National constitutional courts in the European constitutional democracy

National constitutional courts and the European Constitutional Democracy

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This article critically assesses the transformation of national constitutional courts' place in the law and politics of the EU and its Member States. This process, which has its origins in the foundational constitutional doctrines of EU law, has recently been accelerated on the one hand by a handful of recent European Court of Justice (the ECJ) decisions and on the other hand by national constitutional courts' own approach to EU law. The ECJ's doctrine, based on an orthodox understanding of the primacy of EU law, fails to acknowledge the difference between constitutional and ordinary national courts implementing the distinction between ordinary and constitutional legality. At the same time some national constitutional courts show little sensibility to the nature of EU law and to the symbiotic relationship between constitutional democracies established after World War II and European integration. The assessment is based on the idea of European constitutional democracy, which is briefly sketched here. The article argues that maintaining the special place of national constitutional courts is in the vital interest of both the EU and its Member States.

1 Introduction

In this article I critically assess the transformation of national constitutional courts' place in law and politics of the EU and its Member States. This process, which has its origins in the foundational constitutional doctrines of EU law, has recently been accelerated on the one hand by a handful of recent European Court of Justice (the ECJ) decisions and on the other hand by national constitutional courts' own approach to EU law.[1] In my view, the ECJ's doctrine, based on an orthodox understanding of the primacy of EU law, fails to acknowledge the difference between constitutional and ordinary national courts, which reflects the distinction between ordinary and constitutional legality. At the same time, it seems to me that some national constitutional courts show little sensibility to the nature of EU law and to the symbiotic relationship between constitutional democracies established after World War II and European integration. This assessment is based on the idea of European constitutional

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[1] V Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (New Haven: Yale University Press 2009) offers a comprehensive comparative and theoretical overview of European constitutional courts and an analysis (and critical assessment) of the effects of EU law and the European Convention for the Protection of Human Rights on their position (see particularly chapters 10-12).

democracy, which I briefly sketch here. I argue that maintaining the special place for national constitutional courts is in the vital interest of both the EU and its Member States.

In what follows I first sketch the transformation of national constitutional courts brought about by European integration and the recent developments in national constitutional courts' jurisprudence concerning the EU (2). I will then explain why concentrated constitutional courts play a prominent role in the constitutional democracies of the Member States (3). In my view, they represent the best institutional realization of the discourse theory of law and democracy, which underpins the normative argument made here. I then move on to present the notion of European Constitutional Democracy, which does not see the EU as a constraint on or an extension of national political regimes, but a *potential* path to a uniquely European realization of the ideal of constitutional democracy (4). The last section highlights the relevance of the argument made here for the present crisis in the EU. It argues that prescriptions for greater legitimacy for the EU should be searched for not only within political institutions (either national heads of governments acting in the European Council or national parliaments), but also within national constitutional courts (5).

2 The transformation of national constitutional courts

National constitutional courts' transformation analyzed in this article stems from both the ECJ's approach to the authority of EU law, confirmed by a handful of its recent decisions, and constitutional courts' responses to the demands of European integration. In this section I briefly describe them.[2]

In 2010 the French *Cour de cassation* (the highest ordinary court in civil and criminal matters in France) challenged before the ECJ the compatibility with EU law of the constitutional reform which was completed the same year with the explicit aim of putting the French *Conseil constitutionnel* at the centre of constitutional adjudication. It was intended to change the well-established practice of both ordinary jurisdictions to review the compatibility of legislative provisions with international law – including the European Convention. Before the reform France thus had had a dual system of constitutional review broadly conceived: one concentrated in the hands of the *Conseil constitutionnel*, which exercised the review on the basis of the Constitution and before the legislation came into force. In addition to that ordinary courts could set aside already valid laws if they were in conflict with international obligations. While the ECJ's ruling was largely conciliatory, it undermined some of the core premises of the reform, particularly the priority of the *Conseil constitutionnel*'s review over the review exercised by ordinary courts.[3] As game theorists know quite well, to have the *first* word may be as important as the last word, on which the debate concerning constitutional courts in the EU so much focused.

A few months later the ECJ ruled on a reference from Germany that the Federal Constitutional Court *(Bundesverfassungsgericht, BVerfG)*'s authorization to apply rules which the *BVerfG* has found unconstitutional until the legislature amends them within a prescribed period could not stand in the way of setting the same rules aside *immediately* if they conflicted with the EU freedoms of establishment and to provide services. The ECJ

[2] For a detailed analysis of this see Jan Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 *European Constitutional Law Review* 420.

[3] ECJ (Grand Chamber), Judgment of 22 June 2010 in Joined Cases C-188/10 and C-189/10, *Melki and Abdeli* [2010] ECR I-5667. On the ruling and the context of the constitutional reform, see Marc Bossuyt and Willem Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment' (2011) 7 *European Constitutional Law Review* 355.

justified this conclusion 'by reason of the primacy of directly-applicable Union law',[4] without taking into account the *BVerfG*'s desire to let the legislator regulate the matter instead of the courts.

More recently the ECJ established that national supreme courts do not need to respect the decisions of constitutional courts if the latter violate EU law.[5] This was on a reference by the Slovak Supreme Court, which inquired whether it was bound by a ruling of the Constitutional Court if that ruling was, in the Supreme Court's opinion, contrary to EU law and was delivered without a reference to the ECJ. The ECJ's response was unequivocal: EU law has primacy in such situation, irrespective of the Constitutional Court's authority.

The foregoing must be read in the context of the 'rights revolution' currently unfolding in Europe: since the Charter of Fundamental Rights of the EU ('the EU Charter') came into formal force in December 2009, the number of preliminary references from *ordinary* courts to the ECJ concerning fundamental rights has grown significantly.[6] Only now, I would suggest, can we see the true decentralization of constitutional review in Europe, in both quantitative and qualitative terms, and attempts to turn the ECJ into a 'human rights court'.[7] The Austrian Constitutional Court has already reflected this fundamental change in its decision of March 2012, where it overturned its earlier approach and adopted the EU Charter as a standard of its review, albeit only in areas delimited by Article 51 (1) of the Charter.[8]

The ECJ's most recent jurisprudence further undermines the position of national constitutional courts. In *Åkerberg Fransson* the ECJ interpreted the scope of EU fundamental rights rather widely.[9] In *Melloni*, on a reference from the Spanish Constitutional Tribunal, the ECJ forcefully asserted that Article 53 of the EU Charter cannot threaten the supremacy of EU law in any event.[10] The German *BVerfG* thus adopted an opposite approach to that assumed by its Austrian counterpart and warned the ECJ that too expansive an application of EU fundamental rights can be found to be *ultra vires*.[11]

National constitutional courts now also seem to be more willing to refer preliminary questions to the ECJ and to enforce EU law – either through sanctioning ordinary courts' duty to refer

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[4] ECJ (Grand Chamber), Judgment of 8 September 2010 in Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 69. The decision followed an earlier ruling by the ECJ's Third Chamber: Judgment of 19 November 2009 in Case C-314/08 *Filipiak* [2009] ECR I-11049.

