Abstract
This paper deals with an important part of the puzzle of internal security integration: the role of courts at both the domestic and the European level. They are strategic actors and conditional veto players. The paper examines how governments’ JHA integration is influenced by the courts. It argues that governments which are confronted with strong courts’ decisions concerning internal security are more interested in integrating policy matters covered by these decisions or are anticipated to become matters of potential proceedings. However, such multi-level games may have negative externalities: new political restrictions and more severe judicial judgments. Therefore, the research must include the long-term interplay between politics and courts.

1. Introduction
Today, the integration of Justice and Home Affairs within European Union is much further developed than the integration of political external relations or social policies. Jörg Monar certified it “a by all standards exceptional ‘career’”. According to him, “there is no other area, which made its way as quickly and comprehensively to the centre of the Treaties and to the
During the 1980s, the cooperation in this field has been seen as a prerequisite to reach the aim of a free movement of persons, yet JHA “did not exist as a policy-making area within the scope of the Treaties, and the limited co-operation between the Member States which had been building up since the mid-1970s took place in a range of poorly coordinated intergovernmental groups which lacked adequate institutional structures, legal instruments and objectives”.2 The 1997 Treaty of Amsterdam renewed the argumentation that JHA cooperation is a prerequisite to guarantee a free movement of persons, but in a modified manner: In Art. 1(5), it defined the objective “to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.” Accordingly, the treaty regulated more issues of Justice and Home Affairs in more provisions than its predecessors. Policies concerning visa, asylum, refugees, immigration and other Schengen issues were included into the ‘First Pillar’ of the EU, the European Communities. This act of ‘supranationalisation’ decreased the influence of national governments: The governance mode in these areas now was characterized by co-decision procedure of the European Parliament and the Council. Within the Council, decisions are made by qualified majority voting. The agenda-setting prerogative is with the Commission and the European Court of Justice has judicial authority.

At the institutional level, there is ‘work in progress’: The attempts to reform the institutional structure of the European Union, which culminated in the Lisbon Treaty, focused much on Justice and Home Affairs. Since the failure of the Irish ratification referendum, the future of the Treaty is open. Although it is possible to implement many of the concrete plans within the existing institutional structures, there will certainly be a new attempt to reform the Union.3 During the last years, additional European security actors have been established within the framework of the ‘First Pillar’. Among them are FRONTEX, an agency to manage European border control, or the External Borders Fund, the biggest financial instrument of the area of justice, freedom, and security.4 Along with the institutional integration, the common practical measures have been extended. This especially concerns the fight against organized crime and international terrorism. To 9/11, the EU formulated a “seemingly impressive and

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2 Ibid.
3 Matthias Oel, Institutionalierte Kooperation und Umsetzungshürden in der europäischen Innenpolitik (Berlin: IEP, 2008); Andreas Maurer, ibid.
unprecedented... response” within only some weeks.\(^5\) All in all, European JHA policies now formally include a large number of issues: free movement of persons, visa policy, EU external borders policy, Schengen area, immigration, asylum, judicial cooperation in civil and criminal matters, drugs policy coordination, EU citizenship, data protection, fundamental rights, racism and xenophobia, police and customs cooperation, crime prevention, fight against organised crime, external relations.

However, the integration in Justice and Home Affairs still falls behind economic integration. In her comparative analysis of European integration, Tanja Börzel scores the level of JHA integration (i.e. the number of issues falling under EU competence) two to three on a five-points scale and the scope of JHA integration (i.e. involvement of supranational bodies and the Council voting rule) three to four.\(^6\) Indeed, the most JHA issues are treated under the ‘Third Pillar’, i.e. police and judicial cooperation in criminal matters. Here, the governance mode can be qualified as intense intergovernmentalism: The right for initiative is shared between the Commission and the Council and unanimity in the Council is generally necessary for decision-making. The rights of the European Parliament and the European Court of Justice are strictly limited and Member states largely uphold national sovereignty.

The willingness to give up national sovereignty rights differs much across Members States as well as JHA areas. Policies facilitating practical cooperation and information exchange among EU Member states were easier agreed upon and implemented than those directly challenging the core of state sovereignty. This is especially true in areas covered by the ‘Third Pillar’. The high implementation deficits refer to the date, contents and normative quality of transposing legal instruments into national legislation. Out of the ‘Third Pillar’ issues, only fight against terrorism belongs both to the priorities of the EU and of the single Member states, if measured be implementation rate. The report on the implementation of the Hague program for 2007, for instance, revealed an even lower rate of achievement compared to 2006 (38% compared to 53% achieved) with a substantial increase in actions that had to be delayed (41% compared to 27% in 2006).\(^7\) Table 1 shows in which areas the level of achievement has been qualified being “sufficient” or “insufficient”.

