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Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review

Davide Paris*

Abstract

In principle, constitutional courts do not review questions of domestic compliance with EU law, as these are considered to be outside their jurisdiction. But there are several exceptions in which EU law serves as a yardstick for constitutional review. This article focuses on these exceptions from a comparative perspective. First, it describes the 'state of the art' by examining whether and to what extent constitutional courts already use EU law as a standard for their decisions and invalidate domestic legislation or courts' decisions that conflict with EU law. Then, it explores the limits within which EU law can be invoked as a yardstick for constitutional review without jeopardizing the principle of primacy of EU law. Finally, it argues that constitutional courts should not be afraid to embrace EU law as a standard for review: Doing so would not only contribute to a better protection of fundamental rights and the rule of law in Europe, but would also further the interests of constitutional courts.

Keywords

Constitutional courts, compliance with EU law, Charter of fundamental rights of the EU, procedural autonomy, judicial dialogue

* Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany

Corresponding author:
Davide Paris, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany.
Email: paris@mpil.de

1. Introduction

The enforcement of EU law relies primarily on domestic authorities, notably on domestic courts. As Temple Lang succinctly remarked, 'every national court in the European Community is now a Community law court'.[1] While domestic courts ensure EU law's direct application over conflicting domestic provisions, the preliminary reference procedure enables the Court of Justice of the European Union (CJEU) to supervise and guide their actions.

In attempting to explain why Member States' courts normatively accepted the constitutional doctrines of primacy and direct effect developed by the CJEU and practically put them into use by applying the preliminary reference procedure, Weiler suggests judicial self-empowerment as one of the key factors in this regard.[2] By doing so, national courts 'were given the facility to engage with the highest jurisdiction in the Community and thus to have de facto judicial review of legislation'. There is a particular type of court, however, that did not benefit so much from the growing influence of EU law and that never fully accepted its role as a European Union court. These are the constitutional courts. For them, EU law represents a challenge to their authority, rather than an opportunity for self-empowerment.[3]

First, EU law does not expand but rather curtails the jurisdiction of constitutional courts. Since its 1987 judgment in *Foto-Frost*, the CJEU has firmly held that it enjoys exclusive jurisdiction to declare an EU act invalid. The national courts, including constitutional courts, are not endowed with the power to declare such an act invalid themselves.[4] This means that a significant and growing part of the law that is applied in a certain country – that is, directly applicable EU law and domestic law, the content of which merely transposes the mandatory provisions of an EU directive – is immune from constitutional review. Admittedly, many constitutional courts have developed counter-limit doctrines to deny application to EU law provisions in cases where they clash with the most fundamental constitutional principles. But the same constitutional courts limit the possibility to trigger these *controlimiti* mechanisms to very exceptional cases, which have so far practically never occurred, although in the most recent years this threat appears less theoretical than it used to be.[5] As Voßkuhle points out, these 'emergency brake mechanisms are most effective

1. J. Temple Lang, 'The Duties of National Courts under the Community Constitutional Law', 22 *European Law Review* (1997), p. 3. For a more extensive analysis, see M. Claes, *The National Courts' Mandate in the European Constitution* (Hart, 2006).
2. J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), p. 33, from where the following quote is taken.
3. The available literature on the impact of EU law on the role of constitutional courts is prolific. In English, see A. Torres Pérez, 'The Challenges 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* (Intersentia, 2013), p. 49; M. Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts', in M. Claes et al. (eds.), *Constitutional Conversations in Europe. Actors, Topics and Procedures* (Intersentia, 2012), p. 287; J. Komárek, 'The Place of Constitutional Courts in the EU', 9 *European Constitutional Law Review* (2012), p. 420; J. Komárek, 'National Constitutional Courts in the European Constitutional Democracy', 12 *International Journal of Constitutional Law* (2014), p. 525; and D. Piqani, 'The *Simmenthal* revolution revisited: what role for constitutional courts?', in B. de Witte et al. (eds.), *National Courts and EU Law. New Issues, Theories and Methods* (Edward Elgar, 2016), p. 26.
4. Case 314/85 *Foto-Frost*, EU: C:1987:452, para. 11-20. For a more recent case see Case C-362/14 *Schrems*, EU: C:2015:650, para. 61.
5. As for today, the only noteworthy case is the famous judgment of the Czech Constitutional Court of 31 January 2012, (CZ) Pl. ÚS 5/12, *Slovak Pensions XVII*, where a CJEU decision was found to be ultra vires. However, Czech

if they do not have to be applied. Precisely because of their existence – and not despite their existence – it has never "come to the crunch"'.[6]

Secondly, the principle of primacy causes the constitutional courts to lose their exclusive jurisdiction on domestic laws. In the countries that subscribe to the centralized model of judicial review of legislation, ordinary courts are prevented from setting aside domestic statutes that conflict with the constitution, as only the constitutional courts have the power and jurisdiction to invalidate them.[7] But EU law enables them to set aside the same domestic statutes if they conflict with EU law. Then, the prohibition for ordinary courts to deny application to domestic laws for reasons of unconstitutionality can be circumvented by setting aside the same law on the basis that it conflicts with EU law.

In sum, the principle of primacy both curtails the jurisdiction of constitutional courts and denies its exclusivity. As things stand, it is not surprising that constitutional courts do not engage with EU law as frequently as ordinary courts do. On the one hand, with regard to EU law they cannot exercise their usual power to review an act's conformity with the constitution: EU law cannot be the *object* of constitutional review. On the other hand, the intervention of constitutional courts is not strictly necessary in order to secure compliance with EU law. Following *Simmenthal*, all courts are endowed with the power to refuse application to a domestic act that conflicts with EU law.[8] Compliance with EU law can then properly be granted by ordinary courts, in dialogue with the CJEU, even if constitutional courts do not accept EU law as a *yardstick* for constitutional review. Indeed, they normally do not, as will be explained below.