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

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

[7] Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168.

[8] Austrian Constitutional Court, Judgment of 14 March 2012, U 466/11-18 and U 1836/11-13, English translation available at http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf.

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

[10] The ECJ (Grand Chamber), Judgment of 26 February 2013, Case C-399/11 *Melloni*, not yet officially reported. Cf. Jonas Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 28 *Common Market Law Review* 1171

[11] German *BVerfG*, Judgment of 24 April 2013 in Case 1 BvR 1215/07, available at www.bundesverfassungsgericht.de/entscheidungen/rs20130424_1bvr121507.html, par. 91, quoted from the FCC's English press release available at http://www.bundesverfassungsgericht.de/en/press/bvg13-031en.html.

to the ECJ or by the direct enforcement of EU law.[12] This less explored role of national constitutional courts in European integration is not without its problems, however, which relate to the key concern of this article: the transformation of constitutional courts resulting from the process of European integration. For is it for constitutional courts, which were established in Europe in rather peculiar historical circumstances, to translate the requirements of EU law into the language of national constitutional law? Can, and should, they communicate with the ECJ by means of preliminary references? These questions seem to have been ignored in the recently renewed debates on the role of national constitutional courts in the EU.[13] In my view, however, they are crucial for our understanding of the EU's present condition, as they point to the important role which national constitutional courts can play in securing legitimacy for the EU, which has been shattered during the present crisis.

While national constitutional lawyers seem to be upset by the constitutional courts' loss of authority in matters concerning constitutional adjudication, EU lawyers do not appear to share their concerns.[14] This article argues that the recent developments should worry both, because constitutional courts have a special place in the legal and political systems of *both* the Member States *and* the EU, understood together as European Constitutional Democracy. They depend on each other in the realization of their normative ideals and instrumental objectives in today's world, where state boundaries play a less prominent role than they did in the 'short' twentieth century.[15] This is largely ignored by the ECJ's jurisprudence, which does not distinguish between national ordinary and constitutional courts and subordinates both to its own goals and the normative preferences of the EU legal order.

In this article I thus want to go beyond the 'jurisprudence of constitutional conflicts'.[16] For too long national constitutional courts were depicted as powerful actors which imposed constitutional limitations on the effects of EU law in domestic legal orders or even curbed further integration as such.[17] I also suggest that while there has been a lot of interest by political scientists into EU courts,[18] comparatively little has been said in terms of normative political theory. Cold empirical-realist analyses cannot exhaust the topic, especially since both the ECJ and constitutional courts seem to be in search of legitimacy. The following section sketches such theory, based on Jürgen Habermas' conception of constitutional democracy.

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

[13] See particularly M de Visser and C Van De Heyning (eds), *Constitutional Conversations in Europe* (Cambridge: Intersentia 2012).

[14] This comment presumes that it is still possible to distinguish between the two professional groups; something that differs from country to country and is increasingly difficult to maintain.

[15] As Harold James, *The End of Globalization: Lessons from the Great Depression* (Cambridge, Mass. and London, Harvard University Press 2001 shows, globalization, the free movement of capital and people is not such a new thing in Europe as it might seem today.

[16] The term is borrowed from Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', (2005) 11 *European Law Journal* 262.

[17] See particularly A-M Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart 1999). M Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart 2006) did pioneering work, in that she looked at the role of constitutional courts more comprehensively.

[18] See Arthur Dyèvre, 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour' (2010) 2 *European Political Science Review* 297.

3 Constitutional courts in a constitutional democracy

3.1 Constitutional democracy

All current EU Member States aspire to be constitutional democracies.[19] They respect and in their constitutions positively provide for (albeit in different forms) the principles of political morality which were traditionally understood as constraints on democracy: the rule of law, fundamental rights or, at a more general level, equality and human dignity. These principles are often associated with constitutionalism, which established itself as an important independent value after World War II.[20]

Democracy and constitutionalism, understood narrowly, are sometimes presented as being in opposition to each other. The former is to be achieved through the political process (or politicians), whereas the latter is the domain of courts and lawyers and constrains democracy or political will. The achievement of constitutional democracy is thus seen as a balancing act: fundamental rights and the rule of law apply *at the expense* of democracy, and vice versa. This is justified with reference to the need to control democracy's undesirable outcomes, such as the oppression of minorities, and/or to make the democratic process work properly. The precise contours of this balancing act differ according to the understanding of democracy and constitutionalism respectively, but the central point is that the two are seen as being in an irreconcilable tension with each other.[21]

Habermas's conception of constitutional democracy seeks to reconcile the two through the 'co-originality thesis': citizens can act as members of a political community (and thus decide democratically in the narrow sense) only if their individual rights (associated with the narrow understanding of constitutionalism) are guaranteed. In the 'post-metaphysical world', however, where no pre-established truth exists, the content of such individual rights can be determined only in common with others through the discursive process of opinion- and will-formation. The discursive process can 'lead to convincing positions to which all individuals can agree without coercion'[22] and is able to produce decisions with legitimacy.

The focus on discourse makes Habermas's account of constitutional democracy particularly helpful and distinguishes it from other attempts to reconcile constitutionalism and democracy into a unitary concept. The emphasis shifts from either side of the supposed opposition to the *process between them* through which they mutually interact and reinforce the legitimacy of the whole. In the real world, this discourse process is implemented through a communicative arrangement: the set of institutions and practices which are primarily constituted by and structured through the medium of law. Law is therefore put into a hierarchically superior position to other discourses: moral, aiming at universality; ethical, concerning individual and collective identities; and pragmatic, which establishes relations between means and ends and ranks priorities between certain collective goods.

