

Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis[∞]

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A. Are Constitutional Courts the “Most Disparaged Branch” in the EU Constitutional System?

When debating the constitutionalization of EU law, different views emerge regarding the role of Constitutional Courts. Some scholars see these Courts as the institutions that, since the 1970s, have marked turning points in the construction of the European legal system, thanks to their case law on the protection of fundamental rights, democratic principle, and constitutional “counter limits”. Constitutional Courts have provided and can provide invaluable inputs into the activity of the European institutions, particularly to the Court of Justice of the European Union (CJEU), so as to reconcile the national and the supranational.¹

According to other scholars, however, Constitutional Courts can be seen as “the most disparaged branch” in the process of European integration, very often criticized for their

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¹ See Marta Cartabia, *Europe and Rights. Taking Dialogue Seriously*, 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 5, 23-29 (2009); Christoph Grabenwarter, *National Constitutional Law Relating to the European Union*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 83, 95-129 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed., 2011).

EU-related judgments, even if they are probably the institutions whose authority has been challenged most since 1957.² National executives have certainly been the institutions who gained most in terms of powers and visibility in the EU; at the same time, while national parliaments have traditionally been depicted as the main losers in the European inter-institutional game, their role has been partially rehabilitated by the Treaty of Lisbon, not to mention ordinary judges, who have gained substantial powers thanks to European integration and who are in charge of the daily enforcement of EU law. The marginalization of Constitutional Courts in EU integration is partly attributable to structural principles of EU law, like primacy and direct effect, along with the implementation of European human rights law, not always in line with national constitutional provisions, and thus to elements beyond the original control of the Courts themselves. Constitutional Courts have never been formally involved in EU Treaty-making (although in many countries these Courts have been involved in checking the compliance of Treaty revisions with national Constitutions), and nor has there ever been a top-down mechanism of preliminary reference from the CJEU to Constitutional Courts or national judges in place.³

On the other hand, many Constitutional Courts have, thus far, failed to engage in a “structured” conversation with the CJEU, by far the most active engine of the development of EU law. Ordinary judges have become the most important interlocutors of the CJEU through the preliminary reference procedure (Article 267 TFEU) and hence have provided the CJEU with the most significant opportunities to deliver its judgments; this is not certainly the case of most Constitutional Courts in Europe. Out of 18 Constitutional Courts in the EU, only 9 have resorted to preliminary reference.⁴

² The expression “most disparaged branch” – in opposition to the image of the US judiciary as the “least dangerous branch” depicted by Alexander Bickel in 1962 – has been drawn from the title of a symposium held at the Boston University School of Law on 14-15 November 2008, on “The Most Disparaged Branch: The Role of Congress in the Twenty-First Century” then published by the Boston University Law Review. Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUROPEAN CONSTITUTIONAL LAW REVIEW, 420, 421 (2013), has recently pointed to the problem of the threat coming from EU law for the supremacy of Constitutional Courts by quoting the words of the President of the Czech Constitutional Court, Pavel Rychetský. Very similar concerns can be inferred from the reports published on the website of the XVIth Congress of the Congress of European Constitutional Courts, available at <http://www.confecuconstco.org/en/common/home.html>.

³ See Joseph H.H. Weiler, *European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order*, XLIV POLITICAL STUDIES, 517, 532-533 (1996); Marta Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in this *Special Issue*.

⁴ Member States with Constitutional Courts, by which it is meant institutions established outside the judicial branch *ad hoc* for carrying out constitutional review of legislation, are: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. They follow the Kelsenian ideal of the concentrated model of constitutional review. In this regard, although Portugal has a mixed model of constitutional review of legislation, the Portuguese Constitutional Court does play a centralized role insofar as all decisions of ordinary judges declaring an act unconstitutional are usually appealed against before the Constitutional Court by the Public Prosecutor. The Maltese Constitutional Court, in spite of the name, is part of the judiciary. The Constitutional Courts that have used the preliminary reference procedure are those of: Austria, Belgium, France, Germany, Italy, Lithuania, Poland, Slovenia, and Spain.

