The Place of Constitutional Courts in the EU

Jan Komárek*

Going beyond 'judicial dialogues' and 'conflict-and-power' approaches to the analysis of national constitutional courts' role in the EU – The idea of European constitutional democracy – National constitutional courts constrain individual autonomy expanded by European integration – National constitutional courts defend the scope for political autonomy – Against national constitutional courts' displacement – Simmenthal II – After the 'Rights Revolution' in Europe – National constitutional courts' references to the ECJ – Ordinary courts challenging national constitutional courts through the preliminary reference procedure – Parallel references – National constitutional courts enforcing EU law – National constitutional courts challenging EU law

Introduction

'If there is a national authority whose supremacy is being threatened by EU law the most, it is the Constitutional Court,'[1] the President of the Czech Constitutional Court Pavel Rychetský remarked at a colloquium organised by the Czech Senate's Committee for European Affairs. The event took place shortly after Rychetský's court declared the European Court of Justice (the ECJ)'s decision in the *Landtová* case *ultra vires* – hitherto an unprecedented move by a national constitutional court.[2] Czech parliamentarians who were present in the room might have had a different opinion, since it is national legislatures who are usually said

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[1] Senate of the Parliament of the Czech Republic, Committee for European Affairs, 'The Judgment of the Constitutional Court in the Slovak Pensions Case in the light of Constitutional and European Law', 5 April 2012.

[2] Czech CC, Judgment of 31 Jan., Pl. ÚS 5/12, *Slovak Pensions XVII*. The English translation is available at the Czech Constitutional Court's website, <www.usoud.cz/view/6342>; ECJ (Fourth Chamber), Judgment of 22 June 2011 in Case C-399/09 *Landtová*, not yet officially reported.

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to be the greatest losers in the process of European integration. In reality, however, they were put at the centre of the EU democratisation agenda, as the various provisions of the Lisbon Treaty and accompanying rules show.[3] National constitutional courts, on the other hand, are gradually marginalised by the ECJ's decisions, which follow a rather dogmatic approach to the principle of primacy and direct effect.

Thus the ECJ's 2010 decision in *Melki and Abdeli* arguably undermined some of the core premises of the constitutional reform adopted in France only two years earlier. The reform was intended to put the *Conseil constitutionnel* and the French Constitution at the centre of judicial review of legislation.[4] More recently the ECJ established in *Križan* that national supreme courts do not need to respect the decisions of constitutional courts, if the latter have violated EU law.[5] Finally in *Winner Wetten* the ECJ ruled that a national constitutional court's decision to keep temporarily in force unconstitutional legislation until it is replaced within a prescribed time by new rules cannot prevail if the same legislation is also contrary to EU law.[6]

This case-law must be read in the context of the 'rights revolution' currently unfolding in Europe: since the Charter of Fundamental Rights of the EU ('the EU Charter') came into formal legal force in December 2009, the number of preliminary references from *ordinary* courts to the ECJ concerning fundamental rights has grown significantly.[7] Only now can we see the true decentralisation of constitutional review in Europe to ordinary courts, both in quantitative and qualitative terms, which comes together with turning the ECJ into a human rights jurisdiction. The Austrian Constitutional Court has already reflected this fundamental change in its decision from March 2012, where it overturned its earlier approach and adopted the EU Charter as a standard of its review, albeit only

[3] *See* e.g., P Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012).

[4] ECJ (Grand Chamber), Judgment of 22 June 2010 in Joined Cases C-188/10 and C-189/10, *Melki and Abdeli* [2010] *ECR* I-5667. *See* Marc Bossuyt and Willem Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment', *EuConst* (2011) p. 355.

[5] ECJ (Grand Chamber), Judgment of 15 Jan. 2013 in Case C-416/10 *Križan*, not yet officially reported.

[6] ECJ (Grand Chamber), Judgment of 8 Sept. 2010 in Case C-409/06 *Winner Wetten* [2010] *ECR* I-8015.

[7] According to the Commission's 2011 Report on the Application of the EU Charter of Fundamental Rights, <http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm>, p. 8, the number of preliminary references which mentioned the Charter rose in 2011 by 50% as compared to 2010, from 18 to 27. In 2012 it was 35 (Curia website search). This of course does not take into account other sources of EU fundamental rights, listed in Art. 6 TEU.

within the scope delimited by Article 51(1) of the Charter.[8] That scope can be very wide, as shown by the ECJ in *Åkerberg Fransson*.[9] The German Federal Constitutional Court thus adopted an opposite approach and warned the ECJ that too expansive an application of EU fundamental rights can be found to be *ultra vires*.[10]

Yet to describe the place of national constitutional courts in the EU solely in terms of conflict would be far from reality. They do impose important limitations on the application of EU law in their legal orders, but they also help to make it more effective. Thus we have, on the one hand, decisions such as *Solange I* or various Maastricht and Lisbon Treaty rulings, but on the other there are constitutional rulings which enforce the obligation of ordinary courts to refer preliminary questions to the ECJ or which review the correctness of national transposition of Union rules. Constitutional courts are therefore said to engage in a 'judicial dialogue'.[11] Many recent accounts of what constitutional courts do, however, limit their perspective to conflicts and power games. They see various decisions of national constitutional courts as strategic moves intended to protect their own prerogatives and prestige.[12]

This article seeks to provide a different perspective from both 'dialogue' and 'conflict-and-power' accounts. While it acknowledges the importance of 'cold' strategic considerations, they cannot exhaust the analysis of constitutional courts' place in the EU. Constitutional courts also need to be more cautious when accepting their 'European mandate' too readily. This is based on an idea of constitutional democracy, which puts emphasis on discourse and communicatively generated legitimacy, where constitutional adjudication does not simply constrain politics but exists in a symbiotic and mutually supporting relationship to it.

I present the idea of European constitutional democracy briefly in the following section.[13] In the remainder of the article I firstly argue against the present trend

[8] Austrian CC, Judgment of 14 March 2012, U 466/11-18 and U 1836/11-13, English translation available at <www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf>. *See also* text to n. 105 *infra*.

[9] ECJ (Grand Chamber), Judgment of 26 Feb. 2013 in Case C-617/10 *Åkerberg Fransson*, not yet officially reported.

[10] German FCC, Judgment of 24 April 2013 in Case 1 BvR 1215/07, <www.bundesverfassungsgericht.de/entscheidungen/rs20130424_1bvr121507.html>, para. 91, quoted from the FCC's English press release, <www.bundesverfassungsgericht.de/en/press/bvg13-031en.html>.

[11] *See* e.g., Alec Stone Sweet, 'Constitutional Dialogues in the European Community', in A.-M. Slaughter et al. (eds.), *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1999).

[12] *See* particularly Arthur Dyèvre, 'European Integration and National Courts: Defending Sovereignty under Institutional Constraints?', *EuConst* (2013) p. 139.

[13] I develop the theoretical argument in another article, 'Constitutional Courts in the European Constitutional Democracy', 12 *International Journal of Constitutional Law* (2014) (forthcoming).

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of displacing national constitutional courts from national and EU law and politics, represented by *Melki and Abdeli* and other decisions. The section occupies a significantly large part of the article, reflecting the importance of this issue compared to others. I will at the same time raise some cautions against some national constitutional courts' too welcoming approach to EU law, such as the Austrian Constitutional Court's willingness to embrace EU fundamental rights. Finally, I will also explain how national constitutional courts' challenges of the EU, represented by some decisions of the German Federal Constitutional Court, undermine their own place in national but also European constitutional settlement.

Constitutional courts in the European constitutional democracy

Concentrated constitutional courts

A large majority of EU member states have so-called concentrated constitutional courts – specialised judicial institutions empowered to review the constitutionality of the exercise of public power.[14] Their concrete jurisdiction and competences differ considerably, which of course also influences the impact of EU law on their status and possible responses to challenges thus posed, which I discuss in the following sections. The core justification for concentrated constitutional courts presented here however transcends these differences. It is based on the notion of constitutional democracy, which puts emphasis on communicatively generated legitimacy and the importance of the separation between ordinary and constitutional legality.[15]

[14] They are sometimes called 'Kelsenian' or 'centralised' constitutional courts. For a recent overview of constitutional courts' powers, *see* reports for the XV[th] Congress of the Conference of European Constitutional Courts, 23-25 May 2011, *Constitutional Justice: Functions and Relationship with the other Public Authorities*, <www.confcoconsteu.org/en/reports/reports-xv.html>, visited 28 March 2012. The following EU member states have concentrated constitutional courts: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. In Estonia, although there is no separate institution called the 'constitutional court', constitutional review is exercised by a specialised chamber within the Supreme Court, whereas in Cyprus the review is somewhat centralised at the Supreme Court, through the system of mandatory appeals and constitutional references (similarly in Portugal the ordinary courts can find a statute unconstitutional, but such decision will be subject to mandatory appeal). In Malta, on the other hand, although there is a nominal constitutional court, it is not separate and forms part of the Maltese judiciary.