Besides these general long-term characteristics of JHA integration, there are two relatively new trends: The first is a general cross-pillarisation. The second trend is a higher diversification of JHA-related negotiating venues than ever before.

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\(^7\) European Commission, Report on implementation of the Hague programme for 2007 (COM/2008/0373 final).
Table 1: Implementation of planned EU measures in the JHA areas

<table>
<thead>
<tr>
<th>Satisfactory level of achievement</th>
<th>Insufficient level of achievement</th>
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<tr>
<td>Migration Policy;</td>
<td>Visa Policy;</td>
</tr>
<tr>
<td>Border Policy;</td>
<td>Sharing of Information among Law Enforcement and Judicial Authorities;</td>
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<tr>
<td>Terrorism;</td>
<td>Prevention of and the Fight against Organised Crime;</td>
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<tr>
<td>Confidence Building and Mutual Trust;</td>
<td>Management of Crises within the EU;</td>
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<tr>
<td>Judicial Cooperation in Civil Matters</td>
<td>Police and Customs Cooperation;</td>
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The question now is: How can we explain this development in a more comprehensive way?

The paper argues that the characteristics of JHA integration and cooperation (or the strategies of governments which cause the characteristics) depend highly on courts’ behavior at the national level and will depend highly on courts’ behavior at the European level. In doing so, it concentrates on theoretical reflections rather than on empirical evidence. The article first describes the governments’ interests. Then it discusses the judicial behavior and its effect on governments’ strategies. In the third part, the long-term effects of the interplay between governments and courts on European integration in the area of internal security are discussed. In the fourth section, the article derives consequences for research and makes a proposal concerning how to conceptualize the influence of courts on integration in JHA. The last part summarizes the results.

2. Governments’ short run interests in internal security

Governments are strategic actors. They seek:

(1) to attain political (programmatical) goals;
(2) to secure that their political decisions are implemented in the long run;
(3) to maximize their power,
(4) to increase their public reputation in order to win the next elections.

In order to accomplish their goals, governments use strategies like cooperation, securitisation or venue-shopping.

All theoretical as well as empirical studies emphasize that the first and most important goal of States has consisted and still consists in guaranteeing security to its citizens.8 (Only) This function legitimizes its monopoly to use force and thus lies at the core of sovereignty. Accordingly, to protect the citizens from harm is a vital interest of governments. Very different national institutions, practices and routines (cultures) have developed in this sphere.

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That is why security affairs will always cause a special sensitivity of politicians and office holders. Given that any State will voluntarily abolish its own power, one may assume that there must be important reasons for it to agree to a communitarisation of security competencies. Indeed, historically, supranational integration has always been limited to issues which did not influence the essential matters of national sovereignty.9

There are useful concepts in the study of Justice and Home Affairs integration which are based on straightforward assumptions of rational choice, institutionalism, and integration theories. The most convincing theoretical frameworks are based on the mutual complementation of an intergovernmental and a neofunctionalist argument. The liberal intergovernmentalism argues that for most governments, inducing economic modernization was the major purpose of European integration.10 Economic integration then had spill-over effects on internal security cooperation. According to the neofunctionalist paradigm, the free movement of capital and persons within the European Union constituted the necessity for security actors to cope with trans-national crime and money laundering,11 but this did not lead to an automatic JHA integration in big terms.

The change of the international context, especially globalisation and migration after 1989 led to a change of risk perception. The kind of crime which was seen as the main risk and therefore was seen as making necessary related common action differed much from country to country.12 Often the perceived risks were not rationally backed by the criminal statistics, at least they were out of proportions with the real risks.13 However, since citizens demanded for comprehensive security measures and judged the effectiveness and the success of governments more and more by their ability to prevent them from crime and harm,14 the change of risk perception increased the sensitivity of political actors for security measures. As a consequence, basing demands to the government on security arguments increased their chance for being met. That relates to all kind of actors. Besides this, the resources and the relative standing of national ministries within the national political systems influenced the

ministries’ power to frame issues according to their interests, as did national historical experiences that can prescribe or foreclose particular policies.\textsuperscript{15} As to the governments, connecting politically wanted measures with the argument of increasing security was a good strategy them too to legitimize the own action. Since “security is defined largely by what policy makers say it is”\textsuperscript{16}, they tended to frame issues as security-political relevant in order to gain authority in policy-making.\textsuperscript{17}

The terror attacks of September 11th 2001 again gave good opportunities for such a strategy which was especially used by the ministries of the interior and security agencies.\textsuperscript{18} These external events weakened political resistance within the EU as a political system, thus allowing for institutional change.\textsuperscript{19} Besides this, the (pictures of the) terrorist attacks of 9/11 and later terrorist events have made the public and the governments sensible for risks and for to what extent traditional ‘internal’ security might be threatened by international forms of crime. The population was very much in favour of measures to combat crime and tended to accept the restriction of freedom if it seems to be necessary to guarantee security.