It must be noted, however, that even if Constitutional Courts do not use Article 267 TFEU, for years they have been involved in a more informal dialogue with the CJEU and with constitutional judges of other Member States, for example through the Conference of European Constitutional Courts or through regular meetings for exchanging views and best practice.⁵ By the same token, the mere fact of making a preliminary reference to the CJEU does not imply that we witness a friendly use of this device by the Constitutional Court in question.⁶

To some extent, the caution displayed by most Constitutional Courts towards engaging in a formal and open dialogue with the CJEU is not only understandable but also reasonable. Constitutional Courts are not courts like others. Constitutional Courts had only been recently established – compared to century-old institutions, like legislatures, governments and ordinary courts – entrusted with the role to enforce new and rigid Constitutions when, either at the beginning of the process of European integration or following subsequent accessions, they were forced to start managing EC/EU law. They did not have time to consolidate as new institutions shaped within each national constitutional system when they were called to apply a body of law that could potentially challenge the autonomy of their own Constitutions.

Constitutional Courts are enabled to perform a specific task within the national constitutional landscape – namely constitutional review of national legislation.⁷ Because of their close relationship with the legislative branch, the validity of whose action they are called to assess, and due to their composition and appointment structures, Constitutional Courts are particularly sensitive to political issues. Furthermore, since these Courts are empowered to oversee compliance with fundamental and supreme constitutional principles, they are guardians of the constitutional identity of a polity. It is unavoidable that their activity is deeply rooted in a specific national context.

The CJEU represents a potential threat to the legitimacy of Constitutional Courts as well as to their very special jurisdiction. This is by no means explicitly acknowledged by the CJEU,

⁵ See Maartje De Visser & Monica Claes, *Courts United? On European Judicial Networks*, in *LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD* 79-80, 75 (Antoin Vauchez & Bruno De Witte, eds., 2013).

⁶ See Giuseppe Martinico, *The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, in this *Special Issue* and Franz C. Mayer, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It*; Dagmar Schiek, *The German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT) – Another Step towards National Closure?* 15 *GERMAN LAW JOURNAL – Special Issue, OMT* (2014).

⁷ MAARTJE DE VISSER, *CONSTITUTIONAL REVIEW IN EUROPE – A COMPARATIVE ANALYSIS* 53-74, 93-154, and 205-222 (2013).

which deals with these courts as if they were ordinary courts of last resort.⁸ With its claims for primacy, for uniform implementation, and for the unity of EU law, the CJEU challenges the very assumption on which the work of Constitutional Courts is based.

Nevertheless, while constitutional conflicts between the CJEU and Constitutional Courts are probably unavoidable, their relationship has very often been a cooperative one. To this purpose, the reference to the common constitutional traditions of the Member States by the CJEU, now enshrined in Article 6 TEU, is a sign of openness towards Constitutional Courts. Likewise, the “message of war” occasionally launched by some Constitutional Courts through the weapon of the “counter limits” doctrine has never been turned into a proper nuclear attack.⁹

B. The Rise of Preliminary References by Constitutional Courts

There are many reasons as to why the past six years can be depicted as a period of deep constitutional transformations. This should drive scholars to investigate whether and how the preliminary reference by Constitutional Courts has undertaken crucial developments in the formal and substantive European Constitution, by which we mean both national constitutional law and EU constitutional law.¹⁰ Given this ongoing transformation, how can the role of Constitutional Courts be assessed? Is it possible to find a common trend among Constitutional Courts towards EU law? Can their recent case law be seen as a sign of their protagonism or of their marginalization?

First of all, there is quantitative evidence. From 2008 to date, the number of Constitutional Courts issuing preliminary references has doubled. The Constitutional Courts of France, Germany, Italy – EU founding Member States –, Poland, Slovenia, and Spain have joined the club.¹¹ Second, there are qualitative elements – such as the entry into force of the Eastward enlargement, the Treaty of Lisbon and the Euro-crisis – that push towards a

⁸ See Enzo Cannizzaro, *Rinvio pregiudiziale e Corti costituzionali nazionali*, in SCRITTI IN ONORE DI GIUSEPPE TESAURO, 819 (2014). Even from a procedural point of view, when it was necessary to ascertain the priority between the preliminary reference to the CJEU and the *question prioritaire de constitutionnalité* (QPC), it was the former that prevailed over the latter: see Joined Cases C-188/10 and C-189/10, Melki and Abdeli, 2010 E.C.R. I-05667. See also Case C-409/06, Winner Wetten, 2010 E.C.R. I-08015 and Case C-416/10, Križan, (Jan. 15, 2013), <http://curia.europa.eu/>.

