# Chapter 13
# Courts and European Integration

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In 1963, the European Court of Justice (ECJ) proclaimed in *van Gend & Loos* that the European Economic Community (EEC) constitutes a new legal order for the benefit of which the States limited their sovereign rights.[1] This decision was sharply compared to a "declaration of independence" of European Union (EU) law *vis-à-vis* the authority of the Member States (Maduro 2003: 504). It began a praetorian process of transformation of international law treaties into an autonomous constitutional legal order, which gradually was incorporated into the domestic legal orders of the Member States. Since this process of legal integration had the epicenter in the ECJ, the Luxembourg court is commonly identified as its "lonely hero" (Conant 2002: xiii).

Legal integration, however, does not rest solely on the isolated efforts of a court located in a remote European capital. It develops through a complex cooperative process that includes several others national and supranational actors. Among them, the role of national courts is decisive. The EU legal order has been, to a large extent, a byproduct of a judicial dialogue between national and European judges that revolves essentially on an ongoing "negotiation" over the interpretation of legal norms (Alter 2001: 38).

This article explores how the relation between national courts and the ECJ explains legal integration in the EU. The institutional framework of the Communities foresaw judicial enforcement mechanisms similar to other international organizations (Sect. 13.1). A procedural mechanism that allowed national judges to communicate directly with the ECJ opened the path for the constitutionalisation of EU law. Through this mechanism national judges started "internalizing" European Union law (Sect. 13.2). The causes for this behavior are discussed in a multidisciplinary debate on the causes that led national courts to foster legal integration by gradually incorporating into the domestic legal realm the fundamental constitutional principles of EU law developed by the ECJ (Sect. 13.3).

[1]ECJ, 26/62, *van Gend & Loos*, ECR [1963] 1 at 12.

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## 13.1 Law Enforcement Mechanisms in the European Communities Treaties

I. The EU legal order was able to elude the coercive debilities of public international law by progressively imposing compliance on Member States. The evolution to a supranational model was not likely to occur within the conventional framework adopted in the 50s.

The ECJ was created in 1952 within the European Coal and Steel Community (ECSC) as an appeal chamber for the decisions of the High Authority—the predecessor of the European Commission (art. 33 ECSC Treaty). With the EEC Treaty, the ECJ was given the task of ensuring that in the interpretation and application of the Treaties the law is observed (art. 164 EEC Treaty). The mission to monitor institutions remained untouched: the court had to review the validity of legislative acts of the institutions of the Community (arts. 173 and 177 (1) b) EEC Treaty), as well as its omissions (art. 175 EEC Treaty).

In the ECSC, the High Authority had the power to sanction, namely through fines, Member States that breached the Treaty or its decisions and recommendations (art. 8 ECSC Treaty). The mission of being the "keeper of the Treaties" was afterwards given to the Commission (art. 155 EEC Treaty).

Either the Commission and/or the Member States could bring an action before the ECJ based on a Member State failure to fulfill an obligation under the Treaty (art. 169 and 170 EEC Treaty). This soon revealed to be a fragile mechanism of enforcement of EU law. On the one hand, although recognizing the ECJ's mandatory jurisdiction, Member States avoided instituting proceedings against each other. On the other hand, the Commission had its wings clipped by an incipient political autonomy from the Member States and an insufficient human and financial infrastructure (Stein 1981: 6). The ECJ's decisions had, moreover, no teeth. Member States were not liable to fines if they failed to abide to a decision of the ECJ.[2] A declarative condemnation from an obscure court in Luxembourg was usually not enough to force compliance. Most infractions went under the radar and/or had to be tackled through political compromise (Alter 2001: 16). The numbers are overwhelming. Until 1970 the Commission started 27 proceedings. The Member States none.

II. The "declaration of independence" of the EU legal order was made by the ECJ in the context of a preliminary reference. The procedure is quite simple and develops in three phases: (1) the national judge refers a question to the ECJ whenever it has doubts on the interpretation or the validity of the applicable EU law provision, (2) the ECJ answers through a preliminary ruling and (3) the national judge applies the ECJ's preliminary ruling to the pending case. Art. 267 of the Treaty on the Functioning of the European Union (TFEU) foresee a procedural

[2]The possibility to sanction monetarily Member States was introduced later in the Maastricht Treaty (1993).

mechanism aimed at enabling communication between national courts and the ECJ. In other words, it works as a "legal bridge" between EU and national law.

