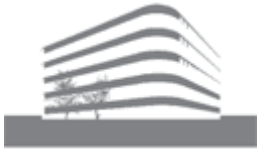

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STRATEGIC ELEMENTS IN JUDICIAL INTERACTION WITH OTHER BRANCHES OF POWER

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Introduction

The role of courts in their function of controlling the legislative and/or executive activity has always been the object of an intense normative debate. The development of concepts such as "Rule of Law" or "Rule by Law" as the main principles of a polity has been accompanied by a discussion on the legitimacy and reach of the power bestowed on a non-elected body of justices. Thus, although the rule of law seems to require that no authority is exercised beyond the limits set by the law, be it the executive or the legislative[1], the countermajoritarian character of judicial power has brought with it the confrontation of authors of very diverse points of view[2].

At any rate, the object of this paper is not to focus on normative considerations or constitutional theory. Therefore, I will not deal with whether *judicial review* is compatible with popular sovereignty (see Holmes, 1998: 195). For the present purposes, it suffices to observe that the existence of some form of judicial control over the other branches of power is a widespread phenomenon in western democracies[3]. This fact means that "whatever the way in which the personnel of the rule-adjudicating bodies is selected, conflicts of authority between judiciaries and governments cannot be avoided" (Blondel, 1969: 440).

The goal of this paper is to present a very simple formalization of a potentially conflictual situation between the judiciary and the government(s), using elements from the American experience (since *Marbury vs. Madison*, 1803), and the process of "constitutionalization of the Treaties" in the European Union, carried out by the European Court of Justice (ECJ). I aim to show that judges in both cases were able to avoid open

[1] For Elster (1998: 6-7), "Constitutionalism [...] fights a two-front war: against the executive and against the legislative branches of government", and "Constitutionalism is closely associated with the Supreme Court, although it should be emphasized that limists on majority rule go beyond judicial review". For Hayek, according to Holmes (1988: 196) "a constitution [...] is nothing but a device for limiting the power of government".

[2] An interesting and accessible discussion can be found in Gargarella (1996), chap. 2 and appendix to chap. 2.

[3] See Shapiro and Stone (1994), and vol. 19, no. 1 (1990) of the *Policy Studies Journal* (Judicial Review Symposium).

confrontation and assert their own authority by acting strategically. To that effect I first introduce the historical facts of the cases. Then I will present an extremely simple formalization of the interaction between Courts and Governments and, finally, will discuss the elements of the model.

The American and European (Communitarian) cases

There are instances in the literature of comparisons between the American and European experiences in relation to the making up of a federal structure and the communitarian process of constitutionalization of the Treaties (see Cappelletti, Seccombe and Wiler, 1986; Lenaerts, 1988; Goldstein, 1997).

There are also common elements with respect to the development of judicial review. In the words of Garret, Kelemen and Schulz (1998: 155, fn. 11): "it is important to remember here that the ability of the ECJ to engage in judicial review of legislation is not guaranteed by the founding treaties of the EU. As was the case for the U.S. Supreme Court (beginning with the famous *Marbury v. Madison* decision), the ECJ has had to accrue power by making decisions that subsequently have been followed by politicians"[4].

The United States

According to academic orthodoxy, the modern American doctrine of 'judicial review', meaning the authority of the Supreme Court to determine whether a state or federal law is constitutional, started with the *Marbury v. Madison* decision in 1803 (Clinton, 1990: 174). According to the conventional view, Justice Marshall made an excursus to invalidate a

[4] Similarly, Alivizatos (1995: 570): "Through the principles of direct effect and supremacy of Community Law over internal legislation, as early as the 60's, the latter [the ECJ] has indeed assumed an extremely significant function, which can only be compared to the activist role anticipated by the U.S. Supreme Court in *Marbury v. Madison* (1803), in a young constitutional framework which, at the time, and exactly like the EEC treaties almost 200 years later, provides nothing about the review of legislation by the courts".

harmless legal provision, in order to avoid an open conflict with President Jefferson and, at the same time, assert the authority of the Supreme Court to revise the constitutionality of laws voted by Congress. The underlying idea is that "the *Marbury* opinion was justified neither by the Constitution nor by existing legal precedent, which implies that judicial review was Marshall's innovation, an early example of raw judicial policymaking in the cause of Federalist political values" (Clinton, 1990: 174 and 178).

This idea of 'judicial review' did not appear from nowhere. In *The Federalist Papers*, (78 and 81, for instance), Hamilton defended the function of the Supreme Court as a guardian of the Constitution. The issue was controversial at the time[5]. Hamilton summarized the view he opposed: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any matter subject to the revision or correction of the legislative body. This is unprecedented as it is dangerous". For him, however, "this, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact". But, according to Mény (1993: 341), the Hamiltonian view was nothing more than 'wishful thinking': "as yet, nothing in the Constitution subjected judges to the check of constitutionality or granted the last word to the Supreme Court. That had to wait until 1803, when the Supreme Court's famous ruling in the *Marbury v. Madison* case, under the inspiration of Chief Justice Marshall, did uphold the superiority of the Constitution to which all are subject"[6].

