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OF JUSTICE IN THE THIRD
PILLAR: DOES NOT IT GROW
TOO FAST?**

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ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE THIRD PILLAR: DOES NOT IT GROW TOO FAST?

The article discusses the role of the European court of justice in the so called third pillar of the European Union. This role, from virtually non-existent in the early 1990s when the third pillar was introduced into the institutional structure of the European Union, grew extensively throughout the 1990-2000s and by the time the pillar structure was abandoned in the Treaty of Lisbon in 2009, the Court has already effectively escaped its limitations by its own case-law. This provides a curious example of judicialization – the process whereby legal institutions gain political power and engage into taking politically salient decisions alongside, and sometimes even instead of politicians acting within majoritarian institutions. By reviewing the ECJ case-law in the third pillar the paper attempts to establish the effect of judicialization on the EU, to evaluate it and to answer the question whether the role of the ECJ grows too fast in the third pillar.

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INTRODUCTION

One of the major topics in the area of judicial politics is the process of judicialization. Judicialization is a relatively novel term widely taken to mean one of the two things: either “the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators”, or “the spread of judicial decision-making methods outside the judicial province proper” (Vallinder 1994). The two are obviously related, although take different forms and look differently.

The expansion of the province of courts into the areas previously reserved by politicians and bureaucrats occurs as judges get involved in the decision making process in the areas previously restricted to them by the political convention. As one of the popularizers of this novel concept suggested, such areas may include abortion, minority rights, constitutional matters that are essentially non-legal and political, and are therefore expected to be resolved within majoritarian institutions and by politicians, not by judges (Hirschl 2008). Letting the judges enter these sensitive areas and treat these ticklish subjects became one of the major political developments in liberal democracies in the second half of the 20th century, after the so called “constitutional revolutions” changed the social attitudes towards these issues and allowed for their constitutional interpretation (Hirschl 2000).

The second part of this process – introducing the more legalistic, quasi-judicial procedures into the functioning of essentially non-legal organizations – is less visible, yet obviously related to this societal change. One could build a more abstract common framework for both of these processes by relating it to the Weberian prediction on the evolution of the West, with the legal rational form of social action justification gradually taking center stage. Judicialization, in both its meanings, is but one manifestation of this legal rationalization becoming the cornerstone of the organization, functioning and cohesiveness of the Western societies and Western states throughout the 20th century.

At the same time, judicialization, although predictable and highly theorized, is by no means a peaceful process. It involves a conflict between the elected politicians who face legal constraints, which they often find annoying, and who cede some important powers to judges, on the one hand, and the legal elites advocating the courts' right to review political decisions and take some crucial decisions, and actually exercising this novel right, on the other. It also leads to many controversies, when societies find out decisions on some salient issues are taken for them (and, in many critical accounts, instead of them) by the non-majoritarian institutions (Thatcher and Sweet 2002). These conflicts evolve and resolve differently, thus resulting in considerable

variation in judicialization in different contexts. This brings us to the question of what determines the outcome of judicialization, and what are the inner mechanics of this process.

To answer this question I take one particular case of judicialization – the European court of justice (ECJ). The ECJ used to be a relatively powerless institution when it was created in the early 1950s, but it gradually built up its powers by proposing and promoting various pieces of jurisprudence which together resulted in the empowerment of the European Union (EU) in general (as related to its member states), and of its judiciary in particular (Weiler 1999; Weiler 1994; Dehousse 1998; Alter 2010). In this context, the politicians who lost power or found themselves restricted more and more by the new legal constraints, were the leaders of the member-states of the European Union, and the national ministers voting in the Council of ministers, one of the two legislative bodies of the European Union. The process of judicialization in the European Union was therefore not only unusual because of the growing powers of the judiciary, but also as it marked the crisis of nation states in Europe².

One area where the growth of judicial powers was particularly impressive is the Area of freedom, security and justice (AFSJ) – the area where the EU member states' police and judicial bodies cooperate in building a safer common inner space for the European citizens. The fact it was so impressive owes not as much to the degree of integration here (which is in fact far from outstanding as compared to some other areas), but rather to the conditions the ECJ started in, and the progress it was able to make in just about twenty years from the moment the area of freedom, security and justice made its way in the Treaties for the first time in 1993 in Maastricht.