The preliminary rulings procedure was originally created within the ECSC Treaty to review the legality of High Authority acts (art. 41 ECSC Treaty). It was not aimed at monitoring the application of ECSC law by the Member States because it did not allowed for preliminary references directed at the interpretation of ECSC provisions. The inclusion of this possibility in the Treaties of Rome was the trigger for the transformation of the EU legal order.

## 13.2 The Constitutionalisation of European Union Law

I. The ECJ emerged as one of the most powerful institutions in the EU after answering a set of explosive interpretative preliminary references sent by national judges (Scheingold 1971: 22). In the 60s, the Court proclaimed the doctrines of direct effect and supremacy based on the argument that the Treaties could not be interpreted merely as an agreement between States but as having been created for the "peoples of Europe" (Maduro 1997: 9). Direct effect determines that EU law creates rights that can be enforced by individuals in the courts of the Member States.[3] Supremacy states that EU law should always prevail over national law.[4] The two doctrines introduced a "genetic mutation" that prevented the EU to remain "an abstract skeleton" (Stein 1981: 6) "barely distinguishable from so many other international organizations whose existence passes unnoticed by ordinary citizens" (Mancini and Keeling 1994: 183).

The proclamation of direct effect and supremacy of EU law founded a praetorian process of constitutionalisation of the Treaties (Weiler 1991, Timmermans 2001–2002). The ECJ declared the Treaties a "basic constitutional charter" of a "Community based on the rule of law" supported in an autonomous and self-sufficient legal order.[5] National courts were given the mission of incorporating EU

[3]ECJ, 26/62, *van Gend & Loos*, ECR [1963] 1. The EEC treaty stated that regulations were binding in every respect and directly applicable in each Member State [art. 189 (2)]. The recognition of direct effect to other primary and secondary EU law provisions depends on an analysis by the ECJ of the fulfilment of certain conditions, such as clarity and unconditionality. The proclamation of direct effect was not in itself original. In 1932, the Permanent Court of International Justice referred that *exceptionally* an international agreement could, if that was the *intent* of the parties, adopt rules creating individual rights and obligations directly enforceable in national courts (*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, (1932) PCIJ Series B 44, at 24 and 25).

[4]ECJ, 6/64, *Costa* [1964] ECR 585.

[5]ECJ 294/83, *Les Verts* [1986] ECR 1365, at 23.

law into the domestic legal realm and protect the rights derived from it for individuals.[6] They have become "EU courts of ordinary jurisdiction".[7]

II. The announcement of the birth of a new legal order was extremely controversial (Alter 2009: 95). The ECJ was accused of "hallucinating" and of judicial activism "running wild" (Rasmussen 1986: 14). The declaration that the Community was a new legal order (*van Gend & Loos*) and that the law stemming from the Treaty ("an independent source of law") had a "special and original nature" (*Costa*) was qualified as an unacceptable interpretation of the Treaties *vis-à-vis* the 1969 Vienna Convention on the Law of the Treaties (Schilling 1996).

Within national legal orders with dualistic and/or with strong parliamentary traditions the ECJ requested nothing short of a legal revolution. National courts were mandated to participate in a monist legal system in which the Luxembourg court would have always the last word (Kumm 1999: 354). As "EU courts of ordinary jurisdiction" national courts were told to directly apply EU law and trump conflicting national law, even of constitutional rank.[8] The reaction of national constitutional and supreme courts, the ultimate gatekeepers of national law, was understandably not enthusiastic.

III. The transformation of the EU legal order was possible thanks to some provocative questions sent to Luxembourg by national judges. Those references allowed the ECJ to develop its case law within a decentralized jurisdictional system, in which national courts act as European courts whenever they deal with the application of EU law.

