Special Issue – Preliminary References to the CJEU
Introduction

Luxembourg, Here We Come?
Constitutional Courts and the Preliminary Reference Procedure

By Monica Claes[*]

A. Introduction

As is well known, Constitutional Courts have for a long time been reluctant to use the preliminary reference procedure and to "engage in a formal dialogue" with the European Court of Justice (CJEU).[1] Several explanations have been put forward for this reluctance, some of which have been found in legal arguments, others in behavioral factors. The initial refusal of the Italian, French, and Spanish Constitutional Courts is illustrative of the former type of arguments. The Italian *Corte costituzionale* has, for a while, denied that it qualified as a 'court or tribunal' in the sense of the Treaties, since it exercised special functions of constitutional review, guaranteeing that the Constitution was observed by the Italian state and sub-state bodies and institutions.[2] Similarly, the French *Conseil constitutionnel* most likely did not consider itself an ordinary court of European law, given its peculiar position in the French legal order and its a-typical competences to review legislation only a priori and outside any case or controversy. In addition, the *Conseil* acts under very short and strict time limits, which for a long time excluded any references to the CJEU. Its conception of a strict division between its responsibilities (to review the *constitutionnalité* of legislation) and those of the ordinary courts (to review their *conventionnalité*) made it highly unlikely

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[1] I will here use the notion of "Constitutional Court" in a limited sense, referring only to those specialized "kelsenian" courts that have been established with a view to reviewing the constitutionality of primary legislation, and excluding those highest or supreme courts that have jurisdiction to review questions of constitutionality, in addition to their function of supreme court of legality, such as the Irish *Supreme Court*, the Cypriot *Supreme Court* or the Danish *Højesteret*, even though they too are members of the Conference of European Constitutional Courts. In the EU, the following courts qualify: the Austrian *Verfassungsgerichtshof*, the Belgian *Cour constitutionnelle*, the Bulgarian constitutional court, the Croatian *Ustavni sud*, the Czech *Ústavní soud*, the French *Conseil constitutionnel*, the German *Bundesverfassungsgericht*, the Hungarian *Köztársaság Alkotmánybírósága*, the Italian *Corte costituzionale*, the Latvian *Satversmes tiesa*, the Lithuanian *Konstitucinis Teismas*, the Luxembourg *Cour constitutionnelle*, the Polish *Trybunał Konstytucyjny*, the Portugese *Tribunal Constitucional*, the Romanian *Curtea Constituţională*, the Slovakian *Ústavný súd*, the Slovenian *Ustavno Sodišče,* and the Spanish *Tribunal Constitucional*, totaling a number of 18 specialized constitutional courts, or possibly 19 if one includes also the Maltese Constitutional Court. Interestingly, the Conference of European Constitutional Courts has admitted in 2014 the Dutch *Hoge Raad*, which does *not* have jurisdiction to review the constitutionality of primary legislation.

[2] *See Corte costituzionale*, decision 13/1960 of 16 March 1960 and decision 536/1995 of 29 December 1995.

that it would make a reference. The same argument has been put forward in the context of the Spanish *Tribunal constitucional*, which has always left EU law to the ordinary courts, whilst concerning itself only with reviewing the constitutionality of Spanish laws.

The behavioral explanations are usually concerned with allegations of "judicial ego",[3] "judicial jealousy", and of courts being protective of their own position of "highest court" of the land.[4] Constitutional Courts have supposedly been reluctant to make use of the procedure, because making a reference implies a voluntary subjection to the authority of an external court, given that it must be presumed that the sender of the question will consider itself bound by the answer. That is the consequence of playing by the rules.[5] Constitutional Courts would avoid such a situation. Instead, some of them have insisted that ordinary courts act on their obligation to make references, with some even making it a constitutional obligation. The German *Bundesverfassungsgericht*, for instance, made it a breach of the constitutional right to a lawful judge for a highest German court not to make a reference without explanation. As a result, making references and engaging with the CJEU was a constitutional obligation imposed on the other courts, not on the Constitutional Courts.

For a long time, Constitutional Courts could thus stay out of the game, but at the same time, they had to watch the ordinary courts apply EU law and engage with the CJEU.[6] Engaging with EU law and with the CJEU comes with the mandate to review national law and makes all courts review courts, thus empowering them. Ordinary courts become competitors to Constitutional Courts. Sometimes, lower courts have used EU law and the preliminary reference procedure to challenge decisions of higher domestic courts,

[3] Famously, *see* Joseph H.H. Weiler, *Editorial: Judicial Ego*, 9 INT'L J. CONST. L. 1, 1–4 (2011).