\textit{In the short run}, Justice and Home Affairs remained mainly products of the national executives which hardly could and can be controlled by the national or regional Parliaments.\textsuperscript{20} Often a misbalance between measures designed to guarantee the trias freedom, security and justice is observed and complained.\textsuperscript{21} The governments were ready to integrate partly their internal security sector when it promised a better way to cope with risks, but they insisted on national sovereignty. Therefore, the Council plays a prominent role in ‘Third Pillar’ policy-making.\textsuperscript{22} Generally, as Johan Olsen has put it, the European institutions did “not dictate specific forms of institutional adaptation but leave considerable discretion to domestic actors and institutions. There are significant impacts, yet the actual ability of the European level to penetrate domestic institutions is not perfect, universal or constant. Adaptation reflects variations in European pressure as well as domestic motivations and abilities to adapt.
European signals are interpreted and modified through domestic traditions, institutions, identities and resources in ways that limit the degree of convergence and homogenization.\textsuperscript{23}

The interesting question now is: Why were some governments much more pro-active in JHA integration than others? Theoretically or empirically identified driving forces of JHA integration which refer to the EU level, like institutional creep, the behaviour of the Commission or the emergence of common values, notions of risks or others, are very plausible but may not explain this different commitment to the integration of internal security. The variation of practical security problems which had to be solved (in some countries more, in others less) explains the different levels of activity only partly. Especially Germany is much more committed to internal security integration than it should according to the presented theoretical assumptions. To fill the gap of explanation, the role of the courts should be highlighted. They may influence the engagement for JHA integration \textit{in the long run}.

I argue that to be rational does not only mean to strive for the maximal substantive gain from cooperation but also to make pareto-good decisions in a short time. Actors who are embedded in complex day-to-day politics use shortcuts in strategic thinking in order to save time, cognitive and organizational resources. That means that they do not automatically consider the endless variety of possible long-term reactions of all other players. The capacity to anticipate the behavior of the others evolves through practical experience during the process.

3. \textit{(National) Courts as strategic actors}

The aforementioned picture of governments’ behaviour is incomplete. This is not only true because some governments engage more in integration than necessary. It is incomplete too, because the instruments of political control have not been covered. National governments have to vindicate their actions to a critical society which demands for justification.\textsuperscript{24} Parliaments may lack effective instruments of control, but the judicial branch of power has such instruments. It may be activated as a veto player. This is possible if we assume that the court at least sometimes has own preferences which differ from those of the other veto players. Otherwise, it would be “absorbed” and thus not function as a veto player.\textsuperscript{25} Although the judicial branch is non-political and judges are not driven by political interest, courts nevertheless are strategic actors. They seek:

\textsuperscript{24} Jürgen Neyer, „Welche Integrationstheorie braucht Europa?“, in Integration 30 (2007) 4, 382-393.
\textsuperscript{25} George Tsebelis, Veto Players. How Political Institutions Work (Princeton, 2002), 228.
(1) to secure the maintenance and effectiveness of the constitutional norms;
(2) to secure the longterm implementation of their decisions;
(3) to uphold the own existence and power,
(4) to increase the public reputation of the court.

These interests influence the judges and thus the court’s policy preferences according an issue although they are not intrinsically political actors. The most important interest of courts is the first mentioned. (Only) Their capacity to save the constitution or special norms legitimizes their existence. While making a good job, they nevertheless may lose competencies when the political actors agree to transfer judicial competencies to other courts or when other courts interfere into their competencies. Therefore, they have a living interest in upholding the own existence as a separate point. That concerns the relationship of national courts to the European Court of Justice which was established in order to guarantee that the norms of the European Communities and later the European Union were applied in the Member states and to solve legal disputes between institutions and states. The public reputation is very important for courts because they often enjoy broad powers of review, but seldomly direct means to oversee the implementation of their rulings. Instead, implementation usually requires the cooperation of other actors – “on many occasions, even the cooperation of the very institutions whose acts the court has just struck down”. Therefore, a positive image is necessary to have a natural authority. Moreover, a good reputation is a prerequisite for being activated by plaintiffs.