[15] For two powerful defences of concentrated constitutional courts, *see* Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press 2007) and Victor Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (Yale University Press 2009).

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Constitutional democracy reflects the dual commitment to individual and political autonomy, which we can find in all European post-war liberal democracies. Individual autonomy is concerned with individuals' sphere free from interference of others, whereas political autonomy deals with their need to cooperate with each other in order to shape the conditions of their lives. Jürgen Habermas sought to reconcile the two forms of autonomy through the 'co-originality thesis': citizens can act as members of a political community (and thus realise their political autonomy) only if their individual autonomy is guaranteed.[16] Constitutional democracies provide the guarantee in the form of fundamental rights. In the 'post-metaphysical world', however, where no pre-established truth exists, the content of fundamental rights can only be determined in common with others through the discursive process of opinion- and will-formation, which is able to provide these determinations with legitimacy. Individual and political autonomy (transposed into constitutionalism and democracy or human rights and popular sovereignty) thus presuppose each other. Constitutional democracy understood in deliberative terms therefore does not conceive constitutionalism and rights as opposing or merely constraining democracy and popular sovereignty. They are both tied in a discourse that provides constitutional democracy with legitimacy.

The legitimating discourse is realised through a particular communicative arrangement which comprises elected officials, expert bureaucrats, independent judges and public opinion. Their relationship is organised through a 'deliberative separation of powers'.[17] It separates different forms of discourse and, importantly, distributes the effects of particular decisions in time. Conrado Mendes, who coined this term, helpfully distinguishes between 'the finitude of a procedural round' and 'the permanently possible continuity of political mobilization' concerning courts.[18] The former concerns the context of a single case, where the principle of *res judicata* precludes further questioning of the final decision adopted by a constitutional court. The latter reflects the openness of an interpretation adopted by that court, which can be either reinterpreted or in extreme instances challenged by other participants in the communicative arrangement. One may call this the temporal dimension of the communicative arrangement.

Discourse concerning *constitutional* legality is different from that concerning ordinary legality in that it often concerns the validity of norms involved and their justification, not simply the appropriateness of their application to the concrete case.[19] In Habermas' view, this entails 'additional obligations for courts to justify

[16] J. Habermas (W Rehg transl.), *Between Facts and Norms* (Polity Press 1996).

[17] *See* Conrado H. Mendes, 'Neither Dialogue Nor Last Word: Deliberative Separation of Powers III', 5 *Legisprudence* (2011) p. 1.

[18] *See* ibid., particularly p. 12-18.

[19] For this distinction, *see* Habermas, *supra n.* 16, p. 217.

opinions before an enlarged critical forum specific to the judiciary. This requires the institutionalization of a legal public sphere that goes beyond the existing culture of experts and is sufficiently sensitive to make important court decisions the focus of public controversies.'[20]

Habermas leaves the question of how to achieve this unanswered; some constitutional theorists however suggest that concentrated constitutional courts are better suited to this task than constitutional adjudication dispersed among the whole judiciary.[21] Their arguments can be summarised as follows: firstly, judges of concentrated courts have more time and resources to engage in constitutional justificatory discourses which place specific demands on their competence. Secondly, the process before concentrated courts can be structured so that other institutions have a proper voice and representation. Thirdly, cases before concentrated courts can also obtain proper attention from the general public, and concentrated courts cannot easily avoid hard cases through 'legalistic' tactics. Altogether, these factors establish a more effective communicative arrangement than diffuse constitutional review. Fourthly, concentrated constitutional courts can also be constituted with a view to greater professional diversity, so that they include members with different backgrounds, not just lawyers or even career judges, as is still usual in continental Europe. Fifthly, a shorter term of office can also secure the greater responsiveness of constitutional adjudication.

Before we consider how European integration transforms and to a great extent undermines the place of constitutional courts, we need to take a broader look to see how the EU affects national constitutional democracy as such.

European constitutional democracy

European integration potentially affects both the individual and political autonomy of European citizens. The idea of *European* constitutional democracy suggests that at least potentially (if not in reality) both kinds of autonomy can be tied in a communicative arrangement that allows for their mediation.

European integration provides further safeguards of individual rights in the form of externally enforced human rights commitments, and extends the scope of individual autonomy in that individuals can seek realisation of their potential beyond the boundaries of the national community. Potentially, it can also help to overcome the limitations of states in addressing problems affecting their citizens, such as the power of global (financial) markets or global environmental problems.

[20] Habermas, *supra n.* 16, p. 440.

[21] This would of course require much longer argument not pursued here. *See* the works cited in *supra n.* 15. One can add that in fact many countries which do not have nominal constitutional courts have *de facto* concentrated constitutional review, since it is their supreme courts which play their role (and constitutional adjudication in lower courts has a rather marginal role).

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In this second aspect it can extend the scope of the political autonomy of European citizens – acting as a collectivity (of a different kind from a political nation) which transcends state borders.

In reality, however, the extension of individual autonomy through European integration came without effective mechanisms of securing political autonomy at the supranational level and, more importantly, the establishment of the corresponding communicative arrangements, which underpins national constitutional democracies. It is not only the often invoked 'democratic deficit' of the EU,[22] but the very shape of free movement rights, which favours individual autonomy. Free movement rights empower those who can move easily across borders to challenge regulatory choices and redistributive policies adopted at the level of the state, while there is only a limited ability to engage in regulatory and redistributive policies to correct imbalances created by the extended individual autonomy of mobile actors.[23] EU law thus contains an inherent bias in favour of the mobile – manifested in other fields of EU law as well. Instead of extending the political autonomy of European citizens, EU law, as it stands today, curbs it and brings about a new form of social conflict: between those who benefit from integration and those who are losers in the process.[24]

The EU has been struggling to overcome the above-mentioned deficits for a long time. However, while national parliaments and even citizens were served quite well by recent developments,[25] constitutional courts' role in the integration process is still not fully appreciated in integration practice. Instead, EU law as interpreted by the ECJ breaks the communicative arrangement existing on the national level without creating a true substitute. At the same time, the current doctrines of national constitutional courts embracing or challenging EU law do not reflect the idea of European constitutional democracy either, as they do not seem to fully acknowledge the mutually supporting role of the EU and its Member states.

The key role of national constitutional courts consists in defending the rights of those who do not benefit from integration and whose voice can be structurally undermined by it. This, however, should not be understood as constitutional courts' simple defence of national constitutions or national democracy. It should

[22] *See* e.g., Andreas Follesdal and Simon Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', 44 *Journal of Common Market Studies* (2006) p. 533.

[23] For now the classic account of this problem, *see* Fritz Scharpf, 'The Asymmetry of European Integration, Or Why the EU Cannot Be a "Social Market Economy"', 8 *Socio-Economic Review* (2010) p. 217.

[24] *See* Marco Dani, 'Rehabilitating Social Conflicts in European Public Law', 18 *European Law Journal* (2012) p. 621, at p. 638-639.

[25] National parliaments through the Early Warning Mechanism and Barroso Initiative (*see supra* n. 3), citizens through European Citizens' Initiative.

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be seen in the context of European constitutional democracy as putting limits on the currently too wide individual autonomy, which is not placed into a communicative arrangement with its political counterpart.

This is why I do not fully subscribe to the suggestion that the special place of national constitutional courts could be preserved with reference to the 'constitutional identity clause' of Article 4(2) TEU, which assumes a conflictual, rather than a mutually presupposing, role of the EU and its Member states. For the same reason I do not subscribe to a call for 'a national constitutional resistance', voiced recently by Agustín José Menéndez in his powerful diagnosis of the Euro crisis.[26]

In my view, the key is the construction of European constitutional democracy where no institution is neglected and each has a part to play. European constitutional democracy presupposes the involvement of the institutions capable of formulating such demands from each side. In this way it relates closely to the idea of constitutional pluralism.[27] While a full articulation of the institutional implementation of the idea of European constitutional democracy cannot be carried out here, for our purposes we need to acknowledge the important place of national constitutional courts within this idea. They form an important component of communicative arrangements, which generate decisions that remain open to further revision, and are subject to communicatively generated legitimacy. The present *praxis*, however, shows little sensitivity to the notion of European constitutional democracy. In the rest of this article I describe the various forms this insensitivity takes.

The displacement of national constitutional courts

In this section I firstly explain the significance of the ECJ's primacy doctrine for the position of constitutional courts regarding other domestic actors, particularly ordinary courts. While until recently these effects were rather negligible, with the 'rights revolution' in Europe constitutional courts can no longer ignore them, especially since the ECJ does not seem to be willing (or able) to recognise their special role. This can explain constitutional courts' (diminishing, certainly) reluctance to engage the ECJ directly through preliminary references. Contrary to most current scholarship I express some sympathy for this stance and provide some principled reasons why it can sometimes be right for a national constitutional court not to refer to the ECJ.

[26] Agustín José Menéndez, 'The Existential Crisis of the European Union', 14 *German Law Journal* (2013) p. 453.

[27] *See* J. Komárek, 'Institutional Dimension of Constitutional Pluralism', in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in Europe and Beyond* (Hart 2012).