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[19] According to Article 49 TEU, in order to become a member of the EU, European states must respect the values listed in Article 2 TEU. These are 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' and 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

[20] See Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press 2011), 146-150.

[21] For an overview, see CF Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge: Cambridge University Press 2007), chapter 2.

[22] J Habermas (W Rehg transl), *Between Facts and Norms* (Cambridge: Polity Press 1996), 103.

Although Habermas contends that this superior position of the legal discourse to others leaves their inner logic intact, the legal form nevertheless imposes important constraints: temporal, social, and also substantive.[23] Habermas implicitly envisions a 'deliberative division of powers':[24] 'the distribution of the possibilities for access to different reasons and to the corresponding forms of communication that determine how these reasons are dealt with'.[25] He does not further develop what kind of institutionalization is required (although his reconstruction draws on the practise of the Federal Republic of Germany and its Constitutional Court). As I will argue below, what is required is precisely the separation of constitutional courts (and constitutional legality) from ordinary ones, especially since the creative role of courts in the sphere of constitutional adjudication concerns the fundamental principles embodied in the Constitution. The transformation of constitutional courts, briefly described in the previous section, threatens this separation of national constitutional courts from the rest of the judiciary and their superior authority necessary for maintaining the communicative arrangement.

3.2 Deliberative separation of powers

The superior position of legal discourse has been criticized from many sides.[26] Gunther Teubner observed that Habermas's account 'underestimates the single-mindedness of legal dynamics which does far more than just filtering out arguments'.[27] Teubner further questions the ability of law 'to decide between economic, political and moral rationality and claim to be binding for all society'.[28]

The response to this objection can be twofold: firstly, by further distinguishing between ordinary and constitutional legality law becomes much more open to rationalities other than those Teubner acknowledges. Coherence, which in Teubner's view dominates law's internal logic, can be achieved to differing degrees and at different levels. That is also why Habermas distinguishes two opposing paradigms of law: bourgeois formal law, related to the 19th century idea of a free-market economy, and welfare-state materialized law, which appeared in reaction to the injustices of the former after World War I.[29] The bourgeois paradigm highlights formal justice and legal certainty, whereas the welfare paradigm puts emphasis on substantive justice in the individual case. The discourse theory of law and democracy envisioned by Habermas in *Between Facts and Norms* is realized through a third, procedural, paradigm, which is able to arbitrate between the other two.[30]

Habermas envisions another separation of discourses: that between discourses of justification and application.[31] In the first, the validity of norms is established, whereas the second

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[23] Ibid.
[24] The term was not used by Habermas himself, but by Conrado H Mendes, 'Neither Dialogue Nor Last Word: Deliberative Separation of Powers III' (2011) 5 *Legisprudence* 1.
[25] Habermas, n 22, 192.
[26] I do not consider the various critiques of Habermas' theory of constitutional democracy as such, since they are not central to the issue at heart here: the separation of constitutional courts from ordinary judiciary.
[27] Gunther Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895-1995* (Oxford: Clarendon Press 1997), 163.
[28] Ibid, emphasis added.
[29] Habermas, n 22, 195 and Chapter 9.
[30] Ibid.
[31] Ibid, 217-218. This distinction has been criticized in the literature: see particularly Robert Alexy, 'Justification and Application of Norms' (1993) 6 *Ratio Juris* 157, who nevertheless recognizes the distinction between the two contexts and its importance for adjudication, which is central for the argument made here.

examines the appropriateness of their application to concrete situations. Habermas does not deny the creative role for courts – on the contrary: 'To the extent that legal programs are in need of further specification by the courts because decisions in the gray area between legislation and adjudication tend to devolve on the judiciary, all provisos notwithstanding juristic discourses of application must be visibly supplemented by elements taken from discourses of justification'.[32] In other words, the creative role of courts requires 'another kind of legitimation than does adjudication proper'.[33] It must, in Habermas' view, entail 'additional obligations for courts to justify opinions before an enlarged critical forum specific to the judiciary. This requires the institutionalization of a legal public sphere that goes beyond the existing culture of experts and is sufficiently sensitive to make important court decisions the focus of public controversies'.[34]

The second response to Teubner concerns revisability. Legal decisions which arbitrate between different systems can possibly claim binding force – or finality – from their own perspective only. The socio-political reality is different and the 'final word' has at least two temporal dimensions: one concerning the concrete case at hand and the other oriented beyond it. There are many possible ways in which 'the finitude of a procedural round' can be turned into 'the permanently possible continuity of political mobilization'. The last word is therefore always 'provisional'.[35] The question therefore is how to balance the desire for finality with that of revisability and change, while acknowledging that one can be achieved only at the price of the other. It is in relation to this problem that we see why the ECJ's decision in *Winner Wetten*[36] was problematic: it destabilizes this balance.

3.3 Constitutional courts

The dual separation of ordinary and constitutional legality and the discourses of application and justification, together with the desire for revisability, are best realized through the institutional separation of constitutional adjudication in concentrated constitutional courts.[37] They form an important part of the communicative arrangement of constitutional democracies. This is for the following reasons:

Firstly, judges of concentrated courts have more time and resources to engage in constitutional/justificatory discourses which place specific demands on their competence. Secondly, the process before concentrated courts can be structured so that other institutions have a proper voice and representation. Thirdly, cases before concentrated courts can also obtain proper attention from the general public, and concentrated courts cannot easily avoid hard cases through 'legalistic' tactics. Altogether, these factors establish a more effective communicative arrangement than disperse constitutional review. Fourthly, concentrated constitutional courts can also be constituted with a view to greater professional diversity, so that they include members with different backgrounds, not just lawyers or even career judges,

[32] Ibid, 439.
[33] Ibid, 440.
[34] Ibid.
[35] Mendes, n 24, 22.
[36] See n 4.
[37] The following draws on Comella, n 1, chapter 4, who also considers the 'classical' justification for concentrated constitutional courts, based on the separation of powers and legal certainty, presented by the father of the idea, Hans Kelsen.

as is still usual in continental Europe. Fifthly, a shorter term of office can also secure the greater responsiveness of constitutional adjudication.[38]

The separation of constitutional and ordinary courts does not concern 'democratic legitimacy', which we usually relate to political institutions, especially not in terms of what Robert Alexy calls 'decisional' or 'volitional' representativeness centered around the concepts of election and majority rule.[39] The point is not to make constitutional courts democratically legitimate in terms of majoritarian democracy, but to employ them in the communicative arrangement which legitimates the decisions adopted in the given constitutional democracy. For that aim it is therefore not so important that elected officials mostly appoint the judges of constitutional courts, but rather that the appointment is somewhat responsive to the communicative power generated in society.