The probability of activating the Court as potential veto player is especially high when the governing majority has only a small power lead over the opposition and when diverging majorities exist in bicameral Parliaments. In some countries, e.g. Germany, single citizens can institute proceedings against laws and other official instruments. Activists will use this option regardless of the probabilities of a victory. Decisions of the courts might directly influence politics and legislative options. Unpleasant decisions may also indirectly influence politics by shaking the trust of other actors in mutual recognition mechanisms and thus their willingness to harmonize legal norms.

The decision-making of the courts and their possibilities to accomplish the mentioned goals are bounded to the existing norms which were made or at least adopted by politicians. They may not breach these norms. But it is unquestioned that the text of norms does not

determine a certain interpretation. There are rooms to move. The choice of the method of interpretation by the court, inter alia, influences the extent of making law instead of measuring law. Although it is clear that Union law and thereby the interpretation of the ECJ overrides national law and thereby the interpretation of the national Constitutional or Supreme Courts, experts say that the European Union could be blocked if the national courts assessed European measures strictly on the basis of the national law in all the cases beyond competencies of the ECJ or where ‘grey zones’ exist. The national sets of legal norms and their particular traditions of interpretation differ much. It would be plausible that courts do not decide ‘neutrally’ in cases which touch directly or indirectly their own competencies. They will hesitate to give up competencies of the court or the state to other actors.

Georg Vanberg analysed the mutual strategic interplay between constitutional courts and governments (or legislatures) with special reference to Germany and without taking into account multi-level games. He came to the conclusion that judges anticipate the parameters of implementation and consider the political context when they formulate a decision. According to him, judges are sensitive to the interests of governing majorities but avoid strong partyness because of their professional ethics, because they want that future governing majorities will also respect their decisions and because they know that their most important resource of power, their public reputation, is mostly based on the political neutrality of the court. The court will be more deferential on issues that are central to the interests of the governing majorities and it will avoid decisions that counteract perceived public opinion. As public support is central to the enforcement of judicial rulings, courts become more powerful and less deferential as their public support increases. The threat of a public backlash against legislative majorities that flout judicial rulings provides the key enforcement mechanism for the court. Courts that fear a lack of enforcement, will try to mobilize public support for the specific subject. The more politically important a matter, the weaker the court since the government and the legislative majority will probably be responsive towards public opinion and the court thus cannot mobilize the public for its own interests. Confrontations between legislative majorities and courts, as well as evasion of judicial decisions, may become more frequent as courts are more likely to enjoy public support and as the political environment is

29 Gunnar Folke Schuppert, Funktionell-rechtliche Grenzen der Verfassungsinterpretation (Königstein, Ts.: Athenaeum, 1980), 7.
30 “Through its case-law, the Court of Justice has identified an obligation on administrations and national courts to apply Community law in full within their sphere of competence and to protect the rights conferred on citizens by that law (direct application of Community law), and to disapply any conflicting national provision, whether prior or subsequent to the Community provision (primacy of Community law over national law).” http://curia.europa.eu/de/instit/presentationfr/index_cje.htm
31 Reinhard Müller, „Entscheidung über Deutschlands ‘existentielle Staatlichkeit’,” in FAZ, 17.06.2008.
more likely to be transparent. In cases characterized by a lack of transparency or in which the court’s specific ruling meets widespread popular opposition, a constitutional court is generally not likely to provide much of a brake on the legislative process.32

Sieberer added that strong interventions of the Court in the political sphere are perceived legitimate by the public if they concern negative defense rights rather than if they concern positive fundamental rights. The latter are perceived to reflect only political priorities while the first are seen to protect citizens.33

Moreover, one should underline the fact that the veto capacity of courts depends on the easiness to initiate proceedings and the existence of actors who actively use the instrument of initiating proceedings. Are there political and societal activists which use their chances to institute proceedings concerning internal security matters?

Accordingly, the following variables should theoretically influence the decision-making (judgments) of national courts:
- the easiness to activate the court,
- the compatibility of a matter at stake with national constitutional norms,
- the compatibility with EU norms and ECJ decisions,
- the importance of the subject for the government,
- the level of public attention for the subject (which influences transparency, salience),
- the trend of public opinion concerning the subject when the public attention is high
- the kind of rights which is affected.