Indeed, the AFSJ was referred to as the “third pillar” in the Maastricht treaty, indicative of the peculiar architecture proposed to the European Union at the time, where most Community bodies had powers in the “first pillar” only, while the “second” and “third pillars” – the Common foreign and security policy and the Justice and home affairs (the JHA, only to be renamed into the AFSJ with the treaty of Amsterdam in 1999) – were protected from possible encroachment by the Community bodies, that is, by the ECJ and the European commission. The Court did not submit to this, and its role in the third pillar started to grow already after the Maastricht (Peers 1998). The question I ask is did not its role grow too fast?

'Role' is a word that can have two meanings. Role can be the role assigned, that is, the function; or it can be the role played, that is, the contribution to a broader process. As both meanings fit the title of this paper perfectly well, I shall try to cover both here. A preliminary observation,

² There are different views though on whether European integration marks an end to the European nation state as such, or merely a solution used to «rescue» it (Milward, Brennan and Romero 2000).

however, would be that in neither of the meanings the answer to the question which role the Court plays in the third pillar would be unambiguous.

On the one hand, the role assigned to the Court in the third pillar is something one would feel difficult to define because it evolved quite significantly during the sixteen years of existence of the third pillar itself (and continues to evolve since the pillar structure does not disappear completely with the Treaty of Lisbon), and because this evolution is far from being an ordered process.

On the other hand, the role the Court played is hard to explain in terms of its positiveness or negativeness, as the record is rather mixed; neither it is clear if we have an appropriate yardstick to measure this role, as the Court is supposed to be a politically neutral body that should only be evaluated by the way it performs its function of administering justice, and this is rather a task for a legal scholar.

In this paper I would, however, try to venture into evaluating the Court's role – in all the meanings of the word – by placing it into a broader perspective of development of the third pillar as such. The question of whether the role played by the Court grows too fast would thus be translated into a less bold, but more feasible one of whether this role is adequate to the third pillar's task of making the European Union “an area of freedom, security and justice” that the member states subscribed to in the Treaty of Amsterdam. I shall argue that the Court's interference with the third pillar allowed for a more full-fledged implementation of the last ingredient of this mix (namely, justice), but led to some suboptimal results because of the uneven development of the area as such.

To do so, I shall proceed as follows: first, I shall outline what the Treaty says on the Court's competences in the third pillar; secondly, I show what the Court itself says on this subject in its case-law; thirdly, I discuss the Court's contribution to the development of the third pillar; fourthly, I bring to the fore the drawbacks of the Court's intervention and discuss the reasons why the results of the Court's rulings were sometimes politically suboptimal; then, finally, I conclude by some broader remarks on the Court's performance.

ROLE ASSIGNED: WHAT THE TREATIES SAY ON THE COURT'S JURISDICTION IN THE THIRD PILLAR

Despite the assertion that “the Union shall be served by a single institutional framework” by article C of the Treaty of Maastricht, the only mention of the Court (which certainly makes an integral part of the institutional framework) in the third-pillar Title VI of the EU Treaty is made in relation to the conventions that the Council may draw up and that may themselves “stipulate that the Court of Justice shall have jurisdiction to interpret their provisions”. Apart from this optional possibility that the Court could be invited by the member states to adjudicate in relation to a particular instrument of the third pillar, nothing in the Treaties says of the Court's role anywhere but in the Community pillar. Thus, even though the Treaty of Maastricht introduced the third pillar, the Court remained a body of the Communities empowered exclusively within the Community law.

This changed with the two-fold reform of the Treaty of Amsterdam. First, the pillar itself was split, with visas, asylum, immigration and civil justice transferred to the Treaty establishing the European Communities (EC) (and thus falling back under the Court's judicial control). Second, in the remainder of the third pillar, covering the cooperation in criminal justice, that stayed in title VI TEU, the new provisions that allowed for the Court's interference were introduced. Thus the reform of Amsterdam created three distinct regimes in which the Court operated. First, the classical one, was described in articles 220-245 EC; it is the regime applied in the Communities since the Treaties of Rome (the so called *Community method*). The second one is the modified procedure of article 68 EC that restricts application of article 234 on preliminary rulings by allowing only the national courts “against whose decisions there is no judicial remedy under national law” to submit requests for preliminary rulings on provisions of the newly created title IV EC. Finally, the third procedure – the one applying to the third pillar itself – is defined by article 35 EU which is even more restrictive than article 68 EC. Not only does it specify the types of action available to the Court as concerns the interpretation of provisions of title VI EU; it gives the member states a possibility to submit a declaration that would give the Court a jurisdiction to answer the requests for preliminary rulings from the national courts of each member state, or not to submit it, in which case national courts just cannot ask for preliminary rulings at all.