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I will also show in this section that constitutional courts risk displacement through the ECJ's case-law concerning preliminary references, although the ECJ is far from embracing various challenges by ordinary courts. The latter seek to circumscribe constitutional courts' authority and try to replace it with that of the ECJ. All this undermines existing communicative arrangements without creating sufficient alternative structures of a new deliberative separation of powers at the European level.

The beginnings: Simmenthal II and its consequences

The fundamental constitutional doctrines of EU law, particularly the principle of direct effect and primacy,[28] challenge not only the place of national constitutions as the 'supreme law of the land', but also the special position of national constitutional courts in the communicative arrangement connecting constitutional law, politics and society. The ECJ's decision in *Simmenthal II*, which came about a few years after the doctrines were established by the ECJ, only made their effects explicit.[29]

As is well known, in *Simmenthal II* a first instance court in Milan asked the ECJ whether its duty to submit a constitutional reference to the Italian Constitutional Court concerning the compatibility of certain domestic rules with EU law complied with the ECJ's 'established case-law' on the principle of primacy.[30] The constitutional duty in question was imposed on ordinary courts by the Italian Constitutional Court in a series of decisions from 1975 and 1976[31] as an attempt to contain the ECJ's constitutional doctrines.[32] *Costa* v. *ENEL*, establishing the principle of primacy, effectively meant that any national authority (including the administration)[33] could disregard provisions of national law deemed contrary to EU law. Constitutional courts thus lost their exclusivity of review of domestic legislation. The Italian Constitutional Court wanted to re-establish its exclusivity by turning the questions of compatibility with EU law into questions of conformity with the Italian Constitution, namely its 'integration clause',[34] implying

[28] Established in judgments of 5 Feb. 1963, Case 26/62 *Van Gend en Loos* [1963] *ECR* 1 and of 15 July 1964, Case 6/64 *Costa* [1964] *ECR* 1141.

[29] Judgment of 9 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato* v. *Simmenthal* [1978] *ECR* 629.

[30] 'Established case law' is the term used by the reference itself. *See Simmenthal II*, n. 29, 632.

[31] Referred to in the ECJ's judgment in *Simmenthal II*, *supra* n. 29, 632.

[32] For a detailed account, *see* Marta Cartabia, 'The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Union' and P. Ruggeri Laderchi, 'Report on Italy' both in Slaughter et al., *supra* n. 11.

[33] Later expressly confirmed in the ECJ's judgment of 22 June 1989 in Case 103/88 *Costanzo* [1989] *ECR* 1839.

[34] Art. 11 of the Italian Constitution.

ordinary courts' duty to submit constitutional reference to it instead of deciding the case independently on the basis of EU law.

One can assess this move simply as an attempt by the Italian Constitutional Court to get power back. If we use the framework developed in the previous section, however, we can rather say that the Italian Constitutional Court wanted to remain part of the communicative arrangement regulating the relationship between law and politics. Whereas the European doctrine of primacy would exclude the Italian Constitutional Court completely, its own version left scope for its participation, but also for the involvement of the ECJ through a reference from the Italian Constitutional Court itself.

The ECJ found the Italian Constitutional Court's involvement incompatible with the 'requirements which are the very essence of Community law.'[35] These 'essential requirements' reflect normative preferences of the EU legal order,[36] while entirely ignoring the contribution which national constitutional courts can make to the overall arrangement of European Constitutional Democracy by raising concerns that are structurally undermined by market integration.[37] In essence, they mean giving way to the norms originating at the EU level, whose legitimacy can be questionable if national institutions, including national constitutional courts, are not involved.

The ruling in *Simmenthal II* eventually became part of the EU constitutional canon and was ultimately accepted by the Italian Constitutional Court in 1985.[38] It is difficult to assess empirically how much the ruling changed relationships between constitutional courts and other domestic authorities, particularly ordinary courts. In reality many constitutional courts accepted it quite happily and rejected constitutional questions which in fact asked about the compatibility of national law with EU law with reference to *Simmenthal II*.

The tolerant (or even welcoming) approach to *Simmenthal II* adopted by most constitutional courts coincided with their general avoidance of EU law: deeming EU law distinct from constitutional law, they mostly rejected the power to review national legislation in the light of EU law, even in the case of the so-called abstract review, where it is not an individual but rather an institutional actor which submits the petition for review to the constitutional court and the problem of compatibility of such kind of review with *Simmenthal II* does not seem to arise. Most constitutional courts thus were content to delegate issues concerning EU law to

[35] *Simmenthal II*, *supra* n. 29, para. 22.

[36] *Simmenthal II*, *supra* n. 29, paras. 14-25.

[37] For example the social protection of immobile labour force.

[38] As noted by AG F. Mancini in his opinion of 22 Jan.1987 in Case 166/85 *Bullo and Bonivento* [1987] *ECR* 1583, 1589.

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ordinary courts and to limit their role to the control of ordinary courts' fulfilment of the duty to refer preliminary questions to the ECJ.

The voluntary displacement of national constitutional courts from EU law and politics can be explained by their desire to concentrate on questions they deemed important for their own systems and not to subordinate themselves to the authority of the ECJ. This could, to some extent, work when EU law truly concerned matters not typically decided by them. Before 2009 (when the Treaty of Lisbon, which made the EU Charter formally binding, came into force) there were only a few references to the ECJ concerning fundamental rights, although the right to equality, broadly speaking, was part of EU law from the beginning, and fundamental rights were 'discovered' to exist by the ECJ in *Stauder* as early as in 1969.[39] EU law could therefore be seen as separate from internal constitutional law, and as such left to ordinary courts and the court in Luxembourg.

After the 'Rights Revolution' in Europe

This ignoring approach has gradually become untenable, however, especially with the coming into formal legal force of the EU Charter in 2009. Together with the rapid increase in the number of references concerning fundamental rights,[40] ordinary courts started to question the national structure of constitutional adjudication. Here, we must note, the ECJ has thus far consistently rejected their invitation further to displace national constitutional courts.

In *Kamberaj*, when the ECJ was asked whether Article 6 TEU makes the European Convention directly applicable in the Italian legal order, the European Court replied that this provision 'does not govern the relationship between the [European Convention] and the legal systems of the Member States' nor 'does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law.'[41] This was further confirmed in *Åkerberg Fransson*,[42] where the ECJ also explicitly confirmed the room left for the review of rules implementing EU obligations in the light of domestic fundamental rights, 'provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.'[43]

[39] Judgment of the ECJ of 12 Nov. 1969 in Case 29/69 *Stauder* [1969] *ECR* 419, para. 7.

[40] *See* text to n. 7 *supra*.

[41] Judgment of the ECJ (Grand Chamber) of 24 April 2012 in Case C-571/10 *Kamberaj*, not yet officially reported, para. 62.

[42] *Åkerberg Fransson*, *supra* n. 9, para. 44.

[43] *Åkerberg Fransson*, *supra* n. 9, para. 29, where the ECJ refers to *Melloni*, *supra* n. 50, discussed below (and decided the same day as *Åkerberg Fransson*).

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Åkerberg Fransson, however, is far more ambiguous when it comes to assessing it in the light of the notion of European constitutional democracy and the importance of the deliberative separation of powers. First, it decidedly sides with a wide interpretation of the scope of application of EU fundamental rights, which has been controversial ever since the Charter was drafted.[44] The ECJ puts is simply: 'The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.'[45] The wide interpretation of the scope of application of EU law made by the ECJ in the case invited a warning issued by none other than the German Constitutional Court. It stated in a decision delivered shortly after *Åkerberg Fransson* that the ECJ's decision 'must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in a way that questioned the identity of the Basic Law's constitutional order.'[46]

Second, and more significant from the point of view of the deliberative separation of powers between constitutional and ordinary courts, is the ECJ's reply to the question whether it is compatible with EU law to make national courts' obligation to set aside any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the Charter and the related case-law. In other words, that condition allowed setting aside only if the court in question had no interpretative discretion. Here the ECJ followed the rigid *Simmenthal II* approach and excluded such condition, 'since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.'[47] The ECJ thus forces ordinary (or lower) courts to confront the question and not to leave it to an institution that is deemed to have greater legitimacy – such as the constitutional court or, in some countries, the parliament.

The ECJ's invitation to submit a preliminary reference in case of doubt can be read as its further attempt to *re*place national constitutional courts with itself. The reality is however quite different. When we read the actual response of the ECJ in this case, we see that the decision on compatibility with the *ne bis in idem* principle of national legislation that allowed the imposition of criminal and administrative sanctions for the same tax offence simultaneously was left completely in

[44] Ingolf Pernice's, 'Integrating the Charter of Fundamental Rights into the Constitution of the European Union: Practical and Theoretical Propositions', 10 *Columbia Journal of European Law* (2003) p. 5-45 perhaps best illustrates the point. Pernice at p. 23 acknowledges that Art. 51 'seems to be more restrictive than the ECJ's present doctrine' (meaning the doctrine that preceded the Charter) but then takes pains to explain that the provision should not be read that way.