An activist ECJ fueled by national courts has been driving legal integration in Europe. The "constitutional cases" (*van Gend & Loos*, *Costa* and others) materialized through windows of opportunity opened by questions sent by national judges. Those cases would, however, remain *wishful thinking* if not applied internally by the same judges. ECJ's case law evolution and enforceability is thus totally dependent on national courts cooperation. This boosts the latter's capacity of influence in the definition of the ECJ's jurisprudence. The incorporation by the case law of the ECJ of fundamental principles of the national legal systems, such as the protection of fundamental rights,[9] came as no surprise. The outcome of this process of "cross-fertilization" was the creation of community of legal actors committed to the development of a "quasi-federal" legal order (Chalmers 1997: 164).

[6]Individuals usually lack direct access to Luxembourg. Natural or legal persons may only institute proceedings against an act addressed to that persons or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures [art. 263 (4) TFEU].

[7]ECJ, opinion of Advocate-General Léger. C-224/01, *Köbler*, [2003] ECR I-10239, at 66.

[8]ECJ, 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, at 3.

[9]ECJ, 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, at 4.

## 13.3 Factors that Promote Legal Integration in the European Union

National judges are decisive actors in the dynamic that fosters legal integration in the EU. But why did they accept this role? What incentives did they have to make preliminary references, bypass domestic judicial hierarchies and obey the ECJ? Why did they start trumping national law that conflicted with EU law? Why did they forego their "veto power" (Chalmers 1997: 180) towards the domestic implementation of EU law?

This section presents several possible answers to these questions that propose different causes to explain the judicial reception of the EU legal order in the Member States.

### *13.3.1 The Legal Answer*

#### 13.3.1.1 Law and Legal Reasoning as Factors of Legal Integration

I. Among EU lawyers, the prevailing explanation for legal integration is found in the EU legal order itself, which genetically has a federalist *ethos*. In the words of Robert Lecourt (1976: 305):

> (EU law) is at the service of an objective. The objective is also here the driving force of the law (…) and an instrument of legal integration.

This *ethos* was incorporated by the judicial institution specifically created to interpret the Treaties, which assumed a catalyst stance towards the expansion of the reach of EU law, usually with the functionalist argument that it had to safeguard its *effect utile*. This explains the use by the ECJ of interpretative methods that went beyond the letter of the Treaties and secondary law and tried to capture its spirit though a lenses that refracted a "certain idea of Europe"—to use a famous expression of a former ECJ's judge (Pescatore 1983: 157).[10]

This *modus operandi* of the ECJ is a consequence of the declaration of autonomy of EU law regarding international law and diverts the criticism that the court was "running wild". International courts cannot intervene without being accused of

[10]This functionalist methodology is well documented in the constitutional cases. In *van Gend & Loos*, the Court declared that Treaty law could have direct effect, although the advocate-general Roemer said the Court could not say that without dealing first with the question of supremacy (ECJ, 26/62, *van Gend & Loos*, ECR [1963] 1: 23 and 24). One year afterwards, in *Costa*, the Court proceeded to state that supremacy is a necessary condition of direct effect (ECJ, 6/64, *Costa* [1964] ECR 585, at 3).

judicial activism and of encroaching on States competences whenever they rule on questions not explicitly mentioned in treaty provisions. However, this critic is not directly extensible to the ECJ. The latter acts like a constitutional jurisdiction and simply has made the most of framework treaties, which are materially a "Constitutional Charter" and, therefore, regulate few topics in exhaustive detail (Tridimas 1996: 205). At least among the core issues of European integration (the constitutional principles of direct effect, supremacy, state responsibility and the fundamental freedoms), there is a large consensus among legal authors that the ECJ "has been faithfully interpreting the rules, legitimately filled some gaps, and rarely engaged in excessive activism. Rather, it has acted in an overall manner that has genuinely corresponded with the tasks entrusted to it under the treaties, and it continues to do so" (Waele and Vleuten 2011: 651).[11]

II. Legal integration is assumed to develop smoothly in a non-political and self-sufficient judicial environment: (i) litigants present claims based on EU law; (ii) national courts refer questions and obediently follow the case law of the ECJ; (iii) the Court adopts preliminary rulings that foster European integration. This narrative explicitly downplays national courts' importance by identifying the ECJ as the only relevant actor in the process. This idea is implicit in Stein's (1981: 1) famous quote:

> Tucked away in the fairyland Duchy of Luxembourg and blessed with benign neglect by the powers that be and the masse media, the Court of Justice created a new legal order with a federal architecture.