This triple jurisdiction of the Court existed from 1999 on till the Treaty of Lisbon that just demolished the pillar structure as such (at least, as concerns the third pillar) thus streamlining the preliminary ruling procedure. However, given the five-year transition period that applies to all the measures adopted under titles V and VI EU, the Court would still often face a situation where a distinct regime of ex article 35 EU would be in force.

This brief review of the Court's jurisdiction in the third pillar leaves us with two conclusions. First one is that the period where the Court had any jurisdiction in the third pillar started only in 1999 with the entry into force of the Treaty of Amsterdam. Second is that we can clearly see in the provisions governing the Court's behaviour in the third pillar that the drafters of all the treaties starting from the Maastricht intended to place the Court into a more restrictive institutional environment as if fearing the Court's ungovernable nature.

ROLE DEVELOPPED: WHAT THE COURT SAYS ON ITS JURISDICTION IN THE THIRD PILLAR

The draftsmen's fear that the Court would not behave in line with their interest proved right shortly after the Treaty of Amsterdam was signed and even before it entered into force when the Court gave a ruling saying that it can interpret the second and third pillar provisions of the Treaties, if need be. The *Air transit visas* case was brought to the Court by the Commission that sought annulment of the Council Joint action aimed at harmonisation of the national legislation on airport transit arrangements that was adopted under article K.3, whereas according to the Commission the legal basis should have been the then article 100(c) EC on the movement of persons³. The Court dismissed the action, giving a rather curious reasoning for that; for the aims of our analysis it is interesting, however, that to give such a ruling the Court should have in principle been able to *look* into the EU Treaty and to use the provisions of that treaty in its deliberations, which it clearly was not supposed to do by the Treaty of Maastricht. The Council insisted on inadmissibility of the case because of limitedness of the Court's jurisdiction outside the Community pillar, but the Court could ground its argument in provision of the then article M that “nothing in the [EU] treaty shall affect the [EC treaty]”. The *Air transit visas* ruling was thus used by the Court to restore its powers of interpreting the Treaty provisions regardless of the pillar they belong to (Hatzopoulos 2008: 47).

Second step in that direction was equalising the legal protection provided in the first and third pillars, and this step was made in the *Gestoras Pro Amnistía* and *Segi* rulings. Both rulings concerned Basque organisations that were put into the list of terrorist groups by a Council common position and brought actions for damages to the Court. Yet, the Court's powers to

³ 'Air transit visas, Case C-170/96', *EUR-Lex*, May 12, 1998, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996J0170:EN:HTML>, retrieved May 13, 2010. The information on cases cited in the paper is hereinafter put in the footnotes.

comfort plaintiffs in these cases were limited as article 35 did not suppose action for damages at all, which was the reply the Court of First Instance gave when proclaiming the cases inadmissible⁴.

However, when an appeal was brought to the Court itself, it had to propose a solution that would allow national courts to request preliminary rulings from it and then restore the plaintiffs in rights on the national level as

“it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules... in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to... the application to them of an act of the European Union and to seek compensation for the loss suffered”⁵.

In these rulings the Court solved two problems. It brought into the third pillar the concept of legal remedy that was not quite present there before; at the same time, it provided the reasoning for a broad interpretation of article 35 EU as it would “run counter to [the Court's] objective [of guaranteeing observance of the law in the application of the Treaty] to interpret Article 35 narrowly”⁶. This broad interpretation allowed the Court to go even further and to say, for example, that the Court would have jurisdiction to review the legality of the Council common positions in a suit brought by the Commission or the member states⁷, whereas article 35 EU only gives the Court such powers as concerns the Framework decisions and Decisions.