The material question of the mentioned case was as follows: Thomas Jefferson was to assume the presidency of the U.S.A. in March 1801, after the elections in 1800. The lameduck president, John Adams, federalist, did not want to lose all leverage in the branches of power and, consequently, carried out a number of partisan nominations to the judiciary. In February 1801 the *Circuit Court Act* was passed, doubling the number of federal judges; the

[5] And not only at that time. According to Shapiro (1994: 103): “The judicial review powers of the Court have never gone uncontested”.

[6] Similarly, for Clinton (1990: 178), “Hamilton’s views were unrepresentative of the federeal convention”, and, so, the Court’s decision in *Marbury*… “should be regarded as bold judicial activism”.

former Secretary of State John Marshall was appointed Chief Justice of the Supreme Court in January. The *Organic Act* was also passed, authorizing the appointment of 42 new judges in the Columbia District (almost all of them federalist). Due to time limitations, some commissions for those offices were not posted before midnight on the 3rd of March, the last day of Adams' presidency. On assuming the presidency, an enraged Jefferson ordered his new Secretary, Madison, to withold and not to send those commissions. William Marbury, one of those affected by this decision asked the Supreme Court to issue a *writ of mandamus* against the Secretary of State. This possibility was based on the *Judiciary Act* (1789), section 13. Facing a delicate situation, Justice Marshall, after noting that Mr. Marbury had the right to his commission and, therefore, the right to resort to the laws of his country in search of redress, declared, however, that his petition was not admissible. The reason was that section 13 of the *Judiciary Act* (the base of Mr. Marbury's petition) bestowed on the Court a jurisdiction that was not established in the Constitution. In such an 'incidental' and artful way was *judicial review* asserted.

It is remarkable that the material question was solved in favour of the executive: "technically, Madison won the case" (Clinton, 1994: 297). Thus, the Court asserted its authority in a way that "could not be challenged *in the circumstances of the case*, yet would be serviceable as a legal basis for *subsequent assertions of the same authority*" (Clinton, 1989: 5; emphasis added). Actually, the Supreme Court had already acted in a similar way in a previous case. Though less famous than *Marbury*, in *United States v. Schooner Peggy (1803)*, the Court forced somewhat the meaning of an international treaty in order to achieve a result in line with presidential preferences, establishing at the same time an important precedent for judicial authority related to the interpretation of treaties (a detailed discussion in Graber, 1998[7]). Jeffersonians, then, found themselves in an awkward position to openly defy the judicial decisions, since indeed they upheld materially the governmental position, Marshall's suggestion that the Court could declare void a treaty or a law did not attract much attention from the public.

[7] According to him: "Marshall's opinions in *Shooner Peggy* and *Marbury* may claim a judicial power to challenge the constitutional pretensions of transient democratic majorities, but the bottom line in both cases is a ruling in favor of the incumbent Jefferson administration" (Graber, 1998: 222). And: "As in Marbury, his *Schooner Peggy* opinion reached a politically convenient conclusion by twisting the law in question in ways that even Jefferson's attorney general regarded as legal nonsense" (p. 225).

"Both *Schooner Peggy* and *Marbury* seek to preserve judicial power by asserting its existence, thus establishing precedents for future use, while not actually attempting to challenge executive or legislative authority in any controversial way" (Graber, 1998: 224). "This tactic [...] establish[ed] precedents that future federal justices working under friendlier political conditions could use to justify striking down federal laws" (p. 236).

This tactic, the setting of a bold doctrine at the same time that the case is resolved in favour of the part which will suffer its consequences in the future, is an option that highlights the strategic elements of institutional interaction. We can find similar maneuvering in the context of European integration.

European Integration

Created in 1952 as part of the Coal and Steel Community, with the main purpose of preventing supranational EC institutions from exceeding their authority (not to police member-state compliance with EC law [Alter, 1996: 472]), the European Court of Justice has attracted the attention of the literature for its 'activist' role in the process of European integration.

The Conventional view is that, over the years, with more or less resistance from member states, the ECJ has molded the various Treaties and laws of the European Community into a constitutional charter (see *inter alia* Weiler, 1991, 1993, 1994; Mancini, 1989; Volcansek, 1992; Shapiro, 1992; Mischo, 1990; Stein, 1981; Rinze, 1994; for a skeptical point of view see Wincott, 1994). As early as 1964, in *Costa v. ENEL* Advocate General Lagrange suggested that "it is certainly true to say that the Treaty of Rome has, in a sense, the character of a genuine Constitution, the Constitution of the Community" (Wincott, 1995a: 589). And the Court itself summarized the proccess in its opinion of December 14, 1991:"The EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law ... The essential characteristic of the Community legal order which has thus been established are in

particular its primacy over the law of the Member States and the direct effect of a whole series of provisions (of Community law)" (Rinze, 1994: 426-27).