Thus, constitutional courts do not seem to be fully involved in the interaction between EU and domestic law. No doubt that in several legal orders they delivered landmark decisions concerning

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commentators point out that this decision is an isolated and improper episode that is deeply rooted in peculiar national circumstances – a 'collateral damage in the judicial war' opposing the constitutional and the Supreme Administrative court – rather than an indicator of the CJEU's authority crisis. J. Komárek, 'Playing with Matches: the Czech CC Declares a Judgment of the Court of Justice of the EU *Ultra Vires*', 9 *European Constitutional Law Review* (2012), p. 323; similarly, R. Zbíral, 'A legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires*', 49 *Common Market Law Review* (2012), p. 1487. In its decision (DE) 2 BvR 2735/14, order of 15 December 2015, *EAW II*, the *Bundesverfassungsgericht* applied its doctrine of the *Identitätskontrolle* for the first time. Yet many German commentators stressed that the court did not need to apply this mechanism to solve the case at hand, in which no true conflict between EU law and the German constitutional identity existed. In fact, the *Bundesverfassungsgericht* seized this occasion to develop and clarify the procedural framework of the *Identitätskontrolle.* See, for example, D. Burchardt, 'Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht', 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016), p. 527; T. Reinbacher and M. Wendel, 'The *Bundesverfassungsgericht*'s *European Arrest Warrant II* Decision', 23 *Maastricht Journal of European and Comparative Law* (2016), p. 707-708. Most recently, see the preliminary references by the Italian Constitutional Court (IT) *Corte costituzionale*, order n. 24/2017 of 26 January 2017, *Taricco*) and by the *Bundesverfassungsgericht* ((DE) order of 18 July 2017, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, and (DE) 2 BvR 1651/15, *Public Sector Purchase Programme of the European Central Bank*). On a different level, one must also cite the recent decision by the Hungarian constitutional court on the EU's refugee relocation policy: (HR) Decision 22/2016 (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law.

6. A. Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', 7 *European Constitutional Law Review* (2010), p. 195.
7. The centralization in one specific court of the power to invalidate unconstitutional statutes is the core element of the European, 'Kelsenian', model of judicial review of legislation: see, e.g. A. Stone Sweet, 'Constitutional Courts', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), p. 818.
8. Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal*, EU: C:1978:49.

the relationship between EU and domestic constitutional law.[9] They certainly helped to settle the questions concerning EU law's position within the domestic hierarchy of legal norms and to gain acceptance for the principle of primacy at the domestic level. But it is in the day-to-day interaction between the EU and domestic law that constitutional courts seem to remain largely excluded. The use of the preliminary reference proceedings demonstrates as much.

With the two well-known exceptions of Austria and Belgium, constitutional courts make very limited use of the preliminary reference procedure that is contained in Article 267 TFEU.[10] In recent years, legal scholarship has welcomed the first preliminary references by a significant number of constitutional courts, namely those of Lithuania, Italy, Spain, France, Slovenia, Germany and lastly Poland.[11] But up until now, the questions referred by the aforementioned courts are so few that one can count them on two hands: three from the Italian Constitutional Court, two from the German Federal Constitutional Court (*Bundesverfassungsgericht*) and one from each of the others. Important – or dangerous – as they may be, they certainly do not represent a daily praxis.

'Judicial ego'[12] may partly explain this very cautious approach. As Claes suggests, 'presumably, constitutional courts have been reluctant to make references, because making reference is seen as a voluntary subjection to the authority of an external court because it presumes that the sender of the question will consider itself bound by the answer'.[13] This notwithstanding, one should not overlook that there is little need for constitutional courts to ask the CJEU to clarify the interpretation of EU law or to prove its validity, if, in principle, EU law is neither an object nor a yardstick for constitutional review.[14] This is not to say that constitutional courts never have to

9. See, for instance, the judgments of constitutional courts in relation to the Lisbon Treaty: J.M. Beneyto and I. Pernice (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos, 2011), particularly the contributions by J. Dutheil de la Rochère, D. Thym, J. Zemánek and M. Wendel therein. For a comprehensive account, see P.J. Castillo Ortiz, *EU Treaties and the Judicial Politics of National Courts. A Law and Politics Approach* (Routledge, 2016).
10. For an up-to-date account, see M. Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure', 16 *German Law Journal* (2015), p. 1331.
11. See (LT) Lithuanian Constitutional Court, decision of 8 May 2007 in case 47/04; (IT) *Corte costituzionale*, orders n. 103/2008 of 15 April 2008, n. 207/2013 of 18 July 2013, and n. 24/2017 of 26 January 2017; (ES) *Tribunal Constitucional*, judgment n. 99/2009 of 28 September 2009; (FR) *Conseil constitutionnel*, decision of 4 April 2013, 2013-314P QPC; (DE) *Bundesverfassungsgericht*, order of 14 January 2014, 2 BvR 2728/13, and order of 18 July 2017, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15; (SI) *Ustavno sodišče Republike Slovenije*, order of 6 November 2014, U-I-295/13-132; (PL) *Trybunał Konstytucyjny*, decision of 7 July 2015, case K 61/13.
12. J.H.H. Weiler, 'Editorial: Judicial Ego', 9 *International Journal of Constitutional Law* (2011), p. 1.
13. M. Claes, 'The Validity and Primacy of EU Law and the Cooperative Relationship Between National Constitutional Courts and the Court of Justice of the European Union', 23 *Maastricht Journal of European and Comparative Law* (2016), p. 164.
14. In this regard, see P. Mengozzi, 'A European Partnership of Courts. Judicial Dialogue between the EU Court of Justice and National Constitutional Courts', 20 *Il Diritto dell'Unione Europea* (2015), p. 707: '[i]n a number of Member States, the constitutional courts do not consider that their national constitutions allow them to include EU law in the constitutional norms used for reviewing the constitutionality of domestic laws. Consequently, few issues of interpretation of EU law occur which would necessitate to refer the case to the Court of Justice'. For a similar perspective, see C. Grabenwarter, 'Der österreichische Verfassungsgerichtshof', in A. von Bogdandy, C. Grabenwarter and P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum. Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen* (Müller, 2016), p. 468, who points out that the small number of preliminary references by the cooperative Austrian Constitutional Court is due to the fact that in principle EU law is not a yardstick for constitutional review.

engage with EU law if EU law is no yardstick for constitutional review. As Advocate General Kokott stressed

> even without such express incorporation [of EU law into the constitutional yardstick], Community law may be relevant to the decision in constitutional law disputes where, for example, the purported effects of a Community law measure are at issue in constitutional law proceedings or where the scope left by a Community law measure for the national legislature is open to review by a constitutional court.[15]

But if EU law only indirectly affects the decisions of constitutional courts, then it will come as no surprise that the constitutional court's engagement with EU law remains limited.

This incomplete involvement of constitutional courts with EU law is regrettable. Several Member States' constitutional courts exclude themselves from fully contributing to domestic compliance with EU law. More generally, they risk remaining at the margin of the European multi-level system of fundamental rights' protection, or at least not fully contributing to it. This article aims to show a path that constitutional courts could follow to enhance their engagement with EU law and play a more significant role in the current dialogue between national and supranational jurisdictions. This path consists of embracing EU law as a yardstick for constitutional review. Doing so entails a significant shift in the role of constitutional courts and their self-perception. By reviewing domestic acts in light of EU law, they accept the task of guaranteeing not only the domestic order's compliance with the constitution, but also compliance with EU law. Yet formally, they remain subject to a single master, the constitution. After all, a law or a judicial decision that does not comply with EU law still violates the constitution, albeit indirectly. But in substance, in these cases constitutional courts exceed their role of only guarding the constitution and become guardians of EU law as well.