⁹ By contrast, in Italy the “counter limit” doctrine has recently been used by the Constitutional Court against international law: see decision no. 238/2014 of 22 October 2014.

¹⁰ See ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 1-8 (2012).

¹¹ The Constitutional Court of Italy issued its first preliminary reference to the CJEU in an incidental proceeding in 2013 (order no. 207/2013), while in 2008 the preliminary reference was issued in a *principaliter* proceeding. See Giorgio Repetto, *Pouring New Wine Into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, in this *Special Issue*.

reconfiguration of the preliminary reference's rationale. The first group of elements is united by the time. Indeed, one can wonder why national Constitutional Courts embedded within the EU legal system for almost sixty years have decided only now to change their mind on the preliminary reference, thus eventually recognizing themselves more or less explicitly as courts of last resort (Article 267(3) TFEU).

I. A Matter of "Time"

1. The Entry into Force of the Treaty of Lisbon and the Charter of Fundamental Rights

The period in question is characterized by at least two "constitutional moments": the entry into force of the Treaty of Lisbon and the Euro-crisis.¹² The Treaty of Lisbon entered into force on 1 December 2009, and has in itself triggered many changes. For example, the formal incorporation of the Charter of Fundamental Rights into EU primary law has given rise to a debate about the potential expansion or limitation in the protection of rights.¹³ The reference by the Spanish Constitutional Court in the *Melloni* case, and the saga of the *Data Retention Directive*, which ended up with annulment by the CJEU upon the preliminary references by the Irish High Court and the Austrian Constitutional Court,¹⁴ are significant examples.

Similarly, the new national identity clause (Article 4(2) TEU), although never invoked by a Constitutional Court as the main standard to adjudicate the validity of EU law or in seeking the correct interpretation of EU law by the CJEU, is certainly a contended issue.¹⁵ The questions of what is inside and what is outside the national identity of a Member State, of who is entitled to decide, and of whether such a clause will increase constitutional conflicts

¹² BRUCE A. ACKERMAN, *WE THE PEOPLE*. FOUNDATIONS 307 (1993).

¹³ See Anneli Albi, *Erosion of constitutional rights in EU law: A call for "substantive co-operative constitutionalism"*, 9 VIENNA JOURNAL OF INTERNATIONAL CONSTITUTIONAL LAW (forthcoming 2015). In this *Special Issue* see Ludovica Benedizione & Eleonora Paris, *Preliminary Reference and Dialogue between Courts as Tools for the Reflection on the EU Multilevel Protection of Rights. The case of the Data Retention Directive*; Andreas Orator, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*; Miryam Rodríguez-Izquierdo Serrano, *The Spanish Constitutional Court and Fundamental Rights Adjudication After the First Preliminary Reference*. In particular, since 2012 the Austrian Constitutional Court has recognized the Charter of Fundamental Rights as a standard for constitutional review of national legislation implementing EU law (VfSlg 19.632/2012, Decision U 466/11-18 and U 1836/11-13, of 14 March 2012). The English translation of the judgment is available at https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtcharta_english_u466-11.pdf.

¹⁴ Case C-399/11, *Melloni*, (Feb. 26, 2013); Case C-293/12, *Digital Rights Ireland*, (Apr. 8, 2014), <http://curia.europa.eu/>.

¹⁵ The clause has been used, however, by other courts, like the Austrian Supreme Administrative Court in the order for a preliminary reference to the CJEU in Case C-208/09, *Sayn-Wittgenstein*, 2010 E.C.R. I-13693.

or not remain unresolved.¹⁶ What cannot be neglected is that since 2009, the clause forms part of the Treaties and is sometimes invoked in the case law of Constitutional Courts as a potential leeway against the EU's most 'oppressive' measures and judgments.¹⁷

Moreover, the Treaty of Lisbon has further enlarged EU competence in criminal law, particularly as regards judicial cooperation in criminal matters. As the troublesome implementation of the Framework Decision on the European Arrest Warrant (EAW) has already proved, this field is one of the most sensitive for Constitutional Courts; the Czech, the German, and the Polish Constitutional Courts have, amongst others, warned about the recourse to "counter limits" against the EAW Framework Decision.¹⁸ Further expansion of EU law in this domain could trigger a reaction by Constitutional Courts and a more active use of the preliminary reference procedure in the future, as is indicated by the first case of a preliminary reference by the French *Conseil constitutionnel*.¹⁹

