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Central European Constitutional Courts in the face of EU membership : the influence of the German model of integration in Hungary and Poland

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CHAPTER ONE: THE GENERAL EU CONSTITUTIONAL CONTEXT

The aim of the present Chapter is to provide an overview of the context in which judges in Central European constitutional courts must deal with issues of EU law. In order to afford a clearer understanding of this context, the present author will focus initially on a brief explanation of how the ECJ turned the Community and Union treaties into a constitution of the EU while noting that such judicial activism has not been universally accepted by constitutional courts in the EU Member States, pre-CEEC accession (below in section A). Next, it will be necessary to examine the framework of constitutional court reluctance to European integration, in other words why constitutional courts display their wariness to integration based on the individual nature of their national constitutions and the legal cultures that lay behind them. At the centre of the discussion is the dilemma which all constitutional judges face – protecting the constitution and system that they have worn to uphold or complying with the duty of Union loyalty to give precedence to EU law in cases before them, as now enshrined in Art. 4(3) TEU (below in section B).

Coupled with this individuality is the way in which the various constitutional courts have evolved their own case-law defining the essential and inalienable core of their nation's sovereignty which is not susceptible to the forces of European integration. In this process, constitutional judges have clearly operated within a European-wide context, communicating their own ideas on state sovereignty in the face of EU membership between one another. The borrowing of ideas from other constitutional courts or the migration of ideas between them is the central focus of the entire thesis (below in section C).

A. JUDICIAL CONSTRUCTION OF THE EU CONSTITUTION

1. Constitutionalisation of the Treaties

This work is predicated on the idea that, even at this juncture of European integration, there is an identifiable construction which may even now be referred to as the Constitution of the European Union.¹ The “thin” definition of a constitution as a body of law which constitutes and differentiates the main organs of government and their powers and which specifies the main rights and obligations connecting the citizenry to those organs of government indicate little more than that, in such a minimal sense, the EU² already has “constitutional law.”³

¹ In general, see J.H.H. Weiler, *The constitution of Europe: “Do the new clothes have an emperor?” and other essays on European integration*, CUP, Cambridge (1999).

² Following the report of the European Convention, the conclusions of the 2003 Intergovernmental Conference and the formulation of the EU Constitutional Treaty, the EU was to have gained its own Constitution in the form of a specific document. The phoenix-like rebirth of the Constitutional Treaty, from the ashes of the negative French and Dutch referendums, in the form of the Lisbon Treaty was (more than ever) a necessary prerequisite for further widening and deepening of the Union. Its subsequent immolation at the hands of Irish voters rejecting its ratification in June 2008 resulted in the resubmission of the (largely unchanged) Treaty to a further successful referendum in Ireland in October 2009.

³ P. Craig, “Constitutions, Constitutionalism and the European Union” (2001) 7 ELJ 125, at 126.

Since the early 1960s, the ECJ has construed the founding Treaties of the European Communities “in a constitutional mode rather than employing the traditional international law methodology”⁴ and thus shifted the nature of the European legal order from that of Treaty to that of Constitution.⁵ Even in 1983, Rinze⁶ was able to conclude that – through the distribution of powers and competences between Community institutions and Member States set out in the Treaties, as well as the establishing of certain fundamental principles for the functioning of the then Communities – the Treaties at that time constituted the constitution of the EC. In fact, as will be seen below, this opinion was later confirmed by the ECJ in the case of *Les Verts*.⁷

From the jurisprudential stream of the ECJ flowed the now well-recognised EU constitutional principles⁸ including (a) the *sui generis* nature of EU law; (b) supremacy; (c) direct effect; (d) pre-emption; and (e) protection of fundamental rights.⁹ As Rudden observed¹⁰ the ECJ had thereby affirmed that Union law was like Frankenstein’s monster – independent of its creator, imbued with a life of its own, supreme throughout the States’ territories, and immune from attack by their laws and constitutions.

Confirmation of this conversion of international legal instrument to constitution was made (as indicated above) in the case of *Les Verts*¹¹ that the EEC was “a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with *the basic constitutional charter, the Treaty*.”¹² The high-water mark of the ECJ’s support for the treaty structure as being a constitution came several years ago with its *Opinion on the Draft EEA Treaty* wherein it stated:¹³

In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less *constitutes the constitutional charter of a Community*

⁴ E. Stein, “Lawyers, Judges and the Making of a Transnational Constitution” (1981) 75 AJIL 1, at 1.

⁵ S. Weatherill, *Law and Integration in the European Union*, Clarendon Press, Oxford (1995), chap. 6, 184, at 185.

⁶ J. Rinze, “The role of the European Court of Justice as a Federal Constitutional Court” [1983] PL 426, at 430-431.

⁷ Case 294/83 *Parti Ecologiste Les Verts v. European Parliament* [1986] ECR 1339.

⁸ M.L. Fernandez Esteban, “Constitutional Values and Principles in the Community Legal Order” (1995) 2 MJ 129; J. Temple Lang, “The Constitutional Principles Governing Community Legislation” (1989) 40 NILQ 240.

⁹ On these points, see variously, P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials*, 3rd ed., OUP, Oxford (2003), chaps. 5, 6, 7, and 8, at 178-229, 230-274, 275-316, and 317-370, respectively; B. de Witte, “Direct Effect, Supremacy and the Nature of the Legal Order,” in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law*, OUP, Oxford (1999), chap. 5, at 177-213; Weatherill (1995), chaps. 4 and 5, at 97-134 and 135-183, respectively.

¹⁰ B. Rudden, *Basic Community Cases*, 1st ed., Clarendon Press, Oxford (1987), at 52.

¹¹ Case 294/83 *Parti Ecologiste Les Verts v. European Parliament* [1986] ECR 1339.

¹² Case 294/83 *Parti Ecologiste Les Verts v. European Parliament* [1986] ECR 1339, at para. 23. Emphasis supplied.

¹³ Opinion 1/91 *Re Draft Treaty on a European Economic Area* [1991] ECR I-6079, at paras. 20-21.

based on the rule of law. As the Court of Justice has consistently held, the Community Treaties established a new legal order for the benefit of which the States have limited their sovereign rights, *in ever wider fields*, and the subjects of which comprise not only Member States but also their nationals The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. [Emphasis supplied.]

The process of constitutionalisation of the Community and later Union legal order¹⁴ was thus substantially achieved by the ECJ.¹⁵ While acceptance of this European constitutional settlement has been challenged by academics,¹⁶ any deficiencies were meant to be addressed, at least in part, by the European Convention¹⁷ which resulted in the 2004 Treaty establishing a Treaty on the Constitution for Europe.¹⁸ However, failed referendums in the

¹⁴ For consideration of European law as constitutional law, see *e.g.* T.C. Hartley, "Federalism, courts and legal systems: the emerging constitution of the European Community" (1986) 34 AJCL 229-247; J.H.H. Weiler, "The Transformation of Europe" (1991) 100 Yale LR 2403; Curtin (1993); Harden (1994); J.L. Seurin, "Towards a European Constitution? Problems of Political Integration" [1995] PL 625; E.-U. Petersmann, "Proposals for a new constitution for the European Union: Building-Blocks for a constitutional theory and constitutional law of the E.U." (1995) 32 CML Rev. 1123; K. Lenaerts "Constitutionalism and the Many Faces of Federalism" (1990) 38 AJCL 205; F. Mancini, "The Making of a Constitution for Europe" (1989) 26 CML Rev. 595; E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 75 AJIL 1; A. Weale, "Democratic Legitimacy and the Constitution of Europe," in R. Bellamy, V. Bufacchi and D. Castiglione (eds.), *Democracy and Constitutional Culture in the Union of Europe*, Lothian Foundation Press, London (1995), 103; F. Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays*, Hart Publishing, Oxford (2000); P. Beaumont, C. Lyons & N. Walker (eds.), *Convergence and Divergence in European Public Law*, Hart Publishing, Oxford (2002).

¹⁵ I. Harden, "The Constitution of the European Union" [1994] PL 609; F. Jacobs, "Is the Court of Justice of the European Communities a Constitutional Court?," in D. Curtin & D. O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law*, Butterworths (Ireland), Dublin (1992), 25. Curtin recently described the "sedimentary" nature of the EU's Constitution: "the metaphor of the sedimentary 'living' constitution conjures up the image of organic and incremental growth: gradual rather than sudden (although there may well be distinct and specific impulses, also treaty-based), piecemeal rather than a 'big bang.'" D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, OUP, Oxford (2009), chap 1, 3, at 9-10. Nevertheless, Curtin notes that the idea of a sedimentary constitution was previously proposed in respect of the US Constitution in B. Friedman & S. Smith, "The sedimentary constitution" (1998) 147/1 U. Pa. L. Rev. 1-90; and in respect of EU integration by W.T. Eijsbouts, "Constitutional sedimentation" (1996) 23 LIEI 51-60.