This article is structured as follows. Section 2 describes the 'state of the art' by examining whether and to what extent constitutional courts already use EU law as a standard for their decisions. It shows that they generally do not and discusses why this is so. It also points out that in some exceptional cases, constitutional courts do agree to review domestic legislation and judicial decisions in light of EU law. Finally, this Section discusses whether the general refusal of constitutional courts to embrace EU law as a yardstick for review corresponds to a specific mandate in domestic constitutions or not.

Section 3 explores the limits that the CJEU imposes on the use of EU law as a yardstick for constitutional review. In particular, it stresses that in a specific proceeding, it is the very principle of primacy that limits constitutional courts' capacity to review domestic legislation in light of EU law.

After explicating the current use of EU law as a standard for constitutional review and its further potential applications, Section 4 addresses the normative question of whether constitutional courts should review domestic legislation and judicial decisions in the light of EU law or not. It argues that they should and provides reasons for this claim.

15. Opinion of Advocate General Kokott in Case C-169/08 *Presidente del Consiglio dei Ministri v. Regione autonoma della Sardegna*, EU: C:2009:420, para. 23. The case originated from the first preliminary reference by the Italian Constitutional Court that was referred to above. The first preliminary reference by the *Conseil constitutionnel*, that was also cited above, is a case in point for the second situation that was cited in Advocate General Kokott's Opinion.

Section 5 recaps this article's main contentions, stressing that the proposed perspective would not only contribute to a better protection of fundamental rights and the rule of law in Europe but would also further the interests of constitutional courts.

Precisely defining this article's scope and goal requires a couple of preliminary clarifications.

First, the term constitutional court refers to a specific judicial institution, which is detached from the ordinary judiciary and specifically entrusted with the task of securing the constitution, in particular from potential violations by the legislative power. Inspired by Kelsen's thinking, constitutional courts have spread progressively in post-World War II Europe and are now a key institution of most EU Member States.[16] The analysis and suggestions offered here only apply to the countries in which such a constitutional court exists. Put differently, this article aims to explore how a specific institution – the 'European' or 'Kelsenian' model of constitutional review – whose coexistence with the principle of primacy of EU law has proven to be highly problematic, could rethink its role in the European multilevel constitutionalism. As a consequence, it could play a more significant part in this integrated system for the protection of fundamental rights and the rule of law.

Second, the analysis is confined to three main jurisdictions of constitutional courts: abstract and concrete review of legislation, and constitutional complaints. *Abstract review* is the legislation's review performed independently of a specific case, either before (ex ante) or after (ex post) its entry into force.[17] *Concrete review* is the interlocutory procedure initiated by an ordinary court, which stays a proceeding pending before it and refers a question of constitutionality to the constitutional court, whenever it doubts the constitutionality of a statute that it has to apply.[18] *Constitutional complaints* enable an individual to file an application to the constitutional court to redress the violation of his or her fundamental rights by a legislative, administrative or judicial authority, after exhausting all other available remedies.[19] Distinguishing between different proceedings is crucial, for the capacity of constitutional courts to review compliance with EU law varies significantly depending on the type of proceeding involved.

16. For a comprehensive account, see V. Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (Yale University Press, 2009); M. de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart, 2014); A. von Bogdandy, C. Grabenwarter and P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum. Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen*.
17. In the countries considered here, this type of review is referred to as '*abstrakte Normenkontrolle*' (Austria and Germany), '*abstraktní kontrola norem*' (Czech Republic), '*contrôle a priori*' (France), '*giudizio in via principale*' (Italy) and '*recurso de inconstitucionalidad*' (Spain).
18. I refer to '*konkrete Normenkontrolle*', '*konkrétní kontrola norem*', '*contrôle a posteriori/question prioritaire de constitutionnalite*', '*giudizio in via incidentale*', and '*cuestión de inconstitucionalidad*'.
19. See the German '*Verfassungsbeschwerde*', the Czech '*ústavní stížnost*' and the Spanish '*recurso de amparo*'. There is no constitutional complaint mechanism available in either France or Italy. For the peculiarities of the Austrian '*Bescheidbeschwerde*', see Section 2.D. below. Regarding the Polish constitutional complaint, Article 79, paragraph 1 of the Polish Constitution (*Konstytucja Rzeczypospolitej Polskiej*) sets forth that 'everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the constitutional Tribunal for its judgment *on the conformity to the constitution of a statute or another normative act* upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the constitution' (emphasis added). It follows that the violation of a fundamental right in a concrete case is not the object of the *Trybunał Konstytucyjny*'s jurisdiction, but rather it constitutes an occasion to instigate the review of legislation: see P. Tuleja, 'Der polnische Verfassungsgerichtshof', in A. von Bogdandy, C. Grabenwarter and P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum. Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen*, p. 492.

Third, this article does not take into account all the Member States' constitutional courts, but only seven of them: those of Austria, Czech Republic, France, Germany, Italy, Poland and Spain. Although incomplete, this selection encompasses constitutional courts whose history, proceedings and position in the domestic legal orders are very different. This suffices for a comprehensive overview of the attitude of constitutional courts on this specific point.

Fourth, this article focuses only on those cases that expressly acknowledge EU law as a standard of review. Needless to say, constitutional courts rely on several techniques to ensure compliance with EU law without explicitly recognizing it as a separate standard of review. The interpretation of constitutional rights in light of EU law is a good example of this. These techniques are not considered here, however. This is neither to deny their importance nor to ignore that constitutional courts are able to come to the same practical results to which the CJEU has come, despite divergent approaches.[20] But this article intends to explore and advocate the potentials of an approach that challenges the idea of the separation between the domestic and EU legal orders more directly – and that more openly molds constitutional courts into European Union courts.

2. EU law as a yardstick for constitutional review: the constitutional courts' perspective

A. Constitutional courts' main approach: EU law is no yardstick for constitutional review

In principle, constitutional courts do not use EU law as a yardstick for constitutional review. They consider their task to be that of upholding the constitution, not EU law.