Whether concentrated constitutional courts are better than other institutional alternatives and whether the above reasons for their superiority are valid in reality depends on their specific powers and the overall design of a given political system. These differ greatly from country to country,[40] which makes it difficult to present a truly universalizable argument. Yet, the analysis provided here offers a more general theoretical framework which can be used to justify the more specific institutional settings of individual Member States. The separation of constitutional and ordinary legality thus does not preclude the involvement of other actors in constitutional review. On the contrary, this is what deliberative theories of democracy explicitly envision.[41] That is also why I consider many of the arguments presented here as directly relevant for the defense of such other arrangements, if threatened by the requirements of European integration.

3.4 Containing social conflicts in post-war constitutional democracies

One can further explain the centrality of concentrated constitutional courts for constitutional democracies more historically. They represent the conscious choice of the drafters of most of today's European constitutions, which reflect the 'post-war constitutional settlement' discussed recently by Jan-Werner Müller in his book *Contesting Democracy*.[42] The usual justification provided for the establishment of concentrated constitutional courts was the transition from totalitarian regimes, be it Nazi Germany and fascist Italy after the War or most post-communist countries after the fall of the Iron Curtain in 1989. While ordinary courts

[38] See Comella, n 1, chapter 4, who also considers the 'classical' justification for concentrated constitutional courts, based on the separation of powers and legal certainty, presented by the father of the idea, Hans Kelsen.
[39] See Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 579.
[40] For a recent overview of constitutional courts' powers, see reports for the XV[th] Congress of the Conference of European Constitutional Courts, 23 – 25 May 2011, *Constitutional Justice: Functions and Relationship with the other Public Authorities*, available at http://www.confcoconsteu.org/en/reports/reports-xv.html (accessed 28 March 2012). The following EU Member States have concentrated constitutional courts: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. In Estonia, although there is no separate institution called the 'constitutional court', constitutional review is exercised by a specialized chamber within the Supreme Court, whereas in Cyprus the review is somewhat centralized at the Supreme Court, through the system of mandatory appeals and constitutional references (similarly in Portugal the ordinary courts can find a statute unconstitutional, but such decision will be subject to mandatory appeal). In Malta, on the other hand, although there is a nominal constitutional court, it is not separate and forms part of the Maltese judiciary.
[41] These can, for example, be self-review panels with legislatures and regulatory agencies, mechanisms for interbranch debate and decisional dispersal, making it easier to amend constitutions and, finally, the establishment of civic constitutional fora. See Zurn, n 21, chapter 9.
[42] See n 20.

staffed with judges who had been active during the previous regime (and therefore had at least passively supported it) could not be trusted to implement regime change and a complete change of values, their complete re-staffing was ruled out by the lack of enough competent lawyers (with the possible exception of East Germany after unification). Concentrated constitutional courts could therefore be viewed as guardians of the transition towards the democratic rule of law.[43] The well-known struggles between constitutional and ordinary supreme courts support this view.[44]

The 'post-war constitutional settlement', understood by Müller as a rights-based constraint on popular sovereignty, corresponded to the post-war 'Keynesian consensus' – a notion known primarily to political economists. It presupposed a strong role for the state, committed to providing for the welfare of its citizens while at the same time respecting the market.[45] At the constitutional level it sought to contain social conflicts in a principled way through constitutional adjudication. By this I do not mean just express provision for social rights (which did not, for example, appear explicitly in the German Basic Law),[46] but rather the structure of rights which presupposed the express balancing of classical liberal rights, including the right to property, with certain public goods and policies.[47]

Europeans thus have always had many weak rights, which are not 'trumps', but rather tickets to deliberative forums: constitutional courts.[48] Such a conception of rights thus fits very well the notion of constitutional democracy sketched above, presupposing mediation between private and public autonomy. It allows constitutional courts to form part of the communicative arrangement established by post-war European constitutions. This explains why the controversy concerning constitutional review in Germany was always limited to the proper method of .interpretation of constitutional rights, rather than the very existence of the institution, whose legitimacy was undisputed from the very beginning.[49] The new method of constitutional interpretation, defended by the advocates of the Federal Constitutional Court, stressed 'the community-embedded and community-bound nature of persons without however diminishing their inherent independent value'.[50]

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[43] See W Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer 2005), 43-44 for a critical assessment of this argument with further references.

[44] See generally, with further references, Lech Garlicki, 'Constitutional Courts versus Supreme Courts' (2007) 44 *International Journal of Constitutional Law* 44. On the other hand, one might argue that ordinary courts bind constitutional courts within the confines of legality: too adventurous extensions of the latter are simply not accepted by ordinary courts. See Nuno Garoupa and Tom Ginsburg, 'Building Reputation in Constitutional Courts: Political and Judicial Audiences' (2011) 28 *Arizona Journal of International and Comparative Law* 539.

[45] See Christopher J Bickerton, *European Integration: From Nation-States to Member States* (Oxford: Oxford University Press 2012), 76-90.

[46] See Christian Bommarius, 'Germany's *Sozialstaat* Principle and the Founding Period' (2011) 12 *German Law Journal* 1879.

[47] For an excellent account of the history of the idea of balancing in the European and American legal thinking in the 20th Century, see J Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Post-War Legal Discourse* (Cambridge: Cambridge University Press, forthcoming).

[48] See eg. Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 (2) *European Journal of Legal Studies*.

[49] Christoph Möllers, 'Report on a Missing Debate: Scope and Legitimacy of Judicial Review in German Constitutional Law', forthcoming in Hermann Punder and Christian Waldhoff (eds), *Debates in German Public Law* (Oxford: Hart forthcoming).

[50] German Federal Constitutional Court, Judgment of 20 July 1954, 1 BvR 459, 484, 548, 555, 623, 651, 748, 783, 801/52, 5, 9/53, 96, 114/5, BVerfGE 4, 7 at 15 as translated and quoted by J Bomhoff, n 47.

