in the development process of the application of principle of transparency within the EU. The primitive position of legal regulation was only composed of article 255 of the EC Treaty and the Council Decision 93/730.

Article 255 para.1 reads as follows:

"Any citizen of the Union, and any natural or legal person residing or having registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and conditions to be defined in accordance with paragraphs 2 and 3.
…"

It is no surprise that the right to access documents is granted for Union citizens and residents. Union citizens should have this right as the right of a citizen as a part of democratic rights against the governors. For residents, it is a right that directly

[239] The phrase taken from the Commission President Jacques Delor's speech is quoted from LODGE,Juliet (1994), *"Transparency and Democratic Legitimacy"*; Journal of Common Market Studies: Volume 32, No. 3, September 1994, pg. 343

[240] Article 5 reads as follows:

"The Community shall act within the limits of powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

[241] NEUWAHL, Nanette A. (1995) *"A Europe Close to the Citizen?"; "A Citizens' Europe: In Search of a New Order",* Allan Rosas & Esko Antola (editors), 1. Edition, London: Sage Publications Ltd., p. 54

concerns their public rights as part of the community even they are not citizens. Therefore, it is restricted to both non -citizens and non-residents of the Union.

According to Weiler and Alston, article 255 is not sufficient itself, for the maintenance of necessary degree of transparency and the Community's enhanced freedom of information policy.[242] Specifically, the principles and conditions laid down under the same article restrict this right and diminish as 'insufficient' with regard to what is meant by Weiler. The limits to the rule in the first paragraph of the article are determined in the second paragraph as follows:

"…

General principles and limits on grounds of public and private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entrance into force of the Treaty of Amsterdam.

…"[243]

The paragraph refers to article 251 (ex article 189b) which regulates common procedures of enacting secondary legislation.

Article 1 of the TEU provides that decisions within the European Union are to be taken "as openly as possible" Consequently; the meaning of this phrase may extend the meaning of transparency not only to access to documents and information but also the opportunity to follow up administrative procedures and decision making mechanisms. Besides, the article 191a of the EC Treaty gives the citizens a right of access to European Parliament, Council and Commission documents.

In general, 'transparency' means openness and accessibility. In administrative law, it means accessibility to the documentation and information by the public. The fine line between the private documentation and information and the public (non-private) documentation and information should be given importance. In some cases the public administration may, however, hold private information and documentation that should be kept safe from public accession in relation to the fundamental right "respect for private life".

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[242] ALSTON, Philip / WEILER, J. H. H. (1999), "An EU Human Rights Policy; *'The EU and Human Rights'"*, Philip Alston (editor), 1. Edition, Oxford: Oxford University Press, p. 60

[243] Art.255 para2

Article 255 of the amended treaty by Amsterdam provided the Union citizens and natural or legal persons residing in a Member State accession to documents with reservation to the principles and conditions defined in the paragraphs 2 and 3 of the same provision. The above mentioned documents are documents of the European Parliament, Council and Commission.

Not only the above mentioned main article but also the secondary legislation with regard to Council Decision 93 / 730 and Regulation 1049/2001 and the Article 42 of the Charter of Fundamental Rights and Freedoms grants a right of access to documents for the European Citizen. The history of evolution of this principle within EC Law starts by the declaration no 17 of the Final Act of the treaty of Maastricht on the right to access to information which is a dimension of the principle. The following summits in Birmingham and Edinburgh included statements for a broader access to documents by citizens, and for a code of conduct of the Council and commission adopting the right to access to their documents. Following the decision of Council No:93/730 enacted, thus, the principle firstly granted by secondary legislation before the main article 225 was brought by the Treaty of Amsterdam.

The content of the principle also broadened in the academic debate later on. O'Neill sets three dimensions of transparency:[244]

1- access to information
2- the underlying intention behind the decision
3- opening decision making process to public participation

In this broad meaning, the principle ensures democratic functioning, administrative efficiency and accountability. On the other hand, it has a distance closing function and provides more participation with regard to NGO participation in the decision making process. By the non-governmental participation it also gives possibility for an indirect control of the administration.

[244]O'NEILL, A.(1998) "*The Right to Community held Documentation as a General Principle of EC Law*" European Public Law , No.4, p.403.

Moreover, the traditions of Member States in the application and understanding of the principle varies and in particular cases clash to each other. Since the principle is very broad and strict in Scandinavian legal culture, it is narrow and not much flexible to be extended to attributing an active duty for administrative staff in British legal culture. In Scandinavian legal culture the extension of the application of the principle goes even further in that the administrative staff has the duty to assist the owner of the inquiry in finding the documents and making an effective search. In this context, the application of the principle has an effect of providing 'diversity' in the legal cultures of Member States and in cases like Hautala[245]enforcing the legal procedures to adjust the interpretation and application of the principle with the same level of highest protection. The Swedish approach to accession to documents has so instant 'high protection' that even it is recognized as a fundamental right.[246] There are also objections to this approach that accession to documents itself can not be a fundamental right.[247]

3.1.3.6 Proportionality, Legality and Legitimate Expectations

Craig refers a proportionality test 'entailing some idea of balance and of a proper relationship between means and ends', and more precise than this, asking the questions[248]:

"is the disputed measures the least restrictive which could be adopted in the circumstances?" "do the means adopted to achieve the correspond to the importance of the aim, and are they necessary for its achievement; is the challenged act suitable and necessary for the achievement of its objectives, and one which does not impose excessive burdens on the individual; what are the relative costs and benefits of the disputed measure?

The stages in a proportionality inquiry can be as follows:[249]

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[245] Case T-14/98 (1999) Hautala v. Council and Case C-353/ 99 Council v. Hautala

[246] For the Swedish approach see Osterdahl, Opennes vs. Secrecy: Public Access to documents in Sweden and the European Union, European Law Review vol:23 1998, p336.

[247] R.W.Davis, Public Access to Community Documents: A Fundamental Human Right?, European Integration Online Papers 3, 1998 no: 8, http://eiop.or.at/eiop/texte/1998-008a.htm

[248] Paul Craig / Graine De Burca, Op.cit, p.350,

[249] Ibid.

"

(i) The relevant interests must be identified

(ii) There must be some ascription of weight or value to those interests, since this is necessary condition precedent to any balancing operation.

(iii) Some view must be taken about whether certain interests can be traded off to achieve other goals at all;

(iv) A decision must be made on whether the public body's decision was indeed proportionate or not in the light of the above consideration. The test could be formulated in any of the weights identified above, and different formulations tend to be used in the context of different types of case. For example, the first version (measure the least restrictive which could be adopted in the circumstances?) will commonly be used in cases where the measure in question is in conflict with a right granted by the Treaty.

(v) *The court will have to decide how intensively it is going to apply any of the tests mentioned above. It is important to realize that all of these tests can be applied more or less intensively, as will become apparent."*

The principle evolved within the Community Law before it has become written, and the guidelines set by Craig are for the application of principle by judicial authorities. These guidelines seem to apply in almost every case before a court. The significant points in this statement are "how to ascribe weight and value to conflicting interests" and "how to determine certain interests to be traded off to achieve other goals and what goals must be achieved in this context?" The response for these questions will clarify the functionality of the principle as to its balancing the conflicting interests.

Various types of cases may appear in the exercise of the principle in Community Law: An individual can argue that his/her rights are restricted by administrative action. Another type may be the contention of excessive administrative penalty. Another type may be the policy choice made by the administrative authorities that is disproportionate with respect to various reasons. The reference to 'authority' may not only concern the Community institutions but also may Member States. The claimant may invoke an action disproportionate of the Member State deriving from the right granted by the Community.

"*...it is true that as persons and groups take part in just arrangements, they acquire claims on one another defined by the publicly recognized rules. Having done various things encouraged by the existing arrangements, they now have certain rights and just distributive*

shares honour these claims. A just scheme, then answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions…"[250]

As it is mentioned by Rawls in the context of 'theory of justice', legitimate expectations are among the principles those are litigious just under subject matter reflections against procedural restrains. The social responsiveness against governmental actions, therefore stand as the potential and passive material of legitimate expectations as a granted right.