[45] *Åkerberg Fransson*, *supra* n. 9, para. 21.

[46] FCC, 10, para. 91, quoted from the FCC's English press release, <www.bundesverfassungsgericht.de/en/press/bvg13-031en.html>.

[47] *Åkerberg Fransson*, *supra* n. 9, para. 47.

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the hands of the referring court. It is because the assessment of the compatibility of the dual penalty with that principle hinges on the determination of whether the two sanctions are 'penal' in the sense of the ECHR's jurisprudence. While the ECJ reminds the referring court of the criteria for making such determination (which in my view were perfectly well known to it already), it nevertheless leaves their application in the latter's hand.[48] It therefore forces the referring court to make a decision which that court wanted to delegate either to the higher or constitutional court or to the ECJ.

Preliminary references by national constitutional courts: 'judicial ego' or judicial wisdom?

Constitutional courts were until recently rather reluctant to refer preliminary questions to the ECJ.[49] This applied even to those that chose to engage EU law rather than completely avoid it, such as the Spanish Constitutional Tribunal.[50] This was widely criticised in the legal literature; the German Federal Constitutional Court's avoidance of preliminary references was ascribed to the court's 'judicial ego'[51] and a group of German law professors even proposed an amendment to the Federal Constitutional Court Act to make references by the Court obligatory.[52]

However, if we look at this avoidance from the point of view of the deliberate separation of powers, particularly the distinction between 'the finitude of a procedural round' and 'the permanently possible continuity of political mobilization',[53] we may come to terms with constitutional courts' avoidance on more principled grounds than just the preservation of their egos (or institutional authority, one might want to say). It is because once a constitutional court decides to submit a

[48] *Åkerberg Fransson*, *supra* n. 9, paras. 32-37.

[49] The very first constitutional court to submit a preliminary reference was the Belgian (then) Court of Arbitration in Case C-158/97 *Fédération belge des chambres syndicales de médecins* v. *Gouvernement flamand and Others* [1998] *ECR* I-04837 (reference made on 19 Feb. 1997, judgment of the ECJ, Fifth Chamber delivered on 16 July 1998). On references by national constitutional courts, *see* Giuseppe Martinico, 'Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?', in F. Fontanelli et al., (eds.), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Europa Law Publishing 2010).

[50] It was for example the Spanish Constitutional Tribunal which interpreted Art. 14 of the Spanish Constitution in the light of Art. 41(1) of Regulation No. 2211/78 – SCT, 130/1995. The tribunal sent its very first preliminary reference relatively recently: *see* the ECJ (Grand Chamber), Judgment of 26 Feb. 2013, Case C-399/11 *Melloni*, not yet reported.

[51] Joseph H.H. Weiler, 'Editorial: Judicial Ego', 9 *International Journal of Constitutional Law* (2011) p. 1, 2.

[52] *See* Editorial, 'On the *Lissabon Urteil*: Democracy and a Democratic Paradox', *EuConst* (2009) p. 341, at p. 342-343.

[53] *See* text to n. 18 *supra.*

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preliminary reference it acts in the context of a single procedural round, and the mere fact of consenting to the ECJ's jurisdiction creates an expectation of obedience.[54] If the former decides to disobey it acts against the fundamental social logic of its own function: conflict resolution, whereby two parties submit their dispute to an independent third – the court.[55]

One must also note that constitutional courts' reluctance to submit preliminary references can result from the ECJ's authoritative style of reasoning.[56] This article does not intend to add to the myriad academic complaints made in this respect, usually on the occasion of yet another constitutional issue decided by the ECJ with only cursory reasoning. Sometimes such narrow and shallow reasoning can be even more desirable than wide and deep reasoning.[57] I would however submit that an important difference must be highlighted precisely with regard to who is asking such questions. If a lower court wants to take advantage of the features of EU judicial process that allow the displacing of constitutional courts, the minimalist reasoning by the ECJ, which leaves things open for possible involvement by a national constitutional court, is well justified. On the other hand, if a constitutional court is asking a question which requires a complete response from the ECJ, such response should be provided.

In that respect, the ECJ's recent ruling on the Spanish Constitutional Tribunal's reference in *Melloni* concerning the possibility of a higher national standard of fundamental rights protection to override obligations stemming from EU law is wanting.[58] Whereas the reference expressly mentioned three alternative interpretations, the ECJ replied in terms of the absolute principle of primacy and left many questions unanswered. As noted a long time ago: 'The Cartesian style with its pretense of logical legal reasoning and inevitability of results is not conducive to a good conversation with national courts.'[59] Unfortunately, after 10 years this observation seems ever more cogent. Made in relation to the notion of constitutional democracy which rests on communication, it is even more pressing.

[54] For this argument, *see* M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981) p. 2.

[55] Shapiro, *supra* n. 54, p. 1-17.

[56] For a comparative analysis *see* the now classical M. De S-O-L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004).

[57] *See* Daniel Sarmiento, 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice', in M. Claes, et al. (eds.), *Constitutional Conversations in Europe* (Intersentia 2012).

[58] *Melloni*, *supra* n. 50.

[59] Joseph Weiler, 'Epilogue: The Judicial Après Nice', in G. de Búrca and J.H.H. Weiler (eds.), *The European Court of Justice* (Oxford University Press 2001) p. 225.

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Challenging national constitutional courts' authority through preliminary references

The foregoing should not be read as an invitation to destroy the mechanism of the preliminary ruling procedure by inviting national constitutional courts to ignore the context in which they operate. As much as the ECJ should be more sensitive to the institutional context of the questions it sometimes gets from ordinary courts, national constitutional courts cannot impede the logic of the interaction of national courts and the ECJ. The ECJ's recent decision in *Križan* cannot therefore be criticised as unduly limiting the authority of national constitutional courts. In that case, the Slovak Supreme Court asked whether EU law, particularly Article 267 TFEU, required or enabled it to submit a preliminary reference to the ECJ even when the Constitutional Court had annulled the Supreme Court's previous decision and imposed on it the obligation to abide by its opinion, while it failed to make a preliminary reference.[60] The ECJ's response was straightforward:

> a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.[61]

Once constitutional courts step into the territory of EU law (as the Slovak Constitutional Court did in this case), they cannot avoid the ECJ's communicative engagement with the issue. This is the other side of the discursively construed notion of European constitutional democracy.

Cartesio, in which the ECJ effectively overturned (although it sought to explain that it in fact followed it) its earlier decision in *Rheinmühlen-Düsseldorf* on the admissibility of appeals against the decision to refer,[62] would have been a similar instance of the ECJ's reserving space for communication with national courts, if the solution ultimately adopted by the ECJ had not disturbed the very foundations of hierarchical ordering in the judicial system. The ECJ held that 'it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.'[63] With little exaggeration, the ECJ invited lower courts to make their own judgment whether they want to abide by higher courts' decisions. The Danish Supreme Court's reaction is telling in this respect. It preferred

[60] *Križan*, *supra* n. 5.
[61] *Križan*, *supra* n. 5, para. 73.
[62] Case 146/73 *Rheinmühlen-Düsseldorf* [1974] *ECR* 139.
[63] ECJ (Grand Chamber), Judgment of 16 Dec. 2008, C-210/06 *Cartesio* [2008] *ECR* I-9641, para. 92.

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ruling out the possibility of an appeal against the decision to refer to observing how its authority would be dismantled under the *Cartesio* effect.[64]

Disturbing the temporal balance

Also, there is a group of judgments concerning national constitutional courts' power to moderate the temporal effects of their decisions: *Filipiak* and *Winner Wetten*.[65] They usually do so in order to allow domestic legislators to regulate the matter instead of courts. The latter seems particularly problematic, since the German Federal Constitutional Court duly considered the interests of EU law and based its proportionality test on the ECJ's previous rulings concerning the regulation of gambling.[66]

The case concerned the laws adopted in one of the German *Länder*; they were found unconstitutional by the German Federal Constitutional Court. The court nevertheless suspended the effects of its ruling in order to give the legislature the chance to regulate the matter in a way conforming to the German Basic Law. The referring court, a first instance federal administrative court, was not content with the limitation and submitted a preliminary reference inquiring whether the limitation was consistent with EU law. The ECJ's answer overruled the Federal Constitutional Court's decision balancing various interests 'by reason of the primacy of directly-applicable Union law.'[67]

Again, with the distinction between 'the finitude of a procedural round' and 'the permanently possible continuity of political mobilization'[68] one can understand the disturbing effects this decision has on a communicative arrangement established at the domestic level, without the possibility of re-establishing it at the level of the EU. The ECJ's criteria of postponing temporal effects of its judgments

[64] The Danish Supreme Court, Case No. 344/2009, judgment of 11 Feb. 2010, <www.domstol.dk/hojesteret/english/ECLaw/Pages/AppealregardingrejectiontohearreferencetotheCourtofJusticeonitsmerits.aspx>. In its decision the Court observed: 'it would not be compatible with the Danish system of means of redress or court hierarchy to have a scheme according to which appeal of a decision to refer a question to the Court of Justice cannot lead to the appellate court setting aside the decision with binding effect for the lower court.'