National courts' acceptance of the new legal order is explained with the strength of the arguments used by the ECJ in the hermeneutic mission of revealing EU law. It was either the brilliancy of the ECJ's decisions (Kakouris 1994: 37) or, in a more modest tone, a persuasive dialogue in "legalese" that convinced eminent judges in the Member States (Volcansek 1986: 18, Weiler 1982: 39, Claes 2006: 247). Cases of disobedience are observed as pathologies that result from lack of preparation. Informed national judges apply EU law in accordance with the ECJ guidelines and refer questions whenever doubts arise on the interpretation or validity of EU law (Alter 1998: 230).

III. The use of legal hermeneutics methodologies certainly gave the ECJ an authority and legitimacy that could not be ignored. By presenting its decisions as the only possible legal outcome, the ECJ made it hard for the development of a critic discourse due to the auto-referential nature of the normative discourse (Maduro 2006: 77). Since law and legal reasoning are the pillars of the judiciary, many national judges observed the ECJ decisions as the law of the land they had a duty to follow.

[11]On this topic, see the chapter on this book of Lourenço Vilhena de Freitas that qualifies case law of the ECJ as an example of "weak activism".

### 13.3.2 Critic

I. Not all national judges were convinced by the arguments used by the ECJ to justify supremacy and direct effect. In the words of a prominent Portuguese constitutional law scholar:

> (Constitutional Courts) never surrendered, at least explicitly, to a radical or pure and simple supremacy of EU law, nor did they waived to the defense, as a last resource, to the rights and basic vectors of their Constitutions (Miranda 2002–2003: 12–13).

Some Supreme and Constitutional courts argued that the constitutional provisions that regulate the domestic incorporation of international law act as intermediary in the relation between EU law and national law of ordinary rank. These courts accepted only a limited supremacy of EU law that stemmed from the national constitutions. They never waived the authority to determine if a EU law act is *ultra vires.*[12] The question of the *kompetenz-kompetenz*, that is to say who holds the competence to define in last instance the allocation of competences between the Member States and the European Union, remains unanswered.

A refusal to apply EU law is not an outcome of sheer ignorance of national judges whenever it results from an antinomy with constitutional law. Challenges to the ECJ constitutional case law may be based in a different perspective on the hierarchical position of EU law inside the domestic sources of law.

II. The argument that national judges were convinced by the constitutional rhetoric of the ECJ implies that the judicial reception of EU law was expected to be relatively uniform throughout the Member States. But that did not happened even inside some Member States. In France, for instance, the swift recognition of supremacy and direct effect by the *Cour de Cassation* (Civil Supreme Court)[13] contrasts with the hesitations and even denials of those doctrines in the *Conseil d'État* (Administrative Supreme Cour).[14]

Different patterns in the judicial reception of EU law may be explained with the diversity of legal cultures (Maher 1994: 238, Mare 1999: 233, Claes 2006: 261), with legal pluralism, namely the influence of dualism (Bebr 1981: 682) or the

[12]This was path followed, amongst others, by the German Constitutional Court (case 2 BvR 2134/92 and 2 BvR, 2159/9212.10.1993, "Maastricht", *Entscheidungen des Bundesverfassungsgerichtes* , 89, 155, at 188 or case 2 BvE 2/08, 30.06.2009, "Lisbon", *Entscheidungen des Bundesverfassungsgerichtes*, 123: 267, at 240 and 241), the Italian Constitutional Court (case 232/1989, 21 May 1989, "Fragd", available at www.giurcost.org), the Danish Supreme Court (case I-361/1997, 6 April 1998, "Carlssen", translation available at *Common Market Law Reports* 3 1999: 854), the Polish Constitutional Court (case K 18/04, 11 May 2005, translation available at www.trybunal.gov.pl/, at 13) or the Czech Constitutional Court (case P1.ÚS 19/08, 26 November 2008, "Lisbon", translation available at http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=484&cHash=621d8068f5e20ecadd84e0bae0527552, n.º 120).

[13]"Vabre", 24 May 1975, available at www.lexinter.net.