The Spanish Constitutional Court (*Tribunal Constitucional*) serves as a prime example of this approach. In a leading decision of 1991, it held that a statute that is not in conformity with EU law does not violate the Spanish Constitution as such – not even indirectly.[21] In particular, it infringes neither Article 93 of the Spanish Constitution, which serves as the constitutional basis for Spain's accession to the EU, nor Article 96(1) of the Spanish Constitution, which regulates the repeal of international treaties.[22] None of these constitutional provisions provide EU law with constitutional rank. As a consequence, a conflict between domestic legislation and EU law does not amount to a conflict between a sub-constitutional law and the constitution, but only between two sub-constitutional norms. Solving this conflict is, in accordance with the principle of primacy, the

20. In this regard, see, for example, on the relationship between the CJEU and the German and Italian Constitutional Courts respectively, A. Voßkuhle, 7 *European Constitutional Law Review* (2010), p. 189; and V. Onida, 'Armonia tra diversi e problemi aperti. La giurisprudenza costituzionale sui rapporti tra ordinamento interno e ordinamento comunitario', 22 *Quaderni costituzionali* (2002), p. 549. See also X. Arzoz Santisteban, *La tutela de los derechos fundamentales de la Unión Europea por el Tribunal Constitucional* (Inap, 2015), p. 110, 141, claiming that after the EU Charter of Fundamental Rights entered into force, the Spanish Constitutional Court can no longer confine itself to interpreting constitutional rights in light of European rights.
21. See (ES) *Tribunal Constitucional*, judgment 28/1991, para. 4-6.
22. Article 93 of the Spanish Constitution (*Constitución española*) reads: '[b]y means of an organic law, authorization may be granted for concluding treaties by which powers derived from the constitution shall be vested in an international organization or institution. It is incumbent on the *Cortes Generales* or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organizations in which the powers have been vested'. Article 96(1) of the Spanish Constitution (*Constitución española*) further stipulates: '[v]alidly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law'.

business of ordinary courts. If needed, they can request the CJEU's help through a preliminary reference. In the words of the Spanish Constitutional Court: 'EU law has its own guardians, among which the *Tribunal Constitucional* is not to be included'.[23]

In a judgment in a constitutional complaint proceeding of the same year, the Spanish Constitutional Court again refused to review national public authorities' conformity with EU law.[24] In particular, it held that individuals cannot use the constitutional complaint to redress the violation of a right they derive from EU law. The Spanish Constitutional Court stressed that the *amparo* proceeding is a procedural tool to claim the protection of the rights enshrined in Articles 14 to 30 of the Spanish Constitution.[25] Thus, a constitutional complaint can only be grounded in the violation of these constitutional provisions and not in the violation of EU law.

Most constitutional courts follow a similar approach, although their reasoning is often more concise.

In France, the refusal of the French Constitutional Court (*Conseil constitutionnel*) to review legislation in light of EU law dates back to its famous decision on abortion in 1975.[26] At that time, the French Constitutional Court did not distinguish EU law from international law. Against this background, it held that although Article 55 of the French Constitution confers an authority superior to that of statutes on international treaties,[27] this does not imply its jurisdiction to review whether legislative acts comply therewith. In the French Constitutional Court's opinion, 'a statute that is inconsistent with a treaty is not *ipso facto* unconstitutional'. Therefore, it was not the French Constitutional Court's task 'to consider the consistency of a statute with the provisions of a treaty or an international agreement'.[28]

23. (ES) *Tribunal Constitucional*, judgment 28/1991, para. 7 (translation by the author). For a discussion of this jurisprudence and further reference to Spanish legal scholarship, see S. Ortiz Vaamonde, 'El Tribunal Constitucional ante el derecho comunitario', 21 *Revista Española de Derecho Constitucional* (2001), p. 314 et seq. and A. Sánchez Legido, 'El Tribunal Constitucional y la garantía interna de la aplicación del derecho comunitario en España', 18 *Derecho Privado y Constitución* (2004), p. 390 et seq. Both authors consider that it is not for the *Tribunal Constitutional* to guarantee compliance with EU law.
24. (ES) *Tribunal Constitucional*, judgment 64/1991, para. 4. Notice that the judgment in the case of *Melloni* ((ES) *Tribunal Constitucional*, judgment 26/2014) clearly reaffirms the traditional position of the *Tribunal Constitucional* that the only yardstick for constitutional complaints is the constitution itself and not EU law, even when the case is entirely determined and underpinned by EU law. In this decision, after having referred its first preliminary reference to the CJEU, the *Tribunal Constitucional* used the Charter and the decision of the CJEU only as an interpretative criterion for determining the scope of constitutional rights, as is required by Article 10(2) of the Spanish Constitution (*Constitución española*). For strong criticisms of this judgment, see the concurring opinion by Justice Asua Batarrita; X. Arzoz Santisteban, *La tutela de los derechos fundamentales de la Unión Europea por el Tribunal Constitucional*, p. 75 et seq., especially p. 94; and J.I. Ugartemendia Eceizabarrena and S. Ripol Carulla, 'Del recato de la jurisprudencia del Tribunal Constitucional sobre la tutela judicial de los DFUE y de las cuestiones y problemas asociados a la misma (A propósito de la STC 26/2014, de 13 de febrero)', 50 *Revista española de derecho europeo* (2014), p. 121 et seq.
25. See Article 161(1)(b) and Article 53(2) of the Spanish Constitution (*Constitución española*).
26. (FR) *Conseil constitutionnel*, decision of 15 January 1975, 74-53 DC. The following quotations are taken from para. 5 and 7 of the decision.
27. See Article 55 of the French Constitution (*Constitution française*): '[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'.
28. This jurisprudence paved the way for a diffuse review of legislation in light of international treaties, known as *contrôle de conventionnalité*: see O. Dutheillet de Lamothe, 'Contrôle de constitutionnalité et contrôle de conventionnalité', in *Juger l'administration, administrer la justice. Mélanges en l'honneur de Daniel Labetoulle* (Dalloz, 2007), p. 315.

Subsequently, the French Constitutional Court determined, in several decisions, that primary and secondary EU law were not exempt from this rule and so could not serve as a yardstick for the review of legislation.[29] Remarkably, the French Constitutional Court did not change its jurisprudence either after a specific title concerning France's participation in the EU in 1992 was inserted in the constitution or after the constitutional amendment of 2008, which introduced a precise reference to the Lisbon Treaty in Article 81 -1 thereof.[30] Again in 2010, it maintained that 'notwithstanding the reference to the Treaty signed in Lisbon on December 13th 2007, it is not its task to review the compatibility of a statute with the provisions of this Treaty'.[31] Finally, the French Constitutional Court maintained that the same principle applies to the recently established *question prioritaire de constitutionnalité* (QPC), which is regulated by the new Article 61 -1 of the French Constitution.[32]

In Austria, since the EU Treaties do not enjoy constitutional rank, reviewing the legislation's conformity with EU law is not considered part of the jurisdiction of the constitutional court. This seemed so obvious to the Austrian Constitutional Court (*Verfassungsgerichtshof*) that it did not require any explanation. Its jurisprudence barely contained a reason for not reviewing legislation in light of EU law: the Austrian Constitutional Court confined itself to stating that the domestic legislation's compatibility with EU law was not, as such, the object of constitutional review.[33] This rule applied at least until 2012, when the Austrian Constitutional Court introduced an important exception, which will be examined in more detail later on.