[65] ECJ (Third Chamber), Judgment of 19 Nov. 2009 in Case C-314/08 *Filipiak* [2009] *ECR* I-11049 and ECJ (Grand Chamber), Judgment of 8 Sept. 2010 in Case C-409/06 *Winner Wetten* [2010] *ECR* I-8015.

[66] FCC, Order of 2 Aug. 2006, Case 1 BvR 2677/04, <www.bverfg.de/en/decisions/rk20060802_1bvr267704.html>. The decision was based on an earlier FCC ruling concerning the identical legislation of another Land, where the FCC gave more detailed reasons for both the unconstitutionality and the suspension of the effects of its ruling: *see* FCC, judgment of 28 March 2006, Case 1 BvR 1054/01, *Sports Betting Case*, available in English at <www.bverfg.de/en/decisions/rs20060328_1bvr105401en.html>, *see* particularly para. 144.

[67] *Winner Wetten*, *supra* n. 65, para. 69.

[68] *See* text to *supra* n. 18.

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do not take into account that it may be desirable to let domestic legislators deal with the issue. It therefore destabilises the deliberative separation of powers without a remedy.

Parallel references

The difficulty, if not impossibility, of national constitutional courts remaining insulated from the effects of EU law became obvious in another group of recent cases concerning so-called parallel (or dual) references.[69] These are situations in which an ordinary court considers the same provision to be simultaneously contrary to EU law and the national constitution. EU law, according to *Simmenthal II*, dictates the immediate setting aside such national rule. According to national constitutional procedure, however, the same court should refer the matter to the constitutional court instead.[70] Parallel references differ from the *Simmenthal II*-type of case discussed above in that the conflict with the constitution is genuine, in the sense that the constitutional provision in question is not EU law disguised as constitution through the integration clause or other means. It is an autonomous norm which stems directly from the constitution.

Recently, for example, the Czech Constitutional Court obtained a constitutional reference from an ordinary court considering that a national provision which restricted the granting of a licence to broadcast radio and television programmes violated the right to engage in enterprise and pursue other economic activity, enshrined in the domestic constitution,[71] and *simultaneously* was 'in conflict with Community law, as it excessively restrict[ed] one of the fundamental freedoms of the internal market, namely the freedom of admittance of certain subjects to commercial activity in a given domain.'[72] The Czech court had already decided before to follow the *Simmenthal II* principle and rejected constitutional references if they required the annulment of national provisions on the grounds of their conflict

[69] On these *see* Bossuyt and Verrijdt, *supra* n. 4.

[70] Constitutional references from ordinary to constitutional courts (with different modalities, of course), now exist in the following EU member states, which have concentrated constitutional courts: Austria, Belgium, Bulgaria, Czech Republic, France, Germany, Hungary, Italy, Latvia, Luxembourg, Poland, Romania, Slovakia, Slovenia and Spain. Portugal, which has the concentrated Constitutional Court, provides for a mandatory appeal by the Public Prosecutor, if an ordinary court finds the provision of Portuguese law unconstitutional. In Cyprus there is a special reference procedure to the Supreme Court, which exercises constitutional review power, although the Supreme Court is not separated from other courts. In Estonia, if a lower court finds a provision of Estonian law unconstitutional, it must inform the Supreme Court and the Chancellor of Justice, whereby constitutional review is initiated.

[71] Art. 26(1) of the Czech Charter of Fundamental Rights and Freedoms.

[72] Czech CC, Order of 2 Dec. 2008, Case Pl. ÚS 12/08, English translation available at <www.usoud.cz/view/pl-12-08>, para. 8.

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with EU law.[73] This was, however, a different type of situation, as the Constitutional Court itself acknowledged, as it involved *both* alleged incompatibility with EU law and possible unconstitutionality.[74]

For the Czech court it presented a dilemma: had the referring court given precedence to the review in the light of EU law, the case would never come up before it. Since *Simmenthal II* requires ordinary courts 'immediately' to set aside the contested provision, the provision is no more applicable in the case before it: hence no constitutional reference is still necessary.

The Constitutional Court decided, with an express reference to a decision of the German Federal Constitutional Court,[75] to give considerable freedom to ordinary courts. It ruled that the Constitutional Court 'leaves it entirely to the discretion of the ordinary court whether it will concern itself with reviewing the conflict with European Community law of the statutory provision which it should apply or will focus on the review of its conflict with the constitutional order of the Czech Republic'.[76] At the same time, it retained some control, since it stressed that the ordinary court's decision either to decide on the basis of *Simmenthal II* or to proceed with a constitutional reference 'must be duly substantiated with reasons, otherwise it could become the subject of review on the part of the Constitutional Court, in the context of a proceeding on a constitutional complaint.'[77]

This looks compatible with the requirements of EU law, although some authors have suggested that the ECJ has already decided on the absolute priority of the review on the basis of EU law in *Mecanarte*.[78] The case, referred to the ECJ by an ordinary Portuguese court, involved an importer from Germany to Portugal who produced an invalid certificate of origin, required by the EU customs procedure and was as a consequence ordered to pay customs duties. The questions revolved around the conditions concerning post-clearance recovery and the possibility of customs authorities not proceeding to it, with the possible involvement of the Commission. The referring court considered that the power of na-

[73] Czech CC, Order of 21 Feb. 2006, Case Pl. ÚS 19/04, summarized in para. 29 of Pl. ÚS 12/08, n. 72.

[74] Pl. ÚS 12/08, *supra* n. 72, para. 32.

[75] 11 July 2006 Judgment in the matter 1 BvL 4/00, BVerfGE 116, 202 at p. 214, points 51 to 53; *see also* order of 4/10/2011, 1 BvL 2/08

[76] Ibid., para. 34.

[77] Ibid.

[78] ECJ (Third Chamber), Judgment of 27 June 1991 in Case C-348/89 *Mecanarte* [1991] ECR I-3277. *See* Michal Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts', in Claes et al., *supra* n. 57, p. 294-295 and Aida Torres Pérez, 'The Challenge for Constitutional Courts as Guardians of Fundamental Rights in the European Union', in P. Popelier et al. (eds.), *The Role of Constitutional Courts in Multilevel Governance* (Cambridge, Intersentia 2012) p. 52.

tional authorities to decide on recovery without referring to the Commission was contrary to the regulations, and in the light of such finding inquired:

> In a constitutional system such as the Portuguese one, which lays down the principle of the primacy of international law over domestic law, does the infringement of secondary Community law by domestic law constitute a case of unconstitutionality which makes it unnecessary to make an immediate reference for a preliminary ruling for the interpretation of Community law?[79]

Interestingly, in the light of the incorrectness of the basic premise of the referring court (since according to the ECJ's case-law, national authorities did not have to refer to the Commission in cases such as that in question), and also its inappropriateness (is it for the ECJ to decide what constitutes unconstitutionality according to the Portuguese constitution), the ECJ decided to proceed with an answer:

> the effectiveness of Community law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by Community law from exercising the right conferred on it by Article [267 TFEU] to refer to the Court of Justice questions concerning the interpretation or validity of Community law in order to enable it to decide whether or not a provision of domestic law was compatible with Community law.[80]

One must not overlook, however, that the case (like *Simmenthal II*) in fact concerned a situation where the national constitutional court considered the incompatibility of national provisions with EU law as instances of unconstitutionality, not true parallel references. Moreover, the Portuguese system of constitutional review does not comprise constitutional references (although it is the term used by the ECJ's judgment), but rather an obligatory appeal by the public prosecutor's office to the Constitutional Court in the event of an ordinary court's finding of unconstitutionality – another element which puts the ECJ's conclusions and the possibility of generalising from them into doubt. It could not rely on the requirement of the immediacy of the legal protection of an individual who claims that national provisions violate her EU rights, since these rights are protected. The only issue is that in such instance the decision will automatically be appealed to the Constitutional Court. And that is, in fact, the crux of the ruling, which reveals the ECJ's mistrust of national constitutional courts. The ECJ is in fact worried that the latter will not refer the question to it.

[79] *Mecanarte*, *supra* n. 80, para, 8, question (g).
[80] *Mecanarte*, *supra* n. 80, para. 45.

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Prioritizing EU review

Contrary to the Czech and German constitutional procedures, discussed above, the Belgian and French ones provided for the express priority of the review based on the domestic constitution. The priority was expressly provided for in reaction to the existing duality of review: one based on the domestic constitution and exercised by constitutional courts, the other based on international treaties (most prominently the European Convention), exercised by ordinary courts, which led to occasional conflicts.[81]

In Belgium the priority of constitutional review by the Constitutional Court was adopted as an express compromise reached between the three highest courts at their conference, and only later codified in positive law.[82] In France, it was a conscious decision supported by the initiator of the constitutional reform, President Sarkozy,[83] and expressly discussed in parliamentary and public debates.[84] The reform profoundly changed the structure of constitutional review in France, by providing for constitutional references allowing posterior review initiated by ordinary courts and filtered by the highest ordinary jurisdictions, the *Conseil d'Etat* and the *Cour de cassation*. It was called '*question prioritaire de constitutionalité*', a priority question of constitutionality, soon to be known as 'QPC'.