Finally, the Treaty of Lisbon has opened the door to EU accession to the ECHR (Article 6(2) TEU). Should the EU accede to the ECHR, despite the CJEU's Opinion 2/13,²⁰ this would add complexity to the existing legal framework of the judicial dialogue between Constitutional Courts and European Courts. In some Member States, the already challenging relationship between Constitutional Courts and the CJEU is perhaps even more contentious when

¹⁶ For example, while some authors see the new identity clause as a cooperative tool between the European and national levels of government. See Barbara Guastaferrro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, YEARBOOK OF EUROPEAN LAW 263 (2012); Armin von Bogdandy & Stephan Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 COMMON MARKET LAW REVIEW 1417 (2011). Others do not share the view that the identity clause will necessarily support a process of "pacification" in the relationship between the CJEU and national courts. See also FRANÇOIS-XAVIER-MILLET, L'UNION EUROPÉENNE ET L'IDENTITÉ CONSTITUTIONNELLE DES ÉTATS MEMBRES (2013); Giuseppe Martinico, *The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, in this *Special Issue*.

¹⁷ See *Lisbon* judgment of German Constitutional Court, Second Senate, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, Judgment of 30 June 2009; the English translation is available at https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html. However, even in the only case in which a decision of the CJEU has been declared *ultra vires* by a Constitutional Court - Pl. ÚS 5/12: Slovak Pensions of 31 January 2012 -, the Czech Constitutional Court did not make any reference to Art. 4(2) TEU and to the national identity clause. Indeed this decision has been described as "an unmeasured and poorly-reasoned response to a domestic conflict between the Constitutional and Supreme Administrative Court" rather than a "declaration of war against the CJEU." See Jan Komárek, *Playing with matches: The Czech Constitutional Court declares a judgment of the Court of Justice of the EU ultra vires*, 8 EUROPEAN CONSTITUTIONAL LAW REVIEW, 323 (2012).

¹⁸ See MARTINICO, *supra* note 6.

¹⁹ See Jeremy F. Case, Decision n. 2013-314P QPC, of 4 April 2013; François-Xavier Millet & Nicoletta Perlo, *The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law?*, in this *Special Issue*. The role of the CJEU in criminal matters, however, is subject to limitations; for example, the CJEU cannot rule on the validity of police operations under EU law (Art. 276 TFEU).

²⁰ Opinion 2/13, pursuant to Article 218(11) TFEU, (Dec. 18, 2014), <http://curia.europa.eu/>.

looking at constitutional judges vis-à-vis the European Court of Human Rights, because of the lack of direct interaction between them akin to that provided by the preliminary reference procedure. In this regard, at least at first sight, the prospective EU accession appears to have adapted the model of the preliminary reference procedure both to the relationship between the European Court of Human Rights and the CJEU, when the EU is a co-respondent and the CJEU has not yet had the opportunity to assess the compliance of EU law with the ECHR and its protocols (Article 3(6) draft accession agreement);²¹ and to the relationship between a Constitutional Court and the European Court of Human Rights through the mechanism of the advisory opinions (Article 1, Protocol no. 16 to the ECHR).²² Although the combination of prior involvement and advisory opinion mechanism has been considered by the CJEU as a challenge to the EU preliminary reference procedure, the need to accommodate the trilateral relationship between Constitutional Courts, the CJEU and the European Court of Human Rights solicits the setting up of new mechanisms that could improve the quality – in terms of stability and effectiveness - of the interplay amongst courts placed at different levels of government in the European constitutional system.

2. *The Euro-Crisis*

The second “constitutional moment” providing an input for a more active use of the preliminary reference procedure is the Euro-crisis. Unconventional legal measures – “new form of law”²³ – have been adopted in reaction to the Eurozone crisis, driving Constitutional and Supreme Courts to question their compliance with existing EU Treaties, like the Treaty on the European Stability Mechanism (ESM) and the Outright Monetary Transactions (OMT) programme announced by the European Central Bank. The latter pushed the German Constitutional to issue its first ever preliminary reference to the CJEU on 7 February 2014.²⁴ By contrast, the validity of the ESM was assessed by the CJEU in the *Pringle* case, upon referral by the Irish Supreme Court.²⁵ Other Constitutional Courts – the Austrian, the German, and the Polish ones – decided not to make a reference to the CJEU. The urgency and complexity of the mechanisms behind the operation of the ESM and the announcement of the OMT have proved to be a valuable test for the use of the preliminary

²¹ See Francesco Cherubini, *The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View of the Accession*, in this *Special Issue*.