Legitimate expectations and legal certainty are two different concepts that have long been broadly used in association with the other. The concept 'legitimate expectation' has relations with a German Law concept "Vertrauensschutz"[251], another principle in addition to proportionality referred by the Courts with respect to Grundgesetz.[252]. In Community law, there have been statistically over 900 cases invoking the principle of 'legitimate expectations' and over 500 'legal certainty' as to the numbers in 1997.[253]

The first aim in legal certainty is the clarity of the community legislation. Not only must the language of the legislation but also its affects be clear and predictable. The aim herein is 'to ensure that situations and legal relationships governed by community law remain foreseeable'. The clarity applies to

a) obligations imposed on individuals
b) The language of laws which sometimes cause ambiguity on their meanings.

The second is the unity and coherence of the Community legal order.

In principle of legitimate expectations, special importance should be given in the context of retroactivity. Craig refers this possibility as exceptional only in cases "where there is a pressing Community objective and where the legitimate expectations to those concerned are duly respected"[254]. In other contexts, the

[250]RAWLS Op.Cit. p.273

[251] USHER, John(1998) *General Principles of EC Law*, Longman, p.54.

[252] It is 'The Federal Constitution of Germany'. It is (truly or mistakenly) translated as 'Basic law'(see Usher, op.cit.)

[253] USHER op. cit.p.52

[254] CRAIG / De BURCA. Op.Cit.p359.

protection of the principle is subject only if the community itself has previously created a situation that may give possibility of legitimate expectation. [255] The difference between the two concepts *legitimate expectation* and *legal certainty* are distinguishing from each other with regard to the time factor.[256] The time is static in legal certainty and not effective as to be a subject to retroactivity.

All of the preceding cases concerned the changes of policy by the Community, which caused damage for individuals. The policy changes in these cases were revoked not because of their being unlawful themselves but their being unlawful as a policy choice breaching the legitimate expectations. This appears to be a public control on the policy choices that even individuals can invoke.

The principle of legal certainty functions as securing the current standing and application of the Community legal order. The 'Actual Retroactivity'[257] is carefully examined for safeguarding the citizens reliance on the current law and planning and acting on behalf of his belief with regard to the results of legal consequences that they may face at the end of their actions. Any retroactivity implementation would cause lack of knowledge about these legal consequences.

3.1.3.7 Subsidiarity and justiciability.

The long run on the codification struggle of this principle is ended by the article 3b of Maastricht Treaty, which follows as:

"*In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community' as well as it is stated within the context of the Treaties"*

Shortly, Article 3b of TEU provided the principle of subsidiarity as the Member State empowerment in the areas which falls within the non-exclusive competence of the

[255] TRIDIMAS, Takis(1999) The General principles of EC Law, Oxford University Press, p.169

[256] ibid.p.170

[257] Craig used this concept, See Craig / De Burca Op.cit. p.357

Community Institutions with respect to the condition if the action would not be achieved better by the community in comparison with a poor achievement of member states.

More specifically, the article 5 paragraph 2 of the EC Treaty should be separated into two parts:

a) The Community should act within the limits of its powers

The competence of the community is limited to some areas in which it has been given power. The limit was reduced and the community competence extended by two developments. The first one is the range of areas in which the community used some form of authority has been expanded by virtue of various major changes in the Treaties. The second one is the Community's legislative competence as a result of the recognition of the implied powers doctrine and via the use of Article 235 as the ECJ has interpreted.

b) The exclusive competence of the community

The article sets out the application scope of the principle in the areas, which fall within the "non-exclusive competence" of the community institutions. The Treaties do not frame the areas that fall or do not fall within the 'exclusive' competence of the community in these terms. Commission's view on this question is that if the treaties impose on the community 'the duty to act' that is in the area that falls within the exclusive competence.[258]

After having defined the current scope of the principle, an examination on its evolutionary process will be helpful to find out the purposive intentions to adopt it in the EU system and its functional expectations.

The concept 'subsidiarity' is not a new - fashioned invention of 1990s political process of establishing a 'union'. On the contrary, it is a fresh and up to date account of *vis a vis* power gaining games of opposite concepts and authorities such as centralisation-decentralisation, high level government-sublevel government,

[258] See 1st report of Commission on Subsidiarity, COM (94) 533

historically, nation state-church. Althusius' 'Politica', made the first attempt to spell the word: subsidiarity as a modem theory of federalism.[259] In this nature of development, the idea of allocation of powers in the divisible sovereignty was attributed to the local institutions in unitary bodies such as nation states. Thus, the criterion "closeness to the citizen" inspired the church that was seeking for an opportunity to remain in power against the non-stoppable development of nation state and its gathering of all powers in the centre under the roof of national sovereignty.

After a long period of silence, recently, the principle is referred to in the Preamble of the Charter of Fundamental Rights and Freedoms of the European Union as proclaimed in Nice on 7 December 2000 and is twice mentioned in the Laeken Declaration on the Future of the European Union on 15 December 2001.

Currently, there are three interpretations of subsidiarity[260]:

a) The Christian democrat interpretation, which is consistent with the historical development of the principle.[261]
b) The German federalist interpretation, which makes it a part of technical allocation of powers, already present in the German Federal Construction.[262]

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[259] In the second half of the 16th century, some of the Dutch calvinists staying as refugees in German territories founded the University of Herborn which was a school of federal theology and a centre of political calvinism. Johannes Althusius was one of the Professors in this school who attacked the doctrine of undivided territorial sovereignty with reference to the rightful ownership of the sovereignty of the federally organized bodies of the people.

[260] See, KERSBERGEN, Kees Van / VERBEEK, Bertjan (1994) "*The Politics of Subsidiarity"*, Journal of Common Market Studies, Vol:32 No:2 p.215

[261] Defendents of subsidiarity in the European Community trace the concept to 20 th century Catholic social philosophy, citing a 1931 Papal Encyclical of Pius XI entitled *Quadragesimo anno*. According to the Document, subsidiarity requires that " (s)maller social units…not be deprived of the possibility and the means for realising that of which they are capable (and) (l)arger units… restrict their activities to spheres which surpass the power and the abilities of the smaller units"

[262] The German constitutional interpretation is similar to the use of principle in German federalism that is balancing of powers between "landern" and the central federal authority. In other words, it is neither centralization nor decentralization, but 'stopping centralization' and securing regional autonomous powers.

c) The conservative British interpretation, a justification of resistance against neofunctional integration within the Community.

The first has already been done above. The second one is the allocation of powers in federal systems[263]. However, the concept is not figuring out a crucial term of federal systems and their constitutionalism, but plainly touches continuing concern to the federalism balance. In other words, the principle has a mechanism that carries out allocational shifts within the federal systems. The question led by the principle is: "What should be the tendency and directions in the allocational shifts: centralization or decentralization?"

Subsidiarity means a preference in governance in favour of the action at the most local level that is not inconsistent with the government's original purposes. George Bermann states this preference in terms of the common governance principles in his article of 1996. [264] It is not a system of substitution, neither use of power interchangeably by different institutions. Therefore, the substitution of government by another level of governance does not mean subsidiarity in any case.[265]

His first reference is 'self determination and accountability'. Self-determination is the first step of participation in self-governance. In addition, it has a democratic sense that ensures autonomy of accountability both in constitution, economy and all policies including sub-level governance. Thus, in the stylistic form, the principle includes self-determination that ensures more 'participation' instead of 'centralization'. In addition, accountability is a form of 'closeness' and 'rationalization'.

Secondly, subsidiarity provides political liberty. In the exercise of subsidiarity, a local government may advance a more liberal and democratic tone of consultation. Political liberty is also a way of 'decentralization' in the means of being liberal, not depending on the central authority.

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[263] There are several examples of the use of this principle in various states such as the US, Canada, Germany, Belgium, etc

[264] BERMANN, George (1994) *Taking Subsidiarity Seriously: Federalism in the European Community and the Unites States*, Columbia Law Review, March Vol:94. p.340

[265] For the concurring view, see KARAKAŞ, A. Işıl (2003) *Avrupa Birliği Hukukunda Anayasal İlkeler*, Yenilik Basımevi, İstanbul, p126

The limited competence of the Community which remains outside the scope of exclusive competence such as environment, consumer protection, Trans-European web, Social Policy are subject to the application of principle.[266] However, this has also a vis a vis impact with the question of 'justiciability' of the principle before the Community Courts and tribunals.

The positions taken by the institutions as regards the application of the principle are noteworthy. The Commission, since the pre-Amsterdam era along with Delors presidency, have coupled the principle initiatively. It is the Commission to decide the policy areas of the Community outside the scope of exclusive competence mentioned under article 5 EC Treaty. The Commission takes "*The positive side of the principle of subsidiarity justifies action on the European level*"[267] The institutional approach seems very clarifying for a possible institutional payoff.