[4] Of course, the CJEU has on several occasions exhibited similar signs of a tendency to jealously guard its competences and of "judicial ego", as most recently in Opinion 2/13 on accession to the ECHR (Opinion 2/13, pursuant to Article 218(11) TFEU, (Dec. 18, 2014), http://curia.europa.eu/). *See generally* Bruno De Witte, *A selfish Court? The Court of Justice and the design of international dispute settlement beyond the European Union*, *in* THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW—CONSTITUTIONAL CHALLENGES 33 (Marise Cremona & Anne Thies eds., 2013).

[5] It is obvious that what the *Bundesverfasssungsgericht* did in its referral on the *OMT*, reserving the right not to follow the decision of the CJEU and declare the OMT not applicable in Germany, even if the CJEU would save the decision under EU law, is in clear breach of the system as set out in the Treaties.

[6] This has not been the case for those supreme courts that have jurisdiction to conduct constitutional review, such as the Irish *High Court*, *Court of Appeal* and *Supreme Court* or the Danish *Højesteret,* or for highest courts that, while not having jurisdiction to review the constitutionality of national law strictly speaking, come close substantially, such as the UK *Supreme Court*, the Estonian *Riigikohus* or the Dutch *Hoge Raad* and *Raad van State.* They do regularly make references including also on questions that could be termed "constitutional", such as fundamental rights issues.

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including also Constitutional Courts.[7] For a long time, however, EU law was for the most part not concerned so much with the main business of Constitutional Courts, such as fundamental rights protection or complex societal issues, but rather with free movement and technical issues of economic law. During that time, an "unofficial" division could accordingly be made between the business of Constitutional Courts and that of EU law. With the entrance of EU law into fields that used to be those of Constitutional Courts, especially fundamental rights, this became more and more problematic, since it meant that Constitutional Courts could become sidelined in their own core business. This is particularly evident in the cases of France and Belgium, be it that in those countries, the competition between the Constitutional Courts and the ordinary supreme courts (*Cours de cassation* and *Conseils d'État*) over the final say in the area of fundamental rights protection mostly concerned the ECHR and the Constitution.

This should not be taken to mean that national constitutional issues never reached Luxembourg: they were often referred by ordinary courts, as in *Internationale Handelsgesellschaft*, *Simmenthal*, *Michaniki, Landtová*, or *X, Y, Z v Staatssecretaris van Veiligheid en Justitie* and many more.[8] After all, it is not only Constitutional Courts that are confronted with "constitutional issues."

The above should also not be taken to mean that Constitutional Courts have had no business at all with EU law. Quite on the contrary: While they may have left the routine application of EU law to the ordinary courts, they have played a key role in designing the European legal space, in regulating the relations between the national and the European legal orders, and in addressing the more systemic legal and constitutional issues of European integration. This role of the Constitutional Courts can be further sub-divided into a number of different and sometimes competing roles that they play within the overall European legal space.[9] First, Constitutional Courts have facilitated the process of European legal integration, by allowing for accession and for the ratification of European Treaties, and by anchoring European law within the national legal order. In doing so, they have often had to develop new conceptions of the relations between national and international law, to reinterpret old concepts such as sovereignty to adapt to the circumstances of

[7] A recent example of the latter situation is the reference made by the Czech Highest Administrative Court in the Slovak pensions case, leading to the *Landtová* decision of the CJEU: Case C-399/09, Landtová, 2011 E.C.R. I-5573. On the feud between the Czech courts and the involvement of the CJEU therein see Michal Bobek, *Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, 10 EUR. CONST. L. REV. 54, 54–89 (2014).

[8] Case 11/70, Internationale Handelsgesellschaft, 1970 E.C.R. 1125; Case 106/77, Simmenthal, 1978 E.C.R. 629; Case C–465/11, Michaniki, 2012 E.C.R. 801; Case C–399/09, Landtová, 2011 E.C.R. I-5573; Case C–148/13, C–149/13 and C–150/13, A, B and C v. Staatssecretaris van Veiligheid en Justitie, 2014 E.C.R. 2406.

[9] This point is further developed in Monica Claes & Bruno De Witte, *The Role of National Constitutional Courts in the European Legal Space*, THE ROLE OF COURTS IN A CONTEXT OF MULTI-LEVEL GOVERNANCE 79–104 (Patricia Popelier, Armen Mazmanyan, & Werner Vandenbruwaene eds., 2012).