Thus judgments of the national courts are not always “neutral” but may restrict the corridor of action of the government. As a reaction to the securitization strategy of the German governments, the Federal Constitutional Court has frequently antagonized German Government and Parliament in matters of internal security. Examples were the aviation security act, the statutorily legitimized covert access to IT-systems by using technological means (the so-called online search), the automatic number plate recognition or the data retention law.34 The Court generally allowed the State to limit the fundamental rights of the citizens in order to protect them and itself but connected this allowance with much stricter

32 All assumptions taken from Vanberg 2005.
34 Andreas Busch, „Von der Reformpolitik zur Restriktionspolitik?,” in Ende des rot-grünen Projektes, ed. Christoph Egle, Reimit Zohlnhöfer (Wiesbaden: VS-Verlag, 2007), 408-430; Sascha Kneip, „Anschieber oder Bremser?,“ ibid., 215-238.
conditions and requirements than provided by the legislator in order to secure privacy and individual freedoms.\textsuperscript{35}

\section*{4. The long-term interplay of government and court and its effects}

Rational governments anticipate the possible activation of the courts as veto players and the possibility of constitutional censure of their enactments. This should be especially true when important policy matters are affected or when the court repeatedly declared political decisions void.\textsuperscript{36} For the opposition parties, the threat of initiating proceedings is an excellent bargaining tool in order to get included much of their positions in a bill. “The shadow that judicial review casts over the legislative process may be particularly pronounced where referral to the court on final passage is a looming threat”.\textsuperscript{37}

If the government anticipated a conflict with the Constitutional Court because its security measures contradict the constitutional norms and if the opposition signaled proceedings, then the government can try to mobilize public support for its plans. However, complex issues are hardly to communicate to citizens.\textsuperscript{38} A second way would be to reach a solution at the European level in order to circumvent the court.\textsuperscript{39} By doing this, the government may be restricted by other rules or actors at the European level. However, there are some favorable conditions for changing the level of the game: Rules which are reached at the European level may be less restrictive than at the national level. The European parliament is often weak and (because of the political heterogeneity) badly organized. Multilateral treaties outside the EU, e.g. the treaty of Prüm, may not be ratified by national majorities which are necessary to change national constitutional norms of a similar quality. There is a strong deficit of public for European affairs which would generate a critical debate. As results of compromises, they are often vaguely formulated. The ECJ hesitates to indicate norms as void. The judges and advocates general of the ECJ are appointed (by common accord) by the governments of the member States (potential norm-breakers who shall be controlled by the appointed persons) for a term of only six years and then may be reappointed by a new decision of the potential norm-breakers.

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\textsuperscript{38} Vanberg 2005: 14.

\textsuperscript{39} Maurer/Parkes 2005.
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Because of the exit option of the government, the opposition should carefully check the possible outcome of an action before activating the Constitutional Court and consider how much the government really may enlarge its corridor of action by switching to another level. If a bill concerns a topic which is already at the European agenda, then the opposition probably will be less interested in appealing to the court than in cases where a government is just initiating its uploading strategy.

Accordingly, the decision to activate or not to activate the constitutional court or to anticipate its activation by the opposition, should be affected by the following variables:\textsuperscript{40}

- the relationship between the government and the opposition,
- the relevance of a matter at stake for the actors,
- the conflict intensity of a subject affect,
- the complexity of a subject/bill,
- the kind of conflict on the subject/bill (distributive, normative-ideological),
- its actual relevance at the European level,
- the status quo of integration (level and scope\textsuperscript{41}).

If proceedings are instituted and when the decision of the Court is met, the government again should assess the potential outcome of the action. A government which believes that the majority of the judges is against its plans or a government that is confronted with negative judicial ruling must try to influence the public opinion. According to Vanberg, the principle inducement for governing majorities to comply with high court decisions is the threat of a loss of public support for elected officials who refuse to be bound by them. “That is, governing majorities will be motivated to respect court decisions primarily when they are concerned about the electoral consequences of not doing so.” When evading a decision, the government will try to hide evasion by reducing transparency. When politically costly issues are concerned, then the political majority will be more willing to evade the court.\textsuperscript{42} The German government, for instance, tried to ignore the judgment concerning the Aviation security act which had been declared void.

The alternative again consists in switching to the European level. The government may indirectly pressure on the Court by influencing the tenor of the politics at the European level or it may influence it directly by initiating European law-making procedures. EU integration or JHA cooperation outside EU could be steps to circumvent not only the veto of

\textsuperscript{40} Piazolo 1995: 11.
\textsuperscript{41} Börzel 2005.
\textsuperscript{42} Vanberg 2005: 14, 57, 137.
other political actors at the national and EU level, but also judicial interpretation by the national courts or the ECJ.

According to these theoretical assumptions, the following variables influence how the executives react to judicial ruling:

- the compatibility between political and judicial ruling,
- the (active) mobilization of public support,
- the reputation of the government and the Constitutional court,
- the compatibility of the positions with the public opinion,
- the intensity with which a matter is handled at the European level.