¹⁶ G. de Búrca, "The Institutional Development of the EU: A Constitutional Analysis," in Craig & de Búrca (eds.), (1999), chap. 2, 55, at 64-65 and at 80; N. Walker, "European Constitutionalism and European Integration" [1996] PL 266; U. Everling, "Comments on B. de Witte's 'International Agreement or European Constitution?'," in J. Winter *et al.* (eds.), *Reforming the Treaty on European Union: The Legal Debate*, Kluwer Law International, Deventer and The Hague (1996), 19, at 21; D. Grimm, "Does Europe need a Constitution?" (1995) 1 ELJ 282, at 291; F. Hayes-Renshaw & H. Wallace, *The Council of Ministers*, Macmillan, Basingstoke (1997), at 276; and D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 CML Rev. 17.

¹⁷ European Convention Secretariat, *Draft Treaty establishing a Constitution for Europe*, submitted by the President of the European Convention to the European Council meeting in Thessaloniki on 20 June 2003, CONV 820/1/03, REV 1, Brussels, 27 June 2003 (01.07).

¹⁸ Treaty establishing a Constitution for Europe: OJ 2004 C310/1.

Netherlands and France ended the process of the Constitutional Treaty's ratification.¹⁹ Rising like a phoenix (minus certain contentious provisions) from the ashes of the Constitutional Treaty, the 2007 Lisbon Treaty²⁰ was viewed as the best possible solution to continue deepening integration absent the Constitution. This Treaty has addressed many of the concerns previously raised: rationalisation of the legislative procedures; an extension of the ECJ's review jurisdiction throughout EU law (subject to some limitations); the introduction of the EU Charter of Fundamental Rights into the Treaty scheme proper (subject to exclusion from UK and Poland); and the ending of the three-pillar system through the consolidation of the Treaties into two, the new TEU and the TFEU.

2. Constitutional basis of EU integration

In its role as constitutional court, the ECJ in little over a decade (from 1963 to the mid 1970s) laid down the foundations of certain basic principles that "fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states."²¹

As a result of this case-law, in each Member State, Union law becomes a new source of law, the provisions of which prevail over domestic norms of any level. The supremacy of EU law requires national judges to become Union judges²² and apply this law over conflicting national provisions, including constitutional law.²³ In this way, the ECJ has accordingly sought to act as a midwife to the birth of a new European constitutional order.²⁴ Such supremacy also – to some extent – reverses the formal subordination of national government to national parliament wherein the established principle of supremacy of statutes over delegated legislation and executive decrees formerly subsisted. Now, according to the case-law of the ECJ, secondary EU legislation, made by representatives of national governments in the Council of Ministers, takes priority even over the national constitution.²⁵

As Rubio Llorente has observed,²⁶ an adequate constitutional basis of the integration process is indispensable: on the one hand, for the Member States, a transformation of this

¹⁹ Tatham (2009), chap. 1, 1, at 4.

²⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community: OJ 2007 C306/1.

²¹ Weiler (1991), at 2413.

²² J. Temple Lang, "The Duties of National Courts under Community Constitutional Law" (1997) 22 EL Rev. 3, at 3.

²³ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629; Case C-213/89 *R. v. Secretary of State for Transport, ex parte Factortame Ltd.* [1990] ECR I-2433.

²⁴ Apologies from the present author for his own flight of fancy in creating this metaphor.

²⁵ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getriebe und Futtermittel* [1970] ECR 1125; Case 9/70 *Grad v. Finanzamt Traunstein* [1970] ECR 825; Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; Case 51/76 *Verbond* [1977] ECR 113; Case 103/88 *Fratelli Costanzo v. Comune di Milano* [1989] ECR 1839. Such point is now confirmed in Declaration 17 on Primacy to the TFEU: see below at Chapter Six, point B.3.c.

²⁶ F. Rubio Llorente, "Constitutionalism in the 'Integrated' States of Europe," *Harvard Jean Monnet Working Paper* No. 5/98: <[www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-5-\(6\).html](http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-5-(6).html)>.

magnitude needs such a basis “since their own legitimacy would fall into doubt if changes were carried out in opposition to their respective constitutions”; on the other hand, the EU itself needs this articulated basis since it only possesses the power granted to it by the Member States and its law exists only to the extent that national judges (whose decisions are not reviewable by the ECJ) respect it. Thus judges would be unable to respect EU law if its validity and asserted primacy were to have no basis of support in the constitution they are bound by oath to uphold.²⁷

For national constitutional courts, the cornerstone of European integration has long been the principle of two co-ordinated but distinct legal systems²⁸ which are applied simultaneously to the parties by a single judge operating inside a single national jurisdiction. The effects of such a principle can be seen most vividly when it is applied to EU secondary legislation.²⁹ Although theoretically derived from domestic law by means of authorisation clauses in the various national constitutions, the ECJ has maintained that the principles of the supremacy, direct effect and validity of such secondary EU legislation are based exclusively on the Treaties as a new order of international law and are immune from review by a national judge under any circumstances.³⁰ The problem in applying this principle, set forth by the ECJ on numerous occasions, becomes most acute in relation to fundamental rights provisions in national constitutions.³¹

B. FRAMEWORK FOR CONSTITUTIONAL COURT RETICENCE VIS-À-VIS EUROPEAN INTEGRATION

1. Introduction

In order to appreciate the actual context within which constitutional courts operate in the deepening European integration project, the two *leitmotifs* to the present research first need to be considered before embarking upon a more, in-depth analysis which is the substantial content of this work. These *leitmotifs* attempt to identify two particular considerations, *viz.*: (a) the “individuality” of national constitutions and the legal cultures behind them; and (b)

²⁷ Confirmed, *e.g.*, by the German Federal Constitutional Court in the *Lisbon* case: *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339, at paras. 240, and 331-340.

²⁸ A.F. Tatham, “The Italian Constitutional Court and the Process of European Integration,” in M. Király (ed.), *Európajogi Tanulmányok*, ELTE ÁJK, Nemzetközi Magánjogi és Európai Gazdasági Jogi Tanszék, Budapest (2006), Volume 7, 169.

²⁹ As defined in Art. 288 TFEU (ex-Art. 249 EC): “To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

³⁰ J. Steiner & L. Woods, *Textbook on EC Law*, 8th ed., OUP, Oxford (2003), chap. 5, at 88ff and the case-law mentioned therein.

³¹ Rubio Llorente (1998) 98-5-(6).html

cross-fertilisation of common constitutional approaches through transjudicial communication.

2. The “individuality” of national constitutions

a. *Legal culture and constitution: separate mentalités*

In their seminal work, Zweigert & Kötz³² identify certain features which set legal families apart from one another, *viz.* history, style of legal thought, ideology, sources and legal concepts. Each of these goes towards creating a distinctive style of legal system where law is seen not merely as a set of rules or norms but a way of thinking. According to both Bell and Krygier³³ although law involves a tradition of handing on texts, the central element of the tradition is the approach which is adopted to the texts and the process of interpretation. Indeed, Bell³⁴ maintains that a legal tradition, “is not just rules and processes, but is essentially the practice of people who operate and perpetuate the tradition. A tradition is a set of practices among a caste of lawyers.” This *mentalité*, according to Zweigert & Kötz as well as to Samuel and Legrand, is a defining feature of the legal culture and legal tradition.³⁵ For Legrand³⁶ a legal system is not just a set of rules (or even principles) but a set of traditions and practices which shape and sustain an attitude to law and its role in society. He has also stated:³⁷ “The notion of ‘legal tradition’ implies, among other features, an idiosyncratic cognitive approach to law.”

Bell, to a certain extent, agrees with these commentators and states:³⁸ “The way you have learnt your law, its conceptual map, the doctrinal coherence and acceptable legal argument, the authoritative sources which must be used are all part of a legal culture.” But Bell departs from Legrand, *inter alia*, when he acknowledges that legal cultures³⁹ are neither homogeneous nor unchanging. Thus, the notion of distinct

³² K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 2nd ed., Clarendon Press, Oxford (1987), chap. 5, at 69.

³³ M. Krygier, “Law as Tradition” (1986) 5 *Law and Philosophy* 237; and J. Bell, “The Acceptability of Legal Arguments,” in N. MacCormick & P. Birks (eds.), *The Legal Mind*, Clarendon Press, Oxford (1986), 45, at 53-56.

³⁴ J. Bell, “Comparative Law and Legal Theory,” in W. Krawietz *et al.* (eds.), *Prescriptive Formality and Normative Rationality in Modern Legal Systems, Festschrift for Robert S. Summers*, Duncker & Humblot, Berlin (1994), 19, at 29.

³⁵ G. Samuel, *The Foundations of Legal Reasoning*, Maklu, Antwerp (1995), at 28; P. Legrand, “The European Legal Systems are not Converging” (1996) 45 *ICLQ* 52.

³⁶ Legrand (1996), at 60.

³⁷ P. Legrand, “Against a European Civil Code” (1997) 60 *MLR* 44, at 45.

³⁸ J. Bell, “Mechanisms for Cross-fertilisation of Administrative Law in Europe,” in J. Beatson & T. Tridimas (eds.), *New Dimensions in European Public Law*, Hart Publishing, Oxford (1998), chap. 11, at 156.