Hecke, makes an agenda of institutional positioning inside the Union in his article.[268] The Council remains very skeptical about the application of the principle. Even though it is the institution that has the task of setting out the basic rules of implementation of the principle of subsidiarity as the author of Treaties and the Protocol, it stays less enthusiastic to implement it by itself.[269] Moreover, the Council "opts for a minimalist approach to the radius of action of EU."[270] The Parliament stands very keen to apply the principle until it came to the point of making amendment on the context of article 5 of the Treaty. At that point there was a real fear of re-nationalization of the community.

The European Court of Justice has almost quite different role than the other institutions when the principle is assumed as a constitutional principle. It is the Court of justice who finally interprets the principle as a constitutional norm.[271] Specifically, the main task of the Court consists of interpreting and applying Treaties including the

[266] TOTH, A.G.(1992) "*The Principle of subsidiarity in the Maastricht Treaty*" CMLRev. p.1093

[267] MOLLERS, Op.cit p.689

[268] HECKE, VAN STEVEN (2003) "*The principle of Subsidiarity: Ten Years of Application in The European Union*", Regional and Federalist Studies Vol. 13 No.1 Franck Cass, London, p.55-80

[269] Ibid. p. 65

[270] İbid. P.66

[271] KARAKAŞ, Op. Cit. p 24

provisions granting the principle of subsidiarity. The Court is extremely hesitant towards the application of the principle. In Bosman and Factortame III the Court rejected the request to apply the principle of subsidiarity. In Tobacco case[272], the Court ruled on the issue compatible with subsidiarity and proportionality principles without making reference to the provisions related with these principles.[273]However, there has never been an annulment case on the grounds of subsidiarity and the provisions regulating this principle, and the indication is that the Court will keep this standing for long.[274]

3.2. Interpretation on outcome of the game

At this stage, it is a duty to cover the interpretation of the game with Vanberg's four different propositions. These propositions, themselves, picture a political system typology that was not proposed before the game was set up. Thus, classical typology of legislature judiciary relations, not surprisingly, appears here. Vanberg, also discussed the four possible propositions with the definitions and equilibrium of the constitutional review game below.

3.2.1. Few Definitions

Before having started to lay out the four propositions and three observations over the results and their interpretation through the outcome of the game, it is necessary to make a few definitions useful for the final evaluation.

The first definition is related with the beliefs of the legislature about its political environment at the stage of responding the court decision.

Definition:[275]

[272] Case C- 491/01, British American Tobacco, Imperial Tobacco 10.12.2002

[273] TRIDIMAS Takis / TRIDIMAS George (2002) *The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?* ; European Journal of Law and Economics Vol.14 p.171-183

[274] CRAIG / DE BURCA, Op. Cit p.137

[275]VANBERG Op.cit. p 351

Assuming that the legislature's subjective belief at the final information set of the game be designated by q(x,y), given that (x,y)∈ {F,A,S} x {T,T̲}. Consequently, replacing the unknowns (x,y) with elements of information set given above over such a sample of q (A,T̲) designates the legislature's subjective belief at the final stage of the game that it is facing an assertive court and the political environment is not transparent.

Definition:[276]

On the assumption that $p^* \cong \frac{\alpha}{\alpha + \beta}$ and $p \cong \frac{C_A}{I_A}$

According to this definition, legislative transparency threshold (p*) is at an equity of legislative resources payoff over a combination of legislative resource payoff and public backlash payoff. The second fragment concerns judicial transparency threshold (p) is a ratio where Assertive court institutional payoff is nominated over the issue payoff of the same type of court as the denominator.

In the part of propositions, there will be more news of these thresholds. The first one is named as 'legislative transparency threshold' which is depended on the legislature's preference parameters. The second one is 'judicial transparency threshold, which is depended upon the assertive court's preference parameters.

The following include four pure strategies due to PBE in the CRG:

3.2.2. Proposition 1 ('Judicial Supremacy')

For $p \geq p^*$ and $r_A + r_S < \frac{\alpha - \varepsilon}{}$

[276] Ibid.

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the following strategy profile constitutes a PBE of the CRG[277]:

Legislature: S_L= {L;$\underline{E}$}

Court: S_C = {c| F; $\underline{c}$| A; $\underline{c}$| S}

The legislature's beliefs at the final information set are given by $q\,(A,T)= \frac{r_A\,p}{r_A + r_S}$

$$q\,(A,\underline{T}) = \frac{r_A\,(1\text{-}p)}{r_A + r_S} \qquad q\,(S,T) = \frac{r_s\,p}{r_A + r_S} \qquad q\,(S,\underline{T}) = \frac{r_A\,(1\text{-}p)}{r_A + r_S}$$

$q\,(F,T) = 0$ and $q\,(F,\underline{T}) = 0$

In this proposition, 'judicial supremacy' equilibrium is characterized. Among the three types of courts, assertive and submissive courts annul the legislation enacted by the legislature. As a final step, legislature complies with the decision of the court. In this sense, the two hostile courts successfully annul the legislation. There are two conditions to be held for this equilibrium. The first condition must be the legislative transparency threshold should be obtained. The second condition is probability of encountering a hostile court must be low enough in case of an annulment of the legislature's act. The first case occurs in a transparent environment that the legislature will not choose to evade the court decision. Finally, the hostile courts, in anticipation of compliance with their decision, declare the statute unconstitutional.

Therefore, considering the case in Article 234,

$$\text{For } p \geq p^* \quad \text{and} \quad r_A + r_S < \frac{\alpha\text{-}\varepsilon}{\alpha}$$

[277] ibid

the following strategy profile constitutes a PBE of the CRG[278]:

Art 234 /1:

Legislature: S_L= {L;E} → L ∈ (L_{EU})

Court: S_C = {c| F; c| A; c| S}

Art 234 /2-3:

Legislature: S_L= {L;E} → L ∈ (L_N)

Court: S_C = {c| F; c| A; c| S}

where in both cases the environment is transparent. (T is not a variable)

The legislature's beliefs at the final information set are given by $q(A,T) = \frac{r_A p}{r_A + r_S}$

$q(S,T) = \frac{r_s p}{r_A + r_S}$ $\qquad q(F,T) = 0$

3.2.3. Proposition 2 ('Autolimitation')

For $p \geq p^*$ and $r_A + r_S < \frac{\alpha - \varepsilon}{\alpha}$

the following strategy profile represent a PBE of the CRG game[279].

Legislature: S_L= {L;E}

[278] ibid.

[279] ibid. p. 352

Court: S_C = {c| F; c| A; c| S}

The legislature's beliefs at the final information set are[280] given by $q\,(A,T) = \frac{r_A\,p}{r_A + r_S}$

$$q\,(A,\underline{T}) = \frac{r_A\,(1\text{-}p)}{r_A + r_S} \qquad q\,(S,T) = \frac{r_s\,p}{r_A + r_S} \qquad q\,(S,\underline{T}) = \frac{r_A\,(1\text{-}p)}{r_A + r_S}$$

$q\,(F,T) = 0$ and $q\,(F,\underline{T}) = 0$

This proposition has equilibrium in characteristics of 'autolimitation'. One of the conditions for this proposition is the representation of the required legislative transparency threshold. However, in this case, the probability of encountering a hostile court rises above the threshold imposed in proposition 1. The first preference of the legislature, in this case, is not to pass the statute. Therefore, the legislature censors itself preemptively in anticipation of a possible attack against the statute attached with an annulment decision. This phenomenon is known as 'autolimitation' and is visible in different courts of Europe. There are insurance systems of legislatures, such as the final procedural demand of a president's final ratification, visible in states like Turkey. Thus, the final actor, in many cases might prefer a constitutional detection of the bill, working as a part of an auto-insurance system. It has been subject to debate in the Turkish public opinion since the current president used the final ratification or turning down preference, according to some policymakers, 'overwhelmingly' in the context of 'constitutionality'. Thus, this type of a single wing autolimitation, in some cases, may spread to the other wing – the Parliament becoming an 'all inclusive' autolimitation.

On the other hand, it is notable that proposition 2 'autolimitation' is depended on the fear of legislature for public backlash after non compliance or a possible evasion attempt. Autolimitation appears in only one type of judicial-executive interaction that occurs in a specific political environment.

[280] ibid.

The protection of fundamental rights and adopting general principles to Community Law such as subsidiarity and transparency resembles and understanding of autolimitation.