The foregoing defense of constitutional courts can be criticized from many sides, most prominently as a defense of 'juristocracy' or 'judicial hegemony'.[51] Indeed, there is some evidence that the power of a minority of either of the chambers of the French Parliament to turn to the Constitutional Council with a request for constitutional review was introduced into the French Constitution in 1974 as a way to 'ensure' the French Right's influence even after its expected loss to the Left.[52] Even if true, however, such criticisms overlook the provisionality of 'final words' delivered by constitutional courts and their role in the overall architecture of communicative arrangement crucial for the legitimacy of legal rules generated within it – unless their place within the communicative arrangement of constitutional democracies of the Member States is not challenged by the process of European integration.

4 The argument: European Constitutional Democracy

4.1 Moving beyond the protection of national constitutional identities

The ECJ's 'displacement doctrines' undermine the institutional separation of constitutional adjudication, defended above. They open discourses of constitutional legality and justification to ordinary courts, which lie on the periphery of the communicative arrangement and which do not possess the institutional advantages of concentrated constitutional courts. *Melki and Abdeli*[53] is the last in the line of decisions beginning with *Simmenthal II*.[54] The same doctrines also disturb the delicate balance between the 'finality of a procedural round' and the 'continuity of political mobilization', which is set in the same communicative arrangement. The *Winner Wetten* judgment[55] is an example of this kind of challenge.

These judgments are problematic for the functioning of *national* constitutional democracies. While the ECJ was never too receptive to the concerns of national constitutional designs,[56] the introduction of the 'identity clause' into the Treaties could change its intolerant approach.[57] In their critique of one of the displacement rulings, Bossuyt and Verrijdt observe that the ECJ 'has always refused to balance its doctrines on the full effect and uniform application of EU law, … with other constitutional principles of EU law, most of which are enshrined in primary EU law'.[58] Bossuyt and Verrijdt thus refer to 'the principle of institutional autonomy

[51] See R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press 2004).
[52] Michel Troper, 'Constitutional Amendments Aiming at Expanding the Powers of the French Constitutional Council' in P Pasquino and F Billi (eds), *The Political Origins of Constitutional Courts: Italy, Germany, France, Poland, Canada, United Kingdom* (Rome: Fondazione Adriano Olivetti 2009), 86-88.
[53] N 3.
[54] ECJ, judgment of 9 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.
[55] Cited in n 4.
[56] Consider the ECJ's judgments establishing Member State liability for violations of EU law, where the ECJ established that 'the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities'; ECJ, Judgment of 5 March 1996 in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 33.
[57] On the place of the identity clause in EU law, see Barbara Guastaferro 'Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause' (2012) 31 *Yearbook of European Law* 263-318.
[58] Bossuyt and Verrijdt, n 3, 388.

and respect for national identity'.[59] In their view the structure of constitutional review forms part of national identity.[60]

Alas, when one looks at the deep remodeling of the domestic political structures provoked by European integration, one has doubts why constitutional review should be more protected than, say, sovereign immunity from liability for legislative acts or the very idea of the constitution as the supreme law of the land. Most recently, moreover, the ECJ suggested that it would be willing to police the domestic separation of powers.[61] The ECJ's record does not therefore offer much hope that the identity clause would change significantly.

I therefore want to present a different argument: one which will not put national constitutional structures on one side and the interests of the EU legal order on another. It is an argument which can be considered 'European' in the sense that it takes into account both levels and shows that they can co-exist in a symbiotic and mutually reinforcing relationship, rather than an antagonistic and conflictual one. It is an argument from European constitutional democracy.

4.2 European Constitutional Democracy

The constitutional nature of the EU is contested,[62] and its democratic credentials seem to be ever more problematic.[63] Defending the notion of European constitutional democracy seems to combine the problems of both. In my view, however, the opposite is true: the notion of European constitutional democracy can respond to problems of both EU democracy and constitutionalism conceived in isolation. The practical realization of the ideal can provide the European integration project with the legitimacy that, according to many analyses, it lacks.[64] Instead of debating either the EU democratic deficit or its constitutional question, one should ask whether the current structure of the EU achieves, or at least *has the potential* to achieve, the ideal of constitutional democracy.

The key is to see the variety of relationships that exist between the EU, its Member States and their citizens. While there are narratives presenting the EU as a means of reinforcing democracy limited to the nation state[65] or establishing a particular form of constitutional discipline,[66] they do not account for the full potential of the idea of constitutional democracy. What follows seeks to connect constitutionalism and democracy without identifying the former with the EU (seen primarily as a constraint) and the latter with the Member States (which would be deemed to possess the democratic legitimacy the EU lacks). Instead, it sees both levels – the EU and the national – as part of a wider whole: European constitutional democracy.

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[59] Ibid.
[60] Ibid.
[61] ECJ, (Second Chamber) Judgment of 22 December 2010 in C-279/09 *DEB* [2010] ECR I-13849, paragraph 59.
[62] For an overview of different theories of EU constitutionalism, see Matej Avbelj, 'Questioning EU Constitutionalisms' (2008) 9 *German Law Journal* 1.
[63] For an introduction to the debate, see Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533.
[64] See generally Fritz Scharpf, 'Legitimacy in the Multi-level European Polity', in M Loughlin and P Dobner (eds), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press 2010), 104-105.
[65] See e.g. Miguel Poiares Maduro, 'Europe and the Constitution: *What if this is As Good As It Gets?*', in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press 2003).
[66] See Joseph HH Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in Weiler and Wind, n 65.

Constitutional democracy seeks to reconcile individual (private) and public (political) autonomy. Constitutional courts, through their communicative links to the rest of the political system on the one hand, and to the society on the other, are able to mediate between individual and public autonomy through the discourse of constitutional legality, which implements the procedural paradigm of law. They can fulfil this task in the context of European integration too, although both kinds of autonomy have changed profoundly. The following section describes this change and discusses the potential role for constitutional courts in mediating Europeanized individual and public autonomy.