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membership, and to make it possible for EU law to be applied directly and with priority over conflicting national law. In many cases, the Constitutional Courts have convinced the ordinary courts to accept their European mandate to apply EU law, even if this has entailed a shift in their traditional constitutional position.[10] In this respect, therefore, Constitutional Courts can be said to have been "Euro-friendly" and cooperative with the CJEU.

Second, Constitutional Courts have also contributed constructively to the constitutionalization of Europe, by feeding the principles and values of constitutionalism into EU law, thus acting as catalysts for rather than as obstacles to European integration. Constitutional Courts have thus contributed to the development of a "common European constitutional heritage", most conspicuously in the area of fundamental rights protection. According to common wisdom, the CJEU developed its fundamental rights jurisprudence on the instigation of the German and Italian Constitutional Courts, who were unwilling to unconditionally accept the primacy of European law as long as the EU did not have an adequate system of fundamental rights protection of its own. While this line of *Solange* and "*contro limiti*" cases[11] has often been interpreted as Euro-skeptic, on a broader view of the constitutionalization of Europe as developing European constitutionalism, national Constitutional Courts should be seen as the CJEU's natural allies, rather than its enemies. European courts and national Constitutional Courts share the responsibility of protecting fundamental rights and basic principles and values against governments, political institutions, and the administration. Together, they are the guardians of the values of constitutionalism in Europe.

Third, and despite the friendly picture just painted, Constitutional Courts do still retain their constitutional mandate to uphold the Constitution: to defend the values of constitutionalism as laid down in the *national* Constitution, to protect the rights of individuals under the *national* Constitution, and for some, to protect the State and statehood itself, as well as the sovereignty, identity, and primacy of the *national* Constitution. In other words, these courts do not, on this view, act to protect 'constitutionalism' itself, but rather a particular version and form thereof: *national* democracy, *national* fundamental rights, the *national* perception of what the limits of European integration are and should be, and the *national* version of what should be essential to the national society. This has led them to develop various doctrines imposing

[10] Take, for example, the French *Conseil constitutionnel* convincing the *Cour de cassation* and the *Conseil d'État* that the review in the light of EU law did not amount to a review of the constitutionality and was therefore something they could, and should, do under the (re-interpreted) French Constitution; or the decision of the German *Bundesverfassungsgericht* accepting, without any hesitation and despite the dualist traditions, that the ordinary German courts could directly apply EU law, thereby even setting aside conflicting national law, even if this meant that they would challenge the monopoly formerly held by the *Bundesverfassungsgericht.*

[11] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 29 May 1974, BVerfGE 37, 271 [hereinafter *Solange I*]; 22 Oct. 1986, 16 BVerfGE 73, 339 [hereinafter *Solange II*]; *Corte costituzionale*, Sentenza of 18 December 1973, n. 183/73, *Frontini*.

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limits on the effect of EU law in the domestic legal order, typically in three main areas: fundamental rights review, competence review (*ultra vires* review) and, more recently, identity review and democracy review.[12] In this respect, the Constitutional Courts do challenge EU law and the CJEU's case law, which does not endorse such national and unilateral reservations to the application of EU law. And yet, it is mainly in these situations of possible constitutional conflict that Constitutional Courts have announced that should the day come that they will act on their retained jurisdiction to review EU law, they will make a reference for a preliminary ruling or will at the very least make sure that a reference is made by ordinary courts involved in the case. The *Bundesverfassungsgericht,* for instance, has recognised the primary role of the CJEU in the framework of fundamental rights protection and it has indicated that it would make a reference before declaring a measure *ultra vires*.[13] In the *Gauweiler* decision on Outright Monetary Transactions (OMT), it has acted on that promise.[14]

The relationship between national Constitutional Courts and the CJEU is thus a highly complex one that cannot be captured in a simple pro- or anti-European matrix, and should not be seen exclusively in terms of "conflict" or "cold war": Constitutional Courts and the CJEU are not simply pitted against each other. Moreover, the relationship between the CJEU and national Constitutional Courts is part of broader and highly complex political and legal dynamics and processes, with Constitutional Courts engaging with various actors at different levels: legislatures, parliaments, and governments, and various layers of government in systems of territorial division. The CJEU, in turn, engages with the European institutions and the Member States acting through their governments, as well as the parties to the cases brought before it, national institutions, and the wider audience.