The capital doctrines of 'direct effect'[8] and of 'supremacy'[9] have been bold jurisprudential creations of the ECJ, whose activism, however, has not stopped here (I will spare a detailed description here; references above deal with this issue).

'Direct effect' was first introduced in 1963 in *Van Gend en Loos*, and was then reasserted and elaborated in subsequent occasions (see Stein, 1981). A year after *Van Gend* the Court proclaimed the supremacy of EC law over conflicting provisions of national law, in *Costa v. ENEL* . First, the Court differentiated EC law from *ordinary* international law and then held that a national law, whether adopted before or after the effective date of the Treaty "cannot take precedence over Community law". Some years later, in *Internationale Handelsgesellschaft (1970)* the ECJ declared that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of national constitutional structure". And, finally, in *Simmenthal* (1978), it ruled that *all* the courts of a member state, not just the highest courts, had the power and the duty not to apply provisions of national law that conflicted with Community law. In particular, lower courts should not wait for the constitutional court to annul the relevant national legislation.

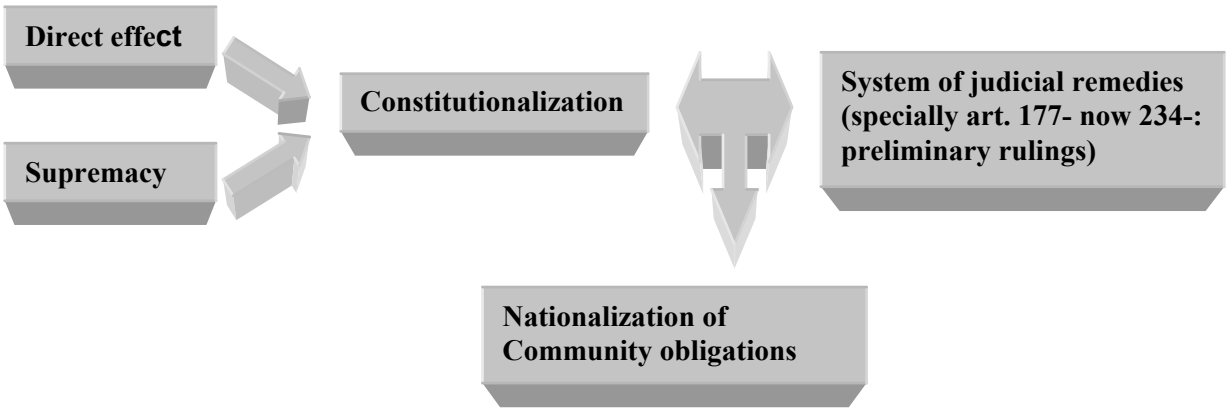
All these decisions were taken following processes under art. 177 (now, after the Amsterdam amendment, art. 234) of the Treaty of Rome (preliminary rulings), according to which, in cases where Community law is implied, national courts, if in doubt concerning its validity or interpretation, *must* refer the question to the ECJ for a decision on it. The combination of direct effect, supremacy and the art. 177 procedure made it possible for any

[8] 'Direct effect' means that certain communitarian legal dispositions, under some circumstances, are effective and, therefore entail enforceable rights for the citizens of the Community, without the requirement of a previous transposition into the national legal order.

[9] 'Supremacy' of Communitarian law means that, in case of conflict with national law, the former is to prevail (even over constitutional dispositions).

interested individual to make use of EC law before all national courts, which massively incremented the range of cases to come before the ECJ, expanding its potential influence.

To put it briefly:



It is important to remember that technically the ECJ has nothing like a power of judicial review. Formally, the Court is limited to the interpretation of Community law, and cannot rule on whether a conflict exists between Community law and national law. But, in practice, as an ECJ judge acknowledged: "[Article 177 has been] transformed in the course of the years into a quasi-federal instrument for reviewing the compatibility of national laws with Community law [...]. [T]he Court does not confine itself to interpreting the Community rule; instead it enters into the heart of the conflict submitted to its attention, but it takes the precaution of rendering it abstract, that is to say it presents it as a conflict between Community law and a hypothetical national provision having the nature of the provision in issue before the national court. The technique thus described [...] results in the Court of Justice acquiring a power of review which is analogous to –though of course narrower than– that routinely exercised by the Supreme Court of the United States and the constitutional courts of some Member States" (Mancini and Keeling, 1994: 184-185).