³⁹ For a detailed argument, from the point of view of sociology of the law, on whether or not a “legal culture” exists, see R. Cotterrell, “The Concept of Legal Culture,” chap. 1, at 13-30, and L.M. Friedman, “The Concept of Legal Culture: A Reply,” chap. 2, at 33-39, both in D. Nelken (ed.), *Comparing Legal Cultures*, Dartmouth Press, Aldershot (1997).

mentalités is a significant feature of legal systems but is not determinative. This feature of a culture is not a barrier to either collaboration or the migration of ideas.⁴⁰

Constitutions are still generally regarded as national phenomena. As such they are eminently dependent upon the historical, political, *etc.*, context in the states they are supposed to govern – yet few legal instruments are more indebted to concepts and ideas from foreign countries.⁴¹

While each of the legal systems of the European states has a distinct *mentalité*, then, this has not prevented them from being open to impulses from outside the region, *e.g.* either in the drawing up of their constitutions or the use of non-domestic sources in judicial interpretation of the constitution. Indeed, it may be that the totalitarian interruption to the legal tradition of the states in both Western and Central Europe have rendered them more open to such extraneous influences.

Without sounding too trivial, the national legal system is a society's expression of its identity,⁴² as cogently argued by the German Federal Constitutional Court in the *Lisbon case*.⁴³ In a sense, as Hart reasons,⁴⁴ any society's legal system contains the norms the society accepts as part of its conventional political morality. More specifically, a key purpose of a constitution is to express the fundamental values of the political order, providing a basis on which all can agree that the endeavour of political association is a good one and thereby assisting the legitimisation of the political order. The values expressed in a constitution resonate with values and beliefs held in society. They can thus affect perceptions and increase acceptability of the political order.⁴⁵

Although a constitution is intended to provide a stable framework for political association, over time, practical experience may make change desirable; external circumstances may also change. With the passage of time, there will be questions of government arising that never were, and never could have been, envisaged by the drafters of the constitution. Constitutions are designed, through the use of constitutional oversight, to prevent unintended changes while providing the necessary procedure for rule changes that become desired or necessary.⁴⁶

Changes in the values of a society are one of the hallmarks of political (and economic) transition, necessitating change, reformulation or accommodation of legal culture to the new realities. This has been most marked in Europe and, in the last 15 years, in Central and Eastern Europe in particular. Institutions and legal procedures have been subject to profound change in such circumstances – the extent to which the limitations on judicial competence imposed through the positivist legal tradition have

⁴⁰ Bell (1998), at 157.

⁴¹ E. Smith, "Give and Take: Cross-fertilisation of Concepts in Constitutional Law," in Beatson & Tridimas (1998), chap. 8, at 101.

⁴² R. O'Connell, *Legal theory in the Crucible of Constitutional Justice: A study of judges and political morality in Canada, Ireland and Italy*, Ashgate/Dartmouth, Aldershot (2000), at 265.

⁴³ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

⁴⁴ H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford (1961), at 199.

⁴⁵ F. Vibert, *Europe: A Constitution for the Millennium*, Dartmouth, Aldershot (1995), at 53-54.

⁴⁶ Vibert (1995), at 164-165.

been altered, redefined or even overcome, particularly in the face of European integration, will be the subject of further discussion.

b. National legal identity: constitution and sovereignty

National identities also include national constitutional identities, since constitutions are the living expression of the very foundational values of a community, they express what turns a community into a genuine political community of principle.⁴⁷

Bell has mentioned⁴⁸ the way in which legal actors and a national legal culture are intrinsically bound up with each other and that apparently common values have significantly different meanings in different judicial cultures: “It is my contention that basic values are understood and implemented in the light of historical and institutional settings ... national histories and traditions colour the understanding of common values....”

Indeed, there still exists a tendency nowadays – despite the many years of European integration through EU law as well as, *e.g.*, the ECHR and its mechanisms, together with the compulsory component of EU law in legal education across the continent – for the great majority of lawyers to think of “their law” and “their legal system” within the narrower limits of the nation-state.

Although EU law has made and continues to make great inroads into the areas formerly regarded as exclusively national or affected by international treaty law, *e.g.*, civil law and private international law respectively, such areas (as with most others) are taught only from the national perspective in the local language. Headway of a sort may be made in providing for a comparative approach, *e.g.*, the availability of national court decisions on the application of the Brussels Convention/Regulation,⁴⁹ yet legal education that generally limits study to a particular state encourages what Habermas⁵⁰ and Aziz⁵¹ have referred to as “*Verfassungspatriotismus*,” a patriotic loyalty to “one’s own constitution.”

The distinctiveness of each EU Member States’ constitution is based not only on different cultural and historical influences but also on the fact that they contain “unique” principles or a national “essential core of sovereignty” which has required strong and

⁴⁷ A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, Kluwer Law International, The Hague, London & New York (2002), at 324.

⁴⁸ J. Bell, “Judicial Cultures and Judicial Independence” (2001) 4 CYELS 47, at 47.

⁴⁹ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters: OJ 1972 L299/32; and Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”), as amended: OJ 2001 L12/1 (corrigendum, OJ 2001 L307/28). The national cases on the application of both these instruments, together with the Lugano Convention (OJ 1988 L319/9; superseded by Council Dec. 2007/712/EC: OJ 2007 L339/1) can be found at: <<http://curia.europa.eu/common/recdoc/convention/en/index.htm>>.

⁵⁰ J. Habermas, “Staatsbürgerschaft und nationale Identität,” in J. Habermas, *Faktizität und Geltung*, Suhrkamp, Frankfurt am Main (1992). Although this concept is associated with Habermas, it was in fact the earlier creation of Sternberger: D. Sternberger, *Verfassungspatriotismus*, Insel, Frankfurt am Main (1990).

⁵¹ M. Aziz, “Review of T. Tridimas, *The General Principles of EC Law* (1999)” (2000) 63 MLR 473-474. In the European context see also, J. Lacroix, “For a European constitutional patriotism” (2002) 50(5) *Political Studies* 944-958.

sustained defence in the face of the constitutionalisation of the European project. This has been affirmed, e.g., by the Polish Constitutional Tribunal in the *European Arrest Warrant* case⁵² and by recognition of national “constitutional identity” by the German Federal Constitutional Court in the *Lisbon* case,⁵³ as well as by the Czech⁵⁴ and Hungarian⁵⁵ constitutional courts in their own *Lisbon Treaty* rulings.

c. Dilemma of constitutional justices faced with European integration

Constitutional court judges are by no means immune to the phenomenon set out in the previous section, bound as they are – through their oath of office – to uphold the State’s constitution and laws. They must also comply with the obligation of Union loyalty imposed on them by Art. 4(3) TEU⁵⁶ which states in part:

The Member States shall take any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

They shall facilitate the achievement of the Union’s tasks and shall refrain from any measure which could jeopardise the attainment of the objectives of the Union.

This Union obligation is binding on Member States irrespective of their institutional or constitutional structure.⁵⁷ The fact that the executive represents the Member State *vis-à-vis* the Union institutions does not – in the eyes of the ECJ – free the judiciary from its obligations to respect and execute Union law: this is so even if, according to their respective national constitutions, they are independent and sovereign.⁵⁸ In fact, the ECJ expressly stated in 1984 in *von Colson*⁵⁹ that the duty under what is now Art. 4(3) TEU was binding, for matters within their jurisdiction, on the courts.⁶⁰

⁵² *Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42; [2006] 1 CMLR 965.

⁵³ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 EuGRZ 339.

⁵⁴ Czech Const. Ct. Decision of 26 November 2008: Case No. Pl. ÚS 19/08; and Czech Const. Ct. Decision of 3 November 2009: Case No. Pl. ÚS 29/09.

⁵⁵ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

⁵⁶ On this Article as Art. 10 EC (ex-Art. 5 EEC), see generally J. Temple Lang, “Community Constitutional Law: Article 5 EEC Treaty” (1990) 27 CML Rev 645.

⁵⁷ Case 77/69 *Commission v. Belgium* [1970] ECR 237, at 243; Case 8/70 *Commission v. Italy* [1970] ECR 961, at 966.

⁵⁸ Case 167/73 *Commission v. France* [1974] ECR 359.

⁵⁹ Case 14/83 *von Colson v. Land Nordrhein-Westfalen* [1984] ECR 1891, at 1909.

⁶⁰ G. Tesaurò, “The effectiveness of judicial protection and co-operation between the Court of Justice and national courts,” in K. Thorup & J. Rosenløv (eds.), *Festschrift til Ole Due: Liber Amicorum*, Gads Forlag, København (1994), 355.

National judges (including constitutional justices) therefore have a duty,⁶¹ in common with the ECJ, to see that EU law is respected in the application and interpretation of the Treaties.⁶² In the view of the ECJ “the judicial authorities of the Member States ... are responsible for ensuring that [Union] law is applied and respected in the national legal system.”⁶³ The duty of national courts to apply Union law means that they must apply it fully, even if it is inconsistent with the national constitution;⁶⁴ further, every court which has to decide a case in which an EU law point arises must be able to decide itself rather than referring it to a constitutional court.⁶⁵

There is a sting in the tail for constitutional justices – on one level, they are required by the ECJ to apply EU law over their own constitution (which they are bound by oath to uphold); on the other level, the ECJ effectively introduces by means of Art. 4(3) TEU a diffuse system of constitutional review through ordinary courts in the field of EU law into what in Germany is regarded as a concentrated system of review. As Alter noted,⁶⁶ this empowerment of ordinary courts is regarded as a major explanation for those courts’ easy acceptance of EU law supremacy: conversely,⁶⁷ “the *capitis diminutio* suffered by constitutional courts” represents another reason why those courts remain hesitant, or even hostile, to the idea of recognising the full force of Union law.