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[12] According to Peter M. Huber, currently a member of the *Bundesverfassungsgericht*, the "democratic principle" and "the sovereignty of the people" have since the 1990s become the new Archimedic point of the German court's case law, as concerns over fundamental rights have decreased. In his view, "the concretization of the democratic principle by Article 20 (1) and (2) GG comprises two central ideas. First, the German concept of democracy substantially amounts to the proposition that the principle of democracy and the sovereignty of the people (Article 20(1) and (2) GG) are based on the individual right to political self-determination which itself is based on human dignity (Article 1(1) GG). (…) Second, though based on the guarantee of human dignity in Article 1 (1) GG, which is applicable to every man and every woman, the *Grundgesetz* itself, as a constitution of a nation state and like most other European constitutions reserves – with some exceptions for EU citizens at the level of local communities – democratic participation to German citizens." And "the concept of democracy as described above is not only laid down in Art. 20(1) and (2) GG but it is part of the constitutional identity in terms of Art. 79(3) GG and therefore inalienable for the ordinary and the constitution amending legislator, as well as for the legislator in European affairs." It is obvious thus that the *Bundesverfassungsgericht* protects *German* democracy and *German* human dignity in its political form. *See* P. M Huber, *The Federal Constitutional Court and European Integration*, 21 EUR. PUB. L. 83–108 (2015).

[13] *Solange II*, BVerfGE 73, 339 and Order of 7 June 2000, BVerfGE 102, 147 (*Bananenmarktordnung*); Order of 6 July 2010, BVerfGE 126, 286 (*Honeywell*). The *Bundesverfassungsgericht* has regularly spoken of a "*Kooperationsverhältnis*" with the CJEU.

[14] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 14 January 2014, 2 BvR 2728/13.

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More recently, Constitutional Courts have been considered as being "gradually marginalized" by the CJEU's case law.[15] On this analysis, it is not national parliaments, but Constitutional Courts, who are the losers of European integration. Jan Komárek has even spoken of a "doctrine of displacement" of the CJEU, with national Constitutional Courts being removed from their place in constitutional law and politics, and with ordinary courts instead acting in cooperation with the CJEU. Komárek calls on national Constitutional Courts to be more cautious when accepting their "European mandate" too readily, as manifested in some recent decisions.[16] There may be some truth in this. But, as Komárek agrees in the end, it seems that 'constitutionalism' is best served when all actors *participate* in the process, including also Constitutional Courts who should refer questions for preliminary ruling to the CJEU. For instance, had the questions challenging the validity of the *Data Retention Directive* been referred to the CJEU earlier, so that it could have reviewed the directive in the light of fundamental rights, rather than Constitutional Courts limiting their review to the exercise of discretion left to the national institutions, would the CJEU not have had the occasion to declare the directive invalid a long time ago, to the benefit of our rights to privacy and data protection?[17]

B. Talking to the European Court of Justice

As much as it requires nuance that Constitutional Courts have not engaged with EU law, it would be an overstatement to say that Constitutional Courts have not engaged at all with the CJEU. They have, but usually not by using the channel of the preliminary reference procedure. Rather, they have done so in their decisions, sending (sometimes) dark signals,

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[15] Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420 (2013); Jan Komárek, *National Constitutional Courts in the European Constitutional Democracy*, 12 INT'L J. CONST. L. 525 (2014). *See* Marc Bossuyt & Willem Verrijdt, *The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment*, 7 EUR. CONST. L. REV. 355 (2011); Anneli Albi, *Erosion of constitutional rights in EU law: A call for "substantive co-operative constitutionalism"*, 9 VIENNA J. INT'L CONST. L. (forthcoming 2015); Anneli Albi, *From the Banana saga to a Sugar Saga and Beyond: Could the Post-communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?*, COMMON MKT. L. REV. 791 (2012).

[16] KOMÁREK , *supra* note 15.

[17] Of course, the context has changed dramatically since then, but still. For a comment on the decision, *see* Orla Lynskey, *The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland, Joined Cases C–293 & 594/12*, Digital Rights Ireland Ltd and Seitlinger and others, *Judgment of the Court of Justice (Grand Chamber) of 8 April 2014, nyr*, 51 COMMON MKT. L. REV. 1789 (2014). On the Data Retention Directive before national Constitutional Courts, *see* Eleni Kosta, *The way to Luxembourg: national Court decisions on the compatibility of the Data Retention Directive with the rights to privacy and data protection*, 10 SCRIPTED 339 (2013); Ludovica Benedizione & Eleonora Paris, *Preliminary Reference and Dialogue between Courts as Tools for the Reflection on the EU Multilevel Protection of Rights. The case of the Data Retention Directive,* in this *Special Issue*. For a strong plea in favor of Constitutional Courts using the preliminary reference procedure to act as agents rather than recipients of the European constitutional construction, *see* Marta Cartabia, *Europe and rights: taking dialogue seriously*, 5 EUR. CONST. L. REV. 5 (2009).