The *Cour de cassation*, however, clearly disliked the QPC.[85] Its President objected to it in the parliamentary debates leading to the adoption of the organic law implementing the reform.[86] Not surprisingly, perhaps, at the first opportunity the Cour submitted a preliminary reference to the ECJ, asking about the compatibility of the new mechanism with EU law.[87]

[81] For an excellent account of both, *see* Bossuyt and Verrijdt, *supra n.* 4.

[82] Bossuyt and Verrijdt, *supra n.* 4, at p. 366-372.

[83] Cf. President Sarkozy's speech at the conference celebrating the 50th anniversary of the Constitutional Council: '[I]t is remarkable to observe the passion of our highest courts to recall the absolute supremacy of the Constitution in the hierarchy of norms, without being actually equipped with mechanisms to enforce it. […] I prefer that our laws are controlled on the basis of our Constitution rather than on the basis of international and European conventions', <www.elysee.fr/president/transcript/usf/098b3696f40960067370f781fc05d6188a504130.xml>, visited 22 Oct. 2012.

[84] Arthur Dyèvre argues that the introduction of the QPC was the result of constitutional scholars' lobbying, and documents this by various interventions made in the political and public discourse by French professors of constitutional law. *See* Arthur Dyèvre, 'Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations', <ssrn.com/abstract=2163735>, p. 24-27.

[85] As opposed to the other ordinary supreme court, the *Conseil d'Etat*; for possible reasons why, *see* Dyèvre, *supra* n. 83, p. 19-22.

[86] *See* the *Rapport fait au nom de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi organique (N° 1599) relatif à l'application de l'Article 61-1 de la Constitution*, 3 Sept. 2009, <www.assemblee-nationale.fr/13/rapports/r1898.asp>, p. 183-185.

[87] *Melki and Abdeli*, *supra* n. 4.

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It did so, however, disingenuously, since it construed the *Conseil constitutionnel*'s jurisprudence concerning the control of compatibility with EU law as the control of constitutionality too widely. Whereas the *Conseil constitutionnel* limited its control to a provision that would be 'obviously incompatible with the Directive which it is intended to transpose',[88] the *Cour de cassation* argued in its reference that all questions concerning the compatibility of the provisions of French law with EU law have to be reviewed by the *Conseil constitutionnel* as questions concerning constitutionality. Moreover, if the *Conseil constitutionnel* found the provision in question to be compatible with EU law, the court's ruling on the substance could not, in the *Cour de cassation*'s view, refer a further question to the ECJ, since the *Conseil constitutionnel's* decision would be binding on it.[89]

Probably as part of the wider campaign against the *Cour de cassation*, the *Conseil constitutionnel* and the *Conseil d'Etat* were able quickly to prove that the *Cour de cassation*'s interpretation of the QPC was wrong and their decisions were communicated by the French government in its submission to the ECJ.[90] The ECJ, clearly aware of the delicacy of the matter, was willing to take this into account, although its settled case-law states that it is the interpretation of national law provided by the referring court which it takes into account, not that submitted by a party or a government in its submissions.[91]

The ECJ responded to the question based on the *Cour de cassation*'s interpretation and found the QPC, construed in the way suggested by the *Cour* to be incompatible with EU law, since ordinary courts could be 'prevented […] from exercising their right or fulfilling their obligation, provided for in Article 267 TFEU, to refer questions to the Court of Justice for a preliminary ruling.'[92] It then proceeded, somewhat extraordinarily, with the interpretation of the QPC estab-

[88] French CC, Judgment of 27 July 2006, Case 2006-540 DC, English translation available at <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2006/2006-540-dc/version-en-anglais.87333.html>.

[89] *See Melki and Abdeli*, *supra* n. 4, para. 46.

[90] *See* French CC, Judgment of 12 May 2009, Case 2010-605 DC, English translation available at <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-605-dc/version-en-anglais.88901.html> and the French *Conseil d'Etat*, Judgment of 14 May 2010, Case 312305, Rujovic, available (in French) at <arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=91761&fonds=DCE&item=2>.

[91] *See* e.g., ECJ, (Sixth Chamber) of 17 Sept. 1998 in Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] *ECR* I-5141, paras. 21-24.

[92] *Melki and Abdeli*, *supra* n. 4, para. 47. Here one can wonder whether such finding was necessary in the light of *Simmenthal II* and *Elchinov*. The ECJ could save the QPC, even if construed in this way, if it ruled that referring the question to the constitutional court did not deprive ordinary courts of their right or duty to refer the matter to the ECJ and, in case of the constitutional court's finding of compatibility with EU, to disregard such findings if they were made without consulting the ECJ. It is true, however, that this could lead to the ECJ and the constitutional court deciding simultaneously, with the risk of conflicting decisions.

lished by the *Conseil constitutionnel* to rule that the QPC may be compatible with EU law if three conditions are respected.

First, an ordinary court must remain 'free to refer [to the ECJ] for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality.'[93]

Second, if the interlocutory procedure (the QPC) prevents a national court from immediately setting aside the provision of national law it considers contrary to EU law, Article 267 TFEU nevertheless requires that national courts are free 'to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order.' At the same time, they must be able to 'disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law.'

Third, the ECJ addressed the problem of the review of the provisions of national law 'the content of which merely transposes the mandatory provisions of a European Union directive.' Such a review 'cannot undermine the jurisdiction of the [ECJ] alone to declare an act of the European Union invalid, and in particular a directive.'[94] The ECJ's jurisdictional exclusivity is justified with reference to the need to 'guarantee legal certainty by ensuring that EU law is applied uniformly.'[95] As a result, the ECJ stresses that the review of such provisions must firstly be executed by the ECJ on a reference from either the constitutional court to which the matter was referred or from an ordinary court. The ECJ explains that 'the question of whether the directive is valid takes priority, in the light of the obligation to transpose that directive.'[96]

It was suggested that with an obligation to refer thus construed, the ECJ wanted to prevent national constitutional courts' review of national provisions implementing directives without referring the matter to the ECJ, such as in a series of cases concerning the European Arrest Warrant Framework Decision and the Data Retention Directive.[97] But this is a misunderstanding, since these cases did not concern national rules transposing *mandatory* provisions of a directive, but those

[93] *Melki and Abdeli*, *supra* n. 4, para. 52.
[94] *Melki and Abdeli*, *supra* n. 4, para. 54.
[95] *Melki and Abdeli*, *supra* n. 4.
[96] *Melki and Abdeli*, *supra* n. 4, para. 56.
[97] Bobek, *supra* n. 78, p. 298-299. The European Arrest Warrant Framework Decision and the Data Retention Directive were reviewed by several constitutional courts; only the Belgian one in case of the former, and the Austrian in case of the latter, ultimately submitted preliminary references to the ECJ. *See* Judgment of the ECJ (Grand Chamber) of 3 May 2007 in Case C-303/05 *Advocaten voor de Wereld* [2007] *ECR* I-363 and Austrian CC, Order of 28 Nov. 2012, G 47/12-11 G 59/12-10 G 62,70,71/12-11, the English translation available at <www.vfgh.gv.at/cms/vfgh-site/attachments/1/4/5/CH0007/CMS1363699922389/vorlage_vorratsdatenspeicherung_english.pdf>.

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provisions which left room for discretion – at least in the constitutional courts' interpretation. The ECJ thus stresses the obligation of national courts to refer the questions of validity of EU law provisions established in *Foto Frost* only in the context of parallel references and does not create a new obligation to refer beyond that established in *Foto Frost*. Its concern is with its own sphere – EU law, rather than a complete submission of national constitutional courts to its authority.

The caution of the ECJ is also illustrated by the fact that it rejected references from Belgian courts challenging the rules on the priority of constitutional review as inadmissible, since they were raised in cases which did not fall within the scope of EU law.[98] Yet, the ruling of the ECJ was criticised as 'stressing the absolute character of [the ECJ's] full effect doctrine, safeguarding its own interests, it has endangered the same interests for the other mechanism' (the one concerning fundamental rights review).[99] I think in the light of the foregoing, the ECJ's case-law on parallel references deserves a more positive evaluation, which however depends primarily on the correctness of the interpretation of the *Mecanarte* and *Melki and Abdeli* rulings offered here.

Summary: constitutional courts' predicament

The foregoing suggests that it would be a mistake to accuse either the ECJ or national constitutional courts of blindness towards the wider context in which they operate. They are often driven by the logic of their institutional position and the constraints of constitutional structures they are called upon to enforce, although they have often helped to establish them in the first place. This concerns both the primacy doctrine of the ECJ and the conception of a constitution which radiates throughout the whole legal order, which is that it requires enforcement by all public authorities, particularly *ordinary* courts. The latter has led to the collapse of the separation between constitutional and ordinary legality in no less profound a manner than European integration.