Finally, the third step the Court made to restore its powers in the third pillar was its attempt to transform the legal order within the third pillar so that it becomes more similar to that of the first one. The ruling it used to do so, a genuine *cause celebre* in this sense, was *Pupino*, a case of an Italian teacher who used to punish her pupils, all small kids less than five years old, “by such acts as regularly striking them, threatening to give them tranquillisers and to put sticking plasters over their mouths, and forbidding them from going to the toilet”⁸. This case that drew a wide response in the Italian society (Spencer 2005: 570), and that, indeed, from the ordinary standpoint seems to be unambiguous, stumbled over a specific norm existent in the Italian law

⁴ 'Segi, Case T-338/02', *EUR-Lex*, June 7, 2004, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002B0338:EN:HTML>, retrieved May 3, 2010.

⁵ 'Gestoras Pro Amnistia, Case C-354/04 P', *EUR-Lex*, February 27, 2007, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0354:EN:HTML>, retrieved May 13, 2010.

⁶ 'Segi, Case C-355/04 P', *EUR-Lex*, February 27, 2007, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0355:EN:HTML>, retrieved May 3, 2010.

⁷ Ibid.

⁸ 'Pupino, Case C-105/03', *EUR-Lex*, June 16, 2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0105:EN:HTML>, retrieved May 3, 2010.

according to which it was impossible to use a special inquiry procedure to the children who were victims or witnesses of the investigated crime because of the age limits. Without the evidence the prosecution could not proceed and the case would have to be closed. Of course, this should have seemed nonsense for an outside observer.

The hope that a preliminary ruling given by the ECJ could remove this snag stemmed from the fact that the norm of the Italian legislation in question clearly contradicted a Framework Decision on Protection of Victims adopted by the Council in 2001 and aimed at approximation of the national “laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection”⁹, so, basically, to let small children, if they are involved in such cases as *Pupino*, safely participate in the trial.

However, the specificity of framework decisions is that they are not enforceable, which means that the Commission, for example, cannot bring a case on failure to fulfil obligations against a member state if its law does not comply with the framework decision. Framework decisions are thus sort of a gentlemen's agreement (that, of course, should be transposed into the law, because otherwise it makes no sense to adopt them, but do not produce direct effect, so do not rule out the contradicting provisions of national law automatically, as we see it happened in this particular example). This led some of the member states to suggest that the Court could not give a preliminary ruling based on a framework decision, especially if it would then mean that Italy should change its legislation accordingly. So this case, although relatively simple content-wise, turned to be a case concerning the Court's own competences of interpreting the measures adopted in the third pillar, and of the legal value of such measures.

The ruling given by the Court basically equalised the procedure existent in the third pillar to that of the first one by subjecting it to the same set of requirements. The Court could argue in favour of such solution by extending the concept of sincere cooperation of the ex article 10 TEC to be applied to the whole of the Union. As the ruling says,

“it would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters”¹⁰.

⁹ '2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings', *Official Journal of the European Union* L 82, March 22, 2001, p. 1.

¹⁰ 'Pupino, Case C-105/03', *EUR-Lex*, June 16, 2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0105:EN:HTML>, retrieved May 3, 2010.

This means, that although Framework decisions have no direct applicability, they are in general similar to Directives adopted in the first pillar: they still produce legal effects, they should be taken into consideration by the national courts, and, as a consequence, should be taken seriously by the participating governments. As Henri Labayle puts it, “the idea here is that states as well as the EU institutions have a dynamic obligation to do everything to achieve the goal [of creating the AFSJ] established by the Treaty” (Labayle 2006: 25).

From the position of the Court's own powers, the effect of this ruling is that the law adopted in the third pillar (despite its particular nature and despite the initial will of the member states to make it exposed to the Court's interpretation only under some particular conditions) became absolutely equal to the Community law in the sense that the Court regained its control over the way the law is applied in the Union.

This last step meant that the law adopted under the third pillar penetrates national law just the way this happens within the first pillar, and that member states cannot adopt together a framework decision, and then wash its meaning away when transposing it. Thus, we see that the Court, starting from a situation of extreme discreteness in its jurisdiction, has brought it to a more or less common denominator by its case-law that effectively erased the difference in interpretability of the first and third pillar treaty provisions, in preliminary ruling procedures adopted in the pillars, and in the legal nature of the legislation adopted in the pillars.