The German Federal Constitutional Court similarly did not perceive the need to give detailed reasons for its refusal to review legislation in the light of EU law. In a handful of cases, it simply denied its jurisdiction to decide on domestic legislation's consistency with EU law. Conflicts of this nature were to be decided by the ordinary courts.[34] As for constitutional complaints, the German Federal Constitutional Court – like its Spanish counterpart – determined that the *Verfassungsbeschwerde* can only protect the constitutional rights that are listed in Article 93(1), n. 4 a) of

29. (FR) *Conseil constitutionnel*, decision of 29 December 1989, 89-268 DC, para. 85; (FR) *Conseil constitutionnel*, decision of 23 July 1991, 91-293 DC, para. 5; (FR) *Conseil constitutionnel*, decision of 24 July 1991, 91-298 DC, para. 21; (FR) *Conseil constitutionnel*, decision of 29 December 1998, 98-405, para. 22; (FR) *Conseil constitutionnel*, decision of 23 July 1999, 99-416 DC. (FR) *Conseil constitutionnel*, decision of 20 May 1998, 98-400 DC, on EU citizens' right to vote in local elections, presents an isolated exception in this regard.
30. See (FR) constitutional law No. 92-554 of 25 June 1992, which added a title on the European Communities and the European Union (Article 81 -1 to 81-4) to the constitution, and (FR) constitutional law No. 2008-103 of 4 February 2008, which amended the same title. Article 81 -1 current wording is quoted later in Section 2.C.
31. (FR) *Conseil constitutionnel*, decision of 12 May 2010, 2010-605 DC, para. 16. Most recently, see (FR) *Conseil constitutionnel*, decision of 9 August 2012, 654-2012 DC, para. 58; and (FR) *Conseil constitutionnel,* decision of 28 May 2014, 2014-694 DC, para. 2.
32. (FR) *Conseil constitutionnel*, decision of 12 May 2010, 2010-605 DC, para. 16; (FR) *Conseil constitutionnel*, decision of 3 February 2012, 2011-217 QPC, para. 3.
33. See (AT) VfSlg. 14.886/1997, 15.189/1998, 15.215/1998 and, more clearly, (AT) VfSlg. 15.753/2000, 15.810/2000 and 18.266/2007. Austrian scholarship stresses that constitutional provisions concerning the review of legislation, and Article 140 of the Austrian Constitution in particular, clearly refer only to domestic sources of law as a yardstick for constitutional review: see M. Potacs, 'Die Bedeutung des Gemeinschaftsrechts für das verfassungsrechtliche Normprüfungsverfahren', in M. Holoubek and M. Lang (eds.), *Das verfassungsgerichtliche Verfahren in Steuersachen* (Linde, 2010), p. 250; T. Öhlinger and M. Potacs, *EU-Recht und staatliches Recht* (LexisNexis, 2014), p. 168.
34. See (DE) BVerfGE, 31, 145, 174 et seq. (9 June 1971, *Milchpulver*); (DE) BVerfGE 82, 159, 191 (31 May 1990, *Absatzfonds*); (DE) BVerfGE 85, 191, 205 (28 January 1992, *Nachtarbeitsverbot*); (DE) BVerfGE114, 196, 220 (13 September 2005, *Beitragssatzsicherungsgesetz*).

the Basic Law. Because they are not on this list, the rights the individual derives from EU law cannot form the basis of a constitutional complaint when they have been (allegedly) violated.[35]

The Czech Constitutional Court provided a similarly terse reasoning. According to Article 87 and 88 of the Czech Constitution, the standard for constitutional review is the 'constitutional order'. Since EU law is not part of the 'constitutional order', the constitutional courts lacks the jurisdiction to review domestic legislation's conformity with EU law and to hear constitutional complaints for the violation of EU law. EU law's application falls within the jurisdiction of the ordinary courts.[36]

What unites the jurisprudence of the constitutional courts examined so far is the fundamental contention that a violation of EU law as such does not amount to a violation of the constitution. The provisions that in each constitution establish the basis for the state's participation in the EU are not deemed to be violated when the legislative or judicial branch breaches the limits that are set by EU law. In other words, none of these provisions – regardless of whether phrased in general terms, like Article 93 of the Spanish Constitution, or referring specifically to the EU or a particular treaty, like Article 55 of the French Constitution – convert a conflict between a domestic and an EU act into a conflict with the constitution. Since the constitutional court is the guardian of the constitution only, it obviously follows that reviewing domestic acts in light of EU law does not fall within its jurisdiction. The natural consequence of this approach is that EU law is never used as a yardstick for constitutional review, irrespective of whether it is invoked in the context of the review of legislation, be it abstract or concrete, or in a constitutional complaint proceeding.

B. The Italian Constitutional Court's approach: EU law is a yardstick for constitutional review, when possible

The Italian Constitutional Court (*Corte costituzionale*) follows a different approach. Unlike the constitutional courts discussed above, the Italian Constitutional Court in principle does not consider it outside the scope of its jurisdiction to review legislation in the light of EU law. Instead, it stresses that such a review is often technically impossible for procedural reasons.

In 1975, it openly neglected the basic premise that a violation of EU law is not a violation of the constitution as such.[37] The court held that a domestic statute that infringes EU law also indirectly violates Article 11 of the Italian Constitution, which was at that time the only (and very general) constitutional provision that supported Italy's participation in the EU.[38] The Italian Constitutional

35. See (DE) BVerfGE 110, 141, 154 (16 March 2004, *Kampfhunde*); and (DE) BVerfGE 115, 276, 299 et seq. (28 March 2006, *Sportwetten*).
36. See (CZ) plenary order of 21 February 2006, Pl. ÚS 19/04, *Golden shares*; (CZ) judgment of 16 January 2007, Pl. ÚS 36/05, *Reimbursement of medications*, and, in particular, (CZ) judgment of 27 March 2008, Pl. ÚS 56/05, *Squeeze-out*, para. 48. As Bobek and Kosař noted, the Czech Constitutional Court only provided a few arguments to reject the thesis that EU law is part of the Czech constitutional order: see M. Bobek and D. Kosař, 'Report on the Czech Republic and Slovakia', in G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws* (Europa Law Publishing, 2010), p. 131.
37. (IT) *Corte costituzionale*, Judgment of 30 October 1975, 232/1975, para. 8.
38. Article 11 of the Italian Constitution (*Costituzione della Repubblica Italiana*) reads: 'Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organizations furthering such ends'.