3. Verfassungskern

a. Core principles of sovereignty

The relation between European legal integration and the fundamental principles and values of the Member State constitutions⁶⁸ still remains far from settled.⁶⁹ For some, the necessary

⁶¹ J. Temple Lang, “The Duties of National Courts under Community Constitutional Law” (1997) 22 EL Rev. 3, at 3.

⁶² Case 244/80 *Foglia v. Novello* (No. 2) [1981] ECR 3045; Joined Cases C-422/93-424/93 *Erasun* [1995] ECR I-1567, at para. 15.

⁶³ Case C-2/88 *Imm. Zwartfeld* [1990] ECR I-3365.

⁶⁴ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

⁶⁵ Temple Lang (1997), at 5-6.

⁶⁶ K.J. Alter, “The European Court’s Political Power” (1996) 19 *West European Politics* 458, at 459; J.H.H. Weiler, “A Quiet Revolution: The European Court of Justice and its Interlocutors” (1994) 26 *Comparative Political Studies* 510.

⁶⁷ De Witte (1999), at 208.

⁶⁸ In many national constitutional cultures (Walker (1996), at 272), Van Caenegem has argued persuasively that an historical symbiosis exists between “the framework of constitutional government and a broad ethic of constitutionalism,” embracing such ideas as fundamental rights, the separation of powers, the federal division of powers or, even more generally, limited government and the rule of law, or *Rechtsstaat*, principle itself: R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, CUP, Cambridge (1995), chap. 1. These ideas have been reinforced by studies of more recent constitutions: C. Grewe & H. Ruiz Fabri, *Droits constitutionnels européens*, Presses universitaires de France, Paris (1995); and D. Rousseau, *La justice constitutionnelle en Europe*, Montchrestien, Paris (1998).

⁶⁹ B. de Witte, “Sovereignty and European Integration: The Weight of Legal Tradition” (1995) 2 MJ 145; revised, B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition” in Slaughter,

constitutional settlement can best be achieved through a written European Constitution⁷⁰ while others are now tending to a less directed, more “naturally organic” growth principle in this field.⁷¹ There are those, like Póires Maduro, who are eloquent in their desire not to advocate a European Constitution at all, when he states:⁷²

European integration not only challenges national constitutions ... it challenges constitutional law itself. It assumes a constitution without a traditional political community defined and proposed by that constitution European integration also challenges the legal monopoly of States and the hierarchical organisation of the law (in which constitutional law is still conceived of as the “higher law”).

The crux of the whole debate is the question of the protection of national sovereignty and what it actually means within the context of European integration.⁷³ As explained by De Witte:⁷⁴

The fiction of popular sovereignty can easily accommodate the fact that all state power is exercised by political institutions that act in the name of the people and are accountable to the electorate (directly or through the intermediary of an elected Parliament), but it can less easily accommodate the exercise of power by *international* institutions that do not act in the name of the people of a single nation and are not, or only very remotely, accountable. This is the reason why the European Community cannot easily be integrated within the traditional account of popular sovereignty. [Emphasis in original.]

He continues by stating that this also explains why the principle of sovereignty has been used by the constitutional courts – in Italy, Germany, France and Spain – as an instrument for regulating the pace of European integration, for drawing the border between acceptable and unpalatable advances of European law.

The attempts of the ECJ at remoulding the European constitutional system were not accompanied by a universal welcome on the part of national, particularly constitutional,

Stone Sweet & Weiler (eds.), (1998), chap. 10, 277.

⁷⁰ L. Siedentop, *Democracy in Europe*, Penguin Books, London (2000), chap. 5, 81, particularly at 94-97; T. Börzel & Th. Risse, “Who is Afraid of a European Federation? How to Constitutionalise a Multilevel Governance System” (2000) *Harvard Jean Monnet Working Paper*, No. 7/00: <www.jeanmonnetprogram.org/papers/00/00f0101.html>. 20 July 2007.

⁷¹ J.H.H. Weiler, “Federalism and Constitutionalism: Europe’s *Sonderweg*” (2000) *Harvard Jean Monnet Working Paper*, No. 10/00: <www.jeanmonnetprogram.org/papers/00/001001.html>. 20 July 2007.

⁷² M. Maduro, *We, The Court: The European Court of Justice and the European Economic Constitution*, Hart Publishing, Oxford (1998), at 175. Weiler also seeks to formulate the dilemma as a “Constitution without Constitutionalism”: J.H.H. Weiler, “‘... We Will Do, And Hearken’ (Ex. XXIV:7): Reflections on a Common Constitutional Law for the European Union,” in R. Bieber & P. Widmer (eds.) *The European Constitutional Area*, Schulthess, Zürich (1995), 413, at 413.

⁷³ Generally, Th. De Barranger, *Constitutions nationales et construction communautaire*, LGDJ, Paris (1995).

⁷⁴ De Witte (1995), at 149; de Witte (1998), at 281.

courts.⁷⁵ The reactions on the part of the domestic constitutional courts to the ECJ's famous doctrinal judgements in this sphere⁷⁶ have occasionally proved to be hostile. As will be later examined, at the forefront of the reaction has been the German Federal Constitutional Court⁷⁷ but the constitutional tribunals in Italy, France and Spain have also added their voices.⁷⁸

Each constitutional judicial entity within these three States has, over several decades, developed through case-law its concepts of the core of national sovereignty that act as limitations to the transfer of the exercise of national sovereign powers to the EU. The French Constitutional Council⁷⁹ has developed since 1970⁸⁰ the concept of "the essential conditions for the exercise of national sovereignty." For example, in its decision on the constitutionality of the 1990 Convention implementing the 1985 Schengen Agreement,⁸¹ these essential conditions include the respect of the institutional structure of the French Republic; the continuity of the life of the nation; and the guarantee of the rights and liberties of the citizen. In the decision on the 2004 EU Constitutional Treaty,⁸² the secular nature of the State was also determined to be an essential condition.

The Italian Constitutional Court has established its own "counter limits" to integration⁸³ based on fundamental principles of the Constitution and inviolable human rights that represent the acceptable limits to limitations to the transfer of sovereignty. In *SpA Fragd c. Amministrazione delle Finanze dello Stato*,⁸⁴ the Italian Court affirmed that in principle a rule of Union law could not be applied in Italy if it infringed a fundamental principle of the Constitution,⁸⁵ notwithstanding the fact that the ECJ had accepted the legality of the rule.⁸⁶ *Fragd* thus indicates that the Constitutional Court would be willing to

⁷⁵ On French administrative courts, e.g., A.F. Tatham, "Effect of European Community Directives in France: The Development of the *Cohn-Bendit* Jurisprudence" (1991) 40 ICLQ 907.

⁷⁶ Case 26/62 *Van Gend en Loos* [1963] ECR I; Case 6/64 *Costa v. ENEL* [1964] ECR 585; Case 106/77 *Simmenthal* [1978] ECR 629; Case C-213/89 *Factortame* [1990] ECR I-2433.

⁷⁷ See generally Chapter 3 below.

⁷⁸ See A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, OUP, Oxford (2000), at 166-193.

⁷⁹ See generally, F. Luchaire, "Le Conseil constitutionnel et la souveraineté nationale" 1991 RDP 1499.

⁸⁰ *Re the Treaty of Luxembourg*, Cons. constit. 19 juin 1970, n. 39, Rec. 15.

⁸¹ Cons. constit. 25 juillet 1991, n. 294, Rec. 91. See comment by G. Vedel, "Schengen et Maastricht (à propos de la décision n° 91-294 DC du Conseil constitutionnel du 25 juillet 1991)" 1992 RFDA 173.

⁸² Cons. constit. 19 novembre 2004, n. 505, Rec. 173.

⁸³ R. Guastini, "La primauté du droit communautaire: une révision tacite de la Constitution italienne" (2000) 9 *Les Cahiers du Conseil constitutionnel* 119, at 120.

⁸⁴ Corte cost. 21 aprile 1989, n. 232: *Giur. cost.* 1989, I, 1001; M. Cartabia, "Nuovi sviluppi nelle 'competenze comunitarie' della Corte costituzionale" *Giur. cost.* 1989, I, 1012.

⁸⁵ The Court referred to Constitution, Art. 24 concerning judicial protection but could be equally applicable to other provisions also considered as fundamental.