Empirical evidence corroborates the assumption that the progressive treatment of JHA issues at the European level is a used strategy to circumvent national democratic constraints. The focus on the operational dimension of integration together with the heterogeneous judicial systems and the application of the principle of mutual recognition leaves member states’ sovereignty widely untouched. In contrast to the Common Market area, within JHA issues the application of this principle mainly boosts governmental enforcement capacity. The mutual recognition of judicial organs’ decisions demands for a higher degree of trust than often observable. And instead of complementing the principle with other, positive integration mechanisms like harmonisation, the national governments’ tend to agree only upon the lowest common denominator with regard to European legal standards.

During the JHA integration process, however, supranational institutions gathered co-decision and monitoring powers in areas which is treated under the EU’s ‘First Pillar’, e.g. asylum and migration policy-making. Like at the national level before, governments try to minimize such democratic control mechanisms by using the strategies of securitization. Another strategy is a more active interfusion of internal and external policies (cross-pillarisation) than backed by the fact that borders increasingly become blurred. Since supranational actors are as susceptible to securitization as national ones, their controlling power in internal security issues is weak. Therefore, internal security policies within EU lack democratic credentials. If the national public demands for policy change, then the governments can try to reform the policies at the European level or to modify the bargaining and negotiating mechanisms at the European level or to sidestep the supranational and

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45 Andreas Maurer and Roderick Parkes, Democracy and European Justice and Home Affairs under the shadow of September 11 (Berlin: SWP, 2005), 5, 10.
national constraints by searching for more favourable, intergovernmental policy-making venues beyond the EU.46

This last option was called venue-shopping. Virginie Guiraudon made it popular with her analysis of migration and asylum integration. According to her, actors always strive for moving decisions to the venue where they see the most promising prospects to achieve their goals.47 One can use the venue-shopping argument to explain, for instance, the decision of politicians to constitute the Convention of Prüm.48 Within this multilateral treaty the participating countries agreed upon an intensification of operational cooperation and information exchange between national security actors. The Convention of Prüm, while explicitly allowing for its integration into the European legal framework as soon as enough EU Member states agree to do so, partly interlocks with European law, obviously bypasses co-decision, controlling and initiative powers of European supranational institutions. The signatories therewith avoided compromises and pursued their particular national and ministerial interests.49 Obviously, the governments are quite successful in outweighing new restrictions and advantages from cooperation and integration.

This could be the end of the game, if political actors acted alone. But courts again play a role. With integrating internal security, the ECJ will be more important in restricting the corridor of action of the government. It is powerful because it owns the competence to decide when the sphere of application of Community law begins and ends. And it may be activated by a broad range of actors: individuals, European actors (e.g. the Commission), member states and national courts. The governments of the EC member states intended to have a court which interprets the Community law and fills in the gaps of the treaties but that does not widen its jurisdiction over the member states. In the course of integration, they had to accept de-facto the rising role of the ECJ.50 Indeed, the judicial decisions of the court were a strong motor for increasing the importance of European law and harmonization.51 But it seems that the

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46 Andreas Maurer and Roderick Parkes, Asylum Policy and Democracy in the EU (Berlin: SWP, 2006), 19.
48 Daniela Kietz and Andreas Maurer, „Der Vertrag von Prüm,“ in Integration 29 (2006) 3, 201-212; Daniela Kietz and Andreas Maurer, Folgen der Prümer Vertragsavantgarde (Berlin: SWP, 2007).
governments are not sufficiently aware of the scope and effects of this influence since it has grown gradually and not in the kind of a ‘shock’.

According to the empirical study of Tracy Slagter on ECJ equal treatment decisions, the German government largely disregarded impending decisions of the ECJ, even when the ECJ case was well-publicized and when the decision had far-reaching implications for Germany. That confirms the assumption that actors risk mistakes in order to make pareto-good decisions in the short time. However, an increasing number of decisions of the Court contradict national regulation or at least deviates. This is seen by the opposition as a good instrument in securing its policy preferences. It declared that it would not have won some policy victories without the ECJ judgments.52 In the long run, strategic governments must modify their strategies in internal security matters by considering the ECJ.