Court therefrom inferred the ordinary courts' duty to refer a question of constitutionality to the Italian Constitutional Court whenever they were confronted with a conflict between a statute and EU law. As Ferreres Comella rightly points out, this was a true 'Kelsenian' solution, aimed at preserving the centralized character of the review of legislation.[39]

The CJEU did not accept the Italian Constitutional Court's self-proclaimed monopoly on conflicts between domestic legislation and EU law, however. In *Simmenthal*, it held that the solution of a conflict between domestic and Community law cannot be 'reserved for an authority with a discretion of its own, other than the court called upon to apply Community law'.[40] The Italian Constitutional Court eventually accepted the *Simmenthal* doctrine. In its judgment 170/1984, it overruled its precedent of 1974 and stated that ordinary courts must solve the conflict between domestic legislation and EU law in favor of the latter by themselves. Nevertheless, the Italian Constitutional Court's approach continues to differ significantly from the one mentioned previously.

Whereas constitutional courts do not generally consider it as part of their jurisdiction to review domestic legislation in light of EU law, what prevents this review in the Italian Constitutional Court's view is a procedural obstacle. One must recall that in the Italian legal order, given the lack of a constitutional complaint mechanism, the main way to bring a case before the constitutional court is through the referral by an ordinary court. As a prerequisite for referring a question of constitutionality, ordinary courts must prove that they have to apply the contested statute in a concrete case. Otherwise, the referral is inadmissible. But according to the CJEU's constant jurisprudence, the principle of primacy requires ordinary courts to set aside domestic laws that are inconsistent with EU law. Consequently, ordinary courts will never have to apply a statute that conflicts with EU law in a concrete case. Hence, in practical terms, the principle of primacy inhibits the referral of a conflict between a statute and EU law to the Italian Constitutional Court.[41]

This procedural approach does not entail an absolute refusal to use EU law as a yardstick. The Italian Constitutional Court agrees not to review legislation in light of EU law when the principle of primacy forbids it from doing so. Yet the court is eager to use EU law as a yardstick when such a procedural obstacle does not exist. This occurs in two situations.

The first is the abstract review of legislation. Article 127 of the Italian Constitution enables the Government to challenge a regional law before the Italian Constitutional Court within 60 days of its publication. Within the same term, every Region can in turn challenge a state law. Since 1994, the Italian Constitutional Court accepts the invocation of EU law as a yardstick for reviewing legislation in these types of proceedings.[42] The Italian Constitutional Court stressed that in the abstract review of legislation, no procedural obstacle prevents it from helping to purge the domestic legal order of legislation that clashes with EU law.[43] In particular, it emphasized that its own contribution was vital to upholding the principle of legal certainty. If the Italian Constitutional

39. V. Ferreres Comella, *Constitutional Courts and Democratic Values*, p. 125.
40. Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal*, EU: C:1978:49, para. 23.
41. The *Corte costituzionale* therefore rules as inadmissible for lack of relevance in the main proceeding the alleged violations of EU law by domestic statutes: see, for example, (IT) *Corte costituzionale*, judgment 284/2007.
42. (IT) *Corte costituzionale*, judgment of 10 November 1994, n. 384/1994 and (IT) *Corte costituzionale*, judgment of 30 March 1995, n. 94/1995.
43. (IT) *Corte costituzionale*, judgment 94/1995. Commenting on judgment 384/1994, Sorrentino noted that it is for procedural reasons only that in most cases, the *Corte costituzionale* does not review the legislation's compatibility with EU law, and not because this exceeds its jurisdiction: see F. Sorrentino, 'Una svolta apparente nel "cammino

Court did not prevent domestic statutes that conflict with EU law from entering the legal order, every single administrative and judicial authority would later set these statutes aside. This would be detrimental to legal certainty.[44]

Secondly, even in the concrete review of legislation, there is an exception to the principle that EU law is not a yardstick for review. The obligation to set aside national law in the name of the primacy of EU law only comes into play when the latter is directly applicable. If not, ordinary courts, by definition, cannot apply it instead of a domestic statute. In this case, provided that they cannot solve the conflict between domestic law and EU law by interpreting the former in conformity with the latter, ordinary courts are allowed to instigate concrete review of legislation. Thus, they may bring a conflict between national legislation and not directly applicable EU law before the Italian Constitutional Court.

These two forms of reviewing domestic legislation in terms of EU law have been applied in very different ways, at least from a quantitative point of view. Every year, a handful of regional laws are nullified in abstract review proceeding for violating EU law,[45] while state laws are nearly immune from this review.[46] By contrast, for a long time, the court did not decide any conflict between an Italian law and not directly applicable EU law – although this option was already envisaged in judgment 170/1984. Only in recent years was this opportunity utilized in a handful of cases.[47]

From a comparative perspective, the Italian procedural approach represents an exception to the prevailing orientation that constitutional courts do not use EU law as a yardstick for review. Besides Italy, traces of this approach can only be found in the jurisprudence of the Polish Constitutional Court. In an important decision of 2006, the Polish Constitutional Court (*Trybunał Konstytucyjny*) refused to review domestic legislation in terms of EU law on the grounds of its own role and for procedural reasons.[48] In particular, it stated that it is only possible to refer a question of constitutionality when the Polish Constitutional Court's answer to that question affects the result of a case pending before the referring court. But this is not so when domestic legislation clashes with EU law, since the latter enjoys precedence in any case. Nonetheless, the Polish Constitutional Court did not exclude the possibility that a conflict between domestic legislation and EU (or international) law might fall under its jurisdiction in exceptional circumstances. It stated that this might occur 'only in the absence of any other means of eliminating the conflict (e.g.

comunitario'' della Corte: l'impugnativa statale delle leggi regionali per contrasto con il diritto comunitario', 39 *Giurisprudenza costituzionale* (1994), p. 3458.

44. (IT) *Corte costituzionale*, judgment 384/1994; and (IT) *Corte costituzionale*, judgment 94/1995. Notice that at the time, the abstract review of regional laws took place ex ante, that is, before the law came into force. Unconstitutional regional laws were therefore effectively prevented from entering the legal order and so too were regional laws that did not conform with EU law. Following a constitutional reform in 2001, the abstract review of regional, as well as state, laws is carried out after the contested law has entered into force.
45. See, for example, (IT) *Corte costituzionale*, judgments 11, 141, 168, 190 and 249 of 2014; and (IT) *Corte costituzionale,* judgments n. 38, 117 and 179 of 2015.
46. This is because as a rule, Regions cannot challenge a state law for every violation of the constitution but only for the violation of their legislative competences. Exceptions to this rule are fairly rare: see E. Malfatti, S. Panizza and R. Romboli, *Giustizia costituzionale* (4th edition, Giappichelli, 2013), p. 169.
47. See (IT) *Corte costituzionale*, judgment n. 28/2010; (IT) *Corte costituzionale*, judgment n. 227/2010; (IT) *Corte costituzionale*, judgment n. 75/2012; (IT) *Corte costituzionale*, judgment n. 267/2013; (IT) *Corte costituzionale*, judgment n. 226/2014; and (IT) *Corte costituzionale*, order n. 207/2013.
48. See (PL) procedural decision of 19 December 2006, P 37/05, in particular para. II and para. III.4, from which the following quotation is taken.

if an international agreement norm does not possess the character of a directly applicable norm) or where an important element relating to the legal certainty weights in favour thereof'.[49] Yet unlike in the Italian case, to date, this approach has not led the Polish Constitutional Court to undertake a significant review of the conformity of domestic legislation with EU law.[50]

C. The French exception: the Conseil constitutionnel's review of the correct transposition of EU directives

Some of the constitutional courts that do not see EU law as a yardstick for constitutional review have nevertheless introduced exceptions to this general principle. France is one of them. The French exception is grounded in Article 81 -1 of the Constitution. This currently reads:

> The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.