²² See Maria Dicosola, Cristina Fasone, & Irene Spigno, *The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights. A First Comparative Assessment with the European Union and the Inter-American System*, in this *Special Issue*.

²³ See Samo Bardutzky, *Constitutional Courts, Preliminary Rulings and the “New Form of Law”: The Adjudication of the European Stability Mechanism*, in this *Special Issue*.

²⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2728/13. See the judgment of the CJEU on this referral, Case C-62/14, *Gauweiler and Others*, (June 16, 2015), <http://curia.europa.eu/>. See also the *Special Section: The CJEU’s OMT Decision*, 16 GERMAN LAW JOURNAL (2015).

²⁵ Case C-370/12, *Pringle*, (Nov. 27, 2012), <http://curia.europa.eu/>.

reference procedure by Constitutional Courts and of their different reactions in spite of the desirability of judicial dialogue in this field.²⁶ Last but not least, on 6 November 2014, the setting up of the Banking Union, an inherent part of the EU constitutional response to the Euro-crisis, triggered the first preliminary reference by the Constitutional Court of Slovenia on the EU Commission's "Banking Communication".²⁷

II. A Matter of "Space"

The second element that leads us to reconsider the tool of the preliminary reference to the CJEU is space. The reference in the EU Treaties to the ECHR, not only with regard to EU accession, but first of all with regard to the protection of rights, has forced us to rethink the virtual boundaries of EU law. The fact that fundamental rights, as guaranteed by the ECHR, 'shall constitute general principles of the Union's law', according to Article 6(3) TEU, implies that the relationship between Constitutional Courts and the CJEU must be placed within the broader context of the Council of Europe and of the European Court of Human Rights' case law, in spite of the EU territory.

Moreover, the space that constitutes the point of reference for embarking on the Article 267 TFEU procedure on the part of Constitutional Courts was extended even prior to the Treaty of Lisbon. Whilst in 1957 only two Member States had established Constitutional Courts, over the years constitutional reforms and accessions to the EU have brought about an increase in the number of Constitutional Courts established. From 2004 to 2007, the EU Eastward enlargement brought 11 new Constitutional Courts into the European legal space, thus expanding the "club" of EU Constitutional Courts that can potentially make a preliminary reference to the CJEU and, in turn, the variety of constitutional traditions.

The fact that none of these new Constitutional Courts, but the Constitutional Courts of Lithuania²⁸, Slovenia²⁹ and, recently, in July 2015, Poland,³⁰ have yet used the preliminary

²⁶ See Editorial Comments, *An unintended side-effect of Draghi's bazooka: An opportunity to establish a more balanced relationship between the ECJ and the Member States' highest courts*, 51 COMMON MARKET LAW REVIEW 375 (2014).

²⁷ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis ("Banking Communication"), OJEU C216/1, 30 July 2013. See the Slovenian Constitutional Court's case, Case U-I-295/13, Order of reference of 6 November 2014 (still pending before the CJEU, Case C-526/14, Kotnik and Others) and the comment by Samo Bardutzky, *The first preliminary reference to the Court of Justice of the EU by the Slovenian Constitutional Court: the case of the Commission's Banking Communication*, available on the CONSTITUTIONAL CHANGE THROUGH EURO-CRISIS LAW website (2015), at <http://eurocrisislaw.eu.eu/news/the-first-preliminary-reference-to-the-court-of-justice-of-the-eu-by-the-slovenian-constitutional-court-the-case-of-the-commissions-banking-communication/>.

²⁸ *Lietuvos Respublikos Konstitucinis Teismas* case, decision no. 47/04 of 8 May 2007.