[14]"Cohn Bendit", 22 November 1978, available at www.lexinter.net.

existence of a Constitutional Court and/or constitutional review mechanisms. However, Members States with dualistic traditions, such as Germany of Belgium, did not had a harder reception of the principles of direct effect or supremacy when compared with Member States with monist systems, like France (Alter 1998: 231, 232). Moreover, the existence of a Constitutional Court was also not decisive. The Italian Constitutional Court struggled for many years to accept lower courts' competence to trump national law that conflicted with EU law.[15] The German Constitutional Court recognized this competence in 1971.[16]

III. A purely normative analysis of legal integration is unable to explain the different patterns in the reception of EU law observed in the Member States. It fails because it ignores the importance of extralegal factors in the dynamics that foster legal integration. It is like "constitutional law without politics", in which the EU is considered:

> (…) as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitution teleology (Shapiro 1980: 538).

But judges are not robots. Judicial neutrality associated to syllogistic answers in the application of the law is a myth (Maduro 1997: 20). In many cases, judges have some discretion when adjudicating because several interpretative paths are viable. The example of the different perspectives on supremacy reveals that is not always possible to find in legal instruments univocal interpretations of the law.

## 13.4 The Neo-realist Answer

### *13.4.1 National Interest as the Factor for Legal Integration*

I. Political scientists identified Member States governmental preferences as the key factor for explaining legal integration in the EU. Mary Volcansek (1986: 252–264) argued that domestic judicial shifts favoring the reception of supremacy and direct effect were directly connected to pro-European positions developed by governments in the Member States. More radically, Geoffrey Garrett (1992: 557–559) contended that ECJ case law mirrors the interests of the stronger Member States. The latter were identified with the adoption of a cheap system of enforcement of EU law that reduced information and transaction costs in a supranational environment.

[15]Case 232/1975, 30 October 1975, "Ministero del commercio con l'estero", and case 170/1984, 5 June 1985, "Granital", both available at www.giurcost.org.

[16]Case 2 BvR 225/699.06.1971, "Lütticke", *Entscheidungen des Bundesverfassungsgerichtes*, 31: 145, n.º 3, a).

Neo-realists believe that judicial discretion is always politically conditioned due to the effectiveness of instruments that governments have to influence judicial behavior, namely by influencing the nomination of judges or by ignoring judicial decisions. When adjudicating, judges take into consideration the possible reaction of the executive and adopt the decisions that will not jeopardize their independence and authority (Garrett and Weingast 1993: 200, Garrett 1993: 173).

In the EU, national and European judges simply followed the interests of the Member States governments because they were afraid of the consequences (Garrett and Weingast 1993: 201 and 202).

### *13.4.2 Critic*

The argument that any ECJ decision could be interpreted as mirroring the interests of the Member States does not survive an empirical check. Member States governments often participate in the preliminary rulings procedure by presenting observations, which are frequently not followed by the Luxembourg Court.

Judicial discretion is much wider than what neo-realist imagine. On a supranational level, although Member States are the masters of the Treaties and may reverse the effects of an ECJ decision, a Treaty amendment procedure is a "nuclear option" that requires unanimity. It does not represent an effective and credible method of monitoring the ECJ (Pollack 1997: 188 and 189). On a domestic level, Member States government's hands are tied by the fact that national courts are the sole responsible for the implementation of EU law. The executive branch cannot prohibit direct communicating with the ECJ and the domestic application of the latter's decisions (Chalmers 1997: 172).

### *13.4.3 The Neo-functionalist Answer*

#### 13.4.3.1 Self-interest as the Factor for Legal Integration

Neo-functionalists metaphorically compare the evolution of legal integration to a machine nurtured by the interest of actors that have seized the opportunities presented by EU law (Stone Sweet 1998: 310–311).

Litigants invoke rights based on EU law (Stone Sweet and Sandholtz 1998: 4–5). A community of specialists in EU law made up of lawyers and law professors continuously promotes these efforts. Both form a "neo-functionalist interest group *par excellence*" (Burley and Mattli 1993: 65) because their careers benefit immensely from the domestic growth and expansion of EU law.

The ECJ empowered lower court national judges with the competence to trump national law that conflicted with EU law even if that meant defying the case law of higher courts.[17] It also refused any attempts to curb their competence to use the preliminary reference procedure.[18] Not surprisingly, national judges were pleased. Not only did they got external help in solving cases more quickly and without having to compromise directly (Sweet and Brunnel 1998: 73), but, more importantly, they felt empower:

> Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and, even more remarkable, to gain the power of judicial review over the executive and legislative branches, even in those jurisdictions where such judicial power was weak or nonexistent. Has not power been the most intoxicating potion in human affairs. (Weiler 1994 :523).

