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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 SIX: CONCLUSION

A. OVERALL CONTEXT OF THE CONCLUSION

1. Introduction

The focus of the present research has been the constitutional judiciary in Central Europe and its response to the application of European law. An examination has already been made in Chapter One on the development and synthesis of the constitutionalisation of the basic Treaties of the EC/EU as they have been transformed by the ECJ, together with – in Chapter Two – the selection of the relevant constitutional court model of Germany whose response to EU integration could guide those of Central Europe. The German model was then set out in Chapter Three.

In the succeeding chapters, Chapters Four and Five, the focus shifted to two Central European States in which an in-depth analysis was presented of domestic constitutional understanding of a State's essential core of sovereignty, with reference to the role of EC/EU law in the domestic legal order, and utilising the model already outlined from Germany.

This Conclusion must therefore seek to provide some context for the different ways in which the German model in Central Europe forms a natural part of the continuing interjudicial communication between the ECJ and national constitutional courts. Such Conclusion, in accepting the Hungarian and Polish constitutional judicial contribution as an integral part of the evolving co-operative relationship, must also furnish some contribution to develop this relationship further. The present author's work is also intended to address in some small part the deficiencies in legitimacy and citizen participation which will continue to subsist, even with the probable coming into force of the Lisbon Treaty now in force.

2. Role of constitutional courts in the face of deepening European integration

a. European constitutional justices as “veto-players”

Over their time of existence and practice, the constitutional tribunals across Europe have developed into important “veto-players” – actors whose agreement is required for a policy decision¹ – in the politics of their own States.² With their benches peopled mostly by legal academics, judgements handed down by constitutional justices have shaped national constitutional culture as much as new laws and the implementation of administrative decisions,³ whether in the period following the Second World War or

¹ G. Tsebelis, “Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism (1995) 25 Brit. J. Pol. Sci. 289, at 293.

² B. Bugarcic, “Courts as Policy-Makers: Lessons from Transition” (2001) 42 Harvard Intl. LJ 1, at 1.

³ D. Horowitz, “Constitutional Courts: Opportunities and Pitfalls,”

after the end of the Cold War. Yet the influence over societies of such a small group of judges highlights the counter-majoritarian problem,⁴ the problem of the separation of powers where, what at first seems to be a small, unrepresentative and unaccountable minority – happening to hold judicial office – can overrule the expression of the legislative will, representing (however imperfectly) a much larger group of the population.⁵ Dworkin argues in favour of judicial review of legislation by presenting the alternatives as allowing the legislature to do everything the majority wants or empowering courts to nullify legislative decisions.⁶ In his opinion:⁷

Legislators who have been elected, and must be re-elected, by a political majority are more likely to take that majority's side in any serious argument about the rights of a minority against it; if they oppose the majority's wishes too firmly, it will replace them with those who do not. For that reason legislators seem less likely to reach sound decisions about minority rights than officials who are less vulnerable in that way.

The “less vulnerable” officials that he has in mind are judges: by virtue of being independent and appointed, they are⁸ “insulated from the majority's rebuke.”

A constitutional court is empowered to invalidate legislative choices where it decides those legislative choices are unconstitutional. Prevailing theories of legitimacy stress the legitimating role of elections by universal adult suffrage and confer particular legitimacy on parliaments to make binding political value choices. Thus it is difficult to see an appointed body like a constitutional court being able to invalidate those value choices.⁹ Smith has said:¹⁰

It should be stressed that typical political procedures are best – or at least necessary – for accomplishing an important number of fundamental tasks in society.

At the same time, however, typical judicial procedures are the superior ones for other categories of societal decisions. The task of defining major guidelines for society should normally not be conferred upon unelected judges. But judges acting under fundamental legal

<<http://www.cic.nyu.edu/pdf/E24ConstitutionalCourtsOppsPitfallsHorowitz.pdf>>. 5 January 2009.

⁴ Coined by Bickel in 1962: A. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*, Bobbs-Merrill, Indianapolis (IN) (1962). However, while this is the root problem of judicial review in the USA, it is not regarded as a major problem in Germany, for example: D.P. Kommers, “German Constitutionalism: A Prolegomenon” (1991) 40 *Emory LJ* 837, at 843.

⁵ I. Hare, “The Constitution and the Justification of Judicial Power,” in J. Beatson & T. Tridimas (eds.), *New Directions in European Public Law*, Hart Publishing, Oxford (1998), chap. 9, 125, at 128.

⁶ R. Dworkin, *Freedom's Law*, OUP, Oxford/New York (1996), at 364.

⁷ R. Dworkin, *Law's Empire*, Fontana, London (1991), at 375.

⁸ Dworkin (1991), at 375.

⁹ R. O'Connell, *Legal Theory in the Crucible of Constitutional Justice*, Ashgate/Dartmouth, Aldershot (2000), at 260.

¹⁰ E. Smith, “Give and Take: Cross-fertilisation of Concepts in Constitutional Law,” in Beatson & Tridimas (1998), chap. 8, 101, at 121.

principles of contradiction, etc., are no doubt often to be preferred for ensuring proper consideration of particular interests supposedly harmed by legislative enactments.

Constitutions invariably contain vague and abstract provisions, the interpretation of which by designated constitutional tribunals inevitably lead to legislating resolutions¹¹ centred on the constitutional justices' understanding of the application of principles such as democracy, the rule of law, and human rights to disputes brought before them.

b. Constitutional justices as “guardians of the State” in the face of EU integration

The main change in the role of the constitutional court in the EU – or perhaps an additional cameo – is as the standard-bearer for the continued existence of the State in the Union and the integration project. Echoing Alter,¹² the constitutional courts have – in many instances – perceived European law as a threat to their independence, influence and authority since it disrupted national hierarchies and allowed for different legal outcomes in a case. As protectors of the national legal order, constitutional courts are especially sensitive to and concerned about the disruptive influence of European law, with ECJ rulings effectively undermining legal certainty. In the words of Dehousse:¹³

From the standpoint of a national lawyer, European law is often a source of disruption. It injects into the legal system rules which are alien to its traditions and which may affect its deeper structure, thereby threatening its coherence. It may also be a source of arbitrary distinctions between similar situations.... What appears as integration at the European level is often perceived as disintegration from the perspective of national legal systems.

While the role as “guardian of the State” developed for constitutional tribunals and supreme courts in the original Member States (and some of the later adherents), by the time of the Mediterranean enlargements a fuller understanding of the constitutional impact of EEC law was coming to the fore – hence the provisions of the Spanish Constitution on membership of international organisations and transfers of (the exercise of) sovereignty.¹⁴

The constitutional changes in the EU of the 1990s put the accession states (and their constitutional tribunals) on a state of high alert. The wording of the so-called “Europe clauses” were drafted in such a way as to allow national constitutional courts leeway for interpretation and protection of the State’s essential core of sovereignty. Why, they would reason, should they devolve power to the EU when states such as France and Germany had actually amended their constitutions and had had their highest (constitutional) courts declare the acceptable limits on the transfer of the exercise of national powers to the EU?

¹¹ C. Sunstein, “The Legitimacy of Constitutional Courts: Notes on Theory and Practice” *EECR*, Winter 1997, 61, at 61-63.

¹² K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, OUP, Oxford (2001), at 47-48.

¹³ R. Dehousse, *The European Court of Justice: the politics of judicial integration*, St. Martin’s Press, New York (1998), at 173.

¹⁴ 1978 Spanish Constitution, Arts. 93 and 96(1). Such understanding was also exhibited by the terms of the 1976 Portuguese Constitution, Arts. 7 and 8 and 1975 Greek Constitution, Art. 28.

Heightened awareness is intrinsically no bad thing – but Central European constitutional courts are aware of the legal and political costs of the German post-*Maastricht* intransigence (which took a number of years to revise in Germany) and are eager to avoid it. Thus, while bearers of the national flag of sovereignty, the Central European constitutional justices’ approach in deciding cases on EU issues also includes recognition of the democratic legitimation of EU accession through their countries’ popular referenda and the need to take a realistic approach to the requirements of continuing EU integration.

It is thus possible to contend that a Central European approach to EU law, more nuanced and almost devoid of a confrontational or “non co-operative” perspective has emerged when compared to the FCC in *Maastricht*, *European Arrest Warrant* and *Lisbon*.¹⁵ For evidence, reference might be had to the Polish CT in its own *European Arrest Warrant*¹⁶ where it allowed time for the legislature to act before its decision became final, or the HCC in *Lisbon*¹⁷ where it emphasised the inherent flexibility of the national constitution and its ability to take on the implications of EU membership, without disturbing domestic constitutional identity.

Yet this role of “guardian of the State,” it should be said, may be seen as a cameo role. Constitutional courts, despite their straining to prove their characters as veto players, are rarely called upon to be the lead in the continuing drama on the relationship between EU and national law: they are regularly by-passed for promotion to the top spot, leaving other members of the judicial cast(e) – supreme courts, appeal courts, etc. – to fill in the lead.¹⁸

c. Constitutional adjudication: European integration and value choices

Constitutional courts cannot avoid law-making but it is arguable as to whether or not this type of judicial legislation can offer satisfactory solutions to complex legal and political problems – through the use of such broad legal principles and concepts – like the approach to further European integration and the gradual erosion of national sovereignty. Constitutional interpretation and adjudication involve very important value choices,¹⁹ including considerations of policy and social and political and economic beliefs.²⁰ As has been noted:²¹ “decisions on constitutionality often involve situations of political importance and thus take on the intuitive character of political decisions.”

¹⁵ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57; *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04: BVerfGE 113, 273; [2006] 1 CMLR 378; and *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.

¹⁶ *Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42; [2006] 1 CMLR 965.

¹⁷ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

¹⁸ R. Uitz, “EU Law and the Hungarian Constitutional Court: Lessons from the First Postaccession Encounter,” in W. Sadurski, J. Ziller & K. Zurek (eds.), *Après Enlargement: Legal and Political Responses in Central and Eastern Europe*, Robert Schuman Centre, Florence (2006), 41, at 56-58.

¹⁹ O’Connell (2000), at 260.

²⁰ B. Laskin, “Tests for the Validity of Legislation: What’s the ‘Matter’?” (1965) Toronto LJ 114, at 123. In fact values and preferences necessarily intrude into any decisions of any complexity: G. Evans, *Politics of Justice*, Victorian Fabian Society, Melbourne (1981), at 11. See also G. Leibholz, *Politics and the Law*, A.W. Sijthoff, Leyden (1965), at 276: “It

Constitutional courts display their awareness of policy considerations by their own evaluation of the desirability or undesirability of social, economic and political consequences likely to flow from legislation the constitutionality of which is being challenged.²² In these circumstances, however, constitutional justices have a duty to identify and articulate the policy factors that influence them in particular cases.²³ Consequently, the express and full articulation of the policy premises of a decision render it more intelligible to the public, thereby legitimising it, and allows for comment and criticism of the decision.²⁴

As regards the present study on constitutional courts' responses to the impulses of European integration, it is conceivably arguable that law professors, subsequently elected as constitutional judges, might be more able to confront the issues of national constitutional law and the demands of European integration (together with the political, economic and socio-legal ramifications of their rulings) in more measured approaches – as Rawls propounds²⁵ – as “exemplary deliberative institutions.”²⁶ Admittedly, such observation is reliant on the quality of those sitting on the bench and it is not unknown for constitutional courts to experience varying quality levels on the bench as a whole, especially where the pool of suitably expert candidates is relatively small, or a large proportion of judges retire within a relatively short period effectively depriving the court of its collective or institutional memory.

Moreover, unlike in the United States, evidence of the internal deliberations of the constitutional courts under consideration is unavailable to researchers since such information is made secret according to the law. What remains for the researcher of the three constitutional courts in this study is the possibility of examining – where made – separate concurring or dissenting opinions to collegial decisions as well as, through the reasoning of their decisions, the level of reception of European integration into the deliberations and decision-making of constitutional court judges.

d. Judicial deliberation and decision-making vis-à-vis European integration

In giving their reasons, constitutional judges evidently intend to ensure the outward “neutrality” of their decisions and seek to maintain the public perception of law being an apolitical instrument, thereby ensuring a general acceptance of their ruling.²⁷ This duty to the public is extensively

pertains to the duties of the constitutional court also to draw into the sphere of its considerations the political consequences of its decisions, in so far as such considerations can be reconciled with an interpretation of the clauses of the constitution.”

²¹ P. Tripathi, “Foreign Precedents and Constitutional Law” (1957) 57 Colum. L Rev. 319, at 346.

²² C. Antieau, *Adjudicating Constitutional Issues*, Oceana Publications, London, Rome and New York (1985), at 100.

²³ B. Laskin, “The Role and Function of Final Appellate Courts: the Supreme Court of Canada” (1975) 53 Can. Bar. Rev. 469, at 480; P. Weiler, “The Supreme Court and the Law of Canadian Federalism” (1973) 23 Toronto LJ 307, at 308.

²⁴ Antieau (1985), at 112.

²⁵ J. Rawls, *Political Liberalism*, Columbia University Press, New York (1993), at 231-236.

²⁶ J. Ferejohn & P. Pasquino, “Constitutional Courts as Deliberative Institutions,” paper presented at “Conference on Constitutional Courts,” Institute for Global Legal Studies, School of Law, Washington University in St. Louis, 1-3 November 2001.

²⁷ A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, OUP, Oxford (2000), at 141-144.

scrutinised beyond the court though when issues impinging on personal matters concerning the populace are at stake – abortion, same-sex partnerships/marriages, religion/faith, employment rights – but the interest among the public has a tendency to wane when the issues are no longer personal or immediate for them. Where a constitutional court provides a well-reasoned exposition of the domestic constitutional order and its relationship with the EU, such judgement may lead to a flood of articles in learned journals but would hardly become the subject of heated discussions among the general public.

The general disinterest of EU citizens in the continued existence of their (for many) centuries-old nation states weighed against an increasingly common future has perhaps left a lacuna in the democratic legitimisation of the integrative processes which the constitutional justices have attempted to plug. Constitutional courts, in order to guarantee a degree of national constitutional accountability, have sought to provide deliberated and reasoned judgements in the face of the seemingly inexorable progress towards an ever closer Union.²⁸

This does not result in a permanent block on all progress to such a closer Union but rather (admittedly, somewhat naïvely on the current author's part) in the reformulation of the context in which constitutional justices render their decisions on the further impulses of integration and provide their own input in respect of the EU as another level of contribution to the debate in this contested polity.

Stone Sweet has examined the contours of this process in the French, German, Italian and Spanish legal systems.²⁹ He does not mince his words, though, when he states:³⁰ “It is crucial to stress, however, that the evolution of the supremacy doctrine has steadily upgraded the capacity of both the ECJ and the national courts to intervene in policy processes, to shape political outcomes, and thus to provoke judicialization.” In her research into this area, Alter describes this process accordingly.³¹

Supreme courts clearly want to avoid a direct conflict with the European Court, conflict that could cause significant damage to the process of European integration and set the precedent that it is legal to ignore international courts if their decisions conflict with national law. As mentioned, supreme courts also do not want to become appeals courts for ECJ decisions. They have accepted key elements of ECJ doctrine. But their *obiter dictum* contains criticisms and refutations of ECJ doctrine and legal reasoning. And they have provided clear signals that they may well challenge future expansions of EC authority.

On the one hand, constitutional courts were forced to accept a significant compromise on the issue of European law supremacy, they clearly understood their inability to halt integration; the necessity to avoid direct conflict; and identified significant pressures on them arising from the actions of lower national courts. According to Alter, in accepting supremacy, they gave up to the ECJ and to lower-

²⁸ See generally, W. Mattli & A.-M. Slaughter, “The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints,” in A.M. Slaughter, A. Stone Sweet & J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford (1998), chap. 9, 253-276.

²⁹ Stone Sweet (2000), at 166-193.

³⁰ Stone Sweet (2000), at 178.