We have therefore seen how the ECJ's decision in *Simmenthal II* opened up the possibility for national ordinary courts to circumvent the authority of constitutional courts and replace them with the ECJ. Constitutional courts can respond to this by themselves engaging the ECJ through preliminary references. I have shown that under certain circumstances this may be a rather problematic option, which will not secure constitutional courts' place in the communicative arrangements that underpin constitutional democracies. Constitutional courts are also threatened by ordinary courts' instrumental use of preliminary references, as shown

[98] ECJ (Fifth Chamber), Order of 1 March 2011, Case C-457/09 *Chartry*, not yet reported, para. 25. For the background of the case *see* Bossuyt and Verrijdt, *supra* n. 4, p. 371-372.

[99] Bossuyt and Verrijdt, *supra* n. 4, p. 391.

by the *Åkerberg Fransson* and *Križan* decisions. They can disturb the temporal balance in the deliberative separation of power, which is best exemplified by the ECJ's rulings in *Filipiak* and *Winner Wetten*. All this can lead to confrontations that both the ECJ and constitutional courts would prefer to avoid, as is well documented by ECJ President Skouris' reaction to the Czech Constitutional Court's *ultra vires* decision.

An alternative approach consisting of the adoption of an explicit constitutional provision that would give national constitutional courts priority in constitutional discourse was largely circumscribed by the ECJ in *Melki and Abdeli*, although my assessment of the ECJ's related jurisprudence was more optimistic than that of other authors. Some authors have recently suggested that constitutional courts should embrace their European mandate – not only by starting explicit communication through preliminary references, but also through enforcing EU law, including EU fundamental rights. Strategically, this may seem an attractive option. In the next section I however argue for caution, based again on the notion of constitutional democracy suggested here.

Constitutional courts enforcing EU law

There are various ways in which national constitutional courts find their way into the EU law discourse. The ECJ takes inspiration from national constitutional courts and the latter thus contribute, willingly or not, to the development of 'a common constitutional heritage.'[100] The same process can be observed on the horizontal level: constitutional courts communicate with each other through different channels.[101] Here I focus on constitutional courts' engagement which more directly affects their position in the European constitutional democracy.

Some constitutional courts allow the review of certain provisions of national law in the light of EU law.[102] The French *Conseil constitutionnel* limited its review to controlling the transposition of directives.[103] Some constitutional courts would deny such jurisdiction completely, but would do so indirectly: through the inter-

[100] *See* Monica Claes and Bruno de Witte, 'The Role of National Constitutional Courts in the European Legal Space', in Popelier et al., *supra* n. 78, p. 94-101.

[101] *See* Maartje de Visser and Monica Claes, 'Are You Networked Yet? On Dialogues in European Judicial Networks', 8 *Utrecht Law Review* (2012) p. 100 or Giuseppe Martinico and Filippo Fontanelli, 'The Hidden Dialogue: When Judicial Competitors Collaborate', 8(3) *Global Jurist* (2008).

[102] For a comprehensive overview see Darinka Piqani, 'The Role of National Constitutional Courts in Issues of Compliance', in M. Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012).

[103] *See* Chloé Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: The Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' *European Constitutional Law Review* (2007) p. 436.

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pretation of national constitutional provisions in the light of EU law. The Czech Constitutional Court did so with regard not only to a similar fundamental right, but a provision of a directive.[104]

The question whether national constitutional courts should enforce EU law arises even more urgently as regards the EU standards of fundamental rights. Should national constitutional courts use them when they exercise their functions? The Austrian Constitutional Court answered this question in the affirmative, while the German Federal Constitutional Court has recently insisted on the separation of EU and national fundamental rights review.[105]

There is a deeper issue there, well recognized by the Austrian court: although it ruled that the rights guaranteed in the Charter are nearly identical in substance and similar in wording to those protected by the Austrian Constitution, therefore justifying the adoption of the Charter as a standard of review, it also stated that 'some of the individual guarantees afforded by the Charter of Fundamental Rights totally differ in their normative structure, and some, such as e.g. Article 22 or Article 37, do not resemble constitutionally guaranteed rights, but principles.'[106] The Austrian Court therefore recognized the need 'to decide on a case-by-case basis which of the rights of the Charter of Fundamental Rights constitute a standard of review for proceedings before the Constitutional Court.'[107]

This argument can go even deeper: due to the differences between the basic normative assumptions of the EU legal order and those of the Member states, it is quite incorrect to deem the rights contained in the EU Charter 'similar' to those guaranteed by national constitutions. Firstly, they express the balance between individual and political autonomy: the space protected from the interference of others on the one hand, and the reach of collective authority on the other, which lies at the heart of constitutional democracy.[108] A long time ago, Joseph Weiler stressed that 'it is as injurious to the social choice involved in this balance to compromise the right of the individual as it would be to limit the rights of government.'[109] Aida Torres Pérez's view, according to which '[n]ational and supranational par-

[104] Judgment of 16 Jan. 2007, Pl. ÚS 36/05, Reimbursement of Medications, English translation available at <www.usoud.cz/en/decisions>.

[105] *See* cases referred to in *supra* n. 8 and 46 respectively.

[106] Art. 22 of the Charter reads: 'The Union shall respect cultural, religious and linguistic diversity', Art. 37 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

[107] Austrian CC, *supra* n. 8, para. 36.

[108] *See* text *supra* n. 16.

[109] Joseph Weiler, 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space', in J. Weiler, *The Constitution of Europe: 'Do the New Clothes Have and Emperor' and Other Essays on European Integration* (Cambridge University Pres 1999) p. 106.

ticipation in the interpretation of rights might contribute to limiting the excesses and detecting the shortcomings of each other, eventually furthering individual protection',[110] therefore neglects the dimension of political (as opposed individual) autonomy at stake. What Torres actually proposes is individuals forum shopping to obtain the greatest realisation of individual autonomy, at the expense, however, of collective autonomy – the ability of a polity to govern itself. In terms of this article, it breaks away from the confines of communicative arrangements which include national constitutional courts.

Secondly, while Weiler was concerned with the protection of 'fundamental boundaries' of polities, one also needs to take into account the conflict between those who gain and those who lose from the process of European integration.[111] There is no reason, in my view, to further empower the former, who are well served by the supranational adjudication of the ECJ cooperating with *ordinary* national courts, while the latter seem to be increasingly unrepresented. We must also bear in mind that the structure of EU fundamental rights adjudication, when conflicting with the interest of the mobile (typically those relying on market freedoms), strikes the balance in favour of the latter. *Schmidberger* shows this quite well: the exercise of the freedom of expression had to be justified, as it interfered with the free movement of goods. To say that this entails no hierarchy between classical liberal and market freedoms, as for example ECJ President Skouris did,[112] is misleading: the burden of justification lies with those who exercise the former.

The perceived difference between national constitutional law and EU law probably explains why some constitutional courts want to keep EU law behind closed doors and claim that it is not their task to apply or interpret it. Instead they limit themselves to the enforcement of the obligation to refer. National constitutional courts do so on the basis of the right to a statutory judge or fair trial. One can add that recently even the European Court of Human Rights decided that the violation of the duty to refer can lead to the violation of the right to a fair trial according to Article 6 of the European Convention.[113]

But that seems inherently problematic: the main task of the procedure is to secure the uniform interpretation and application of EU law, not to protect individual (let alone fundamental) rights. Moreover, the very treatment of individuals

[110] Weiler, *supra* n. 109.

[111] See text to n. 24 *supra*.

[112] Vassilios Skouris 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance', 17 *European Business Law Review* (2006) p. 225, at p. 237.

[113] ECHR (Second Section), Judgment of 20 Sept. 2011, Appl. No. 3989/07 and 38353/07, *Ullens de Schooten and Rezabek* v. *Belgium*, available (only in French) at <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108382>.

in the context of the procedure raises questions about respect for their procedural rights.[114]

More broadly speaking, and concerning all forms of enforcement of EU law, putting national constitutional courts at the service of EU law assumes that the two legal orders are interchangeable. As argued above, they serve different aims and have different objectives. While national constitutions underpin the balance between individual and collective autonomy, supranational law balances and extends the former. Like the necessary separation between ordinary and constitutional legality, defended by the Habermasian version of constitutional democracy, the separation between supranational and constitutional legality must be maintained. Institutionally this means protecting a special place for national constitutional courts. They can reclaim it, but when doing so they must keep in mind their place in European constitutional democracy. The next section shows that this is not always the case and warns against constitutional resistance.[115]

Constitutional courts challenging the EU

Some of the national constitutional courts' challenges to the authority of EU law were ultimately embraced by the ECJ: most famously the Italian and German Constitutional Courts' reservations concerning the absence of the protection of fundamental rights in the EEC legal order. The German Federal Constitutional Court's decision in *Solange I* in particular provoked a coordinated effort by some members of the ECJ, the high officials of the German government and ultimately other EU institutions, which led to the 'discovery' of fundamental rights within the EU legal order.[116] A few years later Advocate General Mancini could thus even refer to *Solange I* as a 'celebrated order'.[117]

There is a major problem with constitutional courts' challenges, however. In the foregoing I have explained the centrality of the revisability of constitutional courts' determinations of what the constitution means, which is open to constitutional amendment and other techniques.[118] These techniques are central to the

[114] *See* Jan Komárek, '"In the Court(s) We Trust?" On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure', 32 *European Law Review* (2007) p. 467, at p. 476-477.