5 Constitutional courts as mediators between Europeanized individual and public autonomy

5.1 Europeanized individual autonomy

Understandings of constitutionalism and democracy which see them as isolated from or opposing each other can present the EU as a constraint on national democracies. Jan-Werner Müller has thus recently argued that 'European integration was part and parcel of the new "constitutionalist ethos", with its inbuilt distrust of popular sovereignty'.[67] The EU (and the European Convention) served as an external check on states whose political regimes Müller describes as 'constrained democracies'.[68] As noted above, this constraint does not need to be limited to courts: the EU Treaty envisions the ability to police compliance with the EU foundational values through extra-judicial means, and the Council of Europe (together with other international institutions) plays a role there too, as the recent example of Hungary shows.[69]

Müller, however, overlooks one fundamental difference between internal constraints (imposed on the notion of popular sovereignty by domestic institutions, most importantly constitutional courts) and their external counterparts (the EU and other international or transnational regimes). It is the presence of the communicative arrangement in constitutional democracies at the state level which allows constant revision of the decisions of constitutional courts, based on the involvement of various institutions.[70] In the context of the EU, this communicative arrangement is broken: to reverse or even criticize any decision (not just the ECJ's) in the EU is very difficult.[71] The balancing mechanism must therefore come from somewhere else: Member State institutions. In this respect, almost everyone seems to be in favor of reinforcing the role of national parliaments in the EU,[72] perhaps with the exception of those who are actually adopting current measures in the context of the Eurocrisis, where national parliaments are marginalized. National constitutional courts however seem to be ignored in this debate, in spite of the fact that some such courts seek to preserve a place for national parliaments.[73]

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[67] See Müller, n 15, 148-149.

[68] See also P Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press 2008).

[69] See Jan Werner Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' *Transatlantic Academy Paper Series* 2012-2013 No. 3, http://www.transatlanticacademy.org/publications/safeguarding-democracy-inside-eu-brussels-and-future-liberal-order.

[70] See text to n 35.

[71] Scharpf, n 64, 99-101.

[72] See P Kiiver, *The National Parliaments in the European Union - A Critical View on EU Constitution-Building* (The Hague/London/New York: Kluwer Law International 2006).

[73] Which however opens them to the criticism that they are defending their *national* democracy.

Moreover, while national constitutional courts were celebrated by the EU legal scholarship for pressing the ECJ (and the EU) to adopt fundamental rights as part of the legal order,[74] a similar move by a number of national constitutional courts which can be read as aiming at safeguarding democracy met with strong criticism.[75] On cannot help but think that the different reactions can be explained by the fact that, while pressing the ECJ to adopt fundamental rights jurisdiction empowers the ECJ, the same pressure on it to take competences seriously is in fact limiting its powers.

European Constitutional Democracy is however not just about mutual constraints and the understanding of individual autonomy as a constraint. The full realization of citizens' capabilities, made possible by free movement rules, requires them to be offered a choice that is not limited by the confines of political boundaries.[76] The EU free movement rules can therefore *extend* individual autonomy, and are *enabling* rather than *constraining*. As Floris de Witte argues, there are legitimate reasons to allow such movement and to require states to open up their borders to foreigners on the basis of their freedom to make value choices in their lives. Importantly, De Witte emphasizes that this commitment to the enlargement of individual autonomy through free movement is not unlimited. It entails 'a normative commitment to insulate the capacity of Member States to redistribute resources internally'.[77]

As is well known, the present interpretation of free movement rules does not respect this limitation,[78] and that is why national constitutional courts should step in to protect Member States' capacity to engage in internal redistribution. That is even more essential today, when national governments willingly accept such constraints through the new regime of European fiscal governance, with only weak checks being made by national parliaments or the European parliament and almost no political debate.[79] Thus the German Constitutional Court's insistence on the meaningful participation of the German Parliament in the decisions concerning the Fiscal Compact and the European Stability Mechanism,[80] following its previous decision on Greek rescue measures,[81] should not be seen as a defense of the

[74] Even by some members of the ECJ: see Opinion of AG Mancini of 26 April 1988, Case 407/85 *3 Glocken and Others v USL Centro-Sud and Others* [1988] ECR 4233, 4273. See also Opinion of AG Stix-Hackl of 18 March 2004, C-36/02 *Omega* [2004] ECR I-9609, paragraph 69 (n 45).

[75] See particularly Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says *"Ja zu Deutschland!"*' (2009) 10 *German Law Journal* 1241.

[76] Floris de Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18 *European Law Journal* 694, 698-700.

[77] Floris de Witte, 'EU Law, Politics and the Social Question' (2013) 14 *German Law Journal* 581, 606. See also De Witte, n 76, 708-710.

[78] See most prominently Fritz Scharpf, The Asymmetry of European Integration, Or Why the EU Cannot Be a "Social Market Economy"', (2010) 8 *Socio-Economic Review* 217.

[79] On this new regime, see Damian Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal* 667-693.

[80] Order of 12 September 2012 in Joined Cases 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, English translation of the extracts available at http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html.

[81] Judgment of 7 September 2011 in Joined Cases 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10, English translation published in Edoardo Chiti, Agustín José Menéndez and Pedro Gustavo Teixeira (eds), *The European Rescue of the European Union? The existential crisis of the European political project*, ARENA Report No 3/12, RECON Report No 19, available at http://www.reconproject.eu/projectweb/portalproject/Report19_EuropeanRescueEuropeanUnion.html.

particularistic interests of Germans,[82] but as an expression of concern for democracy, which is undermined by the government's actions on the supranational level.

The role of national constitutional courts related to the Europeanized individual autonomy thus consists in defending the rights of those who do not benefit from integration and whose voice can be structurally undermined by it. This, however, should not be understood as constitutional courts' simple defence of national constitutions or national democracy. It should be seen in the context of European constitutional democracy as putting limits on the currently too wide individual autonomy, which is not placed into a communicative arrangement with its political counterpart. This leads us to the second side of the coin: public autonomy in Europe and the role of constitutional courts.