⁸⁶ H.G. Schermers, "The Scales in Balance: National Constitutional Court v. Court of Justice" (1990) 27 CML Rev. 94.

test the consistency of individual rules of European law against fundamental constitutional provisions and those protecting inviolable human rights.⁸⁷ The Italian Court accordingly reserves for itself the possibility to raise an ordinary control of constitutional legitimacy of EU law, in reference to the fundamental principles and inviolable human rights in the Constitution.⁸⁸ Shortly put, the control limits conceived at the outset as conditions of the limitations of sovereignty became a limitation as to the primacy of EU law. This position was reaffirmed in later cases of the Constitutional Court dealing with the direct effect of directives: *S.p.A. Industria Dolciaria Giampaoli v. Ufficio del Registro di Ancona*⁸⁹ and *Zerini*.⁹⁰

Lastly, in Spain, the Constitutional Tribunal in the *FOGASA* case,⁹¹ the Tribunal stated that although the conflict between an EU norm and a national law was a “selection of the rule to be applied” problem, that selection could have a constitutional relevance if it violated fundamental rights (excluding Constitution Art. 24(1)⁹²). The Tribunal’s reference to sovereignty as a limit to European integration is perhaps more direct than the reference to fundamental rights that the Tribunal makes, as evidenced by its own *Maastricht case*⁹³ in which it examined whether Art. 20(2)(b) TFEU (then Art. 8b(1) EC) – which permits EU citizens resident in a Member State but not being a national of it to participate in municipal elections⁹⁴ – was contrary to Constitution Art. 1(2) which says that “national sovereignty rests with the Spanish people, from which all powers derive.” The Tribunal established⁹⁵ that the Treaty Article in question could only be infringed if the “attribution of the right to vote to foreigners was [in an election to] those organs that hold powers directly derived from the Constitution and from the Statutes of the Autonomous Regions [i.e., the constitutional bloc] and linked to the holding of sovereignty by the Spanish people.”

⁸⁷ This amounted to a redefinition of the Court’s competence within the limits of its powers to check – “through the control of constitutionality of the law of execution of the Treaty, if whatever norm of the Treaty, as it is interpreted and applied by the Community institutions and organs, is not in conflict with the fundamental principles of the constitutional order nor infringes the inalienable rights of human beings.”

⁸⁸ M. Cartabia & J.H.H. Weiler, *L’Italia in Europa. Profili istituzionali e costituzionali*, il Mulino, Bologna (2000), at 129-133, at 171-172.

⁸⁹ Corte cost. 8 aprile 1991, n. 168: *Giur. cost.* 1991, 327; P.F. Lotito, “Comunità europee: Corte costituzionale e direttive ‘self-executing’” *Quad. cost.* 1991, 613.

⁹⁰ Corte cost. 23 marzo 1994, n. 117: *Giur. cost.* 1994, 785. A. Adinolfi, “The Judicial Application of Community Law in Italy (1981-1997)” (1998) 35 *CML Rev.* 1313 at 1322.

⁹¹ Trib. Const. 31 mayo 1993, STC n. 180/1993: BOE n. 159, 5 julio 1993.

⁹² Constitution Art. 24(1) provides: “All persons have the right to the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.”

⁹³ Trib. Const. 10 julio 1992, DTC n. 1/1991: BOE n.177, Supplement of 24 julio 1992. F.J. 4.8; (1992) 19 *Rev. Inst. Eur.*, 633.

⁹⁴ “Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State...”

⁹⁵ A. Estella de Noriega, “A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration” (1999) 5 *EPL* 269, at 297.

The Tribunal's position as regards both issues of fundamental rights and sovereignty has led commentators to develop a doctrine of a "material constitutional nucleus."⁹⁶ The main aspects of such nucleus would be fundamental rights as well as "structural principles" of the Constitution (Title I and Art. 10). It remains less clear as to whether and to what extent this nucleus could be modified, as a consequence of European integration, through the procedures of constitutional reform.⁹⁷ Although the Tribunal has made no general statement as to the existence of constitutional limits, it has at least indicated that human rights and sovereignty are two areas where European integration could meet the boundaries of Spanish constitutionalism.⁹⁸

The point becomes clearer as each constitutional tribunal delivers a new decision in the field of national sovereignty. Through their own case-law a consensus has emerged among these constitutional tribunals of the existence – in their respective domestic systems – of a concept of an inalienable core of national sovereign rights which remains as a bulwark against further judicial encroachment on the state through ECJ judgements and even the TEU and TFEU.

The content of this core is currently determined by the different constitutional courts according to their own national constitutional traditions. Nevertheless, the fact that this process is not occurring within a vacuum has actually given rise to a pan-European horizontal transjudicial dialogue between national constitutional courts, as discussed later in this Chapter, with each one viewing how the others react to the evolutionary development of EU law and the interpretative judgements of the ECJ.⁹⁹

This perceived cross-fertilisation (discussed presently) is bearing its own fruit, and certain definitive principles are evidently accepted by all the courts under examination in this study, as forming part of the essential, inalienable core of national sovereign rights. These include: fundamental rights; the democratic principle; the rule of law principle; and the nature of state governance – monarchy/republic; federal/unitary.¹⁰⁰

⁹⁶ Generally, A. López-Castillo, *Constitución e Integración*, CEC, Madrid (1996).

⁹⁷ E. García de Enterría & R. Alonso García, "Spanish report," in J. Schwarze, *The Birth of a European Constitutional Order: The Interaction of National and European Constitutional Law*, Vol. 249 *Schriftenreihe Europäisches Recht, Politik und Wirtschaft*, Nomos Verlagsgesellschaft, Baden-Baden (2001), 287, at 297.

⁹⁸ Estella de Noriega (1999), at 298.

⁹⁹ Such was the case of the German FCC in its decisions in *Solange I* (*Internationale Handelsgesellschaft*: BVerfG 29 Mai 1974: [1974] 2 CMLR 540); and *Solange II* (*Wünsche Handelsgesellschaft*: BVerfG 22 Oktober 1986, BVerfGE 73, 339 (1986); [1987] 3 CMLR 225) *vis-à-vis* the rulings of the Italian Constitutional Court in *Frontini c. Ministero delle Finanze* (Corte cost. 27 dicembre 1973, n. 183: *Giur. cost.* 1973, 2401; [1974] 2 CMLR 372; M. Berri, "Legittimità della normativa comunitaria" *Giur. it.* 1974, I, 513); and in *SpA Granital c. Amministrazione delle Finanze* (Corte cost. 5 giugno 1984, n. 170: *Giur. cost.* 1984, 1098. F. Capelli, "Una sentenza decisiva sui rapporti fra CEE e leggi nazionali" *Dir. com. scambi. internaz.* 1984, 204) respectively. See further below in Chapter One, point C.

¹⁰⁰ To this must be added the putative meditative influence of the Lisbon Treaty amendments to the EU and TFEU: see below in Chapter 6, point B.3. See also the FCC in the *Lisbon* case: below at Chapter 3, point E.2.d.

b. The essential core in the face of EU integration

Constitutional court justices have, in many respects, arrogated to themselves on the basis of such national uniqueness the right to act not just as guardians of the constitution but the whole legal culture and heritage of their state. Their decisions, effectively determining the contours of continuing integration, have sought to maintain distinct national identities through reference to their own understanding of national sovereignty and its essential core. For constitutional justices, encroachments upon the core could easily precipitate a course of events the ultimate outcome of which would be the negation of the nation-state like a latter-day “Jonah” and its being “swallowed up” by some EU whale.

Judges in constitutional courts are clearly aware of the directions of European integration but are generally wedded to the idea that the concepts of people, nation and constitution are woven into the very fabric of their distinct national cultures. It is evident that the constitutional courts are still coming to terms with a decline in the notion of absolute sovereignty in the post-Westphalian era.¹⁰¹ In the face of increasing EU integration, such courts as influential actors in this process have made their own particular contribution to the debate on the politicisation of sovereignty. Their quandary has been best expressed by Aziz¹⁰² where – although made in reference to the German constitutional debate on EU integration – her remarks highlight the nub of the problem of the sovereignty debate, *i.e.*, identity politics. Due to the utility of her observations, the present writer feels it necessary to quote her *in extenso*. Aziz observes:¹⁰³

Thus, for example, the ‘etatist’ school regards each constitutional court as having a particular notion of human rights that must be viewed in the ‘cultural context’ of its state. It goes one step further, however, to the extent that it uses the context argument to adopt what can only be described as a protectionist view, not only of rights, but also of values as a cultural heritage which may not be relinquished in spite of transfers of sovereignty to the supra-national level of the EU. This issue is pivotal to the discussion at hand as it underscores the ‘identity politics’ nexus of the sovereignty debate. Accordingly, the values which underpin human rights are regarded as being an intrinsic element of the state’s identity and it is this which is both articulated, not only in decisions of constitutional courts, such as the [FCC], but also in the academic sovereignty debate as a whole. The terminology of the sovereignty debate, namely, whether pooled, shared, split or partial does little to draw attention to the fact that what is being fought over is the identity of the nation state. In other words: we (the nation-state) are who *we* say we are and *we* reserve the ability to define who *we* are. We cannot permit others to define who we are, as defining our identity is our sovereign right. It is this tension upon which the two opposing perceptions of the relationship between EC law and national law are based in Germany, namely whether they are ‘distinct.’ In other words: EC law and national law – one legal order or two? With regard to its corollary: one system of values or two?

¹⁰¹ See generally A. Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (1998).

¹⁰² M. Aziz, “Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht’s Bananas Judgment” (2002/03) 9 Col. Jo. Euro L. 109.

¹⁰³ Aziz (2002), at 132. Footnote references omitted.