Strategic national courts do also react to multilevel games of the national executives and the growing influence of courts at other levels, especially when they expect disadvantages for their vital interests. According to the aforementioned assumptions on judicial behavior, they will first and foremost criticize non-political developments. The German Constitutional Court has restrained itself with regard to EU competencies since the treaty of Maastricht, following a decade of rather EU sceptical decisions.53 In its decision on the Maastricht treaty it declared both bodies of jurisprudence to be co-operative and equal.54 This implies that it did not accept a general supremacy of the ECJ. However, the ‘EU-friendly’ behaviour strengthened the public perception that the European Court of Justice is a functional equivalent of the Federal Constitutional Court at a different level of government and thus legitimacy transfer would be rationally backed.55 During the last years the tenor of the constitutional lawyers in Germany has changed to harsh criticism towards ECJ. This can be interpreted as informal threatening towards the ECJ as well as to the German government. One prominent critics is: “that the ECJ deliberately and systematically ignores fundamental principles of the Western interpretation of law, that its decisions are based on sloppy argumentation, that it ignores the will of the legislator, or even turns it into its opposite, and

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invents legal principles serving as grounds for later judgements... that the ECJ undermines the competences of the Member States even in the core fields of national powers.”

The German experts expect crucial formulations of the Federal Constitutional Court in its next judgements on EU related matters. These formulations will address to the federal actors as well as to the European political and judicial actors and probably refer to a strict separation of competencies between the EU member states (and their courts) and the EU (and its courts). Such unpleasant decisions may shake the already limited trust of other actors in mutual recognition mechanisms and thus their willingness to harmonize legal norms. In this way, courts function as watchdogs of integration.

The speculations about following reactions from the government’s side vary, including the prominent role of ‘soft law’ in regulating internal security matters which would be hard to control. Here the political actors own broad corridors of action and the only ‘sanction’ for non-compliance is a loss of reputation among the soft law partners. The level of compliance is influenced by the preferences of the specific actors.

5. Consequences for the research

This article confirms the fact that European security policy-making “crosses sectoral boundaries, draws in a number of governmental and societal actors, and comprises a variety of institutional venues”. That complex structure makes it hard to control. Interestingly, many studies emphasize the fact that the executive institutions do not exclusively determine the policy decisions in Justice and Home Affairs and plead for empirical policy analyses that include other actors: the ministries of internal affairs, parliamentary institutions (commissions), parties and organizations (police unions, organizations of private security-related businesses, civil rights groups) as well as coordinate institutions in federal states (conferences of interior ministers, commissions of upper chambers). However, the rather classical judicial branch of power is often forgotten.

The first consequence of the theoretical reflections in this article is that such an exclusion will provoke false prognoses since (constitutional) courts shape policy making and

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57 Soft law are defined as “Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects. Linda Senden, Soft Law in European Community Law (Oxford: Hart, 2004), 112.
are not ‘unconstrained actors above the political fray’. This especially refers to the conclusion that JHA cooperation and integration at the European level does not limit the national perspectives of the actors since they decide which patterns of behavior (schemes, frames, habits) they conserve and they may transfer the constraints of their own action system systematically to the European level. In this argumentation, the traditional national patterns of internal security affairs are only gradually enlarged to the EU. According to the argumentation above this is the false perception of the governments of the most important EU member states which think that they can control the game.

The second consequence is that we need a long-term analysis of the strategic interplay between courts and legislatures at the national and the European levels. Short-term and long-term strategies differ since every actor reacts to the measures of the others but does not consider all possible long-term reactions of the others. The national courts have reacted to securitization strategies by declaring more governmental enacting void, the governments have reacted by transferring competencies to the European level. As a reaction (not only in JHA), the supranational, European-level court has become an increasingly important player in the legislative-judicial game and should be acknowledged as such. But the national courts will not voluntarily deprive themselves of power.

If one takes the presented arguments serious, then an appropriate analysis of integration has to consider the governmental interests in Justice and Home Affairs, the results of their bargaining and deliberating at national and European level, the ‘downloading’ of created norms and policies from the European and international arenas, various informal negotiation arenas within and outside national political systems and the courts.

Figure 1 shows how an ideal model of analysis of Justice and Home Affairs including the national and the European level would look like. Institutional and collective actors are coloured white, the most important courts are coloured grey. Non-governmental institutions, media and others are summarized as ‘public’. The shadows of the political systems indicate that a complete analysis of JHA would include various if not all European states and their interactions at the European level. The analysis should be embedded in a liberal intergovernmental framework, which accounts for both, the dominant governance mode of intergovernmentalism at the European level in JHA and the predominantly domestic generation of interests.

60 Vanberg 2005: 12f.
In order to promote a systematic empirical exploration of the relationship between politics and courts in JHA integration and of their patterns of action, hypotheses from rational choice institutionalism based studies may be formulated which indicate the appropriateness of different variables to explain the long-term effects of Courts and politics on the institutional mechanisms in JHA, the choice of venues were decisions are made and of course on the contents, the political outcome. These are the power relations at the national and European level, the interests of the actors, political importance of an issue at stake, the level of public attention (transparency, salience), perceived public opinion, the kind of constitutional norms and rights which are affected and the compatibility of European and national norms.