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expressing their expectations of the Court, and agreeing or disagreeing with the directions it has taken. The CJEU is very well aware of the case law of the Constitutional Courts, as the bulletin *Reflets*, produced by the Courts' DG Library, Research and Documentation, containing abstracts of decisions of Constitutional Courts (and other national courts as well as the ECtHR) clearly shows. Members of the CJEU regularly participate in the events of the Conference of European Constitutional Courts. There are regular visits from the CJEU to Constitutional Courts and vice versa. Members of Constitutional Courts and of the CJEU often take part in academic debates, as judges or as law professors, and meet at academic conferences or engage with each other in academic writings. And quite a few members of the CJEU have, before or after their appointment to Luxembourg, served as constitutional judges. So, it is fair to say that there is quite a bit of mutual engagement taking place. But what has been missing, and is still the exception rather than the rule today, is indeed the use of the preliminary reference procedure. With all its imperfections, the preliminary reference procedure offers a couple of unique qualities that "hidden" or "silent" dialogues do not. The procedure forces national courts to submit constitutional arguments to the CJEU, to make it more aware of constitutional sensitivities, and to urge it to argue its decisions carefully (or so one would expect). Moreover, and of no less importance, the use of the procedure brings hidden and informal conversations out into the open, to the benefit of constitutional deliberations and negotiations, both at the European level and nationally.

C. Enter the Preliminary Reference Procedure

As is well known, the Belgian Constitutional Court was the first Kelsenian court to make a reference to the CJEU, and is until today by far the most regular user of the procedure, with twenty-six references to its name thus far.[18] That Court never seems to have made an issue of it: it merely assumed that it qualified as a court in the sense of the Treaties, and made its first reference in a case of limited constitutional importance.[19] Neither the CJEU nor its Advocate General made mention of the fact that it was a Constitutional Court making a reference; perhaps they even did not fully realize, given that the Constitutional Court still went under its old name of "court of arbitration." So, the Belgian Constitutional Court's entrance onto the preliminary reference scene was smooth and painless. Many

[18] The website of the Constitutional Court has a special section on "preliminary references to the Court of Justice," which lists twenty-six references; the CJEU Annual Report 2013 counts twenty-eight references. The first references dates from 1997.

[19] The questions arose in the context of an annulment action against a decree of the Flemish Community relating to specific training in general medical practice, adopted primarily in order to transpose the provisions of Title IV of Council Directive 93/16/EEC of 5 April 1993 to the Flemish Community. The Constitutional Court asked about the correct interpretation of the directive, in order to be able to assess the issue of constitutionality, *Cour constitutionnelle* (Belgium), decision 6/97 of 19 February 1997, *Fédération Belge des Chambres Syndicales de Médecins ASBL v. Flemish Government, Government of the French Community, Council of Minister* (*Training in general medical practice*).

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explanations can be put forward as to this. It is a young and unpretentious Constitutional Court, which was established after the Belgian *Cour de cassation* had developed Belgian-style monism inspired by the European Court's *van Gend en Loos*, *Costa v. ENEL,* and *Simmenthal* case law.[20] The court was not, like, for instance, its counterparts in Italy, Germany, and France, involved in the "design phase." EU law was already considered to be part of the law of the land, and it was natural for the *Cour constitutionnelle* to apply it, both as a standard for review and as applicable law. In fact, given its initially restricted jurisdiction, applying EU and ECHR law implied an empowerment, at least as much as it had been for the ordinary courts. Participating in the application of EU law thus was a natural thing to do, and prevented the Court from being sidelined. Making references to the CJEU was the next logical step. This should not be taken to imply that the Belgian Constitutional Court "slavishly follows" Luxembourg, and makes references whenever EU law is involved; it carefully chooses its cases, applies the *CILFIT* doctrine to reject requests for references, and has at times refused to ask questions which may well have been called for under EU law.[21] The Court has asked questions on interpretation and validity alike, simply to be able to apply EU law correctly, or to challenge the validity of EU law (which could be together termed the "regular use of the procedure"). Sometimes, it has an ulterior motive, for instance to outsource tricky questions concerning sensitive societal and political issues which it is unable or unwilling to solve on its own.[22] But overall, the Court seems rather comfortable with the procedure.[23]