Her critique of what she refers to as the “étatist” school of thought, as championed by Kirchhof,¹⁰⁴ is well reasoned and underlines the school’s premise that the legal strength of Europe lies in its states,¹⁰⁵ and that the EU is a “union of sovereign states” or the *societas* of states.¹⁰⁶ Aziz then¹⁰⁷ proffers a “post-étatist” view by noting that, while the state should not be regarded as anachronistic, nevertheless obligations arising as a consequence of the EU qualify or “go beyond” the State.¹⁰⁸ Such a contrasting theory of the state is predicated on the view of it being porous, able to transcend its boundaries to the extent they are not “hermitically sealed,” not fully independent, having endowed the EU with its sovereign authority, possibly pointing to an emergent *universitas*.¹⁰⁹

This viewpoint has already been challenged by the FCC in the *Maastricht*¹¹⁰ and *Lisbon*¹¹¹ cases. While in the *Lisbon* case the FCC resorted to a new concept of statehood,¹¹² it stuck rigidly to its well-worn attitude to the EU as a “*Staatenverbund*,” an association of (sovereign) States.¹¹³

¹⁰⁴ P. Kirchhof, “Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland,” in J. Isensee (ed.), *Europa als politische Idee und als rechtliche Form*, 2nd ed., Duncker & Humblot, Berlin (1994), 63; and P. Kirchhof, “Der Weg Europas ist der Dialog” (1999) 12 *EuZW* 353.

¹⁰⁵ P. Kirchhof, “Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht,” in P. Kirchhof & C.-D. Ehlermann (eds.), *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, *EuR Beiheft* 1/1991, 11, at 12.

¹⁰⁶ R. Jackson, “Sovereignty in World politics: a Glance at the Conceptual and historical Landscape” (1999) 47 *Political Studies* 431, at 449ff.

¹⁰⁷ Aziz (2002), at 134.

¹⁰⁸ N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, OUP, Oxford (1999).

¹⁰⁹ Jackson (1999), at 451.

¹¹⁰ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57. See below at Chapter Three, point E.2.a.-b.

¹¹¹ *Lisbon*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 *EuGRZ* 339. See below at Chapter Three, point E.2.d.

¹¹² *Lisbon*: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 *EuGRZ* 339, at para. 224 when the FCC stated: “Accordingly, sovereign statehood stands for a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination. The state is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community.”

¹¹³ *Lisbon*: BVerfGE 123, 267; [2010] 2 CMLR 712; (2009) 36 *EuGRZ* 339, at para. 229: “[T]he Federal Republic of Germany takes part in the development of a European Union which is designed as an association of sovereign national states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation.”

C. TRANSJUDICIAL COMMUNICATION IN THE EU

1. Introduction

This concept¹¹⁴ amounts to communication between courts, whether national or supranational, across borders¹¹⁵ and has been vital not only in developing the notions of rights and other components of an essential core of sovereignty but also in formulating “concerted” national constitutional court responses to the ever-deepening integration of the EU. The current research continues to describe and analyse this process in relation to two constitutional courts that are relative newcomers to the European treaties.

Such type of communication is no real “innovation” but actually forms a normal and consistent part of (national) constitutional adjudication, at least in Europe. Brudner has stated:¹¹⁶

[T]hose who interpret local constitutional traditions take a lively interest in how their counterparts in other jurisdictions interpret their own traditions and in how international tribunals interpret human-right instruments whose language is similar to that of their own texts. This interest, moreover, is a professional one. Comparative constitutional studies are valued, not as a leisurely after-hours pastime, but for the aid they give to judicial ... interpreters of a national constitution.

In her seminal work, Slaughter¹¹⁷ provided clear examples of the typology of transjudicial communication and how it operates among the nations of Europe through identifying three forms: (i) horizontal; (ii) vertical; and (iii) mixed.

Horizontal transjudicial communication is said to occur between courts of the same status – whether national or supranational – across national or regional borders. The focus is properly on the awareness of each other’s decisions but with no formal requirement to follow or even to take account of each other’s case-law. Moreover these courts are unlikely to make express reference to or acknowledgement of the fruits of the transjudicial communication by actual citation to another court’s decisions. This is true between the constitutional courts of the EU Member States in their development of the relationship between EU law and national law although there are examples of judicial pronouncements which refer to the decisions of other constitutional courts – the Italian Constitutional Court in *Granital* referred especially to FCC practice in this field.¹¹⁸ In fact, it could be argued that these two courts often act like “Tweedle Dum and Tweedle Dee” in the face of EU integration!

¹¹⁴ For a more recent consideration of the concept, see F. de Londras & S. Kingston, “Rights, Security, and Conflicting International Obligations: Explaining Inter-Jurisdictional Judicial Dialogues in Europe” (2010) 58 AJCL 359, at 371-387.

¹¹⁵ A.-M. Slaughter, “A Typology of Transjudicial Communication,” in T.M. Franck & G.H. Fox (eds.), *International Law Decisions in National Courts*, Transnational Publishers Inc., Irvington-on-Hudson, New York (1996), chap. 4, 37, at 38.

¹¹⁶ A. Brudner, *Constitutional Goods*, OUP, Oxford (2004), at viii.

¹¹⁷ A.-M. Slaughter, “A Typology of Transjudicial Communication” (1994) 29 U. Rich. L Rev. 99, at 103-112.

¹¹⁸ See below at Chapter Three, point E.2.a.

Vertical communication occurs between national and supranational courts, the most developed form of this having emerged between the ECJ and national courts. This experience led, as discussed above, to the ECJ “negotiating” the creation of a constitution for the EC/EU through “dialogue” with national courts, whether constitutional or ordinary. The part of the national constitutional justices in this dialogue is the subject of much of the present work.

Lastly, mixed transjudicial communication brings together both horizontal and vertical forms. The ECJ can serve as a medium for horizontal communication, either as a stimulus or a conduit for cross-fertilisation of ideas and concepts between national legal systems.¹¹⁹

2. Reception of constitutional concepts mediated through constitutional court jurisprudence

a. Brief overview of the theoretical comparative context of reception and transfer

The debate on the use of foreign law by judges of other legal systems, particularly its transfer and reception, was ignited by the seminal work of Watson¹²⁰ and his arguments surrounding the concept of “legal transplants.” Essentially, Watson claims that legal transplants move or transfer a rule or a system of law from one country to another and is based on diffusion according to which most changes in most legal systems occur as the result of borrowing. He further contends that widespread transfer indicates an absence of an intimate link between law and the broader society. Lastly, Watson champions the study of transplants to guide the study of comparative law.

His position is in essence rejected by Legrand – who, as we have already seen, is a strong proponent of the unique nationality of each legal system.¹²¹ He challenges Watson’s claims as based on an erroneous concept of a legal rule which is not a mere propositional statement but rather –¹²²

an incorporative cultural form ... buttressed by important historical and ideological formations. A rule does not have any empirical existence that can be significantly detached from the world of meanings that defines a legal culture; the part is an expression and a synthesis of the whole: it resonates.

According to Legrand, then, interpretation of a legal rule is the result of a particular understanding of that rule which is influenced by a series of factors which would differ if such interpretation had occurred in another place or era.¹²³ Consequently, a legal rule¹²⁴

¹¹⁹ For example, the German constitutional principle of proportionality was adopted by the ECJ and thereby transplanted by judicial decision-making into the “alien soil” of the English common-law system: G. de Búrca, “The Principle of Proportionality and its Application in EC Law” [1993] YBEL 105.

¹²⁰ A. Watson, *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press, Edinburgh (1974).

¹²¹ See above at Chapter One, point B.2.a.

¹²² P. Legrand, “What ‘Legal Transplants’?,” in D. Nelken & J. Feerst (eds.), *Adapting Legal Cultures*, Hart Publishing, Oxford (2001), chap. 2, 55, at 59.

¹²³ Legrand (2001), at 58.

comprises “both the propositional statement as such and its invested meaning – which jointly constitute the rule.” In “transplanting” a legal rule as Legrand understands it, it becomes a different rule since it will be understood differently by the host culture and would be given a cultural-specific meaning different to its original one.¹²⁵ As such, Legrand concludes, legal transplants are impossible.¹²⁶

Into this mêlée of diverse opinion, Whitman adds a timely word of caution and moderation:¹²⁷

[W]e must be careful not to slip into the error of believing that legal practices can be so rooted in their ‘cultures’ that they can never be transplanted ... [I]n raising doubts about ‘transplantation’ of legal institutions, we run the risk of neglecting what is unquestionably a fundamentally important issue: legal systems *do* permit transcultural discussion and transcultural change. Indeed, they undergo transcultural change all the time. [Emphasis in original.]

While acknowledging that legal rules change as they migrate, Whitman rejects Legrand’s bald assertion that legal transplants are logically impossible and concludes:¹²⁸ “*some* kind of borrowing is surely taking place and we need *some* account of what is going on.”

Nelken also notes¹²⁹ “that legal transfers are possible, are taking place, have taken place and will take place.” He readily acknowledges, as will be attested to in the present thesis, that legal transplants are often deliberately sought after by the recipient legal order with countries (and judges) in constitutional transitions often looking to comparative constitutional materials as engines for domestic constitutional change.¹³⁰

The inadequacies and divisiveness of the “legal transplants” concept in comparative law is matched by its counterpart in comparative constitutional law: “constitutional borrowing.” Choudhry¹³¹ clearly acknowledges the impossibility and illegitimacy of constitutional borrowing as a general matter and that it fails to capture the full range of uses to which comparative constitutional materials are put. Bell has considered that “cross-fertilisation” would be the preferred term, implying a more indirect process to transplantation, namely that¹³² –

¹²⁴ Legrand (2001), at 60.