There was no document such as the Charter of Fundamental Rights and Freedoms of the Union before 2000. The fifty years between 1950 and 2000 were lacking such a protection document. However, the Court developed the doctrine of fundamental rights under its case law and there was no resistance from the legislature, neither an evasion attempt.[281] The 'nature' itself submitted the issue as the first player. The Member States constitutions already had provisions safeguarding fundamental rights for their people. However, this submission, including requests of recognizing fundamental rights in Community Law[282], from the nature was not even sufficient to compel the legislature to move up. Thus, there was no legislative attempt by the legislature which has the strategy standing s={ L}. The Court initiated the course to develop fundamental rights and the legislature in these 50 years clearly did not attempt to evade. The Final Strategy of the legislature became a sample of autolimitation s = {L, E}.

The same is also true for general principles of law, especially subsidiarity. Some of them are written in Treaties, however, in general terms as to the application scope is left to the

3.2.4. Proposition 3 ('Legislative Supremacy')

For p < M in [p*; p]
The following strategy profile represents a PBE of the CRG game[283]:

[281] However, the question of 'may the Charter or the Constitution, as regards their scope and positioning over the scope of protection of fundamental rights, be evaluated as a partly evasion attempt?' is already raised in the previous chapters; but left unanswered on the ground that this issue has neither a 'black and white' indicator, nor available to be debated under such a specified chapter.
[282] See cases Stork C- 1/58, Stork v. High Authority [1959] ECR 17, Geitling C- 36,37,38&40/ 59 Geitling v. High Authority [1960] ECR 423 Stauder C 29 /69 , Stauder v. City of Ulm [1969] ECR 419
[283] ibid.

Legislature: S_L= {L; E}

Court: S_C = {c| F; c| A; c| S}

The legislature's beliefs at the final information set are given by

$q\,(A,T) = r_A\,p$
$q\,(A,\underline{T}) = r_A\,(1\text{-}p)$
$q\,(S,T) = r_s\,p$
$q\,(S,\underline{T}) = r_A\,(1\text{-p})$
$q\,(F,T) = (1\text{-}\ r_A\ \text{-}\ r_s\,)p$
$q\,(F,\underline{T}) = (1\text{-}\ r_A\ \text{-}\ r_s\,)(1\text{-}\ p)$

In proposition 3, the character of the equilibrium is 'legislative supremacy'. In this option, the game pathway provides a legislation enacted by the legislature which is upheld by the court. Therefore, the legislature is able to implement its policy disregarding the possibility of to be overturned by a court ruling. Thus, the court's preference has no importance for the legislature. Moreover, this equilibrium provides that the policy environment is transparent remains below the level of legislative and judicial transparency thresholds. Consequently, it is likely to be the case to successfully evade a possible negative court decision. Thus, the choice of the legislature will be, at the first step, to enact the legislation and, at the second step, to evade in a situation of a negative court decision. In such equilibrium, the assertive and submissive court prefers to uphold the legislation avoiding a possible evasion on the ground that the probability of winning a confrontation with the legislature is very low.

3.2.5. Proposition 4 ('Jousting')

For $\underline{p} \leq p < p^*$ the following strategy profile represents a PBE of a CRG game[284]:

[284] ibid.

Legislature: S_L= {L;E}

Court: S_C = {c| F; c| A; c| S}

The legislature's beliefs at the final information set[285] are given by

$q\,(A,T) = p$
$q\,(A,\underline{T}) = (1\text{-}p)$
$q\,(S,T) = q\,(S,\underline{T}) = q\,(F,T) = q\,(F,\underline{T}) = 0$

The final proposition is an intermediate equilibrium: 'jousting'. In this case, the legislature evades every decision of the court. The submissive court upholds the legislation regarding the proposal of evasion. However, the assertive court, disregarding the fact that evasion will appear in any case, annuls the legislation in anticipation of legislature's repealing of the policy under the pressure of a public confrontation. The realization of this equilibrium is due to the fact that parameter '*p*' remains between legislative and judicial transparency thresholds. It is necessary to find a transparent environment low enough to provoke the legislature to risk an evasion attempt but high enough for the assertive court to risk annulling the legislation.

Below is a graph for equilibrium predictions in this four strategy game. [286]

[285] İbid.

[286] Prediction table quoted from Vanberg Op.cit. p.353

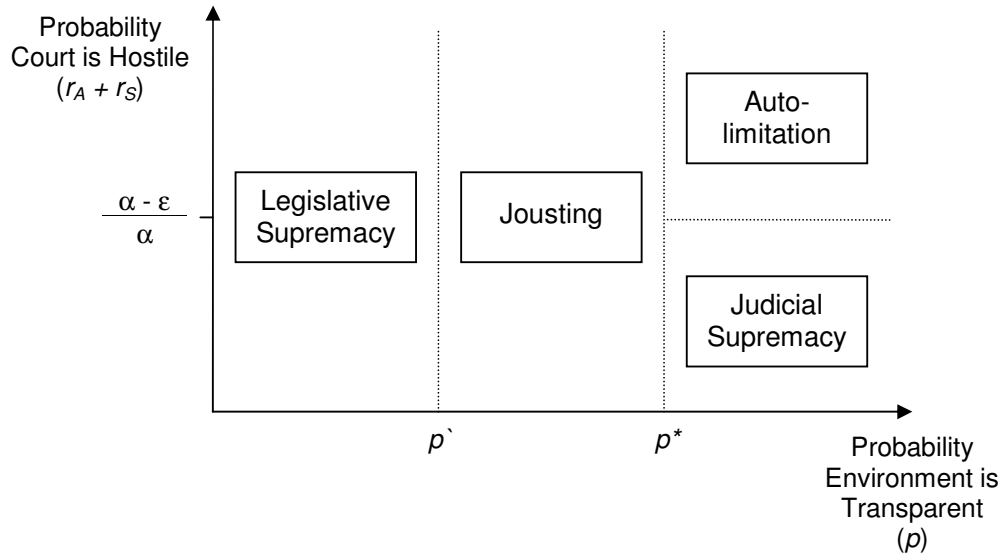


Figure 3.2.Vanberg's Equilibrium Prediction Graph

It is visible that there are four pure strategies PBE of this game. However, the Bayesian model provides a unique equilibrium prediction depending on the parameters '*p'*, 'r_A' and 'r_s'. As it is clearly indicated below in figure 2, there are only two cases to consider: $p^* > \underline{p}$ and $\underline{p} \geq p^*$. If p meets the legislative transparency threshold (p*) and the probability of meeting a hostile court is high, the model predicts the autolimitation equilibrium. If the legislative transparency threshold is met but the probability of meeting a hostile court is low, the judicial supremacy equilibrium appears. If '*p*' is in between the legislative transparency threshold and the judicial transparency threshold, the jousting equilibrium exists. If the judicial transparency threshold is not met, the expected conclusion is legislative supremacy.

CONCLUSION

"*.. In the 'laying down' of binding constitutional doctrine, there is inevitably an element of constitutional (self-) positioning of the Court itself. When the Court makes those determinations, it is implicitly or explicitly placing itself in a power situation as the Community institution with the ultimate authority to make such structural determinations.*

This in turn begs the deeper question: Why should the Court be listened to? What is the power, the compliance pull of its narrative?[287]

[287] WEILER, J. H.H., Op.Cit p. 516

Reference to Weingast: re-interpretation of separation of powers - diagram

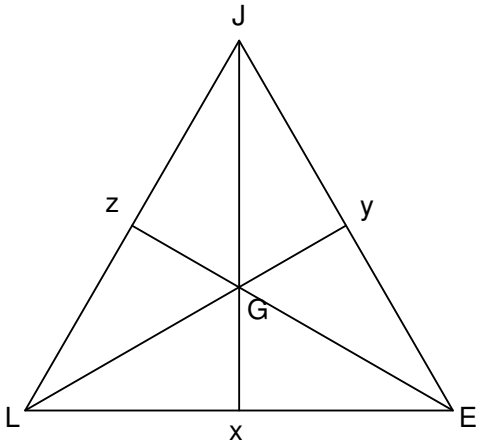
The long tale of the judicial relations under the framework of the European Court of Justice has no end. Nevertheless, number of academic studies is aiming to enlighten different dimensions of this process. In general, behaviour of the Court that is much concerned for various propositions is not often used to classify the Court over a typology dimension. For this reason, the purpose of this study is not to visualize a determinant of hundreds or thousands of cases, which could be studied matching with every type of jurisdiction exercised by the Court. However, even this would not be an effective approach to define a substantive Court behaviour under a game theoretical approach. Nor such massive study could be labelled 'scientific' under the general understanding and methodology of social science. Contrarily, for determining the scope of the Court's typology, the frontiers, which are drawn to be the most extensive and excessive steps of the Court's behaviour, may lay out and provide the sufficient material. Thus, these revolutionary steps such as the adoption of *doctrine of direct effect* or development of the doctrine of *fundamental rights*, or the court behaviour in Cassis de Dijon are indicative examples, constitute fragments of the above mentioned frontiers. This study has re-considered and revised some of these revolutionary steps of the Court behaviour for its game theoretical approach to pick up a court typology. This has been useful for the understanding of judicial politics in the EU which is the interaction between the players of the extensive form game applied in this study.