³¹ Alter (2001), at 58-59.

level domestic courts as well as national and European political bodies, a decisive influence and control over the national policy-making process.³²

On the other hand, Shapiro contends³³ that these same constitutional courts have consistently rejected the idea of European law creating a new legal order, as principally expounded by the ECJ and have instead based the domestic authority of European law on their national constitutions thereby – through interpretation – limiting the remit of both the ECJ and the EU. Constitutional courts thus recognised that the legal basis on which European law gained supremacy domestically would affect national sovereignty, and their own ability to influence the legal and political process.³⁴ In this way, constitutional courts have (to a greater or lesser extent) effectively inserted themselves into the policy-making process “not so much to advance the process of European integration as to create limits on the transfer of national powers to the European level.”³⁵ The latest examples including the Polish CT in the *2003 Accession Treaty* case³⁶ and in *Lisbon*,³⁷ the HCC in *Lisbon*³⁸ and the FCC in *Lisbon*.³⁹

3. Evolution of Central European judicial approaches to the EU

Through including European law and European integration into their deliberations and decision-making, constitutional courts are therefore acting not only as guardians of their respective constitutions but also as arbiters of the reception of European norms into their legal systems. This situation is not so stark as it seems: the constitutional courts in Hungary and Poland have already displayed – in varying degrees – their receptivity and understanding of the EU in their case-law. The cross-fertilisation or migration of constitutional ideas, mediated especially though not fully exclusively through the German model,⁴⁰ has allowed these courts to approach the issue of European integration in a measured and deliberative manner, as befits the nature of “deliberative institutions.” Both the HCC and CT have acknowledged the German model but have tempered their decision-making in a clear attempt to distance themselves from being regarded as forwarding a more rigorous, combative style in defence of constitutional identity and the use of *ultra vires* review, as expounded by the FCC, e.g., in *Lisbon*.⁴¹

³² Alter (2001), at 58-60.

³³ See generally, J. Shapiro, “The European Court of Justice,” in A. Sbragia (ed.), *Euro-Politics: Institutions and policymaking in the ‘new’ European Community*, Brookings Institution, Washington, D.C. (1992), chap. 4, 123ff.

³⁴ Alter (2001), at 60.

³⁵ Alter (2001), at 62.

³⁶ *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

³⁷ *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108.

³⁸ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

³⁹ *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.

⁴⁰ See G.A. Tóth, *Túl a szövegen: Értékezés a Magyar alkotmányról*, at 273-277.

⁴¹ Cf. the Czech Constitutional Court in its two *Lisbon* rulings: (1) Czech Const. Ct. Decision of 26 November 2008:

a. Importance of the German model on the essential core of sovereignty

In this context, the importance of the “opening clause” or “European clause” of the Constitution cannot be stressed enough. The relatively calm acquiescence by both State and constitutional court to a constitutional reconfiguration has only recently been properly tested by the HCC in *Lisbon* whereas the CT has been involved from the very outset in the very thick of the process⁴² and continues to be so in its own review of the Lisbon Treaty.⁴³ Nevertheless the HCC and CT have also realised that the former paradigms (derived from previous experience with international law⁴⁴) are no longer applicable to European law in their national systems unless, as with the FCC, fundamental principles of the Constitution are threatened. Thus, in their viewing the “acceptable limits” to transfers of the exercise of sovereignty, the attitude of the various constitutional courts has formed part of a set of proceedings also involving the executive and legislature. “Policing” these limits has already been expounded as part of its constitutional role in the European integration process by the CT.⁴⁵

For its part, the HCC had already developed an understanding of the basic concepts which underpin the Constitution, chief among them being the rule of law principle to which the idea of popular sovereignty belongs (although the latter is also linked to the democracy principle) under Constitution Art. 2(1) and (2). With transfers of the exercise of sovereignty to the EU expressly provided with a constitutional basis in Constitution Arts. 2/A and 6(4), the role of the HCC has continued to gain in importance in monitoring the boundaries of such transfer/limitations through its *Lisbon* ruling.⁴⁶

Case No. Pl. ÚS 19/08: P. Bříza, Case Note: The Czech Republic. The Constitutional Court on the Lisbon Treaty: Decision of 26 November 2008” (2009) 5 EuConst 143; and (2) Czech Const. Ct. Decision of 3 November 2009: Case No. Pl. ÚS 29/09: J. Komárek, “The Czech Constitutional Court’s Second decision on the Lisbon treaty of 3 November 2009” (2009) 5 EuConst 345.

⁴² For example, the CT’s rulings on the *2003 Accession Treaty: Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49; and on the *European Arrest Warrant: Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42; [2006] 1 CMLR 965.

⁴³ In *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108.

⁴⁴ V. Lamm & A. Bragyova, “Systèmes et normes; l’application du droit international dans le système juridique interne” 1993 *Journées de la Société de Legislation Comparée* 95; W. Czapliński, “Relations between International Law and the Municipal Legal Systems of European Socialist States” (1988) 14 *Review of Socialist Law* 105; A. Bragyova, “Igazságtétel és nemzetközi jog. Glossza az Alkotmánybíróság határozatához. [Political Justice and International Law. Article concerning the Decision of the Constitutional Court],” 1993/3-4, Vol. XXXV, *Állam-és Jogtudomány* 213; L. Bodnár, “A nemzetközi jog magyar jogrendszerbeli helyének alkotmányos szabályozásáról [International law as a subject of the Hungarian constitutional system]” (1996) XLVII *Alkotmány és jogtudományi. Acta Universitatis Szegediensis de Attila József Nominatae. Acta Juridica et Politica* 19; D.V. Trang, “Beyond the Historical Justice Debate: The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary” (1995) 28 *Vanderbilt Journal of Transnational Law* 1; P. Sonnevend, “Verjährung und völkerrechtliche Verbrechen in der Rechtsprechung des ungarischen Verfassungsgerichts” (1997) 22 *ZaöRV* 195; L. Leszczyński, “International Standards of Human Rights in Polish Constitutional Regulations and Practice” (1995) 29/3 *The International Lawyer* 685; Z. Kędzia, “The Place of Human Rights Treaties in the Polish Legal Order” (1991) 2 *EJIL* 133; K. Działocha, “The Hierarchy of Constitutional Norms and Its Function in the Protection of Basic Rights” (1992) 13/3 *HRLJ* 100; W. Czapliński, “International Law and Polish Municipal Law: A Case Study,” (1995) 8 *Hague Yearbook of International Law/HYIL* 37.

⁴⁵ CT rulings on the *2003 Accession Treaty: Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49; and on the *European Arrest Warrant: Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42; [2006] 1 CMLR 965.

⁴⁶ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

In this sense, both the Hungarian and Polish constitutional judicial organs are following in the footsteps of their German mentor. In both cases, the HCC and the CT have adopted the notions of *ultra vires* review and review to protect constitutional identity as detailed by the FCC initially in *Maastricht*⁴⁷ and now more comprehensively in *Lisbon*.⁴⁸ Yet, so far, neither the HCC nor the CT has exhibited anything less than a co-operative approach to exercising this jurisdiction in favour of the essential core of state sovereignty in the face of ever-deepening European integration.

While the HCC has clarified its inherently flexible approach through its *Lisbon* decision,⁴⁹ the CT in *Lisbon*⁵⁰ was more inclined to stake out a position closer to the FCC in this respect: the Hungarian Constitution is “flexible” in the sense that it can be amended by a two-thirds majority of MPs⁵¹ and contains no unalterable core (like the German⁵²) nor a supremacy clause (like the Polish⁵³) – and creation of an essential core of sovereignty is thus left exclusively to Hungarian constitutional judicial interpretation.⁵⁴ The supremacy of the Constitution clause in Art. 8 of the Polish Constitution provided the justification for the CT’s holding it in *Lisbon* as the ultimate limit of integration and defining, through it, the contents of its essential core or constitutional identity.⁵⁵ However, it charted a course more amicable towards European law (than seen in the FCC’s *Lisbon* ruling) by stressing the mutuality in principles and values between the EU and Poland, and the need to balance sovereignty with the constitutional principles of a favourable predisposition towards European integration.⁵⁶

b. Impact of model on European law priority

This mentoring by the FCC has also produced clear results in Poland including the use – in the CT’s reasoning – recognising the priority of application as opposed to the priority of validity of European law vis-à-vis the Constitution and the ability to review national law harmonised to a Directive.⁵⁷ While the

⁴⁷ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57.

⁴⁸ *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. 233 and 329-330.

⁴⁹ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

⁵⁰ *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108.

⁵¹ Hungarian Constitution, Art. 24(3): “(3) For the amendment of the Constitution, or for passing certain decisions defined in the Constitution, the affirmative votes of two thirds of the Members of Parliament are required.”

⁵² See above at Chapter Three, points B.1. and C.

⁵³ See above at Chapter Five, points B.1. and C.

⁵⁴ As it has been with Austria and the “*Bausteine*” (structural principles) of the Constitution, starting with the democratic principle, the principle of the state under the rule of law, and the federal principle, in 1952 with the *Voralberg Nationality* case: VfGH, G17/52, 16 Dezember 1952, VfSlg 2455. See generally, L. Adamovich & B. Funk, *Österreichisches Verfassungsrecht*, Springer Verlag, Wien & New York (1982), at 143ff.

⁵⁵ See above at Chapter Five, point E.2.c.

⁵⁶ See above at Chapter Five, point E.2.c.

⁵⁷ See above at Chapter Five, points D.2. and E.3.

latter proposition has also been acknowledged in Hungary,⁵⁸ neither the PCT nor the HCC has yet expressly threatened to exercise review over Regulations as the FCC has done previously in respect of possible infringement of fundamental rights protected under the Constitution.⁵⁹

In fact, the HCC has gone to great lengths to avoid exercising its review jurisdiction by actually denying that it has any jurisdiction to review European acts *per se*. Granted it regards itself able, according to the Constitution and the 1989 Constitutional Court Act, to review European Treaties amending the founding Treaties under Constitution Art. 2/A since the former clearly fall within its *a priori* jurisdiction on international treaties.⁶⁰ However use of its *a posteriori* jurisdiction focuses on Hungarian legal acts – basically statutes – which promulgate the amending Treaties or which introduce Directives into the national legal system.⁶¹ Beyond this, i.e., in respect of Regulations and Directives themselves, it has indicated that it has no review jurisdiction and thus “deconstitutionalises” the issue⁶² thereby affirming the ECJ in *Simmenthal*⁶³ according to which the ordinary courts are required to disapply national laws in conflict with European law without needing to ask the constitutional court to annul the national rules first. A similar recognition of *Simmenthal* has been elucidated by the CT,⁶⁴ in both States leading implicitly to the decentralisation of constitutional review in respect of EU law enforcement.

c. Lawful judge and ECJ references

Nevertheless, one matter of particular utility is the German principle of the right to a lawful judge. Whereas the circumstances exist for its reception or migration into both Central European constitutional systems by judicial fiat – probably reinforced by provisions in the EU Charter of Fundamental Rights on the right to a fair trial, etc. – neither court has shown its willingness to expound the principle, even with respect to protection of European rights and failure by lower national courts to refer to the ECJ under Art. 267 TFEU (ex-Art. 234 EC).

Moreover, the issue of making references themselves to the ECJ appears – at least for the moment – to have allowed for the reception by the CT of the FCC’s approach to the matter. The CT has accordingly decided, like the FCC, that it does have the power to refer but has so far refused to exercise it. It is clear from the Hungarian perspective that the openness to Art. 267 TFEU references displayed

⁵⁸ See above at Chapter Four, point E.3.

⁵⁹ *Internationale Handelsgesellschaft*, 29 Mai 1974, 2 BvL 52/71: BVerfGE 37, 271; [1974] 2 CMLR 540; and *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339 (1986); [1987] 3 CMLR 225. See above at Chapter Three, point E.2.a.

⁶⁰ See above at Chapter Four, points C.2.b. and E.2.c.-d.

⁶¹ See above at Chapter Four, point E.3.

⁶² See above at Chapter Four, point D.2.

⁶³ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

⁶⁴ See above at Chapter Five, point D.2.

by the Austrian Constitutional Court⁶⁵ would not be reciprocated and so it will fall to the HCC at some future date either to follow the Spanish (or erstwhile Italian) view and declare that it had no power to refer or, as quite predictable, follow the German model, i.e., agreeing that the jurisdiction to refer existed but refusing or avoiding its exercise in practice.

From this brief summary, it is evident that the Polish and Hungarian constitutional justices have started to inculcate into their deliberations and decision-making the constitutional implications of deepening European integration in a way strikingly similar in many (but not in all) respects to their German counterpart. However, that inculcation has proceeded at a quicker and more profound pace in Poland than in Hungary, in which latter tribunal the constitutional justices have been more reticent in their approach to European law.

Nevertheless, a noticeable shift in the attitude of the HCC since 2008 has been discerned since which time it has started to display more interest as a bench in the effect of EU law in the domestic constitutional system.⁶⁶ This change in approach was definitely affirmed in *Dec. 143/2010 (VII.14) AB*,⁶⁷ the *Lisbon* case, where the HCC indicated more precisely the limits to European integration vis-à-vis the constitutional identity of the state. Although argued in much less detail and length than the FCC whose own decision in *Lisbon*⁶⁸ it followed in this respect (together with the Czech Constitutional Court in *Lisbon*⁶⁹), the HCC has still firmly planted its own markers in this field.

Perhaps not surprisingly, the CT in its ruling on *Lisbon*⁷⁰ took up the “constitutional identity” issue and used it as a reaffirmation of national constitutional supremacy when read together with Constitution Art. 8. The CT seized on the opportunity to add more explanation and detail to its own understanding of an essential core of sovereignty immune to European integration, going beyond what it had previously decided in the *2003 Accession Treaty case*.⁷¹

⁶⁵ (1) Case C-143/99 *Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten* [2001] ECR I-8365, applied by the Austrian Constitutional Court in VfGH B 2251/97, 13 Dezember 2001, VfSlg. 16401; (2) Art. 234 EC (now Art. 267 TFEU) reference made in VfGH KR 1-6/00 and 8/00, 12 Dezember 2000, VfSlg. 16050 and the ECJ ruling in Joined Cases C-465/00 *Rechnungshof v. Österreichischer Rundfunk* [2003] ECR-I 4989; and (3) Reference made in VfGH W I-14/99, 2 März 2001, VfSlg 16100 and ECJ ruling in Case C-171/01 *Wählergruppe “Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG” v. Bundesminister für Wirtschaft und Arbeit* [2003] ECR I-4301.

⁶⁶ See above at Chapter Four, points D.2.-3. and E.2.

⁶⁷ *Dec. 143/2010 (VII.14) AB*: ABK 2010. 7-8, 872.

⁶⁸ *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.

⁶⁹ (1) Czech Const. Ct. Decision of 26 November 2008: Case No. Pl. ÚS 19/08; and (2) Czech Const. Ct. Decision of 3 November 2009: Case No. Pl. ÚS 29/09: J. Komárek, “The Czech Constitutional Court’s Second decision on the Lisbon treaty of 3 November 2009” (2009) 5 EuConst 345.

⁷⁰ *Dec. K 32/09*, 24 November 2010: OTK ZU 2010/9A, Item 108.

⁷¹ *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

B. THE ISSUE OF CONSTITUTIONAL PLURALISM FOR CONSTITUTIONAL COURTS: THE CURRENT SITUATION EXPLAINED?

1. Brief recapitulation of the current constitutional stand-off

a. *Constitutional courts v. ECJ*

The present work has been predicated on the idea that, in the contested polity that is the European Union, it is well nigh impossible to square the circle between the prerogatives of the ECJ in the EU on the one hand and the prerogatives of national constitutional courts within their own jurisdictions on the other. De Witte put it accordingly:⁷²

Yet, the thesis of the absolute supremacy of Community law, even over national constitutional provisions, is not fully accepted by all national supreme courts. First of all, those courts tend to recognise the privileged position of Community law, not by virtue of the inherent nature of Community law as the Court of Justice would have it, but under the authority of their own national legal order... But when it becomes a matter of deciding a conflict between Community law and a norm of constitutional rank, the theoretical basis matters very much. *If the courts (and other national authorities) think that Community law ultimately derives its validity in the domestic order from the authority of the constitution, then they are unlikely to recognise that Community law might prevail over the very foundation from which its legal force derives. More precisely, the typical constitutional provision allowing for the transfer of powers to international organisations (or to the Community specifically) is seen as allowing a priori implicit amendments to other provisions of the constitution, but not as allowing alterations to basic principles of the constitution.* [Emphasis supplied.]