¹²⁵ Legrand (2001), at 60.

¹²⁶ Legrand (2001), at 57.

¹²⁷ J. Whitman, “The Neo-romantic Turn,” in P. Legrand & R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, CUP, Cambridge (2003), chap. 10, 312, at 341-342.

¹²⁸ Whitman (2003), at 342. Emphasis in original.

¹²⁹ D. Nelken, “Comparatists and Transferability,” in P. Legrand & R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, CUP, Cambridge (2003), chap. 12, 437, at 443.

¹³⁰ Nelken (2003), at 443.

¹³¹ S. Choudhry, “Migration as a new metaphor in comparative constitutional law,” in S. Choudhry (ed.), *The Migration of Constitutional Ideas*, CUP, Cambridge (2007), chap. 1, 1, at 20.

¹³² Bell (1998), at 153.

an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on. This process often gives rise to greater convergence between the receiving legal system and the external stimulus, but this need not be the case.

In his search for a better term, Choudhry¹³³ settles on the “migration of constitutional ideas” which encompasses a much broader range of relationships between the recipient jurisdiction and constitutional ideas. Walker has summarised the benefits of this migration metaphor:¹³⁴

Migration ... is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike the other terms current in the comparativist literature such as ‘borrowing’, ‘transplant’ or ‘cross-fertilization’, it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather ... it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos. However, the term migration *does* presume the existence of discrete sites and of boundaries between these discrete sites, with legal space mapped onto territorial space. There must, in other words, be a sense of a ‘here’ and a ‘there’ between which movement takes place. [Emphasis in original.]

Indeed Walker’s work on such migration in the EU is a timely contribution to the debate on trans-judicial communication and the use of comparative constitutional law in the Union, particularly by the ECJ.

b. Reception and transfer through judicial decision-making

Smith has noted¹³⁵ that constitutions primarily depend on national phenomena and culture, and that judicial borrowings from other systems may upset the delicate balance of a particular national constitution. Indeed, with respect to the US Constitution, Alford has noted:¹³⁶ “Using global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing one vehicle – constitutional supremacy – that can trump the democratic will.” The use of non-domestic constitutional and other legal sources lacks any democratic origin in the recipient constitutional system: such sources enjoy no democratic connection to the recipient system and they thus are not democratically accountable as constitutional or legal sources in that system.

¹³³ Choudhry (2007), at 21.

¹³⁴ N. Walker, “The migration of constitutional ideas and the migration of *the* constitutional idea: the case of the EU,” in S. Choudhry (ed.), *The Migration of Constitutional Ideas*, CUP, Cambridge (2007), chap. 12, 316, at 320-321. Footnote omitted.

¹³⁵ Smith (1998), at 101-102.

¹³⁶ R. Alford, “Misusing International Sources to Interpret the Constitution” (2004) 98 AJIL 57, at 59.

“Judicial borrowings,” as noted earlier, may be achieved either through “transplantation,” “cross-fertilisation”¹³⁷ or, as more recently argued, “migration.”¹³⁸ In view of heightened national constitutional sensitivities, cross-fertilisation and migration would be the more acceptable approaches used by the constitutional courts in opening and adapting their systems to ever newer legal realities. For such systems, comparative engagement leads to an increased sense of legal awareness through interpretive clarification and confrontation.¹³⁹

Bell¹⁴⁰ and Markesinis¹⁴¹ have remarked that EU law and the case-law of both the ECJ and the ECtHR have provided common points of reference outside the national tradition and created a common dynamic of policy development and the creation of standards: a process of common judicial development has thus emerged. True, the ECHR and the judgements of the ECtHR have acted as catalysts for change in all systems. Yet they set minimum standards only and have, before constitutional courts, been used – for the most part – merely as supporting arguments for a decision rather than the basis for the decision *per se*.¹⁴² The position of constitutional courts with respect to EU law and ECJ rulings is even more marked. Mayer put it succinctly:¹⁴³

What appears to be particularly threatening for legal unity and the uniform interpretation of European law in the case-law of the highest courts and tribunals is the phenomenon of interpreting European law from the perspective of the national constitutional order, generating a parallel-version of European law (a constitutional law-version of European law). Such power to engage in an autonomous parallel-interpretation of European law compatible with the respective constitutions (thus doubling the standard of scrutiny) is claimed by [various constitutional courts].

All in all, considering the constitutional law framework and the case law of these courts, it seems fair to say that for some national supreme courts, developing a jurisprudence that would resemble the German Maastricht decision remains a possibility. The most important indications in that context are

¹³⁷ J. Bell, “Mechanisms for Cross-fertilisation of Administrative Law in Europe,” chap. 11, 147, at 156, and J. Allison, “Transplantation and Cross-fertilisation,” chap. 12, 169, at 170-176, both in J. Beatson & T. Tridimas (eds.), *New Dimensions in European Public Law*, Hart Publishing, Oxford (1998).

¹³⁸ For the advantages of the migration metaphor, see generally K. Lane Scheppele, “The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency,” in S. Choudhry (ed.), *The Migration of Constitutional Ideas*, CUP, Cambridge (2007), chap. 13, 347-373.

¹³⁹ Choudhry (2007), at 23.

¹⁴⁰ Bell (1998), at 165.

¹⁴¹ B. Markesinis, *The Gradual Convergence*, OUP, Oxford (1994), at 21.

¹⁴² See generally A. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study*, Clarendon Press, Oxford (1983), chap. 4; and R. Blackburn & J. Polakiewicz (eds.), *Fundamental Rights in Europe: The Effect of the ECHR on the Legal and Political Systems of Member States*, OUP, Oxford (2001).

¹⁴³ F. Mayer, “The European Constitution and the Courts: Adjudicating European constitutional law in a multilevel system,” in A. von Bogdandy, “European Integration: The New German Scholarship,” *Jean Monnet Working Paper* 9/03, at 19-20: <www.jeanmonnetprogram.org/papers/030901-03.pdf>. 18 June 2005.

constitutional constraints imposed on the European law principle of supremacy by a given Member States' constitutional order.

He then notes that the emphasis on elements of the national constitutional order that are unalterable, thus “supremacy-proof” and the autonomous interpretation of EU law by Member State courts *could* lead to results diverging from the ECJ's findings. In other words, what Dubos previously noted as the emergence of a “parallel interpretation” or “constitutional law versions of European law.”¹⁴⁴

How can this assessment square with the idea that the constitutional courts are mediating the position of EU law in their national systems? The answer is complex.

c. The practice of constitutional migration and trans-judicial communication

At one level, the essential core of sovereignty level, the mediation has been conducted on the basis, ostensibly, of the *Kooperationsverhältnis* (“relationship of co-operation”) of the German Federal Constitutional Court and, more deeply, on watching what other courts are doing in response to the pressures of EU integration.¹⁴⁵ But on another level and in other areas not constituting the essential core of sovereignty, constitutional courts have been open to using EU law and ECJ rulings to support their reasoning.¹⁴⁶

Alter's research into explaining why national judiciaries accepted the supremacy of EU law over national law is enlightening.¹⁴⁷ She notes¹⁴⁸ that national courts in her study – France, Germany and Italy – accommodated EU law by choosing to change national doctrine to be compatible with EU law supremacy while still rejecting the notion that the former EC Treaty (now TEU and TFEU) created a new type of legal obligation. Alter prefers the concept of “doctrinal negotiation” to “legal dialoguing” since negotiations imply competing interests where parties recognise that they may not be able “to have it as they most like it”: negotiations lead to compromises that take into account the power of negotiating parties, the conflicting interests of the different actors, and the intensity of those interests. Such descriptions of “negotiated compromises” are typical of multi-layered systems. She continues:¹⁴⁹

¹⁴⁴ O. Dubos, *Les juridictions nationales, juge communautaire: contribution à l'étude des transformations de la fonction juridictionnelle dans les États membres de l'Union européenne*, Dalloz, Paris (2001), at 857ff.

¹⁴⁵ This is often seen as one of the main reasons why both Sweden and the United Kingdom have introduced Supreme Courts: House of Lords, European Union Committee, Law and Institutions (Sub-Committee E), “Future role of the European Court of Justice,” *EU Sixth Report*, Session 2003-2004, 15 March 2004, chap 3(2), at paras. 90-91: <<http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/47/47.pdf>>. 10 January 2009.

¹⁴⁶ The Austrian Constitutional Court, in the *Telecom Control Commission case* (VfGH B 1625/98, 24 Februar 1999, VfSlg. 15427), actually held that the directly effective provision of a Directive rendered Constitution Art. 133(4) no longer applicable.

¹⁴⁷ K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, OUP, Oxford (2001).

¹⁴⁸ Alter (2001), at 36-37.

¹⁴⁹ Alter (2001), at 38.