To start with, one may test the hypothesis: All other things being equal, governments which are confronted with a powerful national constitutional court which has vetoed political enactments in the area of internal security, try to use the strategy to change the level of policy-making.

For measuring the power of constitutional courts, we can use the Lijphart classification of strength of judicial review. It covers many EU countries and fits better to the design of this question than the classifications of politicization and of centralization of the courts of Alivizatos and of the ‘judicial daring’ index of Cooter and Ginsburg. Lijphart uses

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a fourfold classification of control by constitutional or supreme courts which distinct between
the presence and absence of judicial review and between three degrees of activism in assertion
of this power by the courts. Accordingly he differentiates four kinds of strength: none
(assigned value 0), weak (assigned 2), medium (3) and strong (4) (see table 2 in the annex). It
is still unclear how the strength of national judicial ruling in JHA and the engagement of the
countries for JHA integration may be measured in an adequate way or whether such
comparative data already exist. One could test other variables too, especially the strength of
the perceived national security risks which shall be minimized. Both the perceived risks and
the judicial ruling may be recorded in a more precise way by differentiating JHA areas, e.g.
fundamental rights, free movement of persons, asylum and immigration, police and customs,
organised crime, terrorism, citizenship, discrimination, data protection. Recommendations
considering the best kind of inquiries about the perceived risks are welcome (interviews with
members of government, expert interviews, media content analysis?). And would the
exclusion of the new EU members make sense because they are too different (and, a minor
problem, not covered by the Lijphart data)?

Such quantitative analysis should be complemented by qualitative analysis which
allows to validate or to disprove the assumed causal mechanisms. Such analysis should focus
on the long-term developments around key plans of the governments in Justice and Home
Affairs, around key decisions of the courts and around key integration processes at the
European level (e.g. data retention Directive 2006/24/EC). Ideally, it should combine the
expertise of political scientists with those of legal experts and practitioners.

6. Conclusion

To date, European initiatives tend to be welcomed by national governments only if they are
compatible with the existing national patterns and structures, if they promise to enlarge
opportunities of action, legitimize them symbolically or complete them. The combinational
use of neofunctional and intergovernmental arguments helps explaining JHA cooperation and
integration help. However, it does not suffice to explain why some countries engage more in
JHA integration than they should. The article argues that complementing usual analyses by
considering the interplay between governments and courts would improve the explanatory
power. It presented theoretical assumptions concerning the interests, short-term and long-term
strategies of governments and courts and their possible effects.

Discretion,” in International Review of Law and Economics 16 (1996), 295-313. For a discussion see Uwe
One main hypothesis is that the strength of the constitutional courts at the national level and their activism in declaring JHA measures of the government void influence how strong governments try to regulate JHA at the European level. To be precise: I do not argue that integration is merely a result of strategies to avoid judicial ruling. But strong judicial ruling concerning internal security matters fosters the strategy to circumvent the court by actions at the European level. The other main hypothesis is that the governments disregard the interests and the long-term influence of the courts at the European level as well as following reactions of courts at the national level which function as watchdogs of integration. This will lead to future changes of strategies.

In the end, a model of analysis was proposed that includes interplays of rational actors at the European level, including non-EU venues and processes within nation states. Such an analysis is highly complex, but a complex reality needs a minimum of complexity at the analytical level to get adequately understood. Since the article is mainly based on theoretical assumptions, a systematic empirical study should be conducted to the hypotheses empirically.

**Annex**

Table 2: Constitutional control in EU countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Constitutional control by Lijphart</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>3.0</td>
</tr>
<tr>
<td>Belgium</td>
<td>3.0*</td>
</tr>
<tr>
<td>Denmark</td>
<td>2.0</td>
</tr>
<tr>
<td>Finland</td>
<td>1.0</td>
</tr>
<tr>
<td>France</td>
<td>3.0**</td>
</tr>
<tr>
<td>Germany</td>
<td>4.0</td>
</tr>
<tr>
<td>Greece</td>
<td>2.0</td>
</tr>
<tr>
<td>Ireland</td>
<td>2.0</td>
</tr>
<tr>
<td>Italy</td>
<td>3.0***</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>1.0</td>
</tr>
<tr>
<td>Malta</td>
<td>2.0</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1.0</td>
</tr>
<tr>
<td>Portugal</td>
<td>2.0</td>
</tr>
<tr>
<td>Spain</td>
<td>3.0</td>
</tr>
<tr>
<td>Sweden</td>
<td>2.0</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1.0</td>
</tr>
</tbody>
</table>

*after 1984, ** after 1974, ***after 1956

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