²⁹ Constitutional Court of Slovenia, Case U-I-295/13, of 6 November 2014 (note 27).

reference device should not necessarily be regarded as an issue of concern. While some of them, for example in the Czech Republic and Romania, have occasionally shown some hostility towards EU law and the CJEU, they are relative newcomers in the EU and have had to cope first with challenges that their colleagues in the Old Europe have had decades to deal with, like building up their legitimacy, defining the status of EU law in constitutional review of legislation, and tackling the conflict between the primacy of EU law and the supremacy of the Constitution after the regained independence from the Soviet Union.³¹ Nonetheless, that Central and Eastern European Courts share the same concerns as other EU Constitutional Courts was confirmed by the cases of the *EAW* and the *Data Retention Directive*. The latter case illustrates quite clearly that while the preliminary reference is not yet an option for these Courts, the authority of the CJEU is accepted. Thus, for instance, while the decision on the constitutionality of the Data Retention Directive's implementing measures was pending before Constitutional Courts, awaiting the preliminary decision of the CJEU (finally delivered on 8 April 2014), the Constitutional Court of Slovenia opted to suspend its judgment and the Constitutional Court of Slovakia decided to postpone its ruling until after the CJEU had its final word.

C. The Need to Improve the Quality of the Preliminary References and the Preliminary Rulings

Some of the abovementioned transformations, in particular those deriving from the Treaty of Lisbon, are likely to affect the content of the orders for preliminary reference addressed to the CJEU. For example, while questions on interpretation have traditionally been much more frequent than those on validity, the entry into force of the Charter of Fundamental Rights has made the referral of questions of validity more likely, as indicated by the CJEU landmark judgments in the *Pringle* and in *Data Retention* cases.

Indeed, crucial elements to compare are the nature of the preliminary questions referred by Constitutional Courts as against those coming from ordinary judges, with consideration of whether there are any significant variations, and, if so, their content, and taking into

³⁰ Constitutional Court of Poland, Case K 61/13, of 7 July 2015; the Case C-390/15 is pending before the CJEU. The preliminary reference originated from a constitutional complaint filed by the Polish Human Rights Defender (Ombudsman) because the tax regime on ebooks – if compared with that on normal books – was suspected to violate the constitutional principle of tax equality (Art. 32 of the Polish Constitution). At the same time, since the contested tax legislation on ebooks aimed to implement the Council Directive 2006/112/EC, on the common system of value added tax, the Polish Constitutional Court asked the CJEU whether this Directive was invalid as for how the legislative procedure for its adoption had been carried out (first preliminary question) and/or because it violates the principle of tax neutrality (second preliminary question). See Aleksandra Kustra, *Reading the Tea Leaves. The Polish Constitutional Tribunal and Preliminary Ruling Procedure*, in this *Special Issue*.

³¹ WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 45-90 (2014).

account also constitutional case law dealing indirectly with EU law. In other words, from the preliminary references of Constitutional Courts, as well as from what these Courts purposely omit to do or say, it is possible to get a clearer picture of how constitutional judges perceive themselves in their dialogue with the CJEU. What has been substantially overlooked so far is the different attitudes shown by Constitutional Courts using the preliminary reference tool. Indeed, the mere fact that 9 Constitutional Courts have applied Article 267 TFEU as referring judges does not mean that they do so in like manner. The reasoning applied, the number, the frequency and the nature (interpretation or validity) of references, as well as the fields in which a preliminary reference is issued can make a difference. The attitude of the Constitutional Courts depends on the strategy they pursue, for instance as regards the message they want to send to ordinary courts via a preliminary reference procedure.

The quality of the preliminary references issued by Constitutional Courts could be improved through a process of mutual learning in which Constitutional Courts and the CJEU consider how to make their dialogue more effective. Increased effectiveness here means both enhancing the clarity of the questions raised and reducing, as a consequence, the workload of the CJEU by means of “pilot judgments”³² – in addition to keep on applying the long standing *CILFIT* doctrine.³³ By receiving a lower number of preliminary questions, but ones which are more carefully drafted and which provide the CJEU with viable solutions to the case, the CJEU would be enabled to focus on the most relevant and new issues. At the same time, the input for these “pilot judgments” should come from Constitutional Courts. For if Constitutional Courts were willing to set the path for CJEU judgments on the constitutional substance of EU law (e.g., on the protection of fundamental rights and the enforcement of the Charter), with these in turn being followed by ordinary judges, then there could be positive outcomes for both Constitutional Courts and the CJEU. Constitutional Courts could thereby break the almost exclusive relationship between ordinary judges and the CJEU, from which they have voluntarily remained at the margins; the CJEU, meanwhile, would be asked to judge a lower number of cases, but with these cases being of greatest constitutional significance. The CJEU would, moreover, be judging these cases on the basis of a set of possible answers already provided by Constitutional Courts.