Evidently, this process has not been free from governmental resistance an academic criticism[10]. At any rate, the strategy followed by the ECJ is already familiar:

"A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; *the Court may even find some reason why it should not be applied to the particular facts of the case*. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed" (Hartley 1988: 78-79; emphasis added). We find here the same strategic element as in the American case. The Court established supremacy in *Costa v. Enel*, but declared that the questioned Italian law which privatized the electrical company did not violate communitarian law. Thus, since privatization was legal, politicians did not have immediate reasons for complaint or opposition (Alter, 1998: 131), and at the same time the Court established a doctrine whose implications would be fully revealed later on, in *Simmenthal* (Stein, 1981:)[11]. Since supremacy was established even over national constitutional dispositions some Constitutional Courts (namely, in Italy and German) posed the problem of opposing communitarian dispositions recognizing fewer guarantees than those of the constitutions in the member states. That created for some time tensions already resolved, but, initially, the ECJ tried to avoid the problem in a characteristic way: in 1969, for instance, in *Stauder*, it eschewed confrontation by interpreting the communitarian act in question (a disposition from the Commission) in such a way that it precluded any conflict which any national basic right. Another example of this strategy can be found in the *ERTA* case (1970), concerning communitarian competence to conclude treaties. Formally, the controversy placed Commission against Council, but the real interests were those of the Community (represented by the Commission) and the Member States, whose independent treaty-making power was at stake (Stein, 1981: 22). The Treaty allowed explicitly the Community only to conclude

[10] For the latter, see Rasmussen (1986) and Fellmeth (1996).

[11] Previously, in *Van Gend*, the ECJ restricted 'direct effect' doctrine to 'negative' obligations (obligations not to do). Later, however, it eliminated this and other restrictions step by step (Stein, 1981: 16-22).

treaties with third states in two cases (foreign trade policy and association agreements). In those cases, the Commission 'negotiated' and the Council 'concluded' the pacts. Member State governments had been negotiating with other governments a new European agreement over road transportation. The Council adopted some conclusions on it. But the Commission, alleging its exclusive capacity to negotiate on behalf of the Community, requested from the ECJ the annulment of the actions taken by the Council. The Court, on the one hand, proclaimed an expansive doctrine related to the competencies of the Community, following the arguments of the Commission[12], but, materially, denied the petition, authorizing the Member State Governments to conclude the agreement according to the previous acts.

Indeed there are authors who have identified this strategic element as the axis of European legal integration (Alter, 1998; Ho, 1999). Thus, Alter (1998) stresses the existence of different 'time horizons' for politicians and judges. This difference would manifest itself in terms of different interests in each judicial decision. Due to this divergence in time horizons, then, the ECJ was able to show 'activism', constructing a doctrine based on not very convincing legal interpretations and expanding its own authority without triggering any political response: "by making sure that the ECJ decisions did not compromise short-term political interests, the judges [...] could build a legal edifice without serious political challenges" (Alter, 1998: 130). This point will be dealt with below again. In the next section I will present an extremely simple formalization of a situation in which divergent interests are considered, like the ones I have described.

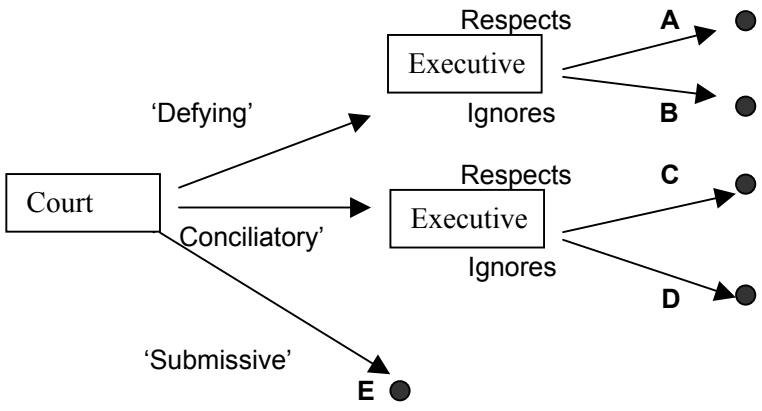
[12] The Court ruled that the treaty-making power did not only flow from an explicit authorization in the Treaty "but may equally flow from other provisions of the Treaty and from measures adopted [...] by the Community institutions. In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules". Advocate General in the case argued that such an interpretation constituted "a very daring exercise in legal construction which indeed I consider too audacious for reasons of principle [...]" (Stein, 1981: 23-24).

A strategic executive-judiciary interaction

In this section I will build upon some assumptions, more or less reasonable, some implicit, some explicit. Among the latter, for instance, it will be taken for granted that the Court holds clear institutional preferences concerning the expansion and/or maintenance of its own authority and, therefore, will take advantage of the possibilities it has (see Clinton, 1994: 292; Garret *et al.*, 1998: 155).