Such explanation of the situation still subsists today and was reinforced by the decision of the FCC in the *Maastricht Treaty case*⁷³ (although it is strongly arguable that some later decisions mark a step back from such position).⁷⁴ However, the conflict is not so stark as one might consider. Admittedly, the FCC's discussion of the relationship of co-operation is not of itself sufficient to allow for constitutional dialogue⁷⁵ in the enlarged, post-Lisbon EU any more than it had been in the post-Maastricht EU, although Groussot⁷⁶ refers to the *Maastricht* decision as showing that "an indirect dialogue is

⁷² B. de Witte, "Community Law and National Constitutional Values" (1991) 2 LIEI 1, at 4.

⁷³ See above at Chapter Three, point E.2.a.-b.

⁷⁴ *Banana Market II*, 7 June 2000, 2 BvL 1/97: BVerfGE 102, 147; (2000) 21 HRLJ 251; and *Rinke*, 1 BvR 1036/99, 9 Januar 2001: (2001) 54 NJW 1267; but now cf. *Lisbon*, BVerfG 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.

⁷⁵ Constitutional courts – together with other national actors, e.g., national and regional parliaments and governments, as well as public opinion – participate in constitutional dialogues in the EU.

⁷⁶ X. Groussot, "Spirit, Are You There? Reinforced Judicial Dialogue and the Preliminary Ruling Procedure," *Eric Stein*

established between the Court of Justice and the national courts even when no preliminary procedure is made available.” Such dialogue – whether direct or indirect – can assist in uncovering divergences within the “layered” constitutional system of the EU, in order to achieve a greater convergence.⁷⁷

Dashwood & Johnston⁷⁸ note that while there exists a clear hierarchy of legal orders between the European and national law – with national courts (when applying European law) being ultimately required to defer to the rulings of the ECJ –, this does not necessarily require the courts applying the rules belonging to these two different legal orders should be in a hierarchical relationship: They stated:⁷⁹

Each ‘side’ has its own particular task in matters concerning Community law: the national court must decide any relevant questions of fact and national law, as well as giving the final ruling on the application of Community law in the national context, while leaving the definitive determination of the meaning of points of Community law for the ECJ. In such cases, neither side can perform its proper function effectively without the input of the other. This fact lends great credence to the co-operative analysis of the relationship between national courts and the Community judicature.

b. Dialogue and co-operation – not hierarchy

In instances where the ECJ has, in effect, decided the case at a national level and thereby overstepped the demarcation lines,⁸⁰ nevertheless such cases are the exception.⁸¹ For Dashwood & Johnston, “the relationship between the national and Community jurisdictions is undoubtedly a complex, finely balanced and shifting one but it is also one which remains fundamentally co-operative in character, not

Working Paper No. 4/2008, Czech Society for European and Comparative Law, Prague (2008), at 20: <<http://www.ericsteinpapers.eu>>. 20 March 2009.

⁷⁷ D. Hanf, “Talking with the ‘*pouvoir constituant*’ in Times of Constitutional Reform: The European Court of Justice on Private Applicants’ Access to Justice” (2003) 10 MJ 265, at 267; and N. Walker, “Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe” in G. de Búrca & J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Hart Publishing, Oxford and Portland (OR) (2000), chap. 2, 9, at 21 in which the author distinguishes between “judicial conversations” between the ECJ and national courts and “political conversations” between Member States in Intergovernmental Conferences and within the EU institutions. However de Witte casts doubts on such “judicial conversations”: B. de Witte, “The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process,” in P. Beaumont et al. (eds.), *Convergence and Divergence in European Public Law*, OUP, Oxford (2002), 39, at 40-41.

⁷⁸ A. Dashwood & A. Johnston, “Synthesis of the Debate,” in A. Dashwood & A. Johnston, *The Future of the Judicial System of the European Union*, Hart Publishing, Oxford and Portland (2001), 55, at 58.

⁷⁹ Dashwood & Johnston (2001), at 58-59.

⁸⁰ In these cases, the ECJ seemed effectively to have *decided* the outcome at the national level as well: Case 106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR 4135; and Case C-323/93 *R. v. H.M. Treasury, ex parte British Telecommunications PLC* [1996] ECR I-1631.

⁸¹ And national courts are not slow in emphasising their prerogatives: see *Brasserie* (Cases C-46 & 48/93 *Brasserie du Pêcheur SA v. Germany* [1996] ECR I-1029) on its return to the German courts: *Brasserie de Pêcheur II*, 24 Oktober 1996, III ZR 127/91: BGHZ 134, 30; [1997] 1 CMLR 971.

hierarchical.”⁸² Such position is consistent with the complex notion of a constitutional order of states.⁸³ As Slaughter has observed:⁸⁴

The tug of war between the ECJ and all national courts, both high and low, will continue, even as their relations and their jurisprudence become increasingly intertwined. However, just as the [German FCC] declared the European Union to be not a “confederation” but a “community of states,” so too is its legal system best characterized as a community of courts. Within this community, each court is a check on the other, but not a decisive one, asserting their respective claims through dialogue of incremental decisions signaling opposition or cooperation.

According to Stone Sweet,⁸⁵ it amounts to a dialogue of constitutionalism within a national-supranational framework. What then would be the basis for a more collaborative judicial relationship between the ECJ and the national constitutional courts in order to ensure overall constitutionality throughout the EU? In order to answer this question, political scientists and legal academics have tried to develop a theory to the evolving Union and its diffuse constitutional controls and even a (contested/negotiated) solution to the situation.

2. The constitutional stand-off explained as “normal”

a. Pluralist constitutionalism as an explanation

Of the many theories that have been expounded over recent years, those of multilevel or pluralist constitutionalism have gone some way to comprehend the currently evolving situation in the EU.⁸⁶ The “post-national constellation”⁸⁷ within the EU produces an approach to constitutionalism in the EU where state or public power is limited to that established in the constitution.⁸⁸ Within this trend of thought, the conceptualising of the EU constitutional construct may be seen as a complementary structure of national and European constitutions.⁸⁹

⁸² Dashwood & Johnston (2001), at 59.

⁸³ A. Dashwood, “The limits of European Community powers” (1996) 21 EL Rev. 113, at 114.

⁸⁴ A.-M. Slaughter, “Judicial Globalization” (1999-2000) 40 Va. J. Intl. L. 1103, at 1108.

⁸⁵ A. Stone Sweet, “Constitutional Dialogues in the European Community,” in Slaughter, Stone Sweet & Weiler (1998), chap. 11, 305, at 305-308.

⁸⁶ I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited” (1999) 36 CML Rev. 710; N. Walker, “The Idea of Constitutional Pluralism” (2002) 65 MLR 317.

⁸⁷ J. Habermas, “Die postnationale Konstellation” (1998) *Politische Essays* 91; M. Zürn, “The State in the Post-National Constellation” (1999) *ARENA Working Papers* WP 99/35, <<http://www.arena.uio.no>>. 10 January 2009; J. Shaw, “Postnational constitutionalism in the European Union” (1999) *Jo. Euro. Public Policy* 579, at 586.

⁸⁸ P. Häberle, *Verfassungslehre als Kulturwissenschaft*, 2nd ed., Duncker & Humblot, Berlin (1998), at 620.

⁸⁹ P. Craig, “Constitutions, Constitutionalism, and the European Union” (2001) 7 ELJ 125.

b. The European constitutional area as complementary not competitive

Pernice⁹⁰ has identified this as *Verfassungsverbund*⁹¹ or multilevel constitutionalism, which already acknowledges the existence of an EU constitution arising from the national and European constitutional planes and which forms two levels of a unitary system in terms of substance, function and institutions.⁹² Conceptualising European constitutional adjudication positively as a complementary process within multilevel constitutionalism, Mayer notes:⁹³

‘[T]he’ European constitutional court would consist of both the highest national courts and tribunals and the ECJ. Since, from the theoretical perspective of multilevel constitutionalism, the national courts’ and the ECJ’s authority both stem from the individual, there is no presupposed hierarchy between the courts, rather a duty of cooperation. The task of this composite European constitutional court would be that of a guardian and interpreter of the (composite) European constitution.

The fundamental consideration is how to minimise the potential for conflict in the case where there are divergent claims of ultimate jurisdiction in the multilevel system. Mayer argues that, in respect of European law primacy, multilevel constitutionalism exposes the basic requirements for the functioning of a conditional principle of supremacy between distinct levels of public power – the supremacy question can then only be answered unambiguously according to the content accorded to it at the overarching (supranational) level. In the EU, this content is the principle of priority of application (*Anwendungsvorrang*), though not in validity (*Geltungsvorrang*), of the law of the overarching level as expounded by the FCC⁹⁴ and expressly accepted by the CT,⁹⁵ but rather impliedly by the HCC.⁹⁶

⁹⁰ I. Pernice, “Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung” in R. Bieber & P. Widmer (eds.) *The European Constitutional Area*, Schulthess, Zürich (1995), 225, at 261; I. Pernice, “Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?” (1998) 36 CML Rev. 703; A. von Bogdandy, “The European Union as a supranational federation: A conceptual attempt in the light of the Amsterdam Treaty” (2000) 6 Col. J.E.L. 27.

⁹¹ Literally, a compound of constitutions. See also M. Heintzen, “Gemeineuropäisches Verfassungsrecht in der EU” (1997) 32 EuR 1; and P. Häberle, “Verfassungsrechtliche Fragen im Prozeß der europäischen Einigung” (1992) 19 EuGRZ 429. Pernice’s concept of a *Verfassungsverbund* is not universally accepted: for criticism, see P. Kirchhof, “The Legal Structure of the European Union as a Union of States,” in A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing, Oxford (2006), chap. 18, 763, at 776-777.

⁹² A. von Bogdandy & M. Nettesheim, “Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung” (1996) 31 EuR 1.

⁹³ Mayer (2003), at 38.

⁹⁴ This principle has also been followed by the Austrian Constitutional Court: VfGH G 2/97, 24 Juni 1998, VfSlg. 15215; see generally, e.g., Th. Öhlinger & M. Potacs, *Gemeinschaftsrecht und staatliches Recht – Die Anwendung des Europarechts im innerstaatlichen Bereich*, Orac, Wien (1998)). However, the Austrian principle of application of priority (*Anwendungsvorrang*) does not imply a hierarchy of superiority or inferiority between EU and national constitutional law: R. Bieber & I. Salomé, “Hierarchy of Norms in European Law” (1996) 33 CML Rev. 907, at 912.

⁹⁵ See above at Chapter Five, point D.2.

⁹⁶ See above at Chapter Four, point D.2.

In a similar fashion, Verhoeven⁹⁷ explains and defends her ideas on a moderate pluralist interpretation of the European constitutional area – of networks of overlapping and interdependent legal systems, each of which has its own criteria for validity. She refers to the statement of MacCormick who noted⁹⁸ that –

[the pluralist image] suggests that the doctrine of supremacy of Community law is not to be confused with any kind of all-purpose subordination of Member State law to Community law. Rather, the case is that these are interacting systems, one of which constitutes in its own context and over the relevant range of topics a source of valid law superior to other sources recognised in each of the Member State systems.

Verhoeven⁹⁹ perceives “an image of the legal sphere covering the EU territory ... as a network of interlocking institutional arrangements and normative spheres wherein no one is privileged, where no central political power or final arbiter of constitutionality exists.” Thus, the EU appears both as a constitutional system of its own as well as referring to a pluralist constitutional area or space composed of different legal systems, *i.e.*, European law/national law. Such area is a legal area, a form of “public space”¹⁰⁰ governed by “meta” values and principles¹⁰¹ that regulate the interface between the various legal systems operating in it.

Nevertheless, as Verhoeven readily acknowledges,¹⁰² absent a single reference point, the pluralist conception of the interface between national and European constitutional law appears to condemn the EU to being a perpetually “contested project.”¹⁰³ Yet, from national constitutional court practice, this has not been the case – although most domestic legal orders do not accept European law supremacy over national constitutions, for (nearly) all practical purposes, constitutional courts have accommodated themselves to the requirements of primacy. The question then becomes, as MacCormick puts it,¹⁰⁴ how a European reality can be conceptualised wherein – “our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious conflict in areas of overlap?”

⁹⁷ A. Verhoeven, *European Union in Search of a Democratic and Constitutional Theory*, Kluwer Law International, The Hague, London and New York (2002), at 299.

⁹⁸ N. MacCormick, “The Maastricht-Urteil: sovereignty now” (1995) 1 ELJ 259, at 264.

⁹⁹ Verhoeven (2002), at 299.

¹⁰⁰ S. Benhabib, “Models of public space: Hannah Arendt, the liberal tradition and Jürgen Habermas” in C. Calhoun (ed.), *Habermas and the Public Sphere*, MIT Press, Cambridge (1992), at 73-98.

¹⁰¹ Walker (2000).

¹⁰² Verhoeven (2002), at 300.

¹⁰³ Z. Bańkowski & E. Christodoloudis, “The European Union as an essentially contested project” (1998) 4 ELJ 341.

¹⁰⁴ N. MacCormick, “Beyond the sovereign state” (1993) 56 MLR 17.

c. Co-operative constitutional adjudication

If pluralism then is to be workable, Verhoeven maintains¹⁰⁵ that it must operate within certain limits:

Its viability depends on an overarching principle of integrity that can be used as a yardstick assessing the reasonableness of the claims to validity and applicability of the different legal systems. Such overarching set of rules – guiding, ultimately, the pluralist interface – cannot be imposed top-down by the EU legal system, nor bottom-up by the Member States.

The rules that guide the pluralist interface therefore have to belong to a third “space,” an overarching legal area, and “must be produced in an interactive manner through an *ongoing* discursive process between the different constituencies of which the pluralist polity is made.”¹⁰⁶ Within such a process of overarching constitution construction, no one has the final word since each legal system (national or EU) has the final say only within its own jurisdiction.¹⁰⁷

Mayer, having explored the objections to the idea of a complementary structure of European constitutional adjudication,¹⁰⁸ continues by summarising the value of conceptualising what courts in the EU do or should do by means of a non-hierarchic, composite multilevel structure:

Starting out from a concept that covers the national and the European levels, and thus establishing responsibilities of adjudication on European constitutional law for both of them, the non-hierarchic relationship of the courts begins to take on a clearer form, constitutional clarity is enhanced and a reciprocal strengthening of constitutional bonds and limits is achieved.

The multilevel approach can serve as a starting point to develop criteria for determining the limits of responsibilities and as a conceptual basis for the constitutional dialogue between the courts, which are allotted functions according to a specific concept of constitutionalism. That means rejecting the conflict paradigm and more readily accepting the cooperation paradigm. To some extent, the non-subordination of national courts could be explained and legitimised in terms of European constitutional law. It would no longer automatically be seen as an infringement of European law.

In any case, he concludes, there would be clear limits on how national courts might act, which would remove the foundations of misleading legal reasoning.

¹⁰⁵ Verhoeven (2002), at 300-301.

¹⁰⁶ Verhoeven (2002), at 302. Emphasis in original.

¹⁰⁷ M. La Torre, “Legal pluralism as evolutionary achievement of Community law” (1999) 12 *Ratio Juris* 182.

¹⁰⁸ Mayer (2003), at 39-42.

d. “Contrapunctual,” “best fit” or “co-ordinate”?

Poiares Maduro moves this discussion on with his concept of contrapunctual law as a way both to describe the subsisting constitutional pluralism in the EU and to explain how national courts and the ECJ should interact.¹⁰⁹ His approach takes three steps, the first being that the courts must accept the idea of pluralism:¹¹⁰ “and legal order (national or European) must respect the identity of the other legal orders; its identity must not be affirmed in a manner that either challenges the identity of the other legal orders or the pluralist conception of the European legal order itself.” According to Poiares Maduro, then, neither a national constitutional court nor the ECJ could assume the supremacy of its own legal order: ergo pluralism means the absence of a formal hierarchy between such legal orders. Komárek notes¹¹¹ that “ ‘primacy in application’ in *every* case of conflict is therefore not the way towards *real* pluralism.”