The Austrian *Verfassungsgerichthof* has referred five preliminary references since 1999. Unlike the Belgian *Cour constitutionnelle*, it does not consider EU law to serve as a standard for its own constitutional review,[24] but in some cases it merely applies EU law.[25] In these instances, the *Verfassungsgerichthof* considers itself bound by Article 267(3)

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[20] Case 26/62, Van Gend en Loos, 1963 English Special Edition, 1; Case 6/64, Costa v ENEL, 1964 English Special Edition, 1129; Case 106/77, Simmenthal, 1978 E.C.R. 629.

[21] *See* Elke Cloots, *Germs of pluralist judicial adjudication: Advocaten voor de Wereld and other references from the Belgian Constitutional Court*, 47 COMMON MKT. L. REV. 645 (2010).

[22] Cases in point are the *Flemish Care Insurance Case*, *Cour constitutionnelle* (Belgium), decision 51/2006 of 19 April 2006; Case C–212/06 Government of Communauté française and Gouvernement wallon v Gouvernement flamand, 2008 E.R.C. I–01683, and *Cour constitutionnelle* (Belgium), decision 2009/11 of 21 January 2009; and the *Libert* case, *Cour constitutionnelle*(Belgium) decision 49/2011 of 06 April 2011; Joined Cases C–197/11 and C–203/11, Libert v Flemish Government; *Cour constitutionnelle* (Belgium), 144/2013 of 7 November 2013.

[23] See also the report submitted by the Belgian *Cour constitutionnelle* to the XVIth Congress of the Conference of European Constitutional Courts on Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives, *available at* www.confeuconstco.org.

[24] But see the recent position on the Charter, explained below.

[25] On the distinction between EU law as "standard of review" and EU law as applicable law, *see* Reinhard Klaushofer & Rainer Palmstorfer, *Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law*, EUR. PUB. L. 1 (2013).

TFEU.[26] In a 2012 asylum case, however, the *Verfassungsgerichthof* held that all this was different for the EU Charter: unlike the rest of EU law, the Charter *is* a standard for its own constitutional review, as it would be inconsistent if the court that reviewed whether constitutional and ECHR rights were respected could not do so with respect to Charter rights.[27] In those situations too, the Court will, where appropriate, make preliminary references to the CJEU, but it will not do so if a constitutionally guaranteed right, especially an ECHR right, has the same scope of application as a Charter right. In such a case, the Constitutional Court will base its decision on the Austrian Constitution without making a reference to the CJEU. So, despite the fact that the Austrian *Verfassungsgericht*, by purely numerical standards, seems to be one of the most cooperative Constitutional Courts,[28] and despite the praise it received from the former EU Commissioner for Fundamental Rights, Viviane Reding, its positions on the preliminary reference procedure and on the application of EU law and the Charter are at least questionable from an EU perspective.[29] In *A v. B and Others*, the CJEU corrected the *Verfassungsgericht* at the request of the Oberster Gerichtshof, confirming that ordinary courts must always be free to make a reference to the CJEU and that an obligation to first make a reference to the constitutional court violates EU law.[30]

The Lithuanian *Konstitucinis Teismas* (1 in 2007), the Italian *Corte costituzionale* (2, in 2008 and 2013),[31] the Spanish *Tribunal constitucional* (1 in 2011), the French *Conseil constitutionnel* (1 in 2013), the Slovenian *Ustavno Sodišče* (1 in 2013) and the German *Bundesverfassungsgericht* (1 in 2014, pending) have also made references. So whereas the Belgian and, to a lesser extent perhaps, the Austrian *Verfassungsgerichtshof,* make regular use of the procedure as it was designed in the Treaties, the other references are very recent and almost accidental. Some commentators have interpreted the recent references as the beginning of a new era of "real constitutional dialogue," ending the reluctance of

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[26] *See id*. at 1–11; Andreas Orator, *The Decision of the Austrian* Verfassungsgerichtshof *on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, in this *Special Issue*.

[27] Austrian *Verfassungsgerichtshof*, 14 March 2012, U 466/11–18 and U 1836/11.

[28] Even though this is relative, of course the *Verfassungsgerichtshof* decides 5,000 to 6,000 cases per year.

[29] Viviane Reding, *Observations on the EU Charter of Fundamental Rights and the future of the European Union*, speech to the XXV Congress of FIDE, Tallinn, 31 May 2012.