The ECJ created communities made up of national judges and litigants directly interested in fostering the domestic application of EU law. The court triggered what neo-functionalist called a "spill-over" or "snowball" effect. After rendering a couple of initial decisions (on direct effect and supremacy) that breakes the *status quo*, litigants press for further jurisprudential developments that are met by the ECJ in a spiraling process that leads to an ever-deeper level of legal integration in the EU.

Member States were unable to reverse the trend because the process developed in a hermetic and apolitical judicial environment. Legal discourse, due to its technical nature, worked as "mask" for the political questions at stake and, due to its normative nature, acted as a "shield" that protected judges from political pressure (Burley and Mattli 1993). EU law acted as a link between litigants, judges and lawyers in the Member States. Governments simply did not understood what was going on until it was too late. In other words, until the costs to reverse the constitutional case law of ECJ were just too high. The EU's legal system will thus develop as long as it stays away from politics and maintains the myth of legal objectivism.

Disparities in the internal incorporation of EU law are explained with the different dimension of GDP and commercial transactions between Member States. The number of preliminary references and the patterns in judicial reception of EU law are said to be directly connected with the level of economic integration of each Member State (Sweet and Brunell 1998, Sweet and Caporaso 1998).

#### 13.4.3.2 Critic

Neo-functionalists argue that litigants invoke rights that derive from EU law and that judges base their decisions in the EU legal order in order to skip the constraints of national law and judicial hierarchies. Both have allowed the ECJ to initiate a

[17]ECJ, 106/77, *Simmenthal II* [1978] ECR 629; Case C-105/03, *Pupino* [2005] ECR I-5285.

[18]ECJ, 166/83, *Rheinmuhlen* [1974] ECR 33, at 4; ECJ, 126/80, *Salonia* [1981] ECR 1563; Case C-2/06, *Kempter* [2008] ECR I-411, at 42.

constitutionalisation process that entails an ever-increasing expansion of EU law into the domestic legal orders.

However, neo-functionalist arguments ignore that litigants that benefited from national law, and, specially, supreme and constitutional courts, which saw their traditional influence and authority in the judicial hierarchy menaced by legal integration, favored the *status quo* and had powerful disincentives to oppose the expansion of EU law. There are thus no reasons to believe that legal integration has a predictable and unidirectional dynamics towards a further continuous penetration of EU law into the national legal orders (Alter 2001: 42).

## *13.4.4 The Historic-Institutionalist Answer*

### 13.4.4.1 A Competition Between Courts as the Factor for Legal Integration

I. If legal integration provokes conflicting interests in national and supranational actors, its evolution cannot be harmonic, but instead it has to be modulated by a continuous set of episodes. Historic-institutionalist authors reject the argument that legal integration has a predictable and unidirectional path, in which sovereign competences and powers are continuously transferred to supranational institutions. They argue that the ECJ is an institution located outside the domestic legal realm that can be used either by national or supranational actors to contest both national and EU law.

II. Karen Alter (2001: 47) identifies a competition between national courts as the key factor for explaining legal integration. She argues that judges have a specific set of interests and form a community in which EU law is used as a tool in their internal conflicts in order to obtain increased domestic authority and independence.

National judicial reactions to the constitutional case law of the ECJ can be traced to the different judicial identities that stem from the institutional position of each judge in the domestic judicial hierarchy.

Supreme and constitutional courts judges see themselves as the natural guardians of national law and, for that reason, do not accept the "subversive nature" of the principles of direct effect and supremacy of EU law to the traditional national judicial hierarchies (Alter 2001: 48).[19]

Lower courts judges are only concerned with the resolution of the case at hand. They are like a child and the ECJ works as one of the parents in a conflict in which a parental permission avoids a potential sanction for bad behavior. If a lower court does not like what one parent says (the supreme court) then she may ask the other

[19]According to Karen Alter (1999: 243) this behavior of supreme courts is merely a tendency. Supreme courts may favor the reception of the case law of the ECJ. That happens when they challenge the validity of EU law. In that case, a supranational decision increases their domestic influence *vis-à-vis* the national governments and the European institutions.