Secondly, for Poiares Maduro, the courts are to seek consistency and vertical and horizontal coherence in the whole EU legal order:¹¹² “[w]hen national courts apply EU law they must do so in a manner as to make those decisions fit the decisions taken by the [ECJ] but also by other national courts.” Komárek¹¹³ regards this as a very ambitious claim and one which requires the ECJ to take seriously the decisions of national courts as a necessary consequence of the non-hierarchical organisation of the EU judiciary.¹¹⁴

Lastly, Poiares Maduro considers¹¹⁵ that: “any judicial body (national or European) should be obliged to reason and justify its decisions in the context of a coherent and integrated European legal order.” According to this principle, the courts are to reason in universal terms and are prohibited from relying on specific provisions of their own constitutions as justification for their rulings.¹¹⁶

Kumm,¹¹⁷ on the other hand, relies on the principle of best fit which assumes that both national and European constitutional orders are built on the same normative ideals:¹¹⁸ *viz.*, liberty,

¹⁰⁹ M. Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action,” in N. Walker (ed.), *Sovereignty in Transition*, Hart Publishing, Oxford (2003), chap. 21, 501-537.

¹¹⁰ Poiares Maduro (2003), at 506.

¹¹¹ J. Komárek, “European Constitutionalism and the European Arrest Warrant: In Search of the Limits of ‘Contrapunctual Principles’ ” (2007) 44 CML Rev. 9, at 30, FN 110. Emphasis in original.

¹¹² Poiares Maduro (2003), at 508.

¹¹³ Komárek (2007), at 30-31.

¹¹⁴ J. Komárek, “Federal elements in the Community judicial system: Building coherence in the Community legal order” (2005) 42 CML Rev. 9, at 27-30.

¹¹⁵ Poiares Maduro (2003), at 529-530.

¹¹⁶ Komárek (2007), at 31.

¹¹⁷ M. Kumm, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty” (2005) 11 ELJ 262-307.

¹¹⁸ Komárek (2007), at 34.

equality, democracy and the rule of law common to all EU Member States and the EU itself. He states:¹¹⁹

[T]he task of national courts is to construct an adequate relationship between the national and European legal order on the basis of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solutions to realize the ideals underlying legal practice in the European Union and its Member States.

Although further discussion of these points with Komárek enters into the realm of jurisprudence,¹²⁰ these proposals nevertheless underpin the clear need for constitutional transjudicial communication and dialogue, not merely between one national constitutional court and the ECJ, but all national (constitutional) courts *inter se*. Bermann¹²¹ identifies the two unresolved questions which remain contested in the emerging “federal polity” that is the EU: (1) the simple *Kompetenz-Kompetenz* one, *viz.*, in determining the outer limits of the exercise of legislative and policymaking authority by the European institutions, whether it is the ECJ (as the EU’s highest court) or the highest court of the Member State (*e.g.*, the constitutional court) that ultimately decides the matter; and (2) whether, and if so when, national constitutional courts – may allow, and possibly even demand, the non-application of EC/EU law due to an irresolvable conflict between it (as interpreted by the ECJ) and the essential core of sovereignty as expounded in paramount national constitutional values (as understood by the constitutional court itself).

In response to these questions, Sabel & Gerstenberg¹²² have argued that the potential clash of jurisdictions within the EU was actually being resolved by the formation of a “novel order of coordinate constitutionalism” in which, *inter alia*, the ECJ and national (constitutional) courts agree to defer to one another’s decisions, provided these decisions respect mutually agreed essentials:¹²³

This co-ordinate order extends constitutionalism – understood as the legal entrenching fundamental values rather than the founding act of political sovereignty – beyond its home territory in the nation state through a jurisprudence of mutual monitoring and peer review that carefully builds on national constitutional traditions, but does not create a new, encompassing sovereign entity.

Interestingly for the present research, the authors base their argument – that the constitutional orders are in such a way profoundly linked without being integrated – on the FCC’s *Solange* principles in *Internationale Handelsgesellschaft*¹²⁴ and *Wünsche*.¹²⁵ According to their interpretation of these

¹¹⁹ Kumm (2005), at 286.

¹²⁰ Komárek (2007), at 35-37.

¹²¹ G. Bermann, “The ‘Highest Court’ in Federal Systems,” in I. Pernice, J. Kokott & C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos Verlag, Baden-Baden (2006), 91, at 93-94.

¹²² C.F. Sabel & O. Gerstenberg, “Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order” (2010) 16 *ELJ* 511.

¹²³ Sabel & Gerstenberg (2010), at 512.

¹²⁴ *Internationale Handelsgesellschaft*, 29 Mai 1974, 2 BvL 52/71: BVerfGE 37, 271; [1974] 2 *CMLR* 540.

cases, those principles provide that each legal order accepts the decisions of the others, even if another decision would have been more consistent with the national constitutional tradition “as long as” those decisions do not systematically violate its own understanding of constitutional essentials:¹²⁶ “*Solange* thus commits each order to monitor the jurisprudential output of the others, and to make acceptance of their deviations from national preferences contingent on a continuing finding of equivalence of fundamental results.”

The creation of this co-ordinate constitutional order, they argued,¹²⁷ was best regarded as an example of Rawlsian “overlapping consensus.” According to this, an agreement on fundamental commitments of principle – those essentials which each order required the others to respect as the condition of its own deference to their decisions – did not rest on mutual agreement on any single, comprehensive moral doctrine embracing ideas of human dignity, individuality, etc. The emergent co-ordinate order suggested a development of the idea of overlapping consensus by demonstrating how the *Solange* principles – in requiring each order to monitor the others’ respect for essentials – created an institutional mechanism for articulating and adjusting the practical meaning of these ideals.

Sabel & Gerstenberg connect mutual monitoring and overlapping consensus with the idea of deliberative polyarchy¹²⁸ by showing that the emergent constitutional order was polyarchic since, absent a final arbiter, it had to resolve disputes by exchanges among co-ordinate bodies, each with a contingent claim to competence; and such polyarchy was deliberative as the parties were bound in these exchanges to re-examine their own interpretations of shared principles – and thus, eventually, the underlying views on which such interpretations were based – in the light of arguments presented by others. Certainly, Sabel & Gerstenberg’s approach reflects, once again, a need to ensure the continuing transjudicial communication and dialogue between the ECJ and national (constitutional) courts and between the latter *inter se*. Indeed this has been a steady component of recent formulations of the theoretical framework for such mutually-respecting dialogue within the European Union.

e. Outwith the hierarchy

This brief analysis allows for understanding the European judicial system as a non-hierarchical, multilevel system, based upon voluntary acceptance, political equilibrium and the mutual control of European and national courts¹²⁹ but with the more controversial questions still unresolved and “accepted” as such by the ECJ and national constitutional courts alike. Within this theoretical framework, then, to what extent does the new Treaty framework (post Lisbon) provide for the

¹²⁵ *Wünsche Handelsgesellschaft*, 22 Oktober 1986, 2 BvR 197/83: BVerfGE 73, 339; [1987] 3 CMLR 225.

¹²⁶ Sabel & Gerstenberg (2010), at 513.

¹²⁷ Sabel & Gerstenberg (2010), at 513.

¹²⁸ Sabel & Gerstenberg (2010), at 543-550.

¹²⁹ I. Pernice, “Introduction,” in Pernice, Kokott & Saunders (2006), 9, at 9; and F.C. Mayer, “Multilevel Constitutional Adjudication,” in A. von Bogdandy & J. Bast, *Principles of European Constitutional Law*, 2nd ed., Hart Publishing, Oxford/Portland (OR) and C.H. Beck, München (2010), chap. 11, 399-439.

implementation of such principles? In this scenario, Art. 4 TEU may be regarded as a pivotal provision in protecting national constitutional orders in the EU system. As such, could it provide for a possible judicial solution to the perennial problem of European law supremacy vis-à-vis national constitutional provisions?

3. The pivotal nature of Art. 4 TEU

a. *Constitutional co-operative adjudication – a Treaty basis?*

Article 4 TEU¹³⁰ links or perhaps juxtaposes the maintenance of national identities in the EU, inherent in their constitutional structures, with the principle of loyalty to the Union.¹³¹

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remains with the Member States.

2. *The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, 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.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. [Emphasis supplied.]

Could these provisions in Art. 4 TEU be considered as enshrining protection and acceptance at the European level of the national understanding of the essential core of sovereignty?

¹³⁰ A similarly-worded provision was set out in the Draft Constitutional Treaty 2003, EU Art. I-5.

¹³¹ Art. 5(1) TEU explicitly recognises that the limits of the Union competences are governed by the principle of conferral and further, in Art. 5(2) TEU: “Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”

What renders the views previously discussed on plurilevel constitutionalism and pluralist constitutional adjudication particularly relevant for the present work is their analysis of Art. 4(2) TEU (ex-Art. 6(3) TEU, pre Lisbon) and its *renvoi* back to the constitutions of the Member States. In addressing the core question of where to locate ultimate jurisdiction claims of the highest *national* courts at the *European* level, Mayer regarded Art. 4(2) TEU as the substantive partner to the procedural Art. 267 TFEU (ex-Art. 234 EC) in addressing the issue. In his view, the interpretation of Art. 4(2) TEU had to be accomplished by both the highest national courts *and* the ECJ, along the lines of Poiares Maduro. He then summarised much of what this Chapter seeks to prove, from a German constitutional perspective:¹³²

The fundamental rights saga from *Solange I* up to the *Banana* decisions in front of the ECJ and the *BVerfG* seem to indicate that the respective courts of ultimate decision, guardians of the interests of the respective levels, are already working towards establishing a core of (constitutional) law exempt from the supremacy of European law, *and accepted as such from both levels*. [Emphasis supplied.]

Article 4(2) TEU was originally introduced, by the Maastricht Treaty, to help highlight the continuing importance of the state in the EU¹³³ and Wouters¹³⁴ has read it as providing, at the European level, *a confirmation of national courts' views that European integration must leave intact the essential core of sovereignty*. Although Art. 4(2) TEU (and its predecessors) was not justiciable on its own, nevertheless the ECJ in *Commission v. Luxembourg*¹³⁵ used it as an interpretative tool, stating the protection of national identities of Member States was a legitimate objective that the EU legal order had to respect; in other cases, the ECJ has also taken into consideration concerns of national identity.¹³⁶

But Verhoeven's most revealing proposition, shared by the current author, came when she stated:¹³⁷

Democracy, respect for human rights and the rule of law are safeguarded at various constitutional levels within the Union. Each legal order (national, European) has its own understanding of what these principles mean and how they should translate in institutional practice. National peculiarities form part of the specific 'national identities' of the Member States that must be respected.... Neither should control and sanction mechanisms be rendered uniform. There is much merit in maintaining the current de-centered system for norm-production and enforcement regarding the fundamental principles.

¹³² Mayer (2003), at 39.

¹³³ A. Bleckmann, "Die Wahrung der 'nationalen Identität' im Unions-Vertrag" (1997) J.Z. 265; A. Dashwood, "States in the European Union" (1998) 23 EL Rev. 201.

¹³⁴ J. Wouters, "Grondwet en Europese Unie" (1999) TBP 303, at 311.

¹³⁵ Case C-473/93 *Commission v. Luxembourg* [1996] ECR I-3207, at para. 35.

¹³⁶ Case 147/86 *Commission v. Greece* [1988] ECR 1637; Case 379/87 *Groener* [1989] ECR 3967; Case C-159/90 *Society for the Protection of the Unborn Child v. Grogan* [1991] ECR I-4719.

¹³⁷ Verhoeven (2002), at 324-325.

In championing the continued existence of a pluralist, de-centralised legal system for the EU and its Member States, she argues strongly that the common constitutional standards gradually emerging in the Union are accomplished through an ongoing dialogue between constitutional partners belonging to various and overlapping legal systems (including constitutional courts). While in such system absolute legal certainty was unattainable, it was equally undesirable, otherwise the Member States would lose their critical force as constituent forces in the European integration process. As a result the success of the European integration project – to achieve an ever closer union between legal systems that retained their own autonomy (national identity) – hinged on a successful reconciliation of the horizontal (acceptance) and the vertical (loyalty) dimensions of the relationship between the EU and national legal systems.¹³⁸

b. ECJ affirmation of co-operative constitutional adjudication

Against the recent background of the ECJ underlining the importance of co-operation with national courts,¹³⁹ it would appear that a series of rulings supports the present contentions on the ECJ's respect for the specific constitutional identity of the Member States. Groussot argues¹⁴⁰ that, in the *Omega* case,¹⁴¹ the ECJ balanced the right to human dignity (under German Constitution Art. 1) with the freedom to provide services when it held that:¹⁴²

Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services

Further in *Laval*,¹⁴³ the ECJ made an express reference to the importance of the right to collective action enshrined in Art. 17 of the Swedish Constitution and pointed out¹⁴⁴ that exercising the right to take

¹³⁸ Verhoeven (2002), at 358.

¹³⁹ See Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, at para. 42; Case C-355/04 P *Segi v. Council* [2007] ECR I-1657, at para. 38; and Case C-432/05 *Unibet (London) Ltd. v. Justitiekanslern* [2007] ECR I-2271, at para. 38: “[u]nder the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual’s rights under Community law.”

¹⁴⁰ Groussot (2008), at 21.

¹⁴¹ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

¹⁴² *Ibid.*, at para. 35.

¹⁴³ Case C-341/05 *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767, at para. 92.

¹⁴⁴ *Ibid.*, at para. 103. In support of this proposition, the ECJ referred to Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Arblade* [1999] ECR I-8453, at para. 36; Case C-165/98 *Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189, at para. 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I-7831, at para. 33; and Case C-438/05 *International Transport Workers’ Federation v. Viking Line ABP* [2007] ECR I-10779, at para. 77.

collective action “for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.” In addition, the ECJ has seemingly given discretion to the national courts to apply the proportionality test (although retaining the ability to provide guidance to the domestic judge), as it said in *Viking Line*:¹⁴⁵ “[I]t is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements [of proportionality].”

Accordingly the national court is expressly seen as the ultimate arbiter of the validity of domestic law in the context of EU fundamental rights.¹⁴⁶ Moreover, the ECJ in *Advocaten voor de Wereld*¹⁴⁷ confirmed the need for the same type of dialogue within the EU’s former Third Pillar. The late Ruiz-Jarabo Colomer AG noted in that case:¹⁴⁸

The protective role [regarding fundamental rights] is exercised in three different spheres – national, Council of Europe and European Union – which are partly coextensive and, most importantly, are imbued with the same values. There are many points of intersection and overlapping is possible, but respect for other jurisdictions does not create any insurmountable problems where there is confidence that all parties exercise their jurisdiction while fully guaranteeing the system of coexistence. A dialogue between the constitutional courts of the European Union permits the foundations to be laid for a general discussion.

Groussot thus notes:¹⁴⁹ “The upshot of all this is that a spirit of dialogue and compromise emerges from the multi-level system of European constitutionalism.... Compromise is necessary and dialogue is of [the] essence.”

c. Declaration 17 of the Lisbon Treaty: reaffirmation of the past and brake on pluralist constitutional adjudication?

Despite the positive wording of Art. 4(2) TEU and the case-law of the ECJ on respecting national constitutional identities, the probability of more judicial “negotiations” or “dialogue,” even “conflict” seems inherent in Declaration 17 to the Lisbon Treaty on the issue of EC law primacy. This replaces EU Constitutional Treaty 2003, Art. I-6 which stated: “The Constitution, and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.” This provision in the EU Constitutional Treaty would have given the primacy of

¹⁴⁵ Case C-438/05 *International Transport Workers’ Federation v. Viking Line ABP* [2007] ECR I-10779, at para. 85.

¹⁴⁶ Groussot (2008), at 21.

¹⁴⁷ Case C-303/05 *Advocaten voor de Wereld v. Leden van de Ministerraad* [2007] ECR I-3633.

¹⁴⁸ Case C-303/05 *Advocaten voor de Wereld v. Leden van de Ministerraad* [2007] ECR I-3633, Opinion of Ruiz-Jarabo Colomer, at para. 81, footnote omitted.

¹⁴⁹ Groussot (2008), at 22.