For a long time, the CJEU has advocated the use of a “green light procedure” when dealing with preliminary questions.³⁴ This procedure allows for swift conclusion of the case. It

³² See Koen Lenaerts, *The Unity of European Law and the Overload of the CJEU – The System of Preliminary Rulings Revisited*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 211, 212 (Ingolf Pernice *et al.*, eds., 2005).

³³ Case C-283/81, *CILFIT v. Ministero della Sanità*, 1982 E.C.R. 03415.

³⁴ See CJEU, Information Note on references from national courts for a preliminary ruling, OJ C 143/1 of 11 June 2005, para. 23, and CJEU, Information Note on references from national courts for a preliminary ruling, OJ C 297/1 of 5 December 2009, para. 23; more recently the Recommendations of the Court of Justice of the European

means that when the referring court drafts a preliminary question, it also foresees an answer to it, to which the CJEU can, if it agrees, simply give a “green light”. If the CJEU does not agree with the proposed answer, then it should provide detailed explanations and reasons as to why alternative solutions are necessary.

Whilst the use of the “green light procedure” is not mandatory, it is recommended as an option to establish a mutually beneficial dialogue between the CJEU and national courts.³⁵ A good illustration of a constructive use of this procedure was the referral of the Spanish Constitutional Court in the *Melloni* case in 2011.³⁶ On that occasion, the Constitutional Court offered the CJEU many different and possible interpretations. It offered also what could appear as the preferred solution: the interpretation of the Framework Decision on the EAW in conformity with Article 24 of the Spanish Constitution and the right to defence, which could prevail over the protection offered by Articles 47 and 48 of the EU Charter. This proposed interpretation was, however, disregarded by the CJEU in the name of the primacy and the unity of EU law.

By contrast, an example of uncooperative, if not coercive, use of the “green light procedure” by a Constitutional Court is provided by the German Constitutional Court’s referral to the CJEU on the OMT. The German Constitutional Court offered a pre-packed solution to the CJEU:³⁷ it seems that either the CJEU had to buy the German Constitutional Court’s interpretation of EU law or it is considered to act *ultra vires* by the German Constitutional Court likewise the ECB has been accused to do.³⁸ This testifies that what appears to be an inherently cooperative mechanism, like the preliminary reference procedure, can be used in many ways, and can even be turned into an instrument of conflict. This requires a careful assessment of the implications that stem from different

Union, to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ C 338/1 of 6 November 2012, para. 24. The proposal for using the ‘green light procedure’ has also been supported in a Report by the Association of the Councils of State and of the Supreme Administrative Jurisdictions of the EU in 2007, available at http://www.juradmin.eu/seminars/DenHaag2007/Final_report.pdf. See Daniel Sarmiento, *Amending the Preliminary Reference Procedure for the Administrative Judge*, 2 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 29, 34 (2009). Even the European Parliament “urges consideration of a «green light» system.” See the European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system, para. 31.

³⁵ MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE COURT OF JUSTICE OF THE EUROPEAN UNION 28 (2nd ed. 2014) (Pointing out that there are many different forms of “green light procedure,” up to the point of allowing the referring Court to send a draft judgment to the CJEU that becomes final after a certain time limit.).

³⁶ Although not the follow up of the CJEU decision. See RODRÍGUEZ-IZQUIERDO SERRANO, *supra* note 13.

³⁷ See Thomas Beukers, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program: “In the ECB We Do Not Trust. What About You?”*, 15 GERMAN LAW JOURNAL – Special Issue, OMT 343, 344 (2014).

³⁸ It remains to be seen what will be the reception of the CJEU judgment, Case C-64/12 (note 24) by the German Constitutional Court in its final decision expected in December 2015.

modes of handling Article 267 TFEU.³⁹

D. The Background and Content of the Special Issue

Whilst the topic of preliminary references to the CJEU by the highest jurisdictions is certainly not new,⁴⁰ a comprehensive study of its management by Constitutional Courts of the EU Member States in the current period of 'constitutional turbulence' is lacking. These issues would have been addressed by Gabriella Angiulli in her PhD dissertation entitled *The preliminary reference to the Court of Justice of the European Union by Constitutional Courts*,⁴¹ which unfortunately she did not have the opportunity to complete. Hence, in her memory and with a view to keeping her contribution alive and developing her research further, a conference on the topic was organized at LUISS Guido Carli University in Rome on 28-29 March 2014, aiming to foster the scholarly debate on a topical, though often overlooked, subject-matter in European and constitutional law. The attempt of this *Special Issue* is to bring together expert scholars from different Member States on this matter in order to analyze the developments that have occurred in the case law of Constitutional Courts, the approach of these Courts in relation to the preliminary reference procedure, and the CJEU from the standpoint of national constitutional law in the light of the transformations that have occurred in the European constitutional system over the past few years.