(the ECJ) to get the answer she wants. Having the approval of one parent will increase the chances of the action not being contested by the other (Alter1998: 242).

Karen Alter (2009: 98–100) argues that if they had the chance, national supreme courts would not have made preliminary references that implied a directly defiance to their internal authority. This explains the absence of preliminary references made by constitutional courts and the fact that supreme courts usually refer technical issues. It also explains the decisions that curbed lowers courts´ discretion to refer questions to the ECJ[20] and the challenges episodically made to the constitutional case law of the Luxembourg court.[21] These preferences, however, did not survive the possibility granted to lower courts to freely decide to refer a question to the ECJ. Supreme courts were suddenly confronted with the domestic application of the ECJ's preliminary rulings. This forced them to inflect their case law in order to avoid an open conflict with the Luxembourg court. They end up recognizing the fundamental tenets of the constitutional case law of the ECJ. But the surrender was not unconditional. Constitutional and supreme courts continued to qualify supremacy as a constitutional issue under their control thereby rejecting the argument that the Treaties created a new legal order. This compromise creates tensions that one day may imply ruptures in the complex relation between the national and European legal orders:

> The very same cases that have advanced European integration have contributed to the perception that European integration, and the European Court, unduly compromise national sovereignty and threaten the national constitutional order. As it expanded the reach of European law, the ECJ also increased the number of national actors on which it and European authority encroached. And the success of the European Court in creating influence for itself in national and European policy debates has led it to become a target of Euro-skeptics and sovereignty jealous actors, and or national supreme courts (Alter 2001: 54).

#### 13.4.4.2 Critic

The argument that lower courts were the crucial "integration engines" through a utilitarian use of EU law to challenge the authority of supreme courts also faces substantial empirical hurdles.

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[20] *House of Lords*, 22 May 1974 ("Bulmer"), at 9, available at http://links.laws.londoninternational.ac.uk/bookmarkpress/hp-bulmer-ltd-anor-v-j-bollinger-sa-ors-1974-ewca-civ-14-22-may-1974/.

[21] The French *Conseil d'État*, in a decision of 22 November 1978 ("Cohn Bendit"), available at www.lexinter.net, and the German *Bundesfinanzhof* , in a decision of 25 April 1985 (case VR 123/84, "Kloppenburg", *Entscheidungen des Bundesfinanzhof*, 143, at 383), rejected the direct effect of directives. The Italian Constitutional Court in a decision from 30 October 1975 (case 232/1975, "Ministero del commercio con l'estero"), available at www.giurcost.org, declared that ordinary courts did not had the power trump Italian law that conflicted with EU law.

Karen Alter considers that the preliminary reference procedure subtracts lower courts of any control exercised by supreme courts. This ignores that the decision to refer questions to the ECJ may in some national legal orders be appealed.[22] Moreover, even if that appeal is not possible, an indirect control may still be exercised. This will certainly be the case in the Member States where career progression is organized in a system of cooptation by older judges.

Karen Alter also assumes that supreme courts, had they had the chance, would have refused the submission of relevant preliminary questions. This explains the technical nature of the questions actually posed by supreme courts and the attitude of defiance towards the ECJ revealed by constitutional courts. Although it is impossible to find a precise definition on what could be a technical question, several cases that, at a first glance, seemed rather technical had a large impact on the development of EU law.[23] Moreover, in last decade we can find several preliminary references made by constitutional courts made in a "spirit of dialogue" with the ECJ.[24] This spirit is

[22]This possibility is available in the Netherlands (ECJ, 13/61, *Bosch*, [1962] ECR 45, at 11), in Spain (Cienfuegos Mateo 2008: 68), in the United Kingdom (*Court of Appeal*, 16 October 1992, "International Stock Exchange", *Common Market Law Reports* 2 1993, at 715–716) and in Hungary (ECJ, Advocate-General Poiares Maduro, opinion of 22 May 2008, C-210/06, *Cartesio*, ECR [2008] ECR I-9641, at 11).

[23]Amongst others, see the ECJ case C-213/89, *Factortame*, [1990] ECR I-2433, in which the Court recognized a duty on national courts to secure the full effectiveness of EU law, even when it is necessary to create a national remedy where none had previously existed.