European law an express legal and constitutional basis.¹⁵⁰ Now Declaration 17 of the Lisbon Treaty states: “The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.” The Conference also decided to attach to this Declaration the Opinion of the Council Legal Service on the primacy of EC law.¹⁵¹

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (*Costa/ENEL*, 15 July 1964, Case 6/64^[152]) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

This reference in Declaration 17 to the already-established European constitutional *acquis* is significant since, in its development of the principle of European law supremacy, the ECJ ruled in *Internationale Handelsgesellschaft*¹⁵³ that even provisions of secondary legislation took priority over conflicting clauses of a national constitution, even those regarding fundamental rights.¹⁵⁴

¹⁵⁰ See A. Albi & P. Van Elsuwege, “The EU Constitution, national constitutions and sovereignty: an assessment of a ‘European constitutional order’” (2004) 29 *EL Rev.* 741, at 751; and M. Kumm & V. Ferreres Comella, “The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union,” *Jean Monnet Working Paper* 5/04, at 8-9: <<http://www.jeanmonnetprogram.org/papers/04/040501-15.html>>. 10 January 2009. The 1997 Treaty of Amsterdam had already come close to stating that European law had primacy over national law: its Protocol on the Application of the Principles of Subsidiarity and proportionality maintains that subsidiarity “shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law.” These principles include the primacy of European law: V. Miller & C. Taylor, *House of Commons Research Paper* 08/09, at 27: <<http://www.parliament.uk/commons/lib/research/rp2008/rp08-009.pdf>>. 10 January 2009.

¹⁵¹ Opinion of the Council Legal Service, 22 June 2007, 11197/07: <<http://register.consilium.europa.eu/pdf/en/07/st11/st11197.en07.pdf>>. 10 January 2009.

¹⁵² The footnote quoted directly from Case 6/64 *Costa v. ENEL* [1964] ECR 585: “It follows ... that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”

¹⁵³ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getriede und Futtermittel* [1970] ECR 1125.

¹⁵⁴ I. Pernice, “The Treaty of Lisbon and Fundamental Rights,” in S. Griller & J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer Verlag, Wien and New York (2008), 235, at 239.

4. The ECJ ship continues on its voyage from Lisbon

a. Past flexibility in ECJ approach

For much of the last 40 years, the ECJ has thus sought to expand competences¹⁵⁵ and, comparatively rarely – e.g., in the case of creating a catalogue of human rights or of refusing to extend horizontal direct effect to provisions of Directives –, has ever properly addressed the concerns of national constitutional courts.¹⁵⁶ The ECJ is engaged in “defensive constitutionalism,”¹⁵⁷ which involves defence of certain core principles of the EC (EU) constitutional legal order against attack from outside. Were this to continue in the new EU (post-Lisbon) legal order – in which the pillar structure is largely done away with by subsuming the EC into the EU, thereby presenting¹⁵⁸ “a unitary actor with its own political and legal system” – national constitutional courts could still try to avoid such interpretative implications behind Declaration 17 to the Lisbon Treaty and avoid making references to the ECJ.

b. Impact of Lisbon Treaty on ECJ and national constitutional courts relationship

The Lisbon Treaty could thus have the effect of inaugurating another stage in the “relationship of co-operation” between the ECJ and domestic constitutional courts with a much clearer basis.¹⁵⁹ No longer contained in judicial fiat, Declaration 17 puts into concrete treaty annex (though non-binding) form what may be regarded as one of the main tenets, if not the main tenet, of this often fraught co-operation. Taking the concept of primacy out of the “negotiated” ECJ case-law and attaching it to the Lisbon Treaty (in a Declaration) may have appeared to many politicians and bureaucrats as a good solution to an old problem. What they have failed to see¹⁶⁰ is that what has been “negotiated” over some 40 years

¹⁵⁵ Even turning itself into the constitutional court of the EU according to Curtin through a series of rulings on the protection of human rights of individuals in Union pillars that do not provide the same legal protection as the Community. In all cases, she asserts, the solution appeared to be the same: the ECJ either interpreted the non-EC (i.e., Union) provisions in the light of the overall Union (*Yusuf/Kadi*) or it used Community analogy to establish the outcome (*Pupino* and *Segi*) it considered necessary from a constitutionalist point of view: see D. Curtin, “The Sedimentary European Constitution – The Future of ‘Constitutionalisation’ without a Constitution,” in I. Pernice & E. Tanchev (eds.), *Ceci n’est pas une Constitution – Constitutionalisation without a Constitution?*, Nomos Verlag, Baden-Baden (2008), 76, at 82.

¹⁵⁶ For an outline of the situation in this area pre and post EU Constitution, see 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(3), at paras. 54-81, especially at paras. 75-81: <<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldecom/47/47.pdf>>. 10 January 2009.

¹⁵⁷ M. Poiares Maduro, “European and the Constitution: What if this is As Good As It Gets?,” in J.H.H. Weiler & M. Wind (eds.), *Rethinking European Constitutionalism*, CUP, Cambridge (2000), 74-102.

¹⁵⁸ Curtin (2008), at 81.

¹⁵⁹ Such an idea has recently been referred to as “judicial deliberative supranationalism”: see J. Komárek, “Federal elements in the Community judicial system: Building coherence in the Community legal order” (2005) 42 CML Rev. 9, at 30. For “deliberative supranationalism,” see Ch. Joerges, “‘Deliberative supranationalism’ – Two defences” (2002) 8 ELJ 133.

¹⁶⁰ In previous Intergovernmental Conferences which, by definition, amounted to a negotiation between Member State governments outside of the framework of the EU’s procedures and institutions, neither the parliamentary nor judicial

allowed for a certain flexibility or manoeuvrability of judicial position – both at the European and the domestic level – which might no longer inure in a static Treaty Declaration, ripe for interpretation by the ECJ. The “*some room*” left to national constitutional courts thus seems to be very little at all. Such concerns, in relation to the EU Constitutional Treaty 2003, were identified by Albi & Van Elsuwege:¹⁶¹

The view that ultimate supremacy belongs to the national constitutions has been a major expression of the traditional concept of sovereignty in the context of European integration and has consistently been reiterated by the highest national courts. The national constitutional courts preserve the right to assess the limits of integration and undertake ultimate review as to whether the EU has acted within the powers conferred upon it by the national constitutions.

c. Further strains or a welcome catalyst for change in the relationship?

The adoption of the Lisbon Treaty and the further steps in integration that it will introduce may put the views of national constitutional courts under further strain.¹⁶² The domestic constitutional courts are thus being faced with a *prima facie* situation in the Lisbon Treaty, on the basis of Declaration 17, that European law is supreme even over national constitutions but such courts will undoubtedly neither be unresourceful nor reticent in response.¹⁶³ Despite views to the contrary, European integration may bring national laws together in a way not originally conceived or actually foreseen. Within this new EU constitutional matrix, reading Arts. 4 and 5(2) TEU together, domestic constitutional courts – including those of Germany, Hungary and Poland – may be able, through the process of transjudicial communication, to take definitive steps along the road to harmonising their diverse formulae of the essential core of their respective national sovereignties. It has been one of the main theses of this work that all national constitutional courts are active participants in this process and that European integration is acting as a catalyst not only for a reformulation of what sovereignty means in the Union – whether at European, national or subnational level¹⁶⁴ – but also for

branches had been represented. The Convention on the Future of Europe marked a change by including national and European parliamentary representatives but not judicial ones. There was a resultingly distinct absence of judicial input into the Constitution except in the matter of issues surrounding the ECJ. In this respect, the Praesidium of the Convention set up a “discussion circle” that was given limited terms of reference before which, *inter alia*, the Presidents of the ECJ and the CFI were able to make submissions: European Convention, Discussion Circle on the Court of Justice, *Final Report*, CONV 636/03, Cercle I/13, 25 March 2003, <<http://register.consilium.eu.int/pdf/en/03/cv00/cv00636en03.pdf>>. 15 January 2009.

¹⁶¹ Albi & Van Elsuwege (2004), at 761. Footnotes in the original excluded.

¹⁶² Cf. Weiler who argues *a contrario*: “If supremacy was constitutionally mandated before [the Draft EU Constitutional Treaty], it remains mandatory now despite the failure of the constitutional project. That is legal logic.” See J.H.H. Weiler, “The Essential (and Would-Be Essential) Jurisprudence of the European Court of Justice: Lights and Shadows Too,” in Pernice, Kokott & Saunders (2006), 117, at 119.

¹⁶³ As clearly shown in *Lisbon* case, the FCC was shown not wanting in inventiveness in this respect: *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.

¹⁶⁴ S. Tierney, “Reframing sovereignty? Sub-state national societies and contemporary challenges in the nation-state” (2005) 54 ICLQ 161.

finding common purpose among this group of elite courts in defining an increasingly identifiable, non-transferable “essential core of sovereignty,” the contours of which are *substantially* coalescing at similar national limits.

So in responding to the implications of constitutionalisation through annexing Declaration 17 to the Lisbon Treaty on the principle of primacy of EC law, the constitutional justices may be finally forced (due to activist and expansive interpretations by the ECJ) to articulate a common position on the essential core of sovereignty the exercise of which – at this stage of integration and public preparedness – cannot be transferred to the Union. Naturally, as with other matters European, a “common core” would still allow for the distinctiveness of national understandings at the penumbra, *e.g.*, the sensitive constitutional issue of abortion in Ireland – constitutional pluralism should therefore also be regarded as a principle or value of the EU, and not just the political and social pluralism in Art. 2 TEU. Indeed, the FCC has – to some extent – specified the contents of essential core of sovereignty in the 2009 *Lisbon* case.¹⁶⁵

d. The need for a new institutional matrix?

How then would the national constitutional courts (perhaps even with the concurrence of the ECJ) articulate such positions. No new judicial institutional arrangements are foreseen by the Lisbon Treaty to provide for an established forum at the European level between constitutional tribunals and the ECJ despite several earlier proposals, including a special Treaty Arbitration Court composed of representatives from national courts and one ECJ representative;¹⁶⁶ a “Common Constitutional Court” bringing together members of the Member State constitutional courts;¹⁶⁷ a European Supreme Court or a European Constitutional Tribunal;¹⁶⁸ a Union Court of Review;¹⁶⁹ a Constitutional Council;¹⁷⁰ or a European Conflicts Tribunal.¹⁷¹

¹⁶⁵ *Lisbon*, BVerfG 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. 249 and 251-252.

¹⁶⁶ S. Bross, “Bundesverfassungsgericht – Europäischer Gerichtshof – Europäischer Gerichtshof für Kompetenzkonflikte” (2001) *Verwaltungsarchiv* 425; and S. Bross “Überlegungen zum gegenwärtigen Stand des Europäischen Einigungsprozesses” (2002) EuGRZ 574.

¹⁶⁷ U. Di Fabio, “Ist die Staatswerdung Europas unausweichlich?” FAZ 2.2.2001, 8.

¹⁶⁸ K. Friedrich, “Bundesfinanzhof contra Europäischen Gerichtshof,” 1985 RIW 794; S. Magiera, in D. Merten (ed.), *Föderalismus und Europäische Gemeinschaften unter besonderer Berücksichtigung von Umwelt und Gesundheit, Kultur und Bildung*, 1990, 127.

¹⁶⁹ European Constitutional Group, *A Proposal for a European Constitution*, ECG, London (1993), Art. XV, at 39: <http://admin.fnst.org/uploads/1207/legal_text.pdf>. 10 January 2009.

¹⁷⁰ J.H.H. Weiler, “The European Union Belongs to its Citizens: Three Immodest Proposals” (1997) 22 EL Rev. 150, at 155. See also J.H.H. Weiler, U. Haltern & F. Mayer, “European Democracy and Its Critique” (1995) 18 *West European Politics* 4, at 38; J.H.H. Weiler *et al.*, *Certain Rectangular Problems of European integration*, Volume 1, European Parliament, Directorate General for Research, Political Series, W-24, European Parliament, Luxembourg (1996), at 14.

¹⁷¹ P. Lindseth, “Democratic legitimacy and the administrative character of supranationalism: the example of the European Community” (1999) 99 Colum. L Rev. 628, at 731ff.

Other fora may be considered under the auspices of which the constitutional courts of the EU Member States and the ECJ may meet although the value of such meetings are necessarily weaker in providing for binding resolutions than in the case of the “relationship of co-operation” or the formal establishment of a new EU judicial body, as noted in the preceding paragraph. Such existing structures include the Conference of European Constitutional Courts (although their meetings occur only once every three years, members are pledged to remain in regular contact)¹⁷² or through the Council of Europe’s European Commission for Democracy through Law (the “Venice Commission”)¹⁷³ which maintains a close watch “on the changes that constantly affect society and are reflected in its fundamental, that is its constitutional, rules.” Nevertheless, personal interactions between constitutional judges in the European Union context remain important.¹⁷⁴

e. Deliberative judicial supranationalism and ECJ references

In the absence of a formal EU institutional set-up or common decision (“deliberative judicial supranationalism”), it will be left to the ECJ (on a somewhat firmer Treaty footing) to renegotiate the currently subsisting settlement with the superior courts of the Member States. This is based on the provisions of Art. 267 TFEU and its interpretation by the ECJ. According to Art. 267(3) TFEU, “a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law ... shall [refer to] the Court of Justice”¹⁷⁵ questions concerning the interpretation of a provision of European law. The purpose of Art. 267(3) TFEU according to the ECJ¹⁷⁶ is “to prevent a body of national case law not in accord with the rules of Community law from coming into existence in any Member State.”

This obligation on courts of last instance is subject to the exceptions set out in the ECJ’s ruling in *CILFIT*,¹⁷⁷ building on previous case-law. *CILFIT* has accordingly sought to achieve a “reasonable balance” between the need to avoid unnecessary references and the need to ensure the uniform application of European law.¹⁷⁸ According to *CILFIT*, a last instance court (e.g., a constitutional court) is not required to make an Art. 267 TFEU reference: (1) where the question of interpretation is irrelevant; (2) where the ECJ has already ruled on the point (*acte éclairé*);¹⁷⁹ or (3)

¹⁷² <<http://www.confueconstco.org>>. 12 January 2009.

¹⁷³ <<http://venice.coe.int>>. 12 January 2009.

¹⁷⁴ See generally J. Limbach, “Globalization of Constitutional Law through Interactions of Judges” (2008) *Verfassung und Recht in Übersee* 51, at 52ff; and A. Voßkuhle, “Multilevel Cooperation of the European Constitutional Courts. *Der Europäische Verfassungsgerichtsverbund*” (2010) 6 *EuConst* 175, at 196-198.

¹⁷⁵ Emphasis supplied.

¹⁷⁶ Case 107/76 *Hoffmann-La Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] ECR 957, at para. 5.

¹⁷⁷ Case 283/81 *CILFIT v. Ministero della Sanità* [1982] ECR 3415.

¹⁷⁸ Opinion of Tizzano, AG in Case C-99/00 *Lyckeskog v. Åklagarkammeren i Uddevalla* [2002] ECR I-4839, at para. 56.

¹⁷⁹ Joined Cases 28-30/62, *Da Costa en Schaake* [1963] ECR 31.

where, in a case, the interpretation of European law is self evident, i.e., the point of law is clear and free from doubt (*acte clair*). However, the ECJ warned national courts that:¹⁸⁰

Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

This particular latter obligation – exemplifying judicial co-operation – has not been effectively monitored by the ECJ with the result that most constitutional courts have preferred to use the *CILFIT* exceptions as a means to refuse or avoid making references to the ECJ, without any explicit mention of other courts’ views. In this respect, Bobek has stated:¹⁸¹

There is no doubt that reference to the decisions of the courts of other Member States interpreting and applying Community law can be a valuable source of inspiration. Moreover, Article 10 EC [now Art. 4(3) TEU] and the duty of sincere and loyal cooperation entail not only a diagonal dimension (Community institutions–Member States) but also a horizontal dimension, which involves the authorities of the Member States, inclusive of courts. References in Member State courts to the decisions of the courts of the other Member States applying [European] law would thus border on the advisable use of comparative legal reasoning before national courts.

Nevertheless, Skouris readily acknowledges that the weak point of the preliminary ruling procedure is that:¹⁸² “where a national judge does not refer a question, individuals may not bring the matter before the Court.” Bobek has further suggested¹⁸³ that the ECJ could radically alter its *CILFIT* judgment and put the co-operation with national courts of last instance (including constitutional courts) on a new, more realistic basis by combining this modified duty to refer with the ECJ’s enforcement of such obligation.¹⁸⁴

¹⁸⁰ Case 283/81 *CILFIT v. Ministero della Sanità* [1982] ECR 3415, para. 16, at 3430.