To avoid too many complications let us assume that there are only two moments that we will call (with poor imagination) 'now' and 'later'. So, facing a case of potential institutional relevance the Court has three basic options: 'defying', 'conciliatory' and 'submissive' (labels are unimportant). In the first case, the Court asserts an audacious doctrine and also proceeds to apply it to the case at hand, without 'compensating' the executive in any way. In the 'conciliatory' case, the one I am interested in, according to the previous exposition, the Court establishes a bold doctrine, but mitigates its immediate effects, typically not applying it to the case at hand, so that the Government's material interests at stake do not suffer any major harm at present ('now'). In the last option ('submissive') not only does the Court bend to the material short-term interests of the executive, but it also fails to proclaim any expansive doctrine. It that is the case, the game ends and result 'E' is obtained. In the other cases, the Government has the option to respect the Court's decision (results 'A' and 'C'), or just ignore it (results 'B' and 'D').

The game, in extensive form, can be summarized like this:



This formulation assumes that what happens at moment 2 ('later'), depends on what the Court and the Government decided at moment 1 ('now')[13]. Thus, results 'A' and 'B' include the final payoffs for both actors (comprising payoffs for moments 1 and 2). To clarify: it is assumed that if the Court adopts successfully (it is respected) a 'defying' stance or a 'submissive' one at moment 1, that will fix the power relations, will establish a precedent, and will entail that all identical cases will be treated in the same way at moment 2. When Governments rebels successfully against the judiciary, we can expect a submissive Court later on[14]. When the executive accepts a 'conciliatory' decision, it receives a short-term material benefit 'now', but then 'later' when the full extent of the doctrine is apparent, the executive will have to face actual application of it to the case at hand. Here is where the myopia or the shorter 'time horizon', mentioned in the literature, takes effect.

The payoffs are presented and explained below.

Result	Payoffs	
	Court	Executive
A	$a (1 + \alpha)$	0
B	- r	$d (1 + \delta) – c$
C	$a (1 + \alpha) – b$	d
D	-r	$d (1 + \delta) – c$
E	0	$d (1 + \delta)$

The understanding of what is expressed above should not be very complicated. Under result 'A', a defying Court receives 'a' now and 'a' later on (because what happens 'later' on

[13] "Formalists are right to say that doctrine is constraining in some way" (Ferejohn, 1995: 195).

[14] It is not a juridical opposition. It means that Government resorts to all kinds of maneuvers (some legal, some maybe not) to ignore judicial decisions. Suppressing the Court would be an extreme example.

depends on what happens 'now'). 'α' is the discount factor and 'αa' is the discounted present value of this 'a' that will be obtained in a later moment[15]. Result 'A' does not produce any benefit for Government, since it 'loses' the case now and a negative doctrine is asserted. Under 'B', a defying but successfully opposed Court will not receive the benefits of the doctrine and also will have to pay a cost (r) in terms of reputation or loss of authority[16]. In this situation, however, Government, after suffering a cost 'c' (the cost of mobilizing resources to oppose the Court), receives benefit 'd' (the material short-term value) 'now' and also gets 'd' in an identical case 'later', from a submissive Court[17]. Case 'D' is considered in the same way[18]. Under 'C', the Court receives the benefit of setting an expansive doctrine, as in case 'A' but diminished by 'b', which can be very little, but expresses the fact that the Court would prefer to assert the doctrine and to apply it at the same time, without having to resort to concessions that sometimes could seem contrived or politically motivated. Under 'C', the executive receives 'd' now, but, given the effectiveness of the doctrine in the future, will receive nothing 'later'. Under 'E' the Court receives nothing and sets a submissive precedent, so that Government receives 'd' 'now' and 'd' 'later' (discounted by δ).

If that is the payoff structure, the Court's preference order is simple. Its best result would be 'A' (it maximizes authority), followed by 'C' (a little concession for the future). But if Government were to impose its own option, the Court would be better off at 'E' (it neither wins nor loses) than at 'D' or 'B' (where its authority suffers some loss). For the Government, however, the situation is not so clear (only that its best result would be 'E') and

[15] The discount factor varies between 0 and 1. If it equals 0 it means that the actor *only* values the present moment and does not give any consideration to the future. If it equals 1 the actor values present and future *equally*. Values in between mean a higher valuation of present than future.

[16] This is an assumption similar to that of Ferejohn and Shipan (1990: 6) when they say: "We assume that all of the actors in the model prefer that their decisions not be overturned [...]. In a sense, we might assume that there is some small cost to having a decision overturned".