5.2 Realizing public autonomy in the globalized world

The capacity of the EU to generate legitimacy for a positive political action which would realize the public autonomy of European citizens is limited. The reasons for this are most importantly the lack of a collective identity (the famous 'no demos thesis'), the lack of a public sphere, and little (if any) political debate at the EU level.[83]

On the other hand, there is no shortage of arguments why the EU *should* be democratic. First, there are the most simplistic ones, which abounded in the recent political responses to the Euro-crisis. They state, essentially, that because the EU has more competences which encroach upon the core functions of its Member States, it should be more democratic. Characteristically, they pay only lip service to how democracy actually should be strengthened in the EU.[84]

More ambitious claims see the EU as a framework capable of containing various limitations of national democracies. This is suggested not in terms of constraining national democracy corresponding to Müller's reconstruction of the integration project,[85] but rather of enabling it to achieve its core premise: the capability of citizens to shape their living conditions in cooperation with others – to realize their public autonomy.[86] This concerns most importantly the inability of national democracies to contain the effects of globalization (today global financial markets in particular) and other challenges which cannot be addressed without intensive international cooperation, such as global environmental problems.[87]

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[82] See Christian Joerges and Florian Rödl, '"Democratisation of Euro-Governance is the Solution!" – But what was the Problem?', Eutopia Law, 12 October 2012, available at http://eutopialaw.com/2012/10/11/democratisation-of-euro-governance-is-the-solution-but-what-was-the-problem/.

[83] All three points are succinctly summarized by Scharpf, n 64, 94-95.

[84] See most recently: Communication from the Commission, 30 November 2012, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' COM(2012) 777 final/2; Herman Van Rompuy, President of the European Council, in close collaboration with: José Manuel Barroso, President of the European Commission, Jean-Claude Juncker, President of the Eurogroup and Mario Draghi, President of the European Central Bank 'Towards a Genuine Economic and Monetary Union'; European Council Conclusions, 14-15 December 2012, 'Roadmap for the Completion of EMU', EUCO 205/12.

[85] This is how much of Miguel Maduro's understanding of the democratic legitimacy of the EU, addressing various national democracies' 'externalities' can be appreciated. See Miguel Poiares Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice' *RSCAS Policy Paper* 2012/11, and its critique by Alexander Somek, 'What Is Political Union?' (2013) 14 *German Law Journal* 561, 570-575.

[86] This can be expressed in various terms, such as the realization of their public autonomy, political self-determination or simply self-government.

[87] See Jürgen Habermas, 'The Postnational Constellation and the Future of Democracy' in Ibid (transl., ed. by Max Pensky), *The Postnational Constellation* (Cambridge: Polity Press 2001).

The issue of controlling negative effects of globalization relates to an opposition which seems far less discussed among European constitutionalists: that between democracy and capitalism.[88] Originally, it concerned the need to contain the social conflict between capital and labor, which seemed to be achieved through the post-war constitutional settlement discussed above.[89] In the present condition of globalization, social conflicts concern not only capital and labor. As, for example, Neil Fligstein shows, in the EU, which provides opportunities to move to a much wider category of actors than just the capital, the conflict between the mobile and the immobile under the global condition is perhaps more telling.[90]

Today's EU, however, rather exacerbates the tension between the mobile and the immobile, together with the dominance of (financial) markets over democracy. As we noted above, the free movement rules undermine the capacity of individual Member States to compensate those who do not benefit from free movement (or are even harmed by it), whereas there are structural reasons why effective redistributive compensation cannot occur on the EU level.[91] While the dominance of (financial) markets over democracy seems to be a more recent phenomenon, resulting from the present crisis in the Eurozone, it in fact follows the trend started at the beginning of the 1980s: the turn in Europe toward neoliberalism.[92]

After the long period of plenty, at the beginning of 1980s the post-war social contract was becoming fragile.[93] National governments adopted policies that aimed at replacing Keynesian policies with neoliberal ones, which viewed with suspicion any intervention by the state in the economy. As Chris Bickerton argues, the EU was instrumental in this effort, in that it liberated national governments from the social contract they could no longer (or did not want to) abide by. The rules they agreed to at the EU level provided an excuse for them to change the orientation of economic policies.[94] The early 1980s thus saw the reversion of the terms of the original social contract: democratic governments were not to tame markets, but the latter were to control democracies. As the historian Tony Judt remarked, this strategy 'was quite seductive to younger voters with no first-hand experience of the baneful consequences of such views the last time they had gained intellectual ascendancy, half a century before'.[95] It can seem that whether one likes this depends on one's ideological preferences (and life priorities). However, the fact that the EU removes decisions concerning redistributive policies from democratic processes is rather worrying: yet another reason for national constitutional courts to be rather cautious towards EU law which implements such policies.

Again, this does not need to be seen as an egoistic move: the need to control markets could be seen as a uniquely European predicament, linked to its troubled history, which provided momentum for European integration. Alexander Somek concludes his powerful argument for the reorientation of the EU thus: 'Europeans have very good reasons to appropriate their social legacy now. Lest we forget, it is much more intimately connected with the events

[88] See in general Wolfgang Streeck, 'The Crisis in Context: Democratic Capitalism and its Contradictions' in rmin Schäfer and Wolfgang Streeck (eds), *Politics in the Age of Austerity* (Cambridge: Polity Press 2013).
[89] See text to n 45.
[90] See N Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (Oxford: Oxford University Press 2008). See also Marco Dani, 'Rehabilitating Social Conflicts in European Public Law' (2012) 18 *European Law Journal* 621, 638-639, for the relevance of this change for EU constitutionalism.
[91] Well described as the tension between negative integration (which limits individual Member States' capacity to redistribute) and positive integration (involving legislative action at the EU level). See n 78.
[92] For a powerful account of the EU's turn to neoliberalism, see Agustín José Menéndez, 'The Existential Crisis of the European Union' (2013) 14 *German Law Journal* 453. See also Bickerton, n 45, 125-131.
[93] See Bickerton, n 45, 90-96.
[94] Bickerton, n 45, 102-108.
[95] T Judt, *Postwar: A History of Europe Since 1945* (London: Penguin Books 2005), 537.

preceding European integration than market building or creating the most competitive knowledge-based economy of the world'.[96] One can simultaneously disagree and concur with British Prime Minister Cameron's speech on Europe.[97] Contrary to Cameron's opinion, the EU *is* a peace project, today even more than it could be in the 1970s, when the memory of war was still fresh, but the European economy was at the same time in a much better condition.[98] It is a peace project *because* it is an internal market project – but of a very different kind than Cameron thinks.

At present, therefore, European constitutional democracy is an ideal rather than a faithful description of what European integration is. Conceptually, however, the EU has the potential to realize this idea practically and national constitutional courts are an important part of this process.