¹⁸¹ M. Bobek, “On the Application of European Law in (Not Only) the Courts of the New Member States: ‘Don’t Do as I Say’?” (2007-2008) 10 *CYELS* 1, at 5.

¹⁸² V. Skouris, “Self-Conception, Challenges and Perspectives of the EU Courts,” in Pernice, Kokott & Saunders (2006), 19, at 25-26.

¹⁸³ M. Bobek, *Porušení povinnosti zahájit řízení o předběžné otázce dle článku 234 (3) SES [Violation of the duty to make a preliminary reference under Article 234(3) EC Treaty]*, (C.H. Beck, Prague, 2004), at 125-128 and at 165.

¹⁸⁴ A reconsideration or refinement of *CILFIT* has been propounded by a number of Advocates General: Opinion of Jacobs, AG in Case C-338/95 *Wiener v. Hauptzollamt Emmerich* [1997] ECR I-6495, at para. 54; Opinion of Tizzano, AG in Case C-99/00 *Lyckeskog v. Åklagarkamreren i Uddevalla* [2002] ECR I-4839, at para. 75; Opinion of Stix-Hackl, AG in Case C-495/03 *Intermodal Transports BV v. Staatssecretaris van Financiën* [2005] ECR I-8151, at paras. 100-104; and Opinion of Ruiz-Jarabo Colomer, AG in Case C-461/03 *Gaston Schul Douane-expediteur BV v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513, at para. 58 and generally at paras. 49-59.

f. Transjudicial communication in the era of Lisbon

In any event, with the entry into force of the Lisbon Treaty a quite different situation arises with confirmation – in an annexed Declaration – of European law primacy (and at least accepted by the EU Member States in the Council of Ministers), and the advantages for activist judicial interpretation by the ECJ – if given the opportunity. Constitutional courts may therefore wish to avoid presenting the ECJ with opportunities of further eroding their “national sovereignty” in the face of Lisbon-based integration and continue their well-established practice of not sending references to the ECJ under Art. 267 TFEU, unless the content of the question to be ruled on falls outside their understanding of the essential core of national sovereignty.¹⁸⁵ According to this scenario, it would be likely that domestic constitutional courts might at some stage be forced to test to the full the limits to the concept in the Preamble to the Treaty on European Union (post Lisbon) of the Member States “deepening the solidarity between their peoples while respecting their history, their culture and their traditions.”

Yet, the strength of transjudicial communication cannot be ignored – indeed the prevention of conflicts through co-operation and interaction both vertical (between ECJ and national courts) and horizontal (between national courts in the EU) is strongly advocated by Albi & Van Elsuwege.¹⁸⁶ In fact the signs of this change in the relationships, through vertical and horizontal transjudicial communication, was really heralded by the Austrian Constitutional Court’s references to the ECJ,¹⁸⁷ and the German FCC’s human rights decisions in 2000 and 2001¹⁸⁸ and taken up by the Italian Constitutional Court¹⁸⁹ and Spanish Constitutional Tribunal¹⁹⁰ in respect of the EU Charter on Fundamental Rights. The reference to the ECJ from the Italian Court where it recently took a further step along the way¹⁹¹ but this progress now seems to have reached an important juncture (or rather possibly impasse) with the ruling of the FCC in *Lisbon*.¹⁹²

¹⁸⁵ As has happened with the Austrian Constitutional Court’s requests, starting with Case C-143/99 *Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten* [2001] ECR I-8365.

¹⁸⁶ Albi & Van Elsuwege (2004), at 762.

¹⁸⁷ Case C-143/99 *Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten* [2001] ECR I-8365; Joined Cases C-465/00 *Rechnungshof v. Österreichischer Rundfunk* [2003] ECR-I 4989; and Case C-171/01 *Wählergruppe “Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG” v. Bundesminister für Wirtschaft und Arbeit* [2003] ECR I-4301.

¹⁸⁸ *Banana Market II*, 7 June 2000, 2 BvL 1/97: BVerfGE 102, 147; (2000) 21 HRLJ 251; and *Rinke*, 1 BvR 1036/99, 9 Januar 2001: (2001) 54 NJW 1267.

¹⁸⁹ Corte cost. 24 aprile 2002, n. 135; Corte cost. 24 ottobre 2002, n. 445. See F. Astengo, “The Europeanisation of the Italian Constitutional Court” (2004) 26 *Journal of European Integration* 125, at 134-135.

¹⁹⁰ STC 290/2000 de 30 de noviembre 2000; STC 53/2002 de 27 de febrero 2002: <<http://www.tribunalconstitucional.es>>.

¹⁹¹ Corte cost. Ordinanza No. 103/2008: <<http://www.cortecostituzionale.it>>. F. Fontanelli & G. Martinico, “Cooperative Antagonists – The Italian Constitutional Court and the Preliminary Reference: Are We Dealing with a Turning Point?,” *Eric Stein Working Paper* No. 5/2008, Czech Society for European and Comparative Law, Prague (2008): <<http://www.ericsteinpapers.eu>>. 12 February 2009.

¹⁹² *Lisbon*, BVerfG 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.

C. A CONTROVERSIAL PROPOSAL

1. Introduction

Within the broader context, the present researcher has noted, with great interest, the development of constitutional discourse during the period of preparing this thesis. Recognition of multi-level governance and constitutional pluralism in the EU, and the often-linked discussion on the evolution of sovereignty from being centred on the nation-state to its expression as that of the people, or arguably the peoples, of the Union, dominates current legal literature.¹⁹³

In many ways, such useful analyses reinforce the non-static nature of sovereignty and confirm this author's view that the *sui generis* nature of the EU, and its relations *vis-à-vis* its constituent units, are still in a process of (re-) negotiation. Indeed it is within the matrix of pluralist European constitutionalism that national constitutional court judges – in being bound to their domestic constitutional oaths and the requirement of Union loyalty – must act. In such way, the political morality of constitutional justices is bound by and limited by the matter of EU constitutionalism and its requirements and this political morality is subject to the increasing integrative impulses in the Union.

Yet one matter does concern the present author – that is, the decline in popular participation in elections (whether subnational, national or European parliamentary¹⁹⁴) and even in referenda.¹⁹⁵ While this trend is more noticeable in some EU Member States than others,¹⁹⁶ it could be argued that “popularising” sovereignty is no more than some covert re-assertion of executive powers – at the subnational, national or European level – at the expense of the parliamentary ones. With the changing role of national and “multinational” parliaments since the latter part of the twentieth century,¹⁹⁷ popular sovereignty may be considered as being only one mode of exercising control over the executive, at whatever level.

¹⁹³ B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition,” in Slaughter, Sweet Stone & Weiler (1998), at 304; Verhoeven (2002), at 292; Anneli & Van Elsuwege (2004), at 758-759.

¹⁹⁴ European Parliament elections, 10-13 June 2004: Overall percentage of eligible voters casting a ballot: 45.7%. For country-by-country breakdown, see <http://www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/index.html>. 25 June 2006.

¹⁹⁵ The referendum held on 12 April 2003 on Hungarian accession to the EU, was approved by 83.76% of votes cast, with a turnout of 45.62%. In Ireland, the Nice Treaty was put to two referenda: (i) the referendum held on 7 June 2001 resulted in a “No” vote of 53.8%, with a turnout of 34.7%; and (ii) at the second referendum, on 19 October 2002, Irish electors approved the Treaty by 62.89% of votes cast, with a turnout of 48.45%.

¹⁹⁶ A. Guyomarch, “The June 1999 European Parliament Elections” (2000) 23 West European Politics 161; M. Franklin, “How Structural Factors cause turnout variations at European Parliament Elections” (2001) 2 European Politics 309; and A. Siaroff, “Elections to the European Parliament: Testing Alternative Models of what they indicate in the Member Nations” (2001) 23 JEI/RIE 237.

¹⁹⁷ A. F. Tatham, “The articulation of different parliaments, their Inter-institutional relations in complex political unions: European Union, United States, Mercosur and the Russian Federation” (1998) 18 PER 143, at 203-208; P. Norton, *Parliament in the 1980s*, Blackwell, Oxford (1985).

Kumm & Comella identified – in their study on the EU Constitutional Treaty – the continuing problem of the democratic deficit and its destabilising effect on legitimacy: as with the Constitutional Treaty, the Lisbon Treaty also does at least partially try to address this problem in the field of constitutional matters and national sovereignty by allowing, under Lisbon Treaty, Protocol A.2,¹⁹⁸ for a process by which national parliaments may challenge the validity of European law. Such indirect democratic participation in the law-making process appears to be cumbersome in its operation and hardly appears to encourage its frequent use.

While not seeking to detract from the many learned writings in this area, this writer considers that a more “rights-based” approach could add a further, positive dimension to the European constitutional discourse and provide for a more direct participation of citizens in the continuing constitutional dialogue: such approach will now be explained.

In a way, this proposal will “call the bluff” of the FCC in the *Lisbon* case. Having basically called on its own legislature to provide new proceedings of *ultra vires* review and identity review to rule on the progress or otherwise of European integration,¹⁹⁹ this proposal aims to put in more concrete and realistic form (though perhaps patently provocative) the FCC’s call for a “*Kooperationsverhältnis*” in the *Maastricht* case²⁰⁰ and for openness to European law (“*Europarechtsfreundlichkeit*”) from the *Lisbon* ruling.²⁰¹

2. Proposed mechanism

a. Background

One of the main motors for the ECJ, in creating the constitutional architecture of the Union, was the use it made of the preliminary reference procedure. As such, Art. 267 TFEU is the most important procedural rule of the Treaty: it facilitates, *inter alia*, access to justice by making it clear that European law is to be applied not only by the ECJ but also by national courts, thus enabling citizens to enforce their EU rights in national jurisdictions.²⁰² The reference procedure thus also facilitates dialogue between the national courts and the ECJ. This judicial dialogue, somewhat favoured in the ECJ-lower national court relationship, allowed the ECJ great leeway in moulding the Union and its essential

¹⁹⁸ Lisbon Treaty, Protocol A.2 on the Application of the Principles of Subsidiarity and Proportionality, Art. 8 (2007 OJ C306/150):

“The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article 230 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.”

¹⁹⁹ *Lisbon*, BVerfG 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. 240-241.

²⁰⁰ *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155, at 178; [1994] 1 CMLR 57, at 81-82.

²⁰¹ *Lisbon*, BVerfG 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, paras. 225 and 240.

²⁰² G. Tridimas & T. Tridimas, “National courts and the European Court of Justice: A public choice analysis of the preliminary ruling procedure” (2004) 24 Intl Rev. L & Econ. 125, at 126-127.

principles such as European law supremacy and direct effect. In talking of the spirit of the Art. 267 TFEU reference procedure, Pescatore observed.²⁰³

The preliminary-ruling procedure is based on a division of tasks between the national court and the Community Court, on a partnership between them in the discharge of a function which is in the common interest, namely the proper application of Community law throughout the Community. Without establishing any hierarchy between the national courts and the Court of Justice, this procedure makes it possible, by the interaction of question and answer, to guarantee the uniformity of Community law throughout the Community as regards its interpretation and the appraisal of the questions of validity which may arise in its application. The Court has always endeavoured to ensure that this dialogue can be undertaken and pursued in a spirit of cooperation, this being possible only if the cooperation is mutual, this is to say, if the national court on the one hand and the Community court on the other are aware of their respective functions in the accomplishment of a task which is in the common interest of the Community as a whole.

The spirit of co-operation referred to in the extract above can only exist if both sides respect the jurisdiction of the other. Few national constitutional courts, however, have actually entered that dialogue directly,²⁰⁴ and certainly not the German, Hungarian or Polish tribunals.

If popular sovereignty is being denuded either due to encroaching executive powers or due to lack of legitimacy through decreasing electoral participation, the possible concept underlying this present research thesis is the “resort to court.” Kumm & Comella had earlier articulated a convincing interpretation of the EU Constitutional Treaty to allow for more and better focussed “transjudicial dialogue” while allowing national constitutional courts to “opt out” of ECJ rulings/European law, injurious to specific and clear national constitutional principles. While these commentators discussed rapprochement between the ECJ and domestic constitutional courts in a “European constitutional order” and offered guidance as to the conduit between these courts, nevertheless they missed the point of how to evolve this “transjudicial dialogue,” “deliberative judicial supranationalism” or “relationship of co-operation.”

²⁰³ P. Pescatore, *References for Preliminary Rulings under Article 177 of the EEC Treaty and Co-operation between the Court and National Courts*, Court of Justice, Luxembourg (1986), at 10-11.

²⁰⁴ These courts are (i) the Austrian Constitutional Court: Case C-143/99 *Adria-Wien Pipeline GmbH v. Finanzlandesdirektion für Kärnten* [2001] ECR I-8365; Joined Cases C-465/00 *Rechnungshof v. Österreichischer Rundfunk* [2003] ECR-I 4989; and Case C-171/01 *Wählergruppe “Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG” v. Bundesminister für Wirtschaft und Arbeit* [2003] ECR I-4301; (ii) the Belgian Constitutional Court: Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* [2007] ECR I-3633; Case C-305/05 *Ordre des barreaux francophones and germanophone v. Conseil des Ministres* [2007] ECR I-5305; Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683; Case C-73/08 *Bressol v. Gouvernement de la Communauté française* [2010] ECR, nyr.; and Case C-306/09 *I.B.* [2010] ECR, nyr.; (iii) the Italian Constitutional Court: Case C-169/08 *Presidente del Consiglio dei Ministri v. Regione Sardegna* [2009] ECR I-10821; and (iv) the Lithuanian Constitutional Court: Case C-239/07 *Sabatauskas* [2008] ECR I-7523.

b. Stakeholder participation

Although extremely radical, might it be possible to open up the discourse at the national level and the European level, through court action? The Lisbon Treaty is not the end station, the continued evolution of the Union based on the rule of law, democracy, and protection of fundamental rights – at European and national level – will need to be further negotiated. Even the ECJ, as Weiler notes,²⁰⁵ although it has repeatedly stated that European citizenship is destined to become the fundamental status of the Union’s individual members, “has steadfastly limited its jurisprudence to the realm of free movement and to an apolitical concept of citizens. There is much scope for a new essential jurisprudence in this area.”

For citizens of EU Member States, periodic parliamentary elections and occasional referenda are unable to fill the lacunae adequately. Could not an opening up of the European constitutional order to litigation –in the same way as the Art. 267 TFEU reference procedure has achieved – at the national and supranational levels actually provoke the negotiation where EU citizens could exercise more control over or more participation in providing input into these negotiations?

Choudhry has articulated the notion²⁰⁶ of migration of constitutional ideas and has argued that these migrations do not necessarily mean a one-way traffic from West to East. His reasoning is one with which the present author agrees and identifies the proposal set out below with Choudhry’s philosophy on championing migration from “East” to West. The proposal is admittedly radical and invests EU citizens, national constitutional courts and the ECJ with greater degrees of responsibility in the discourse on the continued evolution of the concept of sovereignty at both national and European levels. The jurisdiction of neither the FCC nor the CT includes the possibility of the *actio popularis* available before the HCC.²⁰⁷

Yet in all these states, the understanding of the “essential core of sovereignty” or “constitutional identity” – what Dashwood has referred to as the “conservatory elements of statehood”²⁰⁸ – has come from national constitutional court case decisions on the application of the rule of law, democracy, separation of powers or fundamental human rights to concrete cases (usually on reference from an ordinary court) or on the limitations to the transfer of the exercise of national powers to the EU in these areas. Could not the broadening of standing at the national level before the domestic constitutional court, beyond either ordinary judges or specific political actors to include parties in the case before the ordinary court or – more controversially – any EU citizen domiciled in that particular Member State, open up a discourse beyond those of national executives and parliaments? Might this reinforce the evolution of the very nature of popular sovereignty for the twenty-first century?