[17] This assumption, as that under 'D', does not necessarily mean that it is always in the hands of the executive to oppose or accept judicial decisions. Under certain circumstances, 'c' can be so costly that in fact opposition is rendered unfeasible. For instance, if there is no other option than setting the tanks on the street, that may be unacceptable for most democracies. However, recently in Venezuela or in Russia in 1993, suppression of the respective High Court was indeed a feasible option.

[18] Conceding different reputational costs for the Court under 'B' or 'C' does not substantially alter the results.

depends on the values adopted by any of the variables. Concretely, opposition cost ('c') will determine its options.

The most interesting thing now, I believe, is to examine which combinations sustains each of the results. ¿Under which conditions will the Court be submissive? ¿Under which conditions will the Court be successfully defying? and ¿under which conditions will the Court act in a 'conciliatory' way?

Submissive Court (Result 'E')

For the Court to choose the way to 'E' the Government must threaten (in case of 'defying' as in case of 'conciliatory' Court) to oppose the Court's option. If there were any possibility for the Government to accept any of the 'conciliatory' or 'defying' options, the Court would never be 'submissive', since it would be always better off with 'A' or 'C' than with 'E'. Therefore, for the threat to be credible the incentive structure must be such as to cause the Government to be better off opposing both 'conciliatory' and 'defying' stances. The equilibrium condition, then, is given by:

$$\left.\begin{array}{l} d\,(1+\delta) - c > 0 \\ d\,(1+\delta) - c > d \end{array}\right\}$$

(which guarantees opposition to a defying Court)

(which guarantees opposition to a conciliatory Court)

Simplifying, it yields: $\delta > c / d$

That is, when the discount factor is higher than the ratio between the opposition cost and the material value of the case, the Court will always be 'submissive', since the threatening of the Government will always be credible.

A successfully defying Court (Result A)

For the Government to accept result 'A' it must hold that $0 > d\,(1+\delta) - c$ or, equally, $c > d\,(1+\delta)$; that is, the Government must be unable to assume the cost of opposing a Court's decision. If $\delta = 0$ (the Government is absolutely myopic), then it would suffice that

the intrinsic value of the case were higher than the cost of opposition for 'A' to be unsustainable.

A successfully conciliatory Court (Result 'C')

This is the most interesting result according to the previous exposition. In this case the Court asserts an expansive doctrine without imposing short-term costs on the Government, but the latter will suffer the actual effects of the decision later. For this result to be a stable equilibrium, Government must credibly be able to oppose a defying stance but, at the same time, unable to opposing a 'conciliatory' one. So, it must hold that:

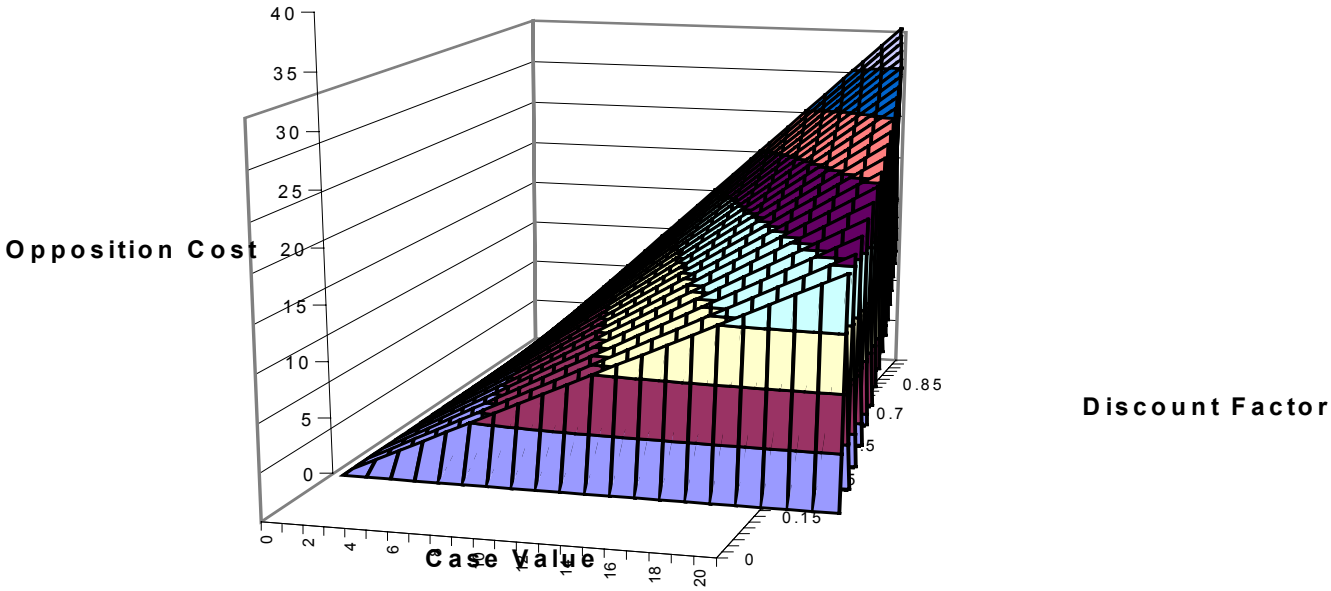
$$\left.\begin{array}{l} d\,(1+\delta) - c < d \\ d\,(1+\delta) - c > 0 \end{array}\right\}$$