Nevertheless, this study has shown that the modelling of Weingast is not useful for the full understanding of Court's behaviour under judiciary legislature relations. The dimension

_____I_____I_____I_____I_____I___

L X **E** Y **C**

is a single dimension pointing out the policy compromise points X between the legislature (L) and executive (E), and point Y between executive (E) and judiciary (J). However, this diagram ignores the possible compromise point between legislature (L) and judiciary (J). In this study, up to this section, these relations between the judiciary and legislature have been debated. They are considerable and have undeniable significance to comment about The Court. Therefore, there is no use of staying with a single dimension line positing these two powers in inverse poles. What might be an alternative suggestion? Maybe, one should concentrate on action spaces or areas rather than the distance between various policy standings. As soon as the political actors generally prefer to strengthen their ideal policy standing via protecting an area of practice, these areas and their neighbourhood and interaction should be determined on a surface of multi-dimension. Thinking three powers of state as three different corners of a triangle as it is visible in figure, the area between these three points should be the area of inter-institutional practice. The triangle is a product of constitution. Thus, it is the type and spirit of the constitution determining what type of a triangle is to be drawn up. The distance between the corners of the triangle and the scope of areas in such a triangle is a constitutional consideration. The assumption in figure is an equilateral triangle where allocation is equally made between the three powers.



Between these three corners there are mid points where 'X' is a compromise point between the legislature and executive

'y' is a compromise point between executive and judiciary

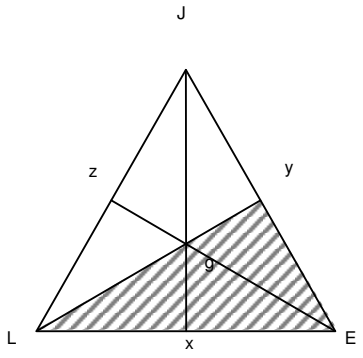
'z' is a compromise point between legislature and judiciary.

,The point 'z' that is ignored in the Weingast diagram is a central issue in the constitutional review game. The strategic expectations of legislature and judiciary *vice versa* on possible counter attacks of 'annulment' and 'evasion' are balanced at the point 'z'.

The ‘G’ point, which is the centre of gravity of the triangle, is the hearth of the system. Under the equilateral design, the lines and distances are |LG|= |EG|= |JG| which also means that

|xG| = |yG| = |zG| where |Lx| = |xE| and |Ey|= |yJ| and |Lz| = |zJ|

The figure above is only an assumption of a well designed separation of powers. In such an assumption the area influenced by powers of state are equally shared. However, this might be different for other designs of institutional balance and may either change as an outcome of a possible clash of institutional prerogatives. The first issue which is the different balance might be as a result of constitutional design. The second might be a matter of exercise of power by institutions. An institution may prefer the influence a larger area than the constitution renders for that institution.

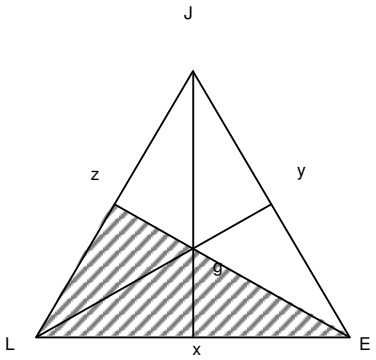


LyE triangle

The figure above shows the executive’s area of influence within the shaded part. However, by different means like ‘bureaucratic drift’, executive always tries to expand this area. The point ‘y’ is the maximum point that the judiciary confirms such an expansion. However, friendly courts, in many cases might also give consent to a move of ‘y’ up to ‘E’.

Nevertheless, the model of the shaded area provides a very friendly judicial review while taking the ideal policy standing of the Court (J) towards the point (y) which is closer to the policy standing of the executive.

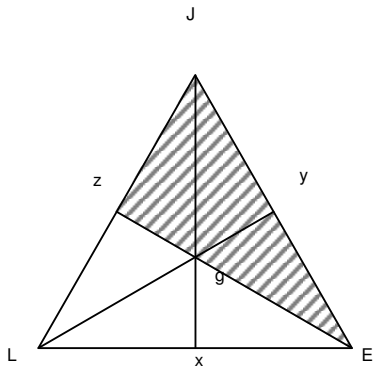
Alternatively, there may be an institutional design where legislature overweighs the others as the most powerful and respected part of state in society.



LzE triangle

One can observe from the figure on the left that judiciary has a concession on constitutional review that the ideal policy position (J) compromise to (z). In such a system, again, the Court is the most powerless and friendly institution of political order.

This type of a design may be deemed to be close to legislative supremacy where a legislature renders to be able to move the centre of the system somewhere between (L) and (G)



JzE triangle

Another option may be the consensus of legislature. The legislature operates consistent with the executive and the judiciary. The necessary legislative action is required by the executive and reviewed by the Court within the constitutional frontiers.

As it is seen in the diagram on the left, the policy standing of legislature (L) is approximated to (z) and (G) where the distance to the ideal positions of executive (E) and judiciary (J) is shortened.

Other possible types of systems and their figures could be considered. However, there is no use for that since the purpose for the triangle figuring of separation of powers has been achieved with the explanation above. The crucial point in this diagram is the centre of gravity (G). No matter what type of triangle is at present, the (G) point is always at the same distance to the three corners. However, the distance of policy compromise points are subject to change. Therefore, grandness has to be given to the distance between the compromise points and the center of gravity which is directly proportionate to the area of influence by the three powers.

Observations and European Court's Judicial Supremacy

The game theoretical approach requires observations on players and interaction between players' payoffs. It is gravely important to submit these observations to make sense of an outcome for the game. This is also true for the constitutional review game of Bayesian model.

Observation 1

The powers conferred to the players of inter institutional bargaining between the constitutional court and a legislature *vice versa* depends on the transparency of the environment which they operate. If the political environment is transparent enough to publicize a legislative evasion attempt, this makes the court stronger. In cases of autolimitation and judicial supremacy equilibria, both hostile courts may prevent implementation of the legislation notwithstanding the legislature's preferences.

Observation 2

The court becomes less deferential and more powerful as the support it can expect from the public in a confrontation with the legislature increases.

Consequently, there is inverse proportionality between the 'β' and legislative transparency threshold. Therefore, the legislative transparency threshold increases as the 'β' decrease and both hostile courts will annul the statute as they expect compliance after their decisions. The autolimitation and judicial supremacy equilibria are expected to be realized even in less transparent environments. According to some authors[288], this is assumption is true for the EU. The Environment is less transparent because of various elements of the political sphere. Among these can be counted the preliminary works at the European University Institute, green papers, and white papers, action programs those are often only known to the specialist… Moreover there is another point where the European Parliament should take action. Unless the Parliament intervenes in legislative procedures earlier and more actively than hitherto, and should publicize them so as to create more transparency and understanding of such plans, it is difficult to claim the environment is transparent. As regards, the Council and national agencies, negotiations should also be maximized to prevent Council deliberations from degenerating secret proceedings.

[288] See MOLLERS, Op. Cit.

On the other hand, the court becomes less respectful as its public support grows and accordingly, greater public opposition to an evasion attempt strengthens the court's dickering position.

Observation 3

Parallel to the increase of the political importance of the issue under review, courts which remain hostile to the legislation becomes more deferential and less powerful in using their powers of review.

In this case the proportion is a direct one. The legislative transparency threshold increases as the α increase. Therefore, there are rigid circumstances to be ensured for autolimitation and judicial supremacy equilibria. Substantively, it is a visible fact that the political ventures of the issue under review increase for the legislature. The submissive court is likely to uphold the statute under review while assertive court is likely to be evaded.