Needless to say, unless some limits are imposed, the use of judicial means to “court” constitutional dialogue between European and national constitutional judges could easily overload the system and create insupportable delays in proceedings. The technology definitely exists to allow for this expansion of court activity but adaptation of present procedures and sufficient skilled staff would be necessary: the costs would, however, be much less than those entailed in the setting up of a new institution.

²⁰⁵ Weiler (2006), at 127.

²⁰⁶ 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 12.

²⁰⁷ See above at Chapter Four, point A.2.

²⁰⁸ Dashwood (1998), at 201-202.

3. The *actio popularis europae*

a. *Basis of the idea*

By putting together several ideas – previously proposed²⁰⁹ –, it is possible to design a national-level *actio popularis europae* (in the spirit of the Hungarian *actio*),²¹⁰ a constitutional reference which could eventually be sent to the ECJ. The use of this procedure would be available to natural and legal persons in EU Member States to raise a claim directly before their constitutional court on an issue of European law on the grounds that an essential element of national sovereignty was being impinged upon by an EU legal provision.

How could the Treaty basis be formulated either as an amendment to Art. 267 TFEU or as a totally new provision?²¹¹ Such provision might be worded:

- (1) Where the court or tribunal of a Member State against whose decision there is no judicial remedy under national law is a constitutional court or a supreme court or chamber thereof exercising final constitutional jurisdiction in that Member State, any natural or legal person in proceedings before such court or tribunal, either directly or indirectly as a party to a case referred from another court, may request a European constitutional reference to the Court where such person claims infringement, actually or potentially, by EU law of the constitutional identity of that Member State.
- (2) The conditions for the exercise and use of the procedure for a European constitutional reference shall be set down in the Statute and Rules of Procedure of the Court of Justice of the European Union.

Naturally, the present author is no legislative draftsman but the suggested wording above might at least encourage further discourse as to how such a provision might be formulated in the TFEU.

The introduction of the European constitutional review would clearly also necessitate amendments to both the Statute of the Court of Justice of the European Union, Protocol (No. 3) to the TEU, TFEU and EAEC as well as to the Rules of Procedure of the Court of Justice. Changes to the Statute would need to be secured by the ordinary legislative procedure²¹² and for the Rules of Procedure by the Court of Justice with the approval of the Council.²¹³ While not proposing the wording of such amendments, the discussion below highlights some of the issues to be considered.

²⁰⁹ European Court of Justice & Court of First Instance, *The future of the judicial system of the Union*, Discussion Paper presented to the Council of the Ministers of Justice, May 1999: <europa.eu.int/cj/en/pres/avenge.pdf>. 15 April 2000. Bobek calls for a new type of appeal to be introduced – his so-called “complaint of breach of Community law” – which would enable appeals against decisions of national courts of last instance to EU courts: Bobek (2004), at 166.

²¹⁰ See above at Chapter Four, point A.2.

²¹¹ In either case, the ordinary revision procedure to amend the Treaties under Art. 48(2)-(5) TEU would need to be employed. See M. Dougan, “The Treaty of Lisbon 2007: Winning Minds, Not Hearts” (2008) 45 CML Rev. 617, at 689-690.

²¹² Art. 281 TFEU: see R. Barents, “The Court of Justice after the Lisbon Treaty” (2010) 47 CML Rev. 709, at 711.

²¹³ Art. 254 TFEU.

b. Prior filtering out – and a green light

This national *actio popularis europae* would be subject to a filtering exercise before the national constitutional court to ensure that the expedited “constitutional reference” is appropriate in the case. In the context of Art. 267 TFEU (ex-Art. 234 EC) references, Jacobs AG in *Wiener*²¹⁴ noted that: “a reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union.”

In filtering these national petitions (and so encouraging national constitutional courts to take responsibility in making references), what criteria are there to assist such determination? The ECJ, in respect of Art. 267 TFEU references, has itself rejected such references if the questions posed are inadequate,²¹⁵ or are clear (*acte clair*) or have already been clarified (*acte éclairé*)²¹⁶ while Jacobs AG suggested again in *Wiener*²¹⁷ that a reference would not be appropriate – “where there is an established body of case law which could readily be transposed to the facts of the instant case; or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case.”²¹⁸

In such circumstances, the constitutional court could refuse to make a reference and decide the matter for itself. Moreover, if the constitutional court considers that no issue concerning the essential core of national sovereignty is raised in the petition, then it would reject the petition. Nevertheless, following Bobek,²¹⁹ it would be necessary – in the absence of Treaty changes – for the ECJ to revise its *CILFIT* criteria so as to “encourage” the making of these types of references. Might it be possible to note that where a provision of European law has a “sufficiently serious” impact on national constitutional law, the constitutional court should refer? “Sufficiently serious” would, of course, be subject to interpretation by the ECJ in order to guide constitutional courts. Such amendment of *CILFIT* might be accompanied by development or revision of the *Köbler*²²⁰ case-law so as to provide a real and effective remedy against refusals to refer which the ECJ could properly monitor.

Where, on the contrary, the constitutional court accepts that a national sovereignty point is raised, it would be required to hear oral argument on the matter before it. Following such argument, an expedited reference²²¹ (suitably adapted) would then be made. In order to ensure a proper judicial

²¹⁴ Case C-338/95 *Wiener v. Hauptzollamt Emmerich* [1997] ECR I-6495, at 6502. See K. Lenaerts, “The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited,” in Pernice, Kokott & Saunders (2006), 211, at 219-220; and C. Timmermans, “The European Union’s Judicial System” (2004) 41 CML Rev. 393, at 402-403.

²¹⁵ Joined Cases C-320-322/90 *Telemarsicabruzzo SpA v. Circostel* [1993] ECR I-393.

²¹⁶ Case 283/81 *CILFIT v. Ministero della Sanità* [1982] ECR 3415.

²¹⁷ Case C-338/95 *Wiener v. Hauptzollamt Emmerich* [1997] ECR I-6495, at 6502.

²¹⁸ Jacobs AG continued ([1997] ECR I-6495, at 6503) that if a reference were still made in such a case, the ECJ should do no more than call the national court’s attention to the previous body of law and leave it to the national court to decide the issue raised.

²¹⁹ Bobek (2004), at 125-128 and at 165.

²²⁰ Case C-224/01 *Köbler v. Austria* [2003] ECR I-10239.

²²¹ On the basis of the Statute of the Court of Justice (OJ 2010 C177/1), the Rules of Procedure of the ECJ, Art. 62a, enable the President of the Court to decide that “that a case is to be determined pursuant to an expedited procedure

dialogue, the referring constitutional court would need to provide all the information that the ECJ would need to take into account in its ruling.²²² The preliminary questions would therefore need to be formulated in such a way as to allow the ECJ to grasp fully the essence of the question to which the referring court needs an answer in order to be able to render judgment. The referring court would also have to explain the nature and importance of the national constitutional traditions which were at stake, in order to make the ECJ aware of the sensitivity of the question referred. For its part, the referring national constitutional court would also be required to attach to the reference its own suggested answer to the petition as happens in Germany, where a reference from a lower court to the FCC is accompanied by the lower court's own proposed answer to the question referred.²²³

This option – in the context of European law – is known as the “green light” procedure, according to which national courts would be encouraged (though not obliged) when making an Art. 267 TFEU reference to include their own proposals for the answer to be given. The ECJ would then be able to dispose of the case by giving the “green light” to such national judicial proposals.²²⁴ Such procedure “would seem to be in keeping with the design of the preliminary ruling procedure as a dialogue between courts. The national courts, on their part, would be inspired to play a greater role.”²²⁵ This proposal has also been proffered in the Discussion Paper of the ECJ²²⁶ as well as in the Due Report.²²⁷

In a milder form, the green light procedure is already allowed to national courts by the ECJ. First, under the Rules of Procedure of the Court of Justice,²²⁸ Art. 104b(1) governing the use of the urgent preliminary ruling procedure in the area of freedom, security and justice, it provides: “The national court or tribunal ... shall, in so far as possible, indicate the answer it proposes to the questions referred.” While, secondly, in its guidance for Art. 267 TFEU (ex-Art. 234 EC) references, the ECJ suggests in general that:²²⁹ “the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling.”

derogating from the provisions of these Rules, where the particular urgency of the case requires the Court to give its ruling with the minimum of delay.”

²²² E. Cloots, “Germs of Pluralism Judicial Adjudication: *Advocaten voor de Wereld* and Other References from the Belgian Constitutional Court” (2010) 47 CML Rev. 645, at 669.

²²³ S. Michalowski & L. Woods, *German Constitutional Law – the protection of civil liberties*, Ashgate/Dartmouth, Aldershot (1999), at 40-41.

²²⁴ P. Van Dijk (chmn.), “Report of the working group on the preliminary rulings procedure,” Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union and Network of the Presidents of the Supreme Judicial Courts of the European Union, The Hague (2007), at 8: <www.juradmin.eu/seminars/DenHaag2007/Final_report.pdf>. 14 October 2008.

²²⁵ Van Dijk (2007), at 8.

²²⁶ European Court of Justice & Court of First Instance, *The future of the judicial system of the Union*, Discussion Paper presented to the Council of the Ministers of Justice, May 1999, Chapter IV, 3(ii), at 24: <europa.eu.int/cj/en/pres/avenge.pdf>. 14 October 2008.

²²⁷ O. Due (chmn.), “Report by the Working Party on the Future of the European Communities’ Court System” (“Due Report”), 19 January 2000, Part II A, 2c: <http://www.europa.eu.int/en/comm/sj/due_en.pdf>. 14 October 2008.

²²⁸ Court of Justice, Rules of Procedure of the Court of Justice: OJ 2010 C177/01.

²²⁹ Court of Justice, “Information Note on references from national courts for a preliminary ruling”: 2005 OJ C143/01, para. 23.

Such reasoned answer by the referring constitutional court has a further importance – were the ECJ to decline the reference, the national constitutional court’s answer would become a final judgement after the lapse of a few months’ limitation period. This “judgement *nisi*” solution,²³⁰ provided the limitation period was on a uniform EU-wide basis in order to give the ECJ sufficient time to assess the constitutional reference, would reduce the delays now experienced in the current Art. 267 TFEU proceedings. It would have the utility of becoming a final decision either on express rejection of the petition by the ECJ or after the end of the limitation period, and in this way add to the *corpus* of decisions helping to determine the contours of the essential core of national sovereignty throughout the Union. This would amount to another national-level contribution to the process of transjudicial communication and judicial constitutional dialoguing in the EU. As Póitares Maduro has argued,²³¹ national decisions on European law ought not to be seen as separated national interpretations and applications of that law but rather as decisions to be integrated into a system of law requiring compatibility and coherence. In this sense, such national decisions would be apt to enter into the deliberations of fellow constitutional courts judges, through the process of transjudicial communication or migration of constitutional ideas, a point again further supported by Póitares Maduro when he states:²³²

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. This 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. At the same time, we should improve European legal pluralism by raising in each legal order the awareness of the constitutional boundaries of the other legal orders.

Koutrakos underlined the point,²³³ when discussing the urgent preliminary review procedure, that judges had to be given time to reflect on the questions put before them, to assess the arguments of a number of actors interested in the answers, and to consider the wider ramifications of their conclusions. Such behaviour, he noted,²³⁴ was “an essential prerequisite for the proper administration of justice which [was] all the more significant in the context of a multilayered and decentralised judicial system set out under EU law.”

²³⁰ Dashwood & Johnston (2001), at 68-69.

²³¹ M. Póitares Maduro, “Europe and the Constitution: What if this is As Good As It Gets?” 2005/5 *Webpapers on Constitutionalism & Governance beyond the State*, Department of European Studies and Modern Languages, University of Bath (2005), at 24: <www.bath.ac.uk/esml/conWEB>. 9 April 2009.

²³² Póitares Maduro (2005), at 24.

²³³ P. Koutrakos, “Speeding up the preliminary reference procedure – fast but not too fast” (2008) 33 *EL Rev.* 617, at 618.

²³⁴ Koutrakos (2008), at 618.

c. Before the ECJ

(i) Unique written procedure

Where however the ECJ accepts the constitutional reference, then it is proposed to have only a written procedure before the Court. This is inspired by the precedent under former Art. 68(3) EC in relation to visa, immigration and asylum policy, whereby the former Art. 109a of the Rules of Procedure of the Court of Justice (both provisions have now been repealed by the Lisbon Treaty) which provided for a completely written procedure.²³⁵ In order to ensure the broadest available basis for rendering the ECJ ruling, an Opinion by an Advocate General would be prepared with an express requirement that s/he should produce a comparative analysis of the point raised in the constitutional reference in all EU Member States.

In order to render the procedure less cumbersome, the ECJ would accordingly be permitted to deliver a reasoned ruling without the need for oral argument. Member State governments and EU institutions would retain the right to intervene in proceedings but only in written form and within set temporal parameters. Due to the written nature of this constitutional reference procedure, it would therefore be essential to ensure that oral pleadings must take place before the national constitutional court.

(ii) Garnering legitimacy and co-operation

The responsibility for a reasoned ruling of the ECJ on a constitutional reference could not be devolved to a chamber of the Court: since the greatest amount of legitimacy would be needed to have the ruling accepted by all national constitutional courts, only the full Court (or possibly a Grand Chamber)²³⁶ would retain the power to make the ruling on a constitutional reference.

Moreover,²³⁷ pluralist decision-making requires the ECJ to show respect for national constitutional traditions, especially when the referring constitutional court has stressed their importance in its reference. As Clouts observed:²³⁸ “Only by showing that making a preliminary reference does not equal loss of fundamental rights protection and national identity, can the ECJ ease the fear many constitutional courts have of entering judicial dialogue and, hence, of making constitutional pluralism true in practice.”

Under present rules, creation of a constitutional reference procedure, based on either a revision of Art. 267 TFEU or a new Treaty Article, and new Articles in the Statute and the Rules of Procedure of the CJEU, would still need the agreement of all EU Member States.²³⁹ How much better it would be, to

²³⁵ Except where a Member State or EU institution requested otherwise under former Rules of Procedure of the ECJ, Art. 109a(3) (again repealed by the Lisbon Treaty).

²³⁶ TEU, TFEU and EAEC, Protocol (No. 3) on the Statute of the Court of Justice of the European Union, Art. 16: OJ 2010 C83/210.

²³⁷ Clouts (2010), at 670-671.

²³⁸ Clouts (2010), at 670.

²³⁹ Revision of TFEU or new TFEU Article: Art. 48(2)-(5) TEU; amendments to the Statute of the Court of Justice, Protocol (No. 3) to TEU, TFEU and EAEC: Art. 281 TFEU. Under TFEU Art. 281, the ordinary legislative procedure is

maintain and enhance the co-operative relationship, to allow the ECJ to negotiate with national constitutional and supreme courts to agree the constitutional reference procedure – while still allowing the European Parliament and the Council of Ministers the power to enact such measures (but through a qualified-majority vote).

Any new procedure would have procedural and substantive repercussions at the national level. For some courts and institutions, changes would need to be made to their jurisdictional rules to allow (or even promote) references to the ECJ. And there still remains the need to address the constant problem of national superior (constitutional) courts refusing to make references to the ECJ or avoiding them.²⁴⁰

4. Establishment of the principle of lawful judge by the ECJ

a. “Plan B” – a weaker form of judicial co-operation

In order to ensure the judicial discourse/negotiation is truly developed, reluctance on the part of national constitutional courts to refer to the ECJ might have to be rectified by a new procedural instrument – like the one discussed above – well beyond the terms of the Lisbon Treaty.

Nevertheless, if this proposed “Plan A” were not to be considered, could the ECJ of its own volition compose and execute a “Plan B”? Perhaps the ECJ could re-examine or examine more deeply its already existing case-law for inspiration. In this sense, one might be able to argue for a combination of the development of the *Köbler* jurisprudence with recognition of another fundamental rights principle, viz. that of the lawful judge.

b. Köbler

On the one hand, the limits of the *Köbler*²⁴¹ decision still need to be explored by the ECJ and national courts: this ruling²⁴² decided that the principle that Member States were obliged to make good damage caused to individuals by infringements of European law for which they were responsible was also applicable where the alleged infringement stemmed from a decision of a court adjudicating at last instance where the rule of European law infringed was intended to confer rights on

applicable and, generally speaking, unanimity is no longer required in the Council of Ministers. There have been proposals that, like the ECtHR, the ECJ should be able to decide its own Rules of Procedure: see, e.g., P. Van Dijk (chmn.), “Report of the working group on the preliminary rulings procedure,” Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union and Network of the Presidents of the Supreme Judicial Courts of the European Union, The Hague (2007), at 6: <www.juradmin.eu/seminars/DenHaag2007/Final_report.pdf>. 14 October 2008.