[30] Case C–112/13, A v B and Others, 2014 E.C.R. I–2195

[31] *Corte costituzionale*, Order nos. 102 and 103 of 2008; Order no. 207 of 3 July 2013. On these cases see Stefano Civitarese Matteucci, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the First Time a Preliminary Ruling in an Indirect ("Incidenter") Proceeding*, 20 EUR. PUB. L. 633 (2014); Giacinto Della Cananea, *The Italian Constitutional Court and the European Court of Justice: From Separation to Interaction?*, 14 EUR. PUB. L. 523 (2008); Filippo Fontanelli & Giuseppe Martinico, *Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice*, 16 EUR. L. J. 345 (2010).

Constitutional Courts towards European integration. This is often attributed to the new binding force of the EU Charter, which shifts the balance between the European courts, Constitutional Courts, and ordinary courts, and which forces Constitutional Courts to enter the arena in order to avoid being sidelined. So, is this a turning point? Are Constitutional Courts developing a new strategy, pushed by the entry into force of the Charter?

On closer analysis, it seems that what is happening is more mundane, and is rather a consequence of the ever-wider reach of EU law, and the particular circumstances of the relevant cases, rather than a revolutionary change of mentality of these courts. After all, there are still many missing players.[32] The change is more incremental, and almost accidental, but it does seem promising.

It is fair to assume that as a consequence of its scope entering the domain of fundamental rights protection, but also the fields of criminal law, asylum, sensitive societal and ethical questions, and the EU's actions to tackle the crisis, EU law has reached the "habitat" of Constitutional Courts more than before, and that it has become difficult for them to maintain their position of "splendid isolation." The unofficial division between "constitutionality" and "EU law" is no longer tenable. The entry into force of the Charter cannot, however, offer the sole plausible explanation. Some of the new referring courts made their first reference prior to the entry into force of the Charter (the Lithuanian and Italian Courts), and while several of the most recent cases did indeed concern fundamental rights issues (the Spanish *Melloni* case and the French *Jeremy F.* case), others did not (the Lithuanian reference, the Italian first reference, and the Gauweiler reference of the *Bundesverfassungsgericht*). In several cases, the referring courts are "merely" asking questions on the correct interpretation of EU law, in order to be able to answer fairly "run-of-the mill" cases (such as the Lithuanian reference).[33]

In several instances, the reference was used to challenge the validity of EU law, as was the case in *Advocatenvoor de Wereld* (on the European Arrest Warrant), *Tests-Achats*, the references on the *Data Retention Directive,* and *Melloni*. In these cases too, Constitutional Courts made "ordinary use" of the preliminary reference procedure, which allows all courts to challenge the validity of EU law. More research is needed into the actual practice of the preliminary reference procedure by Constitutional Courts, but at first sight, it shows a wide range of questions and of reasons for making a reference.

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[32] See the following in this *Special Issue*: Fruzsina Gárdos-Orosz, *Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference*; Aleksandra Kustra, *Reading the Tea Leaves. The Polish Constitutional Tribunal and Preliminary Ruling Procedure*; Mihail Vatsov, *European Integration Through Preliminary Rulings? The Case of the Bulgarian Constitutional Court*; Viorica Viță, *The Romanian Constitutional Court and the Principle of Primacy: To Refer or Not To Refer?*.

[33] Case C–239/07, Sabatauskas *et al.*, 2008 E.C.R. I–7523; *Lithuanian Constitutional Court*, decision no. 47/04 of 4 December 2008, *available at* www.lrkt.lt.

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Looking then at the "tone" of the references, it seems that only the reference of the *Bundesverfassungsgericht* is rather antagonistic and openly challenges or even threatens the CJEU and the EU. The other references are fairly regular references, with some standing out in terms of quality of drafting. The *Melloni* reference of the Spanish *Tribunal constitucional*, for instance, is elaborate and well-drafted, setting out the dilemma facing the *Tribunal* and presenting three possible avenues for the CJEU to address the issue. The reference of the Austrian *Verfassungsgerichtshof* on the Data Retention Directive also illustrates how instructive these references can be and how instrumental they are for the development of European constitutional law.[34] The *Verfassungsgerichtshof* drew the attention of the CJEU to the need for a comparative study of national constitutional systems, and if such a study were to reveal that they provided a more extensive protection than that of the Charter, then the Union courts should be compelled to interpret the Charter as not falling below the common level of protection offered by national constitutions. The Belgian *Cour constitutionnelle* meanwhile often sets out the position under the Belgian Constitution, describing, for instance, how a particular fundamental rights issue is approached under the Constitution, or explaining the constitutional context (e.g. Belgian federalism).[35] These examples show how useful these references can be to bring national and common constitutional traditions, as well as specificities, to the CJEU's attention, and to demand respect for them. The German *Bundesverfassungsgericht* also made reference to the position of several of its European counterparts in the *OMT referral decision*, but it did so with another objective, as if wanting to present itself to the CJEU as "the leader of the pack"—as representing other constitutional and highest courts that do not accept the absolute primacy of EU law and the final authority of the CJEU. This seems less constructive, to say the least.[36]