As a result, it is obvious that legal and constitutional considerations are not the only factors that determine the court's type space. The political environment, including the questions of transparency and public support is the other effective factor. The main idea of court's strategic behavior within the legislative-judiciary interaction is a recent debate of judicial politics. Despite the fact that some authors never accept constraints such as strategic considerations, some other authors accept these constraints very crucial. The Bayesian model evokes both of these views. Remembering propositions 1 and 2, there is no need to act in strategic behavior for the court, while there is no risk of non-compliance. In this case, the public back up for the court is strong (β is large) and the threat of public censure is considerable while the legislative reactions to a court decision are easily to be monitored by citizens (p is large). Otherwise, there is the option where the question is centralized on the problem of compliance. Remembering propositions 3 and 4, the court may prefer to overturn legislation and defer legislature.

The innermost issue in these observations is the issue of 'transparency'. There are three essential elements of transparency considered in this context:

The first one is the institutional structuring of the legislature. This element has an undeniable affect on the sustainability of transparency since the permanency of the opportunity given to citizens to 'monitor the legislative act' must be ensured within institutional structuring. What is meant by 'institutional structuring' is the institutional structure in political environment that determines the design of institutional set up in legislative decision making. Vanberg compares classical parliamentary system with presidential system[289] and concludes presidential system is more transparent with regard to the fact that dual executive has a balance on the ground of restraining counter powers.

In the political environment of the EU, the institutional design is set up under a procedural balance between the legislative powers: the commission, the council and the parliament, and each has various interactions between each other. However, specifically and particularly, the inter-institutional monitoring mechanism, namely the 'comitology' procedure' is set up between the big brothers of legislative process which are the commission and the council. Thus, it becomes a visible fact to give primacy to focus on comitology procedure.

In the European Union (EU), "comitology" committees of member-state representatives assist or supervise the Commission in its implementation of European Community (EC) legislation. Through comitology, The Commission's relations with Council have become more structured. Council and Commission share the executive function in the Union and preferred method of conducting the execution of policies is through the creation of committees.

Comitology committees can be seen as the "dual-executive" pillars contributing to the functioning of the EU's engine since the beginning of the 1960s. They have become a pivotal element in the implementing process of EU legislation, linking the European and the Member States level. [290] These committees are an arena in which

[289] VANBERG, Op. Cit. p. 354

[290] Council Decision of 13 July 1987 provides a number of important aspects: it introduces non-binding criteria for determining the procedure by which implementing measures are to be adopted; it simplifies the various comitology procedures and increases the involvement of the European Parliament in cases where the basic instrument conferring implementing powers on the Commission was adopted

Commission officials can play a decisive role and a mechanism with which they evince considerable satisfaction; the reasons for this satisfaction seem to be that they provide a business-like yet informal setting for largely technical and problem-solving interactions with officials from the member states from which politicians – whether national politicians or the College of Commissioners – can largely be excluded.[291] The members in these committees are on the one hand confronted with having to locate solutions that are issue-specific and have to be established by a majority of the Member States and on the other hand have to focus on keeping up with national interests, as the grades achieved still have to be met with acceptance "back home". The involvement of scientific experts and private interests in the process of policy implementation and regulation is a common feature of most public administration systems. And on high-profile policy issues conflict emerges between the Commission and the national experts, and between experts from different member states.[292]

Finally, as regards comitology, the workers of commission and council has own interest in possible evasion attempt of a court overturned issue within the context of legislation. This institutional arrangement has an intra institutional monitoring process which gives a value added increase to parameter 'p' as legislative transparency threshold.

Another issue for the first element is the parameter 'p*' which is transparency deriving from the institutional structure of judiciary. However, in this case, there is no visible transparency element arising from institutional set up of judiciary. Contrarily, the access to courts and principles securing openness to public are arising from

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under the co-decision procedure. The new Decision will not lead to any dramatic shift of power between the institutions involved in comitology: the Commission will remain the most important "player in the game", and the role of the European Parliament will remain rather limited. Only the amendments concerning the Regulatory Committee Procedure will cause a shift of power between the Commission and Council and its affects are, however, limited since both the Commission and the Council "win" in one case and "lose" in the other.

[291] STEVENS, Ann & STEVENS, Handley , (2001)*"Brussels Bureaucrats? The Administration of the European Union"*,1. Edition, Hampshire: Palgrave, p. 149

[292] HIX, Op Cit. p 45

legislation in force. Thus, it is not contentious to claim an institutional set up affect to parameter 'p*' symbolizing judicial transparency threshold.

Second element that affects transparency is the exogenic issues within the scope of some specific decisions. Other than the effect of court's credibility in a political system, some external factors those include specific instruments in court rulings take public attention more than the average attention to other court rulings. Greater public awareness of the case leads to a more transparent political environment. Sometimes non-governmental organizations, other different interest groups and media may act as 'watchdogs' over the court's anticipated ruling.

Abovementioned focus on transparency that guides to where the public opinion stands for is sufficient and useful. However, there is another issue that needs to be clarified: Where the Court stands? It has been so clear in this study that the judge in the ECJ's bench is not keen to wait as a character of a neutral judge. Consequently, a dangerous argument comes up quiet close to the door of justice: Activism, or not? It seems that it is useful to make few comments on activism after approving the fact that the Court is hostile in any case under a system of judicial supremacy.

Recalling Judicial Activism?

Judicial activism is deemed as a dangerous phenomenon in almost all legal systems[293]. A broad meaning of judicial activism might be the application of law standing far beyond the written rules in texts or in a single context or the teleological approach even different from the *travaux preporatoir*.

In this study, as it is clearly observed, the behaviour of the European Court of Justice is characterized to be hostile. A hostile court is mostly an activist court that generally upholds a bill on the grounds of constitution which is beyond the written text and sometimes beyond the teleological spirit. However, as it is clarified above, within the observations, the judicial transparency threshold is important. Judiciary considers the

[293] DEHOUSSE, Op. Cit., p. 121

institutional payoff while the issue payoff is not a prevailing issue. Thus, under such a condition the Court will prefer to keep in autolimitation.

Contrarily, issue payoff might be extremely high in some cases. The issue may affect even the constitutional element of a political system. A concern of a secondary nature such as institutional credibility may not even be thought of. Schepel expresses such a position as follows:

"The rise and fall of the ECJ's activism in Dehousse's version is an elegant tale of quasi-natural evolution of judicial constitution building"[294]

If a Court has judicial supremacy at a degree of judicial constitutional building, it is likely to be an assertive Court in Dehousse's version. Activism, a concept that has vague frontiers, is a product of judicial politics in its general meaning. In judicial politics, there is always a legitimation for judicial activism. In the case of ECJ, the excuse is 'judicial constitution building'. Not surprisingly, the Court will take incentive and a step forward if it thinks it is given a duty to build up a constitution. However, this type of incentive used by the Court must be restricted in a way. How to set up the borders is the problem. The automatically operating constitutional boundaries may take place in a way Shapiro argues as follows:

"*a reviewing court is a useful device for any political principal delegating authority to a designated agent, as the Member States did when they created the ECSC. Where 'constitutional' boundaries are set, boundary conflicts arise. Where principal – agent agreements are made, principal – agent conflicts arise. A predetermined third party dispute resolver is convenient in such situations. When a principal employs an agent with certain pre-established institutional characteristics, he must anticipate that the agent will act characteristically until dismissed*"[295].