[24]This was the case of the preliminary references made by the constitutional courts of Austria (*v. g.* ECJ, C-143/99, Adrian-Wien Pipeline, [2001] I-8365), Belgium (*v. g.* ECJ, C-93/97, *Fédération Belge des Chambres Syndicales de Médecins, ASBL*, [1997] ECR I-4837), Italy (ECJ, C-169/08, *Presidente del Consiglio dei Ministri* [2009] ECR I-10821), Lithuania (ECJ, C-239/07, *Sabatauskas*, [2008] ECR I-07523) and Spain (ECJ, C-399/11 Melloni [2013] ECR). The same, however, cannot be said of the preliminary reference made by the German Constitutional Court in February 2014 concerning the decision of the European Central Bank (ECB) to implement the Outright Monetary Transaction (OMT) Program. The German court considers the program unlawful both under national constitutional law and EU law and asked the ECJ to declare it *ultra vires* and in violation of the Treaty no-bailout provision (art. 123 TFEU). On 14 January 2015, the Spanish Advocate General Cruz Vilallón upheld the general compatibility of the OMT program with the European Treaties (C-62/74, *Gauweiler*). However, the German Constitutional Court hinted that it would declare the OMT decision to be *ultra vires*, unless the Court of justice restricts the current scope of the program. Contrary to what happened, for instance, in the "bananas saga" in the mid 90s, where the German Constitutional Court established an indirect dialogue with the ECJ on the level of protection of fundamental rights through the intermediation of lower courts (Claes 2006: 445), in this case the Karlsruhe court assumed the possibility of a direct confrontation with the Luxembourg court using the preliminary reference procedure. We have then a constitutional crisis in the making that could still be avoided if the ECJ incorporates some of the concerns of the German Constitutional court and restrains the current scope of the OMT program. Such a decision would be most to the prejudice of Member States like Portugal that have benefited greatly from a more un-orthodox approach to its monetary competences by the ECB and could be interpret as vindicating Garrett's (1992: 557–559) argument that the ECJ is a faithful agent of the most powerful Member States interests.

also found in decisions of constitutional courts that recognized that a breach in an obligation to refer from an ordinary court of last instance in accordance with article 267 (3) TFEU is also a violation of the constitutional principles of the right to the judicial body laid down by law and to effective judicial remedies.[25]

## 13.5 Conclusions

Proposals on the causes that explain judicial reception of EU law in the Member States share an intrinsic heuristic value that helps capturing the dynamics of legal integration in the EU.

The use by the ECJ of legal hermeneutics methodologies certainly gave its decisions an authority and legitimacy that could not be ignored by national courts and probably explains why most of them peacefully incorporated the constitutional case law of the Luxembourg court.

Other accounts on legal integration transpose the limits of legal discourse by observing courts as part of the "political process, rather than a unique body of impervious legal technicians above and beyond the political struggle" (Shapiro 1964: 15). Political factors are intrinsic to judicial adjudication and, therefore, national courts incorporation of EU law is necessarily filtered by their perception of their political role. The identification of judges as agents in the political process may sound at odds with the guaranties of independence and impartiality that surround the judiciary. However, although the "judicial system may be autonomous, it is not autarkic. It will often be used instrumentally by political actors. Indeed, a feature of the legal system is that it is particularly vulnerable to these outside pressures" (Chalmers 2000: 1).

The study of legal integration should not be made exclusively through legal lenses, but it should also not be made only through political lenses. The latter identify the application of EU law by national courts as a mere expression of interests and fail to understand the constraints that legal reasoning imposes on courts due to its capacity to reach forms of knowledge that transcend external interests (Joerges 1996: 118–121, Chalmers 2005: 155, Maduro 2006: 66–69).

[25]German Constitutional Court, 22 October 1986 ("Solange II") 2 BvR 197/83, Entscheidungen des Bundesverfassungsgerichtes, 73: 339, 1, a) and aa); Austrian Constitutional Court, 11 November 1995, B2300/95-18, available at www.ris.bka.gv.at/vfgh/, 4, b)); Spanish Constitutional Court, Case 58/2004, 19 April 2004, available at www.tribunalconstitucional.es.

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