The *Special Issue* is devised as follows. Following an introduction based on a comparative analysis of the status quo and the potential of the use of the preliminary reference by Constitutional Courts (Monica Claes), Part One is devoted to the multilevel system of constitutional adjudication in which Constitutional Courts are requested to act so as to include the national level, the EU, and the system of the ECHR. The analysis begins with an assessment of the role of the preliminary reference procedure in the hands of Constitutional Courts to cope with constitutional conflicts (Giuseppe Martinico), proceeds to focus on the relationship between the CJEU and the European Court of Human Rights in view of the accession (Francesco Cherubini), and ends with a comparison of the role of

³⁹ Monica Claes, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, in this *Special Issue*.

⁴⁰ THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE (Anne-Marie Slaughter, Alec Stone Sweet and Joseph H.H. Weiler eds., 1998); MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION (2006); GIUSEPPE MARTINICO & ORESTE POLLICINO, THE INTERACTION BETWEEN EUROPE'S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS (2012); CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS AND PROCEDURES (Monica Claes, Maartje De Visser, Patricia Popelier *et al.* eds., 2013).

⁴¹ Gabriella Angiulli, *Il rinvio pregiudiziale alla Corte di giustizia dell'Unione europea da parte dei Giudici costituzionali degli Stati membri*, available at http://www.gruppodipisa.it/wp-content/uploads/2011/05/SIENA_Scuola_dottorale_in_-_Diritto_-ed_-economia.pdf (2011).

Constitutional Courts in the prospective advisory opinion mechanism before the European Court of Human Rights, the preliminary references procedure in the EU, and the advisory opinion mechanism of the American Convention on Human Rights (Maria Dicosola, Cristina Fasone, and Irene Spigno).

Part Two of the special issue is devoted to long-standing or (newly) stabilized relationships between the CJEU and Constitutional Courts. It presents assessments of the cases of Austria (Andreas Orator), Italy (Giorgio Repetto), and France (François-Xavier Millet & Nicoletta Perlo).

Part Three deals with Constitutional Courts that have referred preliminary questions to the CJEU and that pose the most challenging questions in terms of how to conceive of their constitutional role in the EU. This challenge may arise because of the subject matters covered and the way the referral has been managed, as in the case of the German Constitutional Court (Eva Lohse), the Spanish Constitutional Court (Miryam Rodríguez-Izquierdo Serrano), and the Polish Constitutional Court (Aleksandra Kustra), the latest newcomer in the cohort of referring Courts, on the very sensitive issue of taxation for the EU-Member States relationships. Or it may stem from the contested institutional role undertaken, and irrespective of whether this role could be fully compared to a Constitutional Court or not, as in the case of the UK Supreme Court (Alessia Fusco).

Part Four analyzes the cases of Constitutional Courts that have not yet issued a preliminary reference to the CJEU, but whose “silence” on this point is equally telling about the approach they adopt. It is particularly so if it is read in the light of the case law of these courts on the primacy of EU law and on those providing alternative solutions and explanations to the referral of preliminary questions. The Constitutional Courts considered in this Part are those of Hungary (Fruzsina Gárdos-Orosz), Bulgaria (Mihail Vatsov), and Romania (Viorica Viță).

Part Five includes a series of comparative analyses of how Constitutional Courts perceive their role in the “dialogue” with the CJEU (Pierre-Vincent Astresses) and on their use of the preliminary reference procedure in crucial sectors. These areas include the challenging relationship between these Courts and ordinary highest Courts (Clelia Lacchi), the Data Retention Directive (Ludovica Benedizione & Eleonora Paris), and the ESM Treaty (Samo Bardutzky).

In the final paper, new questions about the use of the preliminary reference tool by Constitutional Courts are put forward and lead to a depiction of “Europe” as a space of constitutional interdependence (Marta Cartabia).