However, interests of principal and agent are inherently different. Principal wants to control the agent, but the agent tries to catch as much authority and autonomy from

[294] SCHEPEL, Op.Cit. p.460

[295] SHAPIRO, Op.Cit., p.327-329.

the principal as possible.[296] The public opinion generally reflects the principle's emotions on the positioning of the agent. A constitutional review court does not necessarily ignore public opinion reflecting the principles view. Subsequently, it may decide to use the power derived from principle: a power to monitor the use of power by the legislature. Under these circumstances, it is highly doubtful that a judge of constitutional court may ignore political perceptions upon these interactions. The same is true for the position of the judge in the European Court's bench. It is an undeniable fact that "*The Court's 'Constitutionalization' of the Treaties has thus 'juridified' Community politics, a process that has led inevitably to the 'politicization' of Community Law*"[297]

The opponents' view that attacks the activism deserves to be considered. According to this view, It is not difficult to determine where law ends and policy begins or at least where 'legitimate policy-making' ends. Accordingly, the users of judicial power must stay apart from non-legal source of inspiration and keeps holding the formula of 'original intent' The invention 'direct effect' held at Van Gend En Loos ignored the original intent behind article 12 of EEC or not? This question has been asked by many lawyers of Europe dangerously positioning themselves as the Court in some cases do against the distinction 'law' and 'politics'. However, it is highly doubtful that the Court feels itself bounded with such a distinction. Maybe the Court feels more vigorous as an institution of Community more than an adjudicatory body. The Court in Van Gend En Loos, regarding the Member States' submissions about the case, has conflicted a fact which 'proves' that 'direct effect' did not form part of the founders intentions. [298]

Either this behavior is labeled activist or not, last words on this study should consider a fact which has not found place yet in this study. This fact is the difficult position of judge delivering the decision on European Union Law, the issue of future. It is a necessity for me to quote the American Jurist J.C:Gray who was also fond of quoting the following words of Bishop Benjamin Hoadly contained in a sermon delivered before the King in 1717:

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[296] ALTER, Karen J.(1998) "Who Are the Masters of the Treaty?: European Governments and the European Court of Justice" 1998. in International organization 52, 1, p.121-147, The IO Foundation and

Massachusetts Institute of Technology, p.129 footnote 29

[297] SCHEPEL, Op.Cit. p.461

[298] see RASMUSSEN Op.Cit.

"Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them"[299]

The members of ECJ are around the chamber of a victimized virgin accused by the Roman Inquisition and desperately seeking for help. Either they save the system or sacrifice it for the cost of populist policies. They chose the first one that renders even arduous tasks such as interpreting, decision making, gap filling, doctrine developing and constitutional building. They have to stay hostile to guard the system; they have to behave assertive to apply the true strategy that works for this purpose.

[299] GRAY, J.C (1909) *The Nature and Sources of the Law*, Columbia University Pres, New York, p.125,172

REFERENCES

BOOKS & ARTICLES IN EDITED BOOKS

ARAT, Tuğrul, (1989) *Avrupa Toplulukları Adalet Divanı*, Avrupa Toplulukları Araştırma ve Uygulama Merkezi Yayınları, Ankara

ALSTON, Philip & WEILER J. H. H.(1999), "An EU Human Rights Policy"; *"The EU and Human Rights"*, Philip Alston (ed.), 1. Edition, Oxford University Press

ALSTON, Philip (1999); "An Ever Closer Union in Need of a Human Rights Policy: The European Union and the Human Rights"; *"The EU and Human Rights"*, Philip ALSTON & J. H. H. WEILER (eds) 1. Edition, Oxford: Oxford University Press

BECKER, L. Theodore (1970) Comparative Judicial Politics: The Political Functioning of Courts: Rand Mc Nelly, Chicago

BENGOETXEA Joxerramon / **Mac CORMICK** Neil / **SORIANO** Leonor Moral (2000), Integration and Integrity in the Legal Reasoning of the European Court of Justice**,** pp.43-82, in DE BURCA Grainne/ WEILER Joseph H.H. (eds) The European Court of Justice Oxford University Press

BERCUSSON, Brian (2003); European Labor law and the EU Charter of Fundamental Rights, ETUI Publishers, Brussels

BROWNLIE, Ian (1983): System of the Law of Nations: State Responsibility, Oxford University Press

CRAIG, Paul, **DE BÚRCA**, Gráinne, (2003) *EU Law Text, Cases and Materials*, Third Edition, Oxford University Pres

GRAY, John Chipman (1909) *The Nature and Sources of the Law*, Columbia University Pres, New York

DAMASKA, Mirjan R. (1986) The Faces of justice and State Authority, Yale University Press

DEHOUSSE, Renaud, (1998) The European Court of Justice: The Political of Judicial Integration, St. Martin's Press, NY

DUPARC, Christiane (1992); *"The European Community and Human Rights"*, Brussels: Office for Official Publications of the European Communities

EASTON, David (1953) The Poltical System, New York, Knopf

FULLER Lon, (1964) *The Morality of Law*, Yale University Press

GAMBARELLI, Gianfranco / OWEN Guillermo; *Theory and Decision* (2004), Kluwer Academic, Netherlands

GÜRİŞ, Selahattin & **BÜLBÜL**, Şahamet (1995); Olasılık, Marmara Üniversitesi Nİhad Sayar Eğitim Vakfı

HARTLEY, Trevor C.(2003) *The Foundations of European Community Law*, 4th edition, Oxford University Press

HIX, Simon (2000) The political System Of Europe: Palgrave: London

JAKOB, Herbert / **BLANKENBURG**, Erhard / **KRITZER,** Herbert M./ **PROVINE** Doris Marie, &**SANDERS**, Joseph (1996): Courts, Law &Politics in Comparative Perspective, New Haven/London: Yale University Press

KARAKAŞ, A. Işıl (2003) *Avrupa Birliği Hukukunda Anayasal İlkeler*, Yenilik Basımevi, İstanbul

KOSTAKOPOULOU Theodora, (2001) *Citizenship, Identity and Immigration in the European Union*. Manchester University Press: 2001

LYONS, David (1987) Constitutional Interpretation and Original Meaning, Jules Coleman &Ellen Frankel Paul, Philosophy and Law, Basil Blackwell , Oxford

MADISON, James/ **HAMILTON**, Alexander /**JAY**, John (1987): The Federalist Papers, Penguin, London

MALANCZUK, Peter (1997), Akehurst's Modern Introduction to International Law, Routledge

MORE, Gillian (1999) *The principle of Equal Treatment: From Market Unifier to Fundamental Right?*, in Paul Craig / Grainne De Burca, (eds)The Evolution of EU Law, Oxford University press 1999

NASH, John Forbes (1996) *The Bargaining Problem*, Econometrica 18 in Essays on Game Theory, Edgar Elgar Publishing, Vermount (US)

NEUWAHL, Nanette A. (1995) "A Europe Close to the Citizen?"; *"A Citizens' Europe: In Search of a New Order"*, Allan Rosas & Esko Antola (editors), 1. Edition, London: Sage Publications Ltd.

RAWLS, John: (2000) *A Theory of Justice*, Oxford

SCHEPEL Harm and **BLANKENBURG** Erhard, (2001) Mobilizing the European Court of Justice in (WEILER JHH / DE BURCA G. Eds) The European Court of Justice

SHAPIRO, Martin (1981): Courts: A Comparative and Political Analysis: University of Chicago Pres: Chicago

SHAPIRO, Martin (1999) "The evolution of EU law" : in CRAIG & De BURCA Grainne (eds.) "The European Court of Justice" Oxford University Press.

SHAW, M (1997) International Law, Cambridge University Press

SHKLAR, JN: (1964) *Legalism*, Cambridge/ Harvard University Pres

SMIT, Hans, **HERZOG**, E.Peter,(1976) *The Law of the European Economic Community A Commentary on the ECC Treaty*, Mathew Bander, New York

STEVENS, Ann & **STEVENS**, Handley (2001)*"Brussels Bureaucrats? The Administration of the European Union"*,1. Edition, Hampshire: Palgrave

ROSAMOND, Ben (2000); *Theories of European Integration*, chaps 2-3-6, Palgrave Macmillan

TATE, Neal. C, "Judicial Institutions in Cross-National Perspective: toward integrating Courts into the Comparative Study of Politics" in John R. Schmidhauser (ed.) (1987) Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis, Butterworths. London

TEKİNALP, Ünal, TEKİNALP Gülören (1997), *Avrupa Birliği Hukuku*, Beta, İstanbul

TEZCAN, Ercüment (2002), Avrupa Birliği Hukuku'nda Birey. İletişim Yayınları. İstanbul

TRIDIMAS, Takis (1999) The General principles of EC Law, Oxford University Press

USHER, John (1998) General Principles of EC Law, Longman

VANBERG, George (2001) "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review" American Journal of Political Science, Vol.45. April, No. 2,

WATTS, Sir Arthur / **JENNINGS**, Sir Robert (1992) Oppenheim's International Law, 9th edition Vol.1 Peace

WEATHERILL, Stephen / **BEAUMONT**, Paul (1999) *EU Law*, Penguin, London

WECHSLER, Herbert (1961) *Principles, Politics and Fundamental Law*, Cambridge/ Harvard University Pres

PERIODICALS

BETLEM, Gerrit (2002), The Doctrine of Consistent Interpretation- Managing Legal Uncertainty, Oxford Journal of Legal Studies, Vol 22, no.3

BERMANN, George (1994) *Taking Subsidiarity Seriously: Federalism in the European Community and the Unites States*, Columbia Law Review, March Vol:94.