So, how has the CJEU reacted to these references? The CJEU has never shown itself to be very impressed with national *constitutional law* in general. From the very beginning, since *Costa v. ENEL*, *Internationale Handelsgesellschaft*, *Simmenthal,* and *Factortame*, it has repeatedly stated that EU law takes precedence over all national law, including constitutional law, and that whatever its nature and rank, conflicting measures have to be set aside. Defenses based on grounds of constitutional infrastructure are not accepted in enforcement actions. Like other international courts, the CJEU simply regards constitutional law as part of the broader category of national law. That a particular issue is deemed to be of constitutional importance in one Member State does not automatically

[34] *Verfassungsgerichtshof*, decision G 47/12–11 G 59/12–10 G 62,70,71/12–11 of 28 November 2012 (*Data Retention Directive*).

[35] Examples can be found in CLOOTS, *supra* note 21.

[36] For a critical appraisal, *see* M. Claes and J. H. Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, GERMAN L.J. 917–970 (2015).

imply that the CJEU will treat it with special care, as is clear from a case like *Michaniki.*[37] Nor has the Court ever demonstrated much sympathy for the special status of *Constitutional Courts* in the domestic setting, as is clear from cases like *Simmenthal*, *Križan*, *Winner Wetten,* and *Melki*. This seems to be the natural position of the Court as an international court. Of course, the Court may have good reason to take this position, as it does not have any say over national law and has to treat all Member States in the same manner. But the Court could distinguish "constitutional cases" in a subtler manner, by simply being more responsive to those cases that appear crucial to the countries involved and by truly engaging with the arguments put forward by the referring courts and taking their concerns seriously. Of course, there is a difficulty here: Once the reference has been made, the referring court disappears from the procedure, and the Member State is for the remainder represented by the Government, which may even find itself in a very uncomfortable position, as, for instance, in the *OMT* case. So, the particular set-up of the preliminary reference procedure allows only for a rather rudimentary question-and-answer type dialogue between the national courts and the CJEU, and may not sufficiently facilitate *proper* engagement on constitutional issues.

Has the CJEU been sufficiently responsive to Constitutional Courts making references? In many cases, the CJEU decisions on preliminary references from Constitutional Courts have been criticized precisely for not sufficiently engaging with the national courts, and for not demonstrating full awareness of the importance of the issues involved for the referring courts.[38] Several authors have framed their critique in terms of "pluralism." But whether one subscribes to the idea of "constitutional pluralism" or approaches constitutional conflict in traditional hierarchical terms, whereby each system leaves openings to the other, deliberation, judicial diplomacy and mutual engagement are essential to both. For the system to function properly, national Constitutional Courts will have to continue on the path that several have taken over the past years. The CJEU will have to demonstrate, more than it has hitherto done, that it understands the position of Constitutional Courts, and it will have to truly engage with their concerns. Only then will Constitutional Courts be prepared to continue to make references.

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[37] Though there are other cases as well, where the CJEU does appear to be sensitive to constitutional concerns of particular Member States and referring courts, even if these concerns may seem of limited interest to others, for instance in Case C–36/02, Omega, 2004 E.C.R. I–09609, Case C–391/09, Runević Vardyn, 2011 E.C.R. I–03787, or Case C–208/09, Sayn Wittgenstein, 2010 E.C.R. I–13693.

[38] On *Melloni*, *see, e.g.*, Leonard F.M. Besselink, *The parameters of constitutional conflict after* Melloni*,* 4 EUR. L. REV. 531 (2014); Aida Torres Pérez, Melloni *in Three Acts: From Dialogue to Monologue*, 10 EUR. CONST. L. REV. 308 (2014). On *Advocatenvoor de Wereld*, the *Money Laundering case* and *Flemish Insurance Case*, see CLOOTS, *supra* note 21.

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