ROLE PLAYED: THE COURT'S CONTRIBUTION TO THE THIRD PILLAR

It should be said that despite the member states' active insistence on the supposed limitedness of the Court's jurisdiction in the third pillar (often emphasised in their interventions to the cases reviewed so far), the role the Court played in the development of the field was rather positive. The very restoration of its own powers led basically to reinforcement of the rule of law in the Union and, thus, strengthened the justice-related part of the AFSJ.

At the same time, it should be mentioned that the Court's contribution to the third pillar does not only amount to it performing its function of observing the lawfulness in the Union, but goes further to include the promotion of the political process of establishing the principle of mutual recognition in the third pillar, and to reforming its own procedures to make their functioning

better fit the specific tasks of the third pillar (which I exemplify here by the urgent preliminary ruling procedure introduced in 2008).

The mutual recognition is a concept often associated with the Court due to the role its *Cassis de Dijon* ruling played in building of the internal market (Alter and Meunier-Aitsahalia 1994). Similar meaning is assigned to its *Gözütok and Brügge* ruling where the Court suggested that “the *ne bis in idem* principle [contained in the Schengen Convention] necessarily implies that, regardless of the way in which the penalty is imposed, the Member States have mutual trust in their criminal justice systems”¹¹. This appeal for mutual trust in the criminal justice of the other member states is clearly pro-cyclical, as economists would call it, being a solution aimed at promoting the already existent political agenda of avoiding excessive harmonisation through mutual recognition where it is possible (which was proclaimed in Cardiff and fixed in Tampere, see Lavenex 2007: 763).

The Court persistently applied this principle in its case-law since *Gözütok and Brügge*¹²; however, more recently it took a more restrained approach in its *Turanský* ruling where for the first time the concept of “finally disposed of” (used to define if the decision on a particular case already taken by a jurisdiction in one country is ultimate and prevents a court in another country of reopening the case) was interpreted not in favour of the defendant whose case, as it was said by the Court, was not finally disposed of¹³. Combined with the fact that the Court was not the first to propose mutual recognition as a solution for the third pillar's problems, this rollback in the Court's jurisprudence suggests that the application of mutual recognition by the Court, although generally useful, is not politically preconditioned and is rather a result of the Court's routine adjudication.

The third contribution the Court made is the introduction of the new urgent preliminary rulings procedure (PPU) in 2008 made by the Council decision following the Court's request¹⁴ and aimed at cutting down the duration of proceedings especially for the AFSJ cases as “the matters covered by the area of freedom, security and justice... are often characterised by their

¹¹ 'Gözütok and Brügge, Joined Cases C-187/01 and C-385/01', *EUR-Lex*, February 11, 2003, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0187:EN:HTML>, retrieved May 3, 2010.

¹² See, for instance, 'Van Straaten, Case C-150/05', *EUR-Lex*, September 28, 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0150:EN:HTML>, retrieved May 13, 2010; 'Gasparini, Case C-467/04', *EUR-Lex*, September 28, 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0467:EN:HTML>, retrieved May 13, 2010.

¹³ 'Turanský, Case C-491/07', *EUR-Lex*, December 22, 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0491:EN:HTML>, retrieved May 3, 2010.

¹⁴ '2008/79/EC, Euratom: Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice', *Official Journal of the European Union* L 024, January 28, 2008, p. 43.

urgency”¹⁵. It should be mentioned, at the same time, that since its inception the PPU was only used a dozen of times, and only once in a case related to the criminal matters¹⁶, whereas it is more often applied in cases on asylum and civil justice. So the impact of the new procedure for the third pillar is not yet visible.

DRAWBACKS OF THE COURT'S INTERVENTION

It could be concluded from the previous sections that the risks the Court took when venturing into the third pillar were repaid by its contribution, and that the case is thus clear-cut. This is certainly wrong. Apart from achievements, with the major one being the restoration of the rule of law in the third pillar, the Court's activities sometimes led to clearly suboptimal and negative results.

One example of such situation is the infamous *PNR* ruling on the agreement on exchange of passenger name records – a practice used to provide security in air transport after September, 11. The agreement was concluded by the Council with the United States and was contested by the European Parliament (EP) that sought annulment of the Council decision that provided for agreement with the USA (as well as the accompanying Commission's decision on adequacy) on grounds mostly related to compatibility of the Decision with the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data, used as the legal base for the Decision. Without going into details, the Court simply stated in its ruling that the Decision adopted had as its goal provision of public security and thus clearly belonged to the third pillar, not to the first one where it was adopted¹⁷.