²⁴⁰ Komárek (2005) 42 CML Rev. 9, at 10; D. Anderson & M. Demetriou, *References to the European Court*, 2nd ed., Sweet & Maxwell, London (2002), at 177-180.

²⁴¹ Case 224/01 *Köbler v. Austria* [2003] ECR-I 10239.

²⁴² A. Botella, “La responsabilité du juge nationale” 2004 RTDE 40; G. Anagnostaras, “The Principle of State Liability for Judicial Breaches: The Impact of EC Law” (2001) 7 EPL 290; P. Wattel, “Köbler, Cilfit and Welthgrove: We can’t go on meeting like this” (2004) 41 CML Rev. 177; M. Breuer, “State liability for judicial wrongs and Community law: the case of Gerhard Köbler v Austria,” (2004) 29 EL Rev. 243.

individuals, the breach was sufficiently serious and there was a direct causal link between that breach and the loss or damage sustained by the injured parties.²⁴³ In particular the ECJ stated that:

In order to determine whether that condition is satisfied [that the breach of EC law was sufficiently serious], the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and *non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC*.

In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see to that effect *Brasserie du Pêcheur* and *Factortame...*). [Emphasis supplied.]

Köbler, subsequently confirmed in *Traghetti del Mediterraneo*,²⁴⁴ could in fact prove to be a stimulus for more (constitutional) references to the ECJ since it would be economically more efficient to make a reference to the ECJ than subsequently to be held to have failed to apply EU law correctly and have the judicial administration be subject to a damages claim.

The ruling in *Köbler* has not been universally welcomed. Komárek²⁴⁵ considered that by permitting claimants to sue Member States for judicial breaches committed vis-à-vis European law by national court partners to the ECJ in its judicial dialogue, the whole idea of the co-operation relationship might be damaged. Wattel²⁴⁶ regarded *Köbler* as “a source of legal uncertainty, procedural entanglements and even more arrears in the decisions of cases.” Cartabia was even more strident when she concluded:²⁴⁷ “The evolution of State liability as exemplified in the decisions *Köbler* and *Traghetti del Mediterraneo*, should solicit an overruling by the constitutional courts, preferably before facing the unpleasant hypothesis of requests for claims for damages on the part of individuals due to the constitutional courts’ behaviour.”

It is evident that the supreme (and constitutional courts) of the Member States are exceedingly wary of the full implications of the *Köbler* ruling, and little as regards national (superior) court case-law has dealt with the its application, even in a domestic situation. Thus while considering it as a useful instrument in “encouraging” references from national constitutional courts, the actual impact of *Köbler* still remains to be explored further at both national and ECJ level.

²⁴³ Basically repeating its previous formula adopted in Joined Cases 46 and 48/93 *Brasserie de Pêcheur SA v. Germany* [1996] ECR I-1029. J. Steiner, “The limits of State Liability for Breach of European Community Law” (1998) 4 EPL 69; P. Craig, “Once more unto the breach: the Community, the state and damages liability” (1997) 113 LQR 67.

²⁴⁴ Case C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2006] ECR I-5177.

²⁴⁵ Komárek (2005), at 22.

²⁴⁶ Wattel (2004), at 179.

²⁴⁷ M. Cartabia, “Taking Dialogue Seriously’ The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union,” *Jean Monnet Working Paper* No. 12/07, at 33: <<http://www.jeanmonnetprogram.org/papers/07/071201.html>>. 21 January 2009.

c. Lawful judge – a strong possibility

On the other hand, in order to complement *Köbler*, refusal or avoidance to refer by a constitutional court²⁴⁸ could see the extension of the right to a lawful judge throughout the EU Member States and might be interpreted by the ECJ as a general principle of law. This ability to develop general principles of law has been present in the Union system since its inception because it was apparent, at a very early stage, that the ECSC Treaty was not comprehensive enough to deal with the cases that were coming before the ECJ, in as much as specific provisions were not always capable of providing adequate solutions to the problems to be addressed by the Court. Thus the ECJ was faced with a situation where it was compelled either to formulate its own general principles or adopt certain of those general principles used by the Member States.²⁴⁹

The legal basis for the incorporation of general principles into European law is slim, resting precariously on three Articles: the wording of Art. 267 TFEU²⁵⁰ and Art. 19 TEU²⁵¹ allow the ECJ to go beyond the Treaties to create/develop Union law. Moreover, while Art. 340(2) TFEU²⁵² purports to deal only with liability of the Union, it provides some direction for the Court as to where it should look for these non-codified rules of Union law. The ECJ has clearly used this statement as its basic guideline in developing a considerable judge-made element in Union law.

That having been said, some principles have been developed primarily with reference to international law.²⁵³ Some are principles not recognised in the national legal systems of all EU Member States. Even when such principles are present throughout the Union, the form in which they are adopted by the ECJ is usually based primarily on the concept as it exists in one Member State in particular. Regardless of the source of its derivation, once a general principle is adopted by the ECJ, it becomes an independent rule of Union law and leads a separate existence from that of the same principle in the legal system or systems which spawned it.

²⁴⁸ On the issue of a superior court not abiding by its duty to refer, see Case C-453/00 *Kühne & Heitz NV v. Productschap voor Pluimvee en Eieren* [2004] ECR I-837, at para. 18 in which the ECJ stated: “That question is justified in the light of, in particular, Article 234 EC [now Art. 267 TFEU], according to which a national court against whose decision there is no judicial remedy is obliged to refer the question to the Court for a preliminary ruling. In 1991, the College van Beroep voor het bedrijfsleven mistakenly took the view that it was released from that obligation because, in accordance with the judgment in Case 283/81 *CILFIT* [1982] ECR 3415, it considered that the interpretation of the customs tariff subheadings concerned left no room for doubt. The national court is therefore uncertain whether effective and full implementation of Community law requires that, in a case such as that which has been brought before it, the rule on the finality of administrative decisions be relaxed.”

²⁴⁹ A.F. Tatham *EC Law in Practice: A Case Study Approach*, HVG-ORAC, Budapest (2006), at 22-42.

²⁵⁰ This Article gives the ECJ power to review the legality of Union acts on the basis of *inter alia*, “infringement of this Treaty,” or “any rule of law relating to its application.”

²⁵¹ This Article, governing the role of the ECJ and the General provides that the Courts “shall ensure that in the interpretation and application of this Treaty the law is observed.”

²⁵² This paragraph, which governs Union liability in tort, provides that liability is to be determined, “in accordance with the general principle common to the laws of the Member States.”

²⁵³ Case C-27/96 *Danisco Sugar AB v. Almänna Ombudet* [1997] ECR I-6653.

For example, in the *Internationale Handelsgesellschaft* case,²⁵⁴ the ECJ noted: “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.” One of the ECJ’s most detailed discussions of human rights is to be found in *Hauer*,²⁵⁵ in which the ECJ not only referred to particular provisions in the constitutions of three Member States (Germany, Italy and Ireland) in order to establish that the right to property was subject to restrictions, but also analysed in some detail the relevant provisions of the ECHR.

In this respect, might not the ECJ be able to construe, from the constitutional traditions common to Member States,²⁵⁶ the right to a lawful judge at the European level? Using its own previous case-law interpreting ECHR Arts. 6 and 13 (right to a fair hearing and right to a legal remedy)²⁵⁷ together with the EU Charter of Fundamental Rights (“CFR”), Art. 47 (on the right to an effective remedy and the right to a fair trial)²⁵⁸ – and noting a common EU Member State constitutional tradition – the ECJ might seek to “find” the right to a lawful judge from these various provisions. This could be the counterpart to *Köbler* and could allow for a more effective monitoring by the ECJ (in co-operation with parties in domestic litigation) of constitutional court preferences for refusing to or avoiding making Art. 267 TFEU references.

Granted there would be issues that would need to be addressed. First, in *Lutz John v. Germany*,²⁵⁹ the ECtHR declared inadmissible complaints that the failure of a domestic court to seek a reference from the ECJ breached the applicant’s right under Art. 6. While this might appear to undermine the ECJ’s finding of a general principle under Union law based on ECHR Art. 6 and Art. 47 CFR, the ECtHR in *Lutz John* was dealing with a domestic court against which further national remedies lay and did not exclude the possibility that a refusal to refer to the ECJ could infringe ECHR Art. 6 if it appeared arbitrary.²⁶⁰ Clearly the ECtHR decision was as much about its keeping out of disputes between national courts and the ECJ involving EU law and would have caused profound

²⁵⁴ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getriede und Futtermittel* [1970] ECR 1125. See also Case 25/70 *EVGF v. Köster* [1970] ECR 1161.

²⁵⁵ Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

²⁵⁶ Such principle already exists in various Member State constitutions: Austria (Art. 83); Belgium (Art. 13); Estonia (Art. 24); Germany (Art. 101); Greece (Art. 8); Italy (Art. 25(1)); Luxembourg (Art. 13); the Netherlands (Art. 17); Portugal (Art. 32(9)); Slovakia (Art. 48); and Spain (Art. 24). In fact Austria has already followed Germany by its Constitutional Court also recognising the ECJ as a “lawful judge”: e.g., VfGH B2300/95, 11 Dezember 1995, VfSlg. 14390; VfGH B 2477/95, 12 Juni 1996, VfSlg. 14499; and VfGH B 3486/96, 26 Juni 1997, VfSlg. 14889.

²⁵⁷ Case 98/79 *Pecastaing v. Belgian State* [1980] ECR 691; Joined Cases 100-103/80 *SA Musique Diffusion française v. Commission* [1983] ECR 1825; Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; and Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097.

²⁵⁸ In the “Explanations relating to the Charter of Fundamental Rights” (2007 OJ C303/29), it states: “Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.”

²⁵⁹ ECtHR, *Lutz John v. Germany*, Application No. 15073/03, 13 February 2007.

²⁶⁰ On this point, the ECtHR cited to its own case-law: *Matheis v. Germany*, Decision No. 73711/01, 1 February 2005; *Bakker v. Austria*, Decision No. 43454/98, 13 June 2002; and *Schweighofer and Others v. Austria*, Decision Nos. 35673/97, 35674/97, 36082/97 and 37579/97, 24 August 1999.

difficulties were it to have allowed the application – if the complainant had been successful, it would have opened up the floodgates to other actions.

Secondly, the ECJ would have to set out the relevant criteria for claiming infringement of this right to a lawful judge if a national constitutional court were to refuse to make a reference to the ECJ. A start could be made by reviewing the *CILFIT* case as mentioned above,²⁶¹ adapting its criteria to the situation of a refusal to refer by a constitutional (or other supreme) court against whose decision there is no remedy in the national system. Failure to state its reasons for refusal could be considered as a breach of an essential procedural requirement by the constitutional court.²⁶² Any arbitrary refusal could be deemed to infringe the right to a lawful judge (thereby following *Lutz John*). The ECJ could, naturally, draw inspiration from the criteria used by the FCC²⁶³ (and the Austrian Constitutional Court²⁶⁴) uses in respect of its own national courts' refusal to make a reference to the ECJ. In so acting, the ECJ would merely be reaffirming the point that the process of “constitutionalisation” of the EU has been heavily by numerous principles of national constitutional law.²⁶⁵

D. FINAL REMARKS

1. Steps forward and the effects of Lisbon

Through the employment of either proposed mechanism, the citizens of the EU would feel that they had some sort of extra lever over the growth of the EU, perhaps psychologically necessary – beyond the periodic elections to a European institution from which many of the electorate feel remote or alienated, or about which they are ignorant. Such a constitutional reference procedure would broaden indirect citizen participation in constitutional dialogue, adding to Art. 267 TFEU, as well as the separate, though complementary, changes to direct actions before the ECJ for individuals and companies under the Art. 263 TFEU procedure, revised through the Lisbon Treaty.²⁶⁶

²⁶¹ See Chapter Six, point B.4.e.

²⁶² Regulations, Directives and Decisions are subject to certain procedural safeguards – they must “state the reasons on which they are based and shall refer to any proposals or opinions which were requested to be obtained pursuant to this Treaty”: Art. 296 TFEU (ex-Art. 253 EC) and amounts to a general principle of Union law. These are essential procedural requirements and any act which does not comply with these requirements will be subject to annulment: Arts. 263 and 267 TFEU (ex-Arts. 230 and 234 EC). For example, in *France v. Commission* (Case C-325/91 *France v. Commission* [1993] ECR I-3283), the ECJ held that there was a requirement to state the Treaty base, without which the measure was void.

²⁶³ See Chapter Three, point D.4.a. above.

²⁶⁴ See generally G. Holzinger, “Die Bedeutung des Vorabentscheidungsverfahrens für das verfassungsgerichtliche Verfahren,” in M. Holoubek & M. Lang (eds.), *Das verwaltungsgerichtliche Verfahren in Steuersachen*, Linde, Wien (1999), 65.

²⁶⁵ V. Skouris, “L’influence du droit national et de la jurisprudence des juridictions des Etats membres sur l’interprétation du droit communautaire,” in *Festschrift für Günther Hirsch*, München (2008), 175ff.

²⁶⁶ Art. 263 TFEU. For an earlier discussion of the proposed changes to ex-Art. 230 EC under the Draft EU Constitutional Treaty, see M. Varju, “The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention” (2004) 10 EPL 43; C. Koch, “*Locus standi* of private applicants under the EU Constitution:

But these are proposals and aims for a different time. What may be a more realistic aim, post Lisbon, is a reinterpretation of national sovereignty and its essential content for the EU of the twenty-first century and a shift from an understanding of the bifurcated hierarchical EU and national legal orders to an acceptance of a plurilevel common European constitutional order. Such change would go far to creating a better atmosphere for the operation of clearer lines and aims of transjudicial communication, dialogue and the deepening of the relationship of co-operation in the Union.²⁶⁷ “Dialogue and close cooperation between the Constitutional Courts and the ECJ, guided by the principles of mutual respect and the guaranty [*sic*] for national identity will bring about an adequate solution where essential rules of national law seem to be in question.”²⁶⁸ This also appears to be the tone of the President of the German FCC, speaking extrajudicially,²⁶⁹ when he promotes the idea of multilevel co-operation – between national constitutional courts and the ECJ and ECtHR within the context of European integration – as “*der Europäische Verfassungsgerichtsverbund*.”

2. *Ende, Végül, Koniec*

The decisions of the various constitutional judicial organs in this study are a further step in that process with the clear acceptance of the integration (rather than mere co-ordination) of the EU and national legal orders. The members of these domestic constitutional institutions have incorporated (to a greater or lesser extent) European integration and its consequences into their deliberations and decision-making while, at the same time, balancing their protection of national constitutional identity at its deepest level within the European Union. Such institutions have, through the medium of horizontal transjudicial communication, moved the debate on to a more pluralist, multilevel view of constitutionality in the Union and its Member States. Arguably, they have accepted the view that constitutionalism in the integrated EU/national systems must be approached in a co-operative judicial relationship, a marked “holistic” approach to sensitive domestic constitutional issues in the context of the evolving nature of national sovereignty and its essential core. Such reappraisal would benefit all citizens of the EU.

preserving gaps in the protection of individuals’ right to an effective remedy” (2005) 30 EL Rev. 511-527; and J. Usher, “Direct and individual concern – an effective remedy or a conventional solution?” (2003) 28 EL Rev. 575-600.

²⁶⁷ I. Pernice, “The Treaty of Lisbon: Multilevel Constitutionalism in Action,” WHI-Paper 2/09, Walter Hallstein-Institut für Europäisches Verfassungsrecht, Humboldt-Universität zu Berlin, at 55.

²⁶⁸ He continues by observing, though, that where a true conflict remains, the EU might need “to digest the exceptional disregard” or the Member State concerned might consider its withdrawal from the EU.

²⁶⁹ Voßkuhle (2010), at 183-198.