[115] *See supra* n. 26.

[116] For a fascinating account see Bill Davies, 'Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law', 21 *Contemporary European History* (2012) p. 417.

[117] Opinion of AG Mancini of 26 April 1988, Case 407/85 *3 Glocken and Others* v. *USL Centro-Sud and Others* [1988] *ECR* 4233, 4273. *See also* Opinion of AG Stix-Hackl of 18 March 2004, C-36/02 *Omega* [2004] *ECR* I-9609, para. 69 (n 45).

[118] *See* Comella, *supra* n. 15, p. 104-107

deliberative separation of powers described above.[119] EU law's quasi-constitutional status in many national legal systems leads constitutional courts to ground their review in so-called 'eternity clauses'.[120] This considerably limits the possibility of a response by the political process, unless a completely new constitution is adopted.

The Czech Constitutional Court had been among national courts inspired by the German Constitutional Court's approach to European integration.[121] In its second review of the Lisbon Treaty, however, the Czech Court took a rather unprecedented step of criticising its German counterpart. It had to respond to some of the doubts raised by the German Lisbon Treaty judgment, since they were replicated (sometimes verbatim and with express references) in the petition for review initiated by a group of senators supported by the Czech President, Klaus.[122] The Czech Court could not therefore 'cherry-pick' arguments with which it agreed and leave others without referring to them, since otherwise it would have left some of the principal challenges raised in the petition unanswered. When asked by the petitioners, supported by the President of the Czech Republic, to provide a list of competences that must remain with the Czech authorities, as the German Court did in its decision on the Lisbon Treaty, it held that '[r]esponsibility for these political decisions cannot be shifted onto the Constitutional Court; the Court can make these decisions subject to its review only after they have actually been made on the political level.'[123] The Court further observed:

> The Constitutional Court considers that it is exactly the concrete cases that can provide the Court with the relevant framework within which it is possible, by interpretation on a case-by-case basis, to specify the content of the concept of 'a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens'. [...] It is not a manifestation of its arbitrariness, rather on the contrary of its restraint and judicial minimalism, which is understood as a means of limiting judicial power in favour of political procedures, and which prevails over the demand for absolute legal certainty.[124]

[119] *See* text to n. 17 *supra*.

[120] *See* Yaniv Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea', 61 *American Journal of Comparative Law* (2013) p. 651 and Yaniv Roznai, 'The Theory and Practice of "Supraconstitutional" Limits on Constitutional Amendments', 62 *International and Comparative Law Quarterly* (2013) p. 557.

[121] On the earlier case-law of the Court dealing with EU law generally, *see* Jiří Zemánek, 'The Emerging Czech Constitutional Doctrine of European Law', *EuConst* (2007) p. 418.

[122] Judgment of 3 Nov. 2009, Case No. Pl. ÚS 29/09 *Lisbon Treaty II*, English translation available at <www.usoud.cz>. On the background of the litigation concerning the Lisbon Treaty in the Czech Republic, *see* Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives', *EuConst* (2011) p. 96, p. 105-106.

[123] Czech CC, *Lisbon Treaty II*, 122, para. 111.

[124] *Lisbon Treaty II*, 122, *supra* n. 123, para. 113.

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The Court therefore explicitly subscribes to the now, especially in the United States, quite popular theory of judicial minimalism, related to the work of Cass Sunstein (cited even in the decision).[125] In essence, judicial minimalism is based on the belief in 'the limited space of courts in a democratic society, where fundamental principles are best discussed and announced in democratic arenas.'[126] However, do concrete cases really provide a better framework for taking decisions concerning the interpretation of very abstract concepts, such as 'material core of the Constitution' or 'constitutional identity', as the Czech Court claims? The German case suggests a rather negative answer.

As already mentioned, the German Court was quite specific when finding that some decisions must continue to be taken at the level of the German State, and that the competence to take them therefore could not be transferred to the Union. It identified five such areas '[p]articularly sensitive for the ability of a constitutional state to democratically shape itself.'[127] Daniel Halberstam and Christoph Möllers observed that there was no theory behind the list; according to them it was just 'a *post-hoc* argument in support of a preordained result.'[128] What was most striking to them was 'that the policy areas that define sovereignty map perfectly onto the subject matter of the specific *passerelle* clauses that [were] at issue in this case.'[129]

Institutional limitations of adjudication can explain the ultimate shape of the list. Adjudication is defined by a dispute over a particular outcome; here the question whether or not the Lisbon Treaty can be ratified by Germany. Decision making in the context of adjudication often suffers from structural limitations that usually (but not always) do not affect legislators.[130] One of these structural limitations is 'issue framing', 'where, by emphasizing a subset of potentially relevant considerations, a speaker leads individuals to focus on these considerations when constructing their opinions.'[131] The issue of constitutional limitation on further participation of the German State in the European integration project is framed

[125] The Czech CC refers to CR Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999).

[126] C.R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press 1996) p. 6.

[127] German FCC (Second Senate), Judgment of 30 June 2009, Joined Cases No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, English translation available at <www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>, para. 252.

[128] Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court Says *"Ja zu Deutschland!"*', 10 *German Law Journal* (2009), p. 1241, at p. 1250.

[129] Halberstam and Möllers, *supra* n. 128, p. 1251.

[130] For a comparison of structural limitations of the two processes, *see* Jeffrey J. Rachlinski, 'Bottom-Up Versus Top-Down Lawmaking', 73 *University of Chicago Law Review* (2006) p. 933.

[131] James N. Druckman, 'Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects', 98 *American Political Science Review* (2004) p. 671, at p. 672.

by the petitioners and their submissions. The Court, faithful to its adjudicatory role, responds to them.

Jacques Ziller confirms this observation when he stresses that 'it is essential once again to remember that [the German Court's ruling] is, in the first place, a response to the arguments by the applicants, not a spontaneous declaration directed to the European Union's institutions or from the Federal Republic of Germany.'[132] The problem of course is that it is not understood in this way, as the critique raised by Halberstam and Möllers shows well. Most academic commentaries do not accept the Federal Constitutional Court's judgment as a verdict in a controversy defined by arguments submitted by opponents seeking a certain result, but as a comprehensive statement of what the German Government together with the Parliament can do.[133]

Constitutional courts that seek to claim their space in European constitutional democracy and its communicative arrangement therefore need to be aware of their institutional limitations, so as not to disturb the deliberative separation of powers existing on the national level. From this point of view the Czech Lisbon Treaty decision seems ultimately better than the German one.

Conclusion

This article has sought to provide a more balanced and at the same time principled view of the place of national constitutional courts in the EU, going beyond both the 'jurisprudence of constitutional conflicts' and realist accounts that reduce constitutional courts' role to power games and struggles for prestige. It has suggested how European integration can expand the idea of constitutional democracy and at the same time defended a strong role for constitutional courts.

It has therefore criticised the ECJ's 'doctrine of displacement', which marginalises constitutional courts by allowing other actors, particularly ordinary courts, to circumvent their authority or even directly challenge it. It was also shown, however, that often the ECJ has very little room to manoeuvre if ordinary courts choose to use the authority of EU law in an instrumental way.

The article has also raised some cautions against too welcoming an approach by national constitutional courts to EU law, manifested in some of their recent decisions. The principal reason for this sceptical stance lies in the complementar-

[132] Jacques Ziller, 'The German Constitutional Court's Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon', 16 *European Public Law* (2010) p. 53, at p. 69.

[133] *See* e.g., Daniel Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* Judgment of the German Constitutional Court', 46 *Common Market Law Review* (2009) p. 1795.

ity and not interchangeability of national constitutional orders and the law of European integration. Each stands on different normative foundations, and while they empower each other, they need to be kept distinct.

Finally, the article also warned against too aggressive resistance by national constitutional courts to the ECJ. Such resistance can undermine constitutional democracy in a no less problematic way than the ECJ by ruling out involvement by other actors and the revisability of constitutional courts' decisions.

Some time ago European courts were 'discovered' by political *scientists* and lawyers started to recognise the importance of their insights.[134] Today some political *theorists* argue that their discipline should pay more attention to real-life institutions, including courts.[135] This article attempts to use political theory to give a more complete and at the same time attractive understanding of constitutional courts' role in the EU. Lawyers should do better than just acknowledge facts – their discipline is still defined by norms.

[134] *See* Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice', 52 *International Organization* (1998) p. 177.

[135] *See* Jeremy Waldron, '*Political* Political Theory: An Inaugural Lecture', 21 *Journal of Political Philosophy* (2013) p. 1.

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