And simplifying:

$$\delta < c/d < 1+\delta$$

A graphic (and maybe very superfluous) representation is shown below:

Graphic 1: combinations sustaining the 'conciliatory' result



In all points over the figure it is true that $c/d > 1 + \delta$, so that a defying solution will be found. In all points under the figure it is true that $c/d < \delta$ and we will find a 'submissive' solution[19].

Discussion

Graph 1 presents in a simple (even obvious) way the fundamental parameters of the problem: the material value of the case, the opposition cost and the discount factor. Simplicity is also arguably a limitation of the model. In fact I just wanted to show schematically the main points[20].

The intrinsic value that the Government bestows on a case will help hindering or making it easier to oppose the Court. With such a simple hypothesis (equally 'evident') Garret *et al.* (1998) show that the ECJ has modulated an otherwise very incisive doctrine (*Francovich*, which imposes on member-states the obligation of compensating individual claimants for damages caused by a failure by a national government to comply with EU law), so that now it requires very stringent criteria to appreciate those cases. Therefore, EU member-states are now somehow more confident when facing suits for big sums of money.

That opposition cost may determine the result seems also very obvious. In fact a great deal of the literature on European legal integration has tried to show how and why the implication of national courts in the process took place (Alter, 1998; Weiler, 1994, etc.). The result, indeed, is that member-state governments are deprived of a credible individual threatening power. Once national courts had accepted the doctrines flowing from the ECJ, governmental opposition should be directed against its own national judiciary, something that raises the cost of opposition. Moreover, while ECJ decisions are accorded by majority voting

[19] 'δ' varies at 0.05 intervals in the graph, so that the figure appears as a succession of planes rather than a volume. Also, note that the area of any one 'plane' is given by $A = ½ [d^2 (1 + \delta) – d^2\delta] = ½ d^2$ so that it does not depend on the discount factor.

[20] Of course, we cannot expect this strategic behavior to appear everywhere. Sometimes there is just no possibility of separating long-term and short-term costs.

(without dissenting opinions being published), to limit or change the ECJ's jurisdiction member-states would have to introduce changes in the Treaties, and that requires unanimity, something that Scharpf (1992) has termed 'the joint decision trap'.

In *Marbury v. Madison* Justice Marshall knew that Jefferson held a strong position after his electoral victory (Clinton, 1994), and that, in case of establishing judicial review for executive (as distinct from legislative) acts (and granting Marbury's commission) President Jefferson would surely resist the decision in a successful way (see a convincing exposition in Epstein and Knight, 1996)[21]. However, judicial review over legislative dispositions was slightly less controversial and, even though Jefferson's view on it was not particularly enthusiastic[22], he could not muster enough support to reverse the Court's ruling as it was produced: "The charge that the judiciary was tyrannically imposing a federalist will on a republican-minded nation did not square with the immediate facts of judicial behavior, whatever suspicions might be entertained about Marshall's long-term aspirations" (Epstein and Knight, 1996: 99). Another example is Roosevelt's court-packing plan in the 1930s, according to Blondel (1969: 449): "the most dramatic exposition of the behavioural limits to which a court, even endowed with great authority, can go without impunity [and] showed the clear limitations of the Court's independence in the case of major conflicts". Had the Court persisted in its opposition to the New Deal, maybe Roosevelt would have been able to carry out his Court-packing plan. However, by strategically retreating (see Caldeira, 1987), the Court made the danger seem more unlikely since support for the President's plans receded given that their justification became less obvious. That points to a factor that might be of relevance for the opposition cost, namely the relative state of public opinion with respect to the Court and the Government. In a case of confrontation between different branches of power, the publicity of the conflict can entail political costs, but the relative popularity of the

[21] Also, judicial review of executive acts was foreign to anglosaxon legal traditions (see a discussion in García de Enterría, 1995).