In the view of the French Constitutional Court, Article 81 -1 entails a constitutional obligation to transpose EU directives into the domestic legal order.[51]

This affects the regime of the implementing law in two ways. On the one hand, the French Constitutional Court's review of a law that enforces an EU directive is less strict than would normally be the case. As long as it transposes the mandatory provisions of an EU directive, the constitutionality of the implementing law can only be questioned if it violates a rule or a principle that is inherent to the French constitutional identity.[52] Hence, as long as French constitutional identity remains untouched, Article 81 -1 protects the French law transposing an EU directive's mandatory provision from constitutional review like a 'shield' (*écran*). On the other hand, the implementing law must comply with the directive it transposes, and it is the task of the French Constitutional Court to review whether the implementing law conforms to that directive.[53]

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49. On this point, see A. Łazowski, 'Poland: Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Courts and the Court of Justice', 5 *European Constitutional Law Review* (2008), p. 194, who criticizes the Polish Constitutional Court for not providing ordinary courts with clear criteria in order for them to decide whether a conflict between domestic legislation and EU law should be referred to the constitutional court or whether ordinary courts should directly apply EU law.
50. See P. Tuleja, in A. von Bogdandy, C. Grabenwarter and P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum. Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen*, p. 493. In (PL) judgment K18/06 of 7 November 2007, para. 6.2, in a proceeding of abstract review of legislation triggered by the Ombudsman, the *Trybunał Konstytucyjny* in principle denied its competence to review domestic laws in the light of EU law. See further K. Kowalik-Bańczyk and M. Wróblewski, 'Application of the Charter of Fundamental Rights by Polish Courts and the Jurisprudence of the Polish Constitutional Tribunal', 18 *Yearbook of Polish European Studies* (2015), p. 252, who point out that the *Trybunał Konstytucyjny* has yet to clarify whether the Charter can serve as a yardstick for the judicial review of legislation. The authors mention a question of constitutionality raised by the (PL) Court of Appeal of Gdańsk (P 19/14) that could have been good occasion to rule on this point. The Polish Constitutional Court, however, is presently in the middle of a serious constitutional crisis, the outcome of which is not fully known at the time of writing.
51. Firstly, (FR) *Conseil constitutionnel*, decision of 10 June 2004, 2004-496 DC, para. 7. See F.-X. Millet, *Le contrôle de constitutionnalité des lois de transposition. Etude de droit comparé France-Allemagne* (L'Harmattan, 2011).
52. (FR) *Conseil constitutionnel*, decision of 27 July 2006, 2006-540 DC, para. 19.
53. Ibid., para. 18.

Consequently, the EU directive serves as a yardstick for reviewing the constitutionality of the implementing law. However, this form of review is beset with several limitations.

Firstly, not all provisions of EU law serve as a yardstick, and not all French legislation is subject to review. Only a specific EU act – the directive to be transposed – serves as a standard of review regarding a specific domestic act – the implementing law.[54]

Secondly, the French Constitutional Court reviews the correct implementation of a directive only in the context of a specific proceeding, namely the abstract review of legislation. By way of contrast, one cannot bring the conflict between an implementing statute and the directive that is to be implemented before the French Constitutional Court by means of a *question prioritaire de constitutionnalité* (QPC), which now represents the main gateway to the French Constitutional Court.[55]

Thirdly, the obligation of the French Constitution under Article 61(3) to deliver the decision in abstract review proceedings within one month, de facto inhibits the referral of a question to the CJEU. Therefore, the French Constitutional Court only declares an implementing law unconstitutional when it is manifestly incompatible with the directive it is set to transpose. If the inconsistency is not evident, the respective law will transcend constitutional review, but ordinary courts can always exercise stricter scrutiny, with the help of the CJEU if needed.[56]

Because of these limitations, the French Constitutional Court's abstract review of legislation in terms of EU law has been far less extensive and effective than the corresponding abstract review performed by the Italian Constitutional Court. Only once until now has a French law been held unconstitutional for violating the directive it implements.[57]

D. The Austrian exception: the Charter as a yardstick for constitutional review

As was examined above, the French Constitutional Court grounded the exception to the principle that EU law is not a yardstick for constitutional review in a provision of the French Constitution. But curiously enough, the Austrian Constitutional Court has referred to an EU law principle – the principle of equivalence – to introduce a different exception, in a landmark decision of 2012.[58] The principle of equivalence requires that national procedures for safeguarding rights arising from EU

54. In several cases, the *Conseil constitutionnel* refused to review the domestic law's compliance with an EU directive, because contrary to the claims of the parties, the object of the provision was not to transpose the invoked directive. See (FR) *Conseil constitutionnel*, decision of 19 June 2008, 2008-564 DC; (FR) *Conseil constitutionnel*, decision of 9 June 2011, 2011-631 DC, para. 83 and 89; (FR) *Conseil constitutionnel*, decision of 13 December 2012, 2012-659 DC; (FR) *Conseil constitutionnel*, decision of 28 May 2014, 2014-694 DC; (FR) *Conseil constitutionnel*, decision of 5 August 2015, 2015-715 DC; (FR) *Conseil constitutionnel*, decision of 13 August 2015, 2015-718 DC; (FR) *Conseil constitutionnel*, decision of 4 August 2016, 2016-737 DC.

55. See (FR) *Conseil constitutionnel*, decision of 12 May 2010, 2010-605 DC, para. 19.

56. (FR) *Conseil constitutionnel*, decision of 27 July 2006, 2006-540 DC, para. 20. In two decisions, the *Conseil constitutionnel* held that the inconsistency between the implementing law and the directive being transposed was not manifest: see (FR) *Conseil constitutionnel*, decision of 19 June 2008, 2008-564 DC, para. 47 and (FR) *Conseil constitutionnel*, decision 9 June 2011, 2011-631 DC, para. 48.

57. (FR) *Conseil constitutionnel*, decision of 30 November 2006, 2006-543 DC. But note that in this case, the *Conseil constitutionnel* considered the compatibility of the implementing law with the directive on its own motion. Indeed, the referral by the parliamentary minority did not mention the conflict with the Directive: see X. Magnon, 'La loi relative au secteur de l'énergie face au droit communautaire et aux exigences constitutionnelles nationales', 18 *Revue française de droit constitutionnel* (2007), p. 316.