BOGDANDY, Armin von, (2000) Common Market Law Review; Volume: 37, November

COPPEL Jason / **O'NEILL**, Aidan (1992) *'The European Court of Justice: Taking rights Seriously'*, Common Market Law Review.vol.29

DAUSES, Manfred A., (1985) "The Protection of fundamental rights in the Community legal order", European Law Review, Vol 10

FISS, Owen M, (1984) "Against Settlement" Yale Law Journal, Vol. 93

HARSANYI, John C (1967)"Games with Incomplete Information Played by Bayesian Players I II III" Journal of Management Science Vol 14

HECKE, Van Steven(2003) "*The principle of Subsidiarity: Ten Years of Application in The European Union*", Regional and Federalist Studies Vol. 13 No.1 Franck Cass, London

KERSBERGEN Kees Van & **VERBEEK** Bertjan (1994) *The Politics of Subsidiarity*, Journal of Common Market Studies, London,Vol:32 No:2

LENAERTS, Koen and **SMIJTER** , Eddy (2001) *"Bill of Rights" for the European Union*, Common Market Law Review, volume 38, number2, April 2001

LODGE, Juliet (1994), *"Transparency and Democratic Legitimacy"*; Journal of Common Market Studies: Volume 32, No. 3, September.

MOLLERS, Thomas M. J.(2000) *The Role of Law in European Integration*. The American Journal of Comparative Law, Vol 48 No.4

O'NEILL, Aidan (1998) *"The Right to Community held Documentation as a General Principle of EC Law"* , European Public Law, Vol 4

OSTERDAHL, Inger (1998) *Opennes vs. Secrecy: Public Access to documents in Sweden and the European Union*, European Law Review vol:23 1998

RASMUSSEN, Hjalte. (2000) '*Remedying the Crumbling EC Judicial System*' CMLRev Vol 37.

PESCATORE, Pierre (1983) *The Doctrine of Direct Effect: An infant Disease of Community Law*, 8 EL Rev. 155,158

PHELAN, Diarmuid Rossa (1992), Right to life of the Unborn v. promotion of the trade in Services: The European Court of justice and the Normative Shaping of the European Union, Modern Law Review, vol 55

PRECHAL, Sacha, (1998) *Community Law in National Courts: The Lessons from Van Schijndel*, Common Market Law Review, Volume 35, Number 3

TRIDIMAS Takis & **TRIDIMAS** George (2002) *The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?* ; European Journal of law and economics Vol.14

WEILER, J.H.H. (2001) Epilogue: The Judicial Apres Nice, The European Court of Justice DE BURCA/WEILER (eds) Oxford University Pres.

WEILER, J. H.H., A Quiet Revolution: "The European Court of justice and its Interlocutors", Comparative Political Studies 26; 4 (1994, Jan)

WEILER, J. H.H. / **LOCKHART** N.J.S. (1995) '*Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence*', Common Market Law Review Vol 51.

INTERNET RESOURCES

DAVIS, R.W (1998) Public Access to Community Documents: A Fundamental Human Right?, European Integration Online Papers 3, 1998 no: 8, http://eiop.or.at/eiop/texte/1998-008a.htm

FOSSUM, John Erik. *THE EUROPEAN CHARTER – Between deep Diversity and Constitutional Patriotism?* ARENA Working Paper 5/03. p 11 http://www.arena.uio.no/

LIISBERG, Jonas Bering (2001) Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?, Jean Monnet Working paper 4/01 http://www.jeanmonnetprogram.org/papers/01/01-?-.html

LINDFELT, Mats (2001). The Implications of the Proposed EU Charter of Fundamental Rights, Abo Academy, Institute of human Rights, Online Working Papers http://www.abo.fi/instut/imr/degree_programmes/norfa/mats2_implications.pdf

SWEET, Alec Stone, **BRUNELL** Thomas L. (1997) Jean Monnet Working Papers, Jean Monnet Center for International and Regional Economic Law and Justice NYU School of Law
http://www.jeanmonnetprogram.org/papers/97/97-14-.html

REED, J.W.R.(1995) "*Political Review of the European Court of Justice and its Jurisprudence*"
http://www.jeanmonnetprogram.org/papers/95/95-12-.html

ROCHERE, Jacqueline Dutheil de la (2004) The EU Charter of Fundamental Rights, online papers of 'Perspectives of the Nice Treaty and the Intergovernmental

Conference in 2004'. p.44
http://www.ecln.net/elements/constitutional_debate/perspective2004/part1/1_04.html

PREUS, Ulrich K., "Auf der Suche nach Europas Verfassung", Transit Europäische Revue, http://www.iwm.at/t-17txt6.htm, accessed on 12.01.2006

ALACAOĞULLARI M, *Ombudsman in EU and Turkey*, http://www.lightmillennium.org/newyear_03/maogullari_ombudsman.html , accessed on 10.01.2006

Manheim University online Glossary on http://www.sfb504.uni-mannheim.de/glossary/bayes.htm. accessed on 10.01.2006

Wikipedia, online encyclopedia at http://en.wikipedia.org/wiki/Bayes_factors accessed on 11.1.2006

OTHER RESOURCES

House Of Lords, Session 2002–03 6th report, The future status of the EU Charter of Fundamental Rights

TABLE OF CASES

European Union Law

Case 1/58, Stork v. High Authority[1959] ECR 17

Case 36-37-38 and 40/59, Geitling v High Authority [1960] ECR 423

Case 6/64 Costa v. ENEL [1964] ECR 585

Case 40/64, Sgarlata and others v Commission [1965] ECR 215

Case 29/69, Stauder v. Ulm, [1969] ECR 419

Case 11/ 70; Internationale Handelsgesellschaft v Einführ und Vorratstelle für Getriede und Futtermittel [1970] ECR 1125

Case 43/71 Politi v. Italy [1971] ECR 1039

Case 4/73, Nold v. Commission, [1974] ECR 491, [1974] 2 CMLR 338

Case H.P Bulmer Ltd. v. J. Bollinger SA [1974] 2 WLR 202

Case C-128/78 Commission v United Kingdom [1979] ECR 419

Case 246/80 C. Broekmeulen v. Husiarts Registratie Commissie [1981] ECR 2311

C 193/80 Commission v. Italy' [1981] ECR 3019

Case 102/81 Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG and Co. KG [1982] ECR 1095

Case 152/82 [1983] ECR 2323

Case 325/82 Commission v Germany [1984] ECR 777

Case C- 294/83 Les Verts v. The European Parliament [1986] ECR 1339

Case C-14/83, Von Colson and Kaman v. Land Noerdhein Westfalen [1984] ECR 1891

Case 154/85 Commission v. Italy [1987] ECR 2717

Case C-80/86, Criminal proceedings against Kolpinghuis Nijmegen BV[1987] ECR 3969

Case C-12/86 Demirel v. SchwabischGmündstadt, [1987] ECR 3719

Case C - 302 / 87 Parliament v Council [1988] ECR 5615

Case C – 70 / 88 Parliament v Council [1990] ECR – I 2041

Case C-106/89, [1990] ECR I- 4135 Marleasing SA v. LA Commercial Internacionale de Alimentaciaon SA

Case C-146/89 Commission v United Kingdom [1991] ECR I-3533

Case C-192/89 Sevince v. Staatsecretairet van Justitite [1990] ECR I- 03461

Case C-209/89 Commission v Italy [1991] ECR I- 1575
Case C-237/91 Kuş v Landeshauptstadt Wiesbaden.[1992] ECR I-06781
Case C-46 and 48/93, *Brasserie du Pêcheur v. Germany* and *R. v. Secretary of State for Transport, ex. p. Factortame*, [1996] E.C.R. I-4845.
Case C-259/94 Commission v Greece [1995]ECR I- 1947
Case T-14/98 (1999) Hautala v. Council and Case C-353/ 99 Council v. Hautala
Case C- 491/01, British American Tobacco, Imperial Tobacco 10.12.2002

Public International Law

Corfu Channel, Merits, I.C.J. Reports *1949*
German Settlers in Poland Case, 1923, P.C.I.J., Series B, No. 6
Neer Claim 4 UNRIAA, p.60 (1926); 3A D
Phillips Petroleum Co. Iran v. Islamic Republic of Iran (1989) 21 Iran-U.S.C.T.R. 79
Phosphates in Morocco*,* Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74
United States Diplomatic and Consular Staff in Tehran*,* I.C.J. Reports 1980