[22] Jefferson had made an effort "to get rid of the magic supposed to be in the word *constitution*" and considered judicial review countermajoritarian and dangerous (Holmes, 1988: 204).

actors determines which one suffers these costs. In an extreme case, a people disliking severely the judicial institution could encourage or just back up the attemps by the government to curb the authority of the judges. Thus, for instance, in Russia in 1993 or recently in Venezuela, an "excess" of support for the President translated into a strong position that allowed the latter to supress their respective Constitutional and Supreme Courts. In contrast, the attempts by President Roosevelt to change the structure and composition of the Supreme Court in the 1930s did not succeed due partially to the fact that the majority of the public opinion did not support those measures (Caldeira and Gibson, 1992: 638; Caldeira, 1987); likewise, some justices from the Bulgarian Constitutional Court have noted that public support has been a key resource for them in the process of constitutional consolidation (Ganev, 1997). In the Argentinian case, the degree of popularity of the executive has also been related to the dependence or independence of the judiciary (Helmke, 1999)[23].

Introducing discount factors aims at reflecting an inherently human feature: to value the present more than the future. In the XVth century, Leonardo Bruni noted that "we certainly give more attentive consideration to present matters and tend to be more negligent in judging those things ordained for an uncertain future" (quoted in Holmes, 1988: 13). In the context of the present study, it has been argued that politicians are more myopic than judges (see Mény[24], 1993 and, especially, Alter, 1998). Alter has asserted this argument with special emphasis in the European context. According to her, politicians have shorter time-horizons, because they must offer benefits to their constituencies to retain their offices. That makes them discount heavily the long-term effects of their actions or, in this case, inactions. Member states were more concerned about protecting their own national interests in the process of integration, and were trying to avoid hard conflicts that would thwart the efforts toward

[23] It is also curious that the first time in history that the Mexican Supreme Court has decided against the President coincides with the electoral defeat of the latter (Fox beat Zedillo, thus putting an end to decades of domination by the PRI, and the Supreme Court decided a case on 25 August 2000 against the lameduck President. See EL PAÍS, 9/26/2000, p. 3).

[24] "A constitutional judge, by reason of his eminent role, operates in a different temporal context from other political protagonists. The body of norms to which he refers is constituted by values that are, so to speak, atemporal [...] or at least not confined to that 'present moment' which so much obsesses other political agents, subject, as they are, to the pressure of society's demands and electoral deadlines" (Mény, 1993: 371). Similarly, Shapiro (1994) mentions the arugument that "the Court is more capable of focusing on long-term constitutional

a common market. That short-term interest would help explain why politicians often fail to react in a decisive way when doctrines that harm their long-term interests are first established. Retrospectively political inaction may seem quite short-sighted. But predicting what would happen in the light of ECJ's doctrines was difficult and the strategy of refraining from open attack did look convenient. In the beginning, for instance, *supremacy* was only a potential problem. And, at any rate, it would be a problem for another government in the future to face (Alter, 1998: 131-133). Thus, in graphic one we can see that as the discount factor goes to 0 (government is more myopic), result 'C' holds with a range of opposition costs whose upper extreme value is lesser. As the government grows more interested in the future (discount factor goes to 1), the range of opposition costs has a higher upper extreme, showing that, *ceteris paribus,* a more costly opposition is required for result 'C' to hold under those conditions. A simple idea.

One of the starting assumptions was not discussed, namely, that "the Court holds clear institutional preferences concerning the expansion and/or maintenance of its own authority". Some would argue that this statement is arbitrary. In the U.S., for instance, a generation of conservative justices has been imposing *self-restraintism* and 'deference' towards the executive in a way that some authors have considered retrograde (see, especially, Schwartz, 1990). That would imply that assuming 'institutional preferences' is not always safe. However, Sosin (1989) argues that judicial review in the U.S. has been perpetuated by the self-interest of lawyers and judges, for "we must bear in mind that the legal profession has a vested interest in judicial review inasmuch as the expansion of judicial power magnifies the influence in society and government of that special class of persons admitted to argue before the courts" (p. 1, quoted in Clinton, 1990). In fact, in the beginning, when the Supreme Court was unknown and yet not prestigious, it was not rare for judges to refuse to serve there when nominated (see Barnum, 1993)[25].

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values than are legislatures and executives pressed to meet immediate problems with immediate solutions". See also Eisgruber, 1999: 7.

[25] Epstein, Martin, Caldeira and Segal, 1998 show that it is important to "incorporate the goal of maintaining institutional legitimacy, that is, of ensuring that the Court remains a credible force in American politics". See also Caldeira and Wright (1988).

As a way of conclusion we can remember Hamilton's words concerning the judiciary. After quoting Montesquieu, for whom "of the three powers above mentioned, the judiciary is next to nothing", he states that: "The judiciary [...] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements [...]. [T]he judiciary is beyond comparison the weakest of the three departments of power" (Hamilton, in *The Federalist Papers*, nº 78).

In this paper I have tried to show how to some extent this *weak* branch of power can develop strategies that allow it to enlarge its authority and reach higher status and more capacity to control the others. Given the normative relevance of the role of courts in a democracy, understanding the processes that give birth to this situation is always relevant.

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