58. (AT) *Verfassungsgerichtshof* 14 March 2012, VfSlg. 19.632/2012. For a broader discussion of this decision, see A. Müller, 'An Austrian *Ménage à Trois*: The Convention, the Charter and the Constitution', in K.S. Ziegler, E. Wicks and

law are not less favourable than those governing similar domestic actions.[59] The innovative decision of 2012 presented the Austrian Constitutional Court's core argument as follows. Since, in Austria, the rights enshrined in the European Convention on Human Rights (ECHR) enjoy constitutional rank and can therefore be invoked in proceedings before the constitutional court, one must also be able to call upon the rights enshrined in the Charter of Fundamental Rights of the EU (the Charter) in proceedings before the constitutional court, inasmuch as they are similar to the ECHR rights in their 'wording and purpose'. Otherwise, Charter rights would be treated less favourably than constitutional/Convention rights, in violation of the principle of equivalence.

Therefore, the Austrian exception does not encompass the entire EU law, which in principle is still not a yardstick for constitutional review.[60] Not even all the rights listed in the Charter serve as a yardstick, but only those which, according to a case-by-case evaluation, are similar in wording and purpose to the Convention rights. Unlike the French exception, however, the use of Charter rights as a yardstick for constitutional review is not limited to specific proceedings: they can be invoked in all constitutional proceedings, including in the abstract and concrete review of legislation, as well as in proceedings relating to constitutional complaints.

Although its effects are not negligible, some years after its delivery, this landmark decision appears not to have had the groundbreaking impact one might have expected when it was rendered.[61] In practice, not so many or relevant cases have applied the mechanism that was developed in 2012.[62]

As for the application of the Charter as a yardstick for the judicial review of legislation in abstract proceedings, in only one case has a law been declared unconstitutional for violating, inter alia, a provision of the Charter.[63] In other cases, the Austrian Constitutional Court found that the Charter was not applicable to the case at hand or gave precedence to the constitutional yardstick over the Charter.[64]

Concerning concrete review of legislation, the CJEU's judgment in *A v. B* imposed strict limits on the applicability of this mechanism, as will be discussed extensively below. Up until now, there has not yet been a single case in which the Austrian Constitutional Court decided on the merits a

L. Hodson (eds.), *The UK and European Human Rights. A Strained Relationship?* (Hart, 2015), p. 299, with further reference to Austrian literature.

59. See Section 3.A. below.
60. See C. Grabenwarter and M. Holoubek, *Verfassungsrecht. Allgemeines Verwaltungsrecht* (Facultas, 2014), p. 161.
61. On the positive reception of this decision at the European level, see T. Öhlinger, 'Vorlagepflicht bei Verstoß eines nationalen Gesetzes gegen Artikel 47 GRCh', 25 *Europäische Zeitschrift für Wirtschaftsrecht* (2014), p. 956, who mentions, amongst other things, a letter of the then-President of the CJEU to the President of the Austrian Constitutional Court, which praised the constitutional court's ruling as an important contribution to shaping the Charter for the European common good and for promoting the cooperation between the CJEU and national constitutional courts.
62. See the analysis by S. Kieber and R. Klaushofer, 'The Austrian Constitutional Court Post Case-Law After the Landmark Decision on Charter of Fundamental Rights of the European Union', 23 *European Public Law* (2017), p. 221 et seq.
63. (AT) *Verfassungsgerichtshof*, judgment of 27 February 2014, G86/2013, declaring the law in question unconstitutional for the violation, inter alia, of Article 47 of the Charter. In this case, the *Verfassungsgerichtshof* itself instigated the review procedure ex officio, in the context of a constitutional complaint against a decision of the Federal Asylum Tribunal.
64. See (AT) *Verfassungsgerichtshof*, judgment of 3 March 2015, G107/2013 and (AT) *Verfassungsgerichtshof*, judgment of 9 October 2014, G95/2013 and (AT) *Verfassungsgerichtshof*, judgment of 27 June 2014, G47/2012ua respectively. See also (AT) *Verfassungsgerichtshof*, judgment of 25 September 2013, U1937/2012ua, excluding the violation of Article 47 of the Charter.

question of constitutionality raised by an ordinary court regarding an Austrian law that was allegedly incompatible with the Charter.[65]

With respect to constitutional complaints, one must remember that the scope of the Austrian constitutional complaint is not as broad as that of the corresponding proceedings of the German *Verfassungsbeschwerde* or the Spanish *amparo*. In particular, there is no constitutional complaint in Austria against an ordinary court's decision that infringes a constitutional right, since only administrative courts' decision can be challenged before the constitutional court for their fundamental rights' violation.[66] This significantly limits the Austrian Constitutional Court's competence to review whether ordinary courts respect EU fundamental rights in line with the mechanism that was introduced in 2012. So far, the Austrian Constitutional Court has annulled a dozen administrative decisions essentially for violating Article 47(2) of the Charter, thus sanctioning the administrative courts' refusal to conduct an oral hearing in asylum proceedings.[67]

E. The most recent jurisprudence of the Spanish Constitutional Court: the constitutional complaint to redress the wrong application of EU law

As has just been explained, those constitutional courts with the jurisdiction to hear constitutional complaints do not admit complaints that claim the violation of a right arising from EU law. This is because domestic constitutions, in particular in Germany and in Spain, expressly single out the constitutional rights that benefit from the constitutional complaint's guarantee. The rights conferred by EU law clearly do not.

There are, however, some exceptions to this principle. Under certain circumstances, a violation of EU law can amount to an indirect violation of a constitutional right. This happens particularly when ordinary courts fail to correctly apply EU law: under specific circumstances, constitutional courts consider this to be a violation of a constitutional right. Thus, within certain limits, the correct application of EU law by ordinary courts becomes a constitutional right.

The best-known application of this mechanism is the constitutional courts's review on the duty of last-instance courts to refer a matter to the CJEU for a preliminary ruling. In Germany, for example, the German Federal Constitutional Court deems the CJEU to be 'lawful judge' in the sense of Article 101(1) of the Basic Law, which states that 'no one may be removed from the jurisdiction of his lawful judge'.[68] By unduly refusing to raise a preliminary reference, a last-instance court thus violates not only Article 267(3) TFEU, but also – indirectly – Article 101(1) of the Basic Law. This enables the individual to file a constitutional complaint. According to its most recent case law, the German Federal Constitutional Court will then review whether the last-instance court justified, in a non-arbitrary manner, its refusal to raise a preliminary reference

65. In three cases, confronted with a question of constitutionality that concerned a law