The best way to understand the current agreement between national courts, member states, and the ECJ regarding the doctrine of European law supremacy is as a *negotiated compromise*. The ECJ recognizes that it is in no position to impose its views on national courts. National governments, with their crude and limited tools of influence in the legal process, have been mostly unable to shape national doctrine regarding EC law supremacy. And because even high courts must seek support for their decisions by other national courts, the most sovereignty-jealous national judges were not able to impose their views on other national judges. Since the ECJ, national judges, and member states agree that *a compromise is better than legal anarchy*, each was willing to walk away from their most preferred positions. The ECJ ended up accepting that as far as national judges are concerned, there are limits to the supremacy of European law. National judges ended up changing existing doctrine, and ceding significant legal authority to the ECJ. And member states ended up accepting a significant compromise of national sovereignty. [Emphasis supplied.]

Shapiro has argued¹⁵⁰ that applying law means enforcing the interests of the central state over individual actors and subnational agencies and promoting a state-defined hierarchy of values. Political interests are accordingly inherent in the legal process. But Alter goes further,¹⁵¹ identifying that, as a group, judges share certain interests, primarily in the promotion of their independence, influence, and authority. Using her analysis, the situation is even more stark with respect to the small clique of constitutional justices: in protecting their legal autonomy from political bodies, they want freedom to decide a case in the way they regard as appropriate; and in promoting their ability to decide cases, they seek to influence policy, political debate, and the development of legal doctrine, having their interpretation accepted by other judicial and political actors – whether other courts, the executive or legislature as well as other public bodies and agencies.

One peculiarity of constitutional court justices – that greatly influences their attitude in such cases to EU law and to national constitutional law – is their academic and professional backgrounds, being largely drawn from beyond the ordinary judiciary.¹⁵²

The traditional *ethos* of the regular, continental judiciary has usually been described as “positivist,” bound as it is to notions of judges as civil servants, and with it legislative supremacy and the separation of law and politics.¹⁵³ In contrast, the basic Kelsenian model¹⁵⁴ for constitutional courts saw them populated by law professors and

¹⁵⁰ M. Shapiro, *Courts: A Comparative Political Analysis*, University of Chicago Press, Chicago (1981), at 26-27.

¹⁵¹ Alter (2001), at 45.

¹⁵² Other factors which may have a bearing on their choices are their selection on a partisan basis and their generally only limited tenure: P. Magalhães, “Judicial Behavior in Constitutional Courts: The Case of Portugal,” paper presented at the Annual Conference on the Scientific Study of Judicial Politics, Michigan State University, East Lansing, 4 October 1998, at 11-17 and 20-25.

¹⁵³ For example, M. Cappelletti & D. Goy, “Judicial Review, Transnational and Federal: Its Impact on Integration” (1981) *EUI Working Paper* No. 4, European University Institute, Florence; and L. Favoureau, “Modèle américain et modèle européen de justice constitutionnelle” (1988) 4 *Annuaire Internationale de Justice Constitutionnelle/AIJC* 51.

¹⁵⁴ For further consideration of this model, see below Chapter Two, points A.2.-4.

excluded the participation of the ordinary judges.¹⁵⁵ Recruitment to European constitutional courts, whether in the 1920s, late 1940s/1950s, or 1990s, came predominantly from legal academics. The reasons for this were outlined by Ferejohn:¹⁵⁶

One thing that post-authoritarian systems have in common is that the judges that are still on the bench are implicated, to some extent, in the practices of the previous regime. The citizenry in such circumstances have every sociological reason to be suspicious of how those officials would go about their business. In other words, there exists a characteristic circumstance of distrust arising naturally in post-authoritarian settings, and that is distrust of the lawmakers as well of the judges. In such circumstances, there is a natural desire to place both the positive lawmakers and the law enforcers under constitutional control.

The answer to the question of how to achieve this was given by Kelsen when he drew up his concept of a constitutional court of professors.¹⁵⁷ This model has been used extensively, *inter alia*, in Central Europe though its evident utility may be challenged: thus, where there is a large pool of expert academics from which to select constitutional justices or where there is an established tradition in constitutional scholarship then the political actors, responsible for selecting such judges, have a much better chance of choosing the best candidates than those states which have a radically smaller pool of constitutional experts or who lack a tradition in constitutional scholarship.

One further impact on cross-fertilisation or migration, facilitating the transfers of concepts, is language knowledge. The predominance of English, French and German as the main foreign languages of constitutional courts (regrettably, only based on the author's own anecdotal evidence and experience) has given decisions and concepts from jurisdictions using such languages a more predominant influence in other EU Member States. This language competence, coupled with legal study abroad, and the creation of courts based on a particular national model, have given a striking importance to German constitutional law and theory in Central Europe.¹⁵⁸

The approach of constitutional justices to European integration, with their "protection" of the "independence" of the national legal order, notably in respect of the essential core of national sovereignty, is the focus of later Chapters. Nevertheless, it would be correct to observe that these are problems to which, at this time, there may be no viable solutions. In this context, it is interesting to note the remarks of Poiaras Maduro in a review article,¹⁵⁹ in which the writer – an exponent of the legal pluralist viewpoint to

¹⁵⁵ P. Pasquino, "Gardien de la constitution ou justice constitutionnelle? C. Schmitt et H. Kelsen," in M. Troper & L. Jaume (eds.), *1789 et l'invention de la Constitution*, LGDJ, Paris and Bruylant, Brussels (1994), 141. Interestingly, the Austrian Constitution – under Art. 147(2) – requires that a number of justices be recruited from among the regular judiciary.

¹⁵⁶ J. Ferejohn, "Constitutional Review in the Global Context" (2002) 6 *Legislation and Public Policy* 49, at 51.

¹⁵⁷ H. Kelsen, "Judicial review of Legislation: A Comparative Study of the Austrian and the American Constitution" (1942) 4 *J. Pol.* 183, at 185-186.

¹⁵⁸ In this respect, see *e.g.*, C. Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*, Hart Publishing, Oxford (2003).

¹⁵⁹ M. Poiaras Maduro, "The Heteronyms of European Law" (1999) 5 *ELJ* 160, at 167, an article reviewing D. Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, Sweet & Maxwell, London (1997).

European integration (to which discourse the present study will return in the Conclusion) – advocated the integration of national deviations from European law within the EU legal order. This latter order would be viewed as integrating the claims of validity of both national and European constitutional law. He noted that any national court decision, even opposing EU law, not only represented a national deviation from the uniform application of EU law but also established, simultaneously, a new principle in the interpretation and application of the EU legal order. He subsequently stated:¹⁶⁰

If a national constitutional court is aware that the decision that it will take becomes part of European law as interpreted by the “community” of national courts, it will internalise in its decisions the consequences in future cases and the system as a whole. It will prevent national courts from using the autonomy of their legal system as a form of evasion and free-riding and will engage the different national courts and the ECJ in a true discourse and coherent construction of the EU pluralist legal order.

Such reasoning highlights the point that *has already been reached*, namely the way in which judgments of national (particularly superior or constitutional) courts in the field of EU law impact on their colleagues in other jurisdictions, operating forms of transjudicial communication to provide cross-fertilisation or migration of constitutional judicial concepts of the essential core of sovereignty.

D. CONCLUSION

This Chapter has sought to focus on the context within which Central European constitutional justices operate in making choices as to their approach to EU integration. Having examined the process by which the ECJ constitutionalised the legal order created under the Treaties as well as reiterated the need for a national constitutional basis for integration, the study then looked at the context of the conflict between the ECJ and the national constitutional judiciaries in the birth of the new European constitutional order.

The national constitutional judiciary is evidently caught in a quandary between upholding the domestic constitutional orders that they have sworn to do on taking office and complying with the requirements of Union loyalty, i.e., recognising in fact the reality of primacy of EU law as elaborated by the ECJ as an integral and vital part of the European constitutional order, a matter now somewhat more starkly juxtaposed in the actual wording of Art. 4(2) and (3) TEU. As defenders of the individuality of national constitutions – as the unique expression of a people’s sovereign will – it may seem at first sight that constitutional justices would not be open to any form of accommodation to the ECJ position. However, the constitutional courts are deliberative institutions, forums of and conduits for transjudicial communication, thereby susceptible to looking at others’ systems for inspiration and guidance in articulating their own case-law. This openness to judicial borrowings, transplants, cross-fertilisation or migrations of constitutional ideas – a definite hallmark of European constitutional jurisdictions – has afforded the basis of an evolving (though still far from perfect) dialogue between the ECJ and national constitutional courts and between national constitutional courts *inter se* as they participate in a matter of cross-constitutional dialogue in the face of deepening EU integration.

¹⁶⁰ Poiares Maduro (1999), at 167.

The next three Chapters – on the constitutional courts in Germany, Hungary and Poland, and their responses to EU law – attempt to examine that dialogue. The emphasis in the next part of the study then will be on the German model as exerting a strong influence or having a deep impact on the two Central European courts. The Conclusion will acknowledge that although national constitutional court judges may be considered as too staunch defenders and preservers of domestic constitutional identity in an ever increasingly integrated Europe, such attitude may be revised in plurilevel constitutional adjudication through a dialogue with the ECJ and begin, somewhat grudgingly, to accept EU integration as part and parcel of their decision-making.¹⁶¹

¹⁶¹ Even the 2009 decision of the FCC in *Lisbon* could be viewed as another step in this process.