This rollback within an already *de facto* communitarised area still causes many questions. The ruling had regrettable practical consequences as the new agreement was to be reached in three months only and the Americans could thus impose their conditions in negotiations. Besides, this decommunitarisation clearly was not the EP's intention when it went to the Court, as after the ruling the EP found itself completely sidelined from the process, not even having a right to be consulted which it enjoyed before (Jörg Monar called this the EP's “major 'Pyrrhic legal victory'”

¹⁵ 'A new procedure in the Area of Freedom, Security and Justice: The urgent preliminary ruling procedure, Information for the press No 12/08', *European Court of Justice*, March 3, 2008, p. 1, <http://curia.europa.eu/en/actu/communiqués/cp08/info/cp080012en.pdf>, retrieved May 13, 2010.

¹⁶ 'Leymann and Pustovarov, Case C-388/08 PPU', *EUR-Lex*, December 1, 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0388:EN:HTML>, retrieved May 13, 2010.

¹⁷ 'PNR, Joined Cases C-317/04 and C-318/04', *EUR-Lex*, May 30, 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0317:EN:HTML>, retrieved May 13, 2010.

in his third pillar chronicles, see Monar 2007: 119). The ruling thus ran counter to all the political and economic interests present, and it might seem strange the Court gave it at all.

Yet, there were strong legal reasons for the Court to give this ruling. Being an institution empowered through law, the Court is at the same time very much dependent on the law's structure. And the law, being “the Community's common language” (Costa 2003: 740), is at the same time that sort of language that still keeps the meanings put into words even when those who once put those meanings no longer mean what they said. Normally this specificity leads to conservation of values through law and their protection from future hasty revision. However, with the pillar structure imposed over it, the law became over-protective. The additional safeguards of pillarisation made it possible that the political will, when it is institutionalised in law, acquires a different meaning from the one intended because it has to belong to a certain pillar, and the Court reacts to this meaning, not to the new one. When this happens, justice as the most law-oriented element of the trinity, works against the more political freedom and security.

CONCLUSION

In this paper I tried to evaluate the role the Court played in the third pillar. I suggested that the Court's intervention was useful in strengthening the rule of law in the Union, which broadly coincides with “justice” from the AFSJ; at the same time, it is possible that some drawbacks happened in situations where freedom and security find themselves subject to justice if things take a legal turn.

In doing so I first outlined the evolution of the Court's jurisdiction in the third pillar starting from the Maastricht treaty where it had no jurisdiction at all, through the Treaty of Amsterdam, where three distinct regimes of the Court's functioning were created (one in the first pillar in general; one in its new part concerning visas, asylum, immigration and civil justice; and the last one in the remainder of the third pillar, namely, the criminal justice), and, finally, to the Treaty of Lisbon, that demolished the third pillar as such, although with a five-year transition period for the Court. Then I showed how the Court used the cases before it to restore its powers of interpretation of the Treaty regardless of pillars, of giving legal remedy in the third pillar even where it is not presupposed by the Treaty, and of enforcing the law adopted in the third pillar even where this is not meant by the legal instrument in question. Then I discussed which contribution the Court made in the third pillar using its newly acquired powers, namely, the

restoration of the rule of law, promotion of the mutual recognition and introduction of the urgent preliminary ruling procedure. Finally, I showed which drawbacks the Court's intervention can have on the example of the *PNR* ruling and explained these drawbacks through specificity of a legal system divided into pillars.

From this analysis I could conclude that the Court's intervention was indeed needed given the nature of the measures adopted in the third pillar, and had positive effect on construction of the AFSJ. At the same time, some drawbacks were inevitable given the complicated structure of the pillarised legal order. That is why I think that these drawbacks (as well as the fact that Court had to construct its competences itself) are first of all indicative of the fact that the area was not prepared by the legislator properly.

This refers us back to the problem of judicialization as a process which might lead to problematic outcomes where the legal solution taken by the judiciary does not only go against the influential political interests, but may also be overprotective from the standpoint of the broader social interest. When in 2009 the Lisbon treaty was signed, the pillar structure that secured such overprotection, was taken away. The judicial incentives were no longer mixed by the presence of this awkward structure, which should lead to a more balanced jurisprudence for the ECJ in the future.

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