5.3 Constitutional courts and Europeanized public autonomy

In the absence of a thicker EU-level democracy, one must currently look for ways of remedying the imbalances which the Eurocrisis has further exacerbated.[99] Unsurprisingly, prescriptions differ. While Fritz Scharpf argues for a greater role for the European Council,[100] for Jürgen Habermas the empowerment of the same institution would mean 'invert[ing] the European project into its opposite'.[101] In Habermas's diagnosis, '[t]he first transnational democracy would be transformed into an arrangement for exercising a kind of post-democratic, bureaucratic rule'.[102] It is interesting to see the chief proponent of constitutional democracy arguing his case for the legitimacy of the EU in isolationist terms and focusing on democracy (moreover only in its representative form) without constitutionalism. While Habermas calls for the strengthening of the European Parliament and, possibly, national parliaments, indirectly through making the Commission accountable to the Council,[103] he is silent on the role of constitutional courts (and the ECJ for that matter).

An opposing one-dimensional view, focused on rights and constitutionalism, is offered by Aida Torres Pérez. The perspective of an individual and her fundamental rights lies at the center of her argument, as she adds that 'preserving a role for constitutional courts under a mutual checks and balances rationale might foster better protection for individuals, since they will seek to bring their cases before the courts that better protect them'.[104] What Pérez actually proposes is individuals forum-shopping to obtain the greatest individual autonomy, at the expense, however, of public autonomy – the ability of a polity to govern itself.

In my view, the key is the construction of European constitutional democracy where no institution is neglected and each gets its due. In this way it relates closely to the idea of

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[96] Somek, n 85, 580. See also Alexander Somek, 'Europe: Political, Not Cosmopolitan' *Discussion Paper of the WZB Rule of Law Center* SP IV 2011-803.

[97] Speech given on 23 January 2013 at Bloomberg available at http://www.number10.gov.uk/news/eu-speech-at-bloomberg/.

[98] The war in the Balkans in the 1990s is moreover a powerful reminder that it is far from true that wars and mass killings are in Europe's distant past. But it may be too far to see to the Balkans from London…

[99] For an assessment see Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-crisis' (2013) 76 *Modern Law Review* 817.

[100] Scharpf, n 64, 118.

[101] J Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity Press 2012), 52.

[102] Ibid.

[103] Ibid, 41, 43.

[104] Aida Torres Pérez, 'The Challenge for Constitutional Courts as Guardians of Fundamental Rights in the European Union' in P Popelier, A Mazmanyan and W Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Cambridge: Intersentia 2012), 62.

constitutional pluralism.[105] While a full articulation of the institutional implementation of the idea of European Constitutional Democracy cannot be carried out here, for our purposes we need to acknowledge the important place national constitutional courts have in its institutional structure, not as guarantors of certain rights and freedoms, but as important parts of communicative arrangements which generate decisions that remain open to further revision, and are subject to communicatively generated legitimacy.

Only then can we fully appreciate later decisions of the German Constitutional Court which seeks to preserve space for meaningful political debate concerning European issues, when even the German Parliament failed to do so. The Lisbon Treaty decision, making this move, can later be celebrated by members of the ECJ in the way they praised the *Solange I* decision, improbably as it might have seemed in 1974.

The place of constitutional courts in the European constitutional democracy furthermore justifies their caution when they are called to serve the demands of EU rules. Regardless of superficial similarities or attempts to translate market freedoms into political rights protected by national constitutions,[106] they each reflect quite different sensibilities. The same applies when national constitutional courts are called upon to adopt EU fundamental rights or to engage in more cooperation with the ECJ.

It was therefore quite correct for the Austrian Constitutional Court to observe that 'some of the individual guarantees afforded by the Charter of Fundamental Rights totally differ in their normative structure'.[107] The Austrian Court therefore recognized the need 'to decide on a case-by-case basis which of the rights of the Charter of Fundamental Rights constitute a standard of review for proceedings before the Constitutional Court'.[108] The same caution should apply to the decisions of other national constitutional courts which embrace their 'European mandate' rather too warmly, such as courts which enforce EU law through their constitutions. Their primary role in the framework of European Constitutional Democracy is not to further promote the interests of those who are well served at the EU level, but to bring to the fore sensibilities which are systematically ignored by it – which are primarily those of the immobile locals.

At the same time, the ECJ cannot be understood as a neutral arbiter among the Member States' interests, since it represents the interest of the EU level. While its decisions deserve deference for reasons of coherence, they cannot meet with absolute obedience. This also explains why it can be wiser not to engage in direct 'dialogue', which could turn into a direct confrontation. The failure to refer a preliminary reference can sometimes express judicial wisdom, rather than judicial ego.[109]

I want to make clear, however, that this is not a call for 'a national constitutional resistance', voiced recently by Agustín José Menéndez in his powerful diagnosis of the Euro-crisis.[110] I do not agree with him that 'the deep constitution of the European Union', which he invokes as 'the ultimate normative foundation of the whole edifice of the Union, is not the Treaties, but

[105] See J Komárek, 'Institutional Dimension of Constitutional Pluralism' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in Europe and Beyond* (Oxford: Hart 2012).
[106] Most famously see MP Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Oxford: Hart Publishing 1998).
[107] Judgment n 8, paragraph 36.
[108] Ibid.
[109] Joseph HH Weiler, 'Editorial: Judicial Ego' (2011) 9 *International Journal of Constitutional Law* 1, 2.
[110] Menéndez, n 92, 525-526.

the collective of national democratic constitutions'.[111] It ignores the potential, if currently unrealized, which the EU has with regard to the limitations of national constitutional democracies. To unleash this potential, national constitutional courts must claim their place in European Constitutional Democracy and the ECJ should respect it.

6 Conclusion

This article presented the idea of European constitutional democracy and sought to argue for a special place for national constitutional courts within its framework. Constitutional courts' recent efforts to come to terms with their transformation caused by European integration need to obtain a better justification than 'cold-realist' accounts focussing on issues of power and control, and the same applies to the ECJ. European integration offers great potential to the idea of constitutional democracy and the awareness of this potential can help its realization in practise, although the current condition of the EU is rather worrying and constitutional courts struggle to find their place in EU law. This article offers some support that should be welcomed by orthodox EU lawyers as much as national constitutionalists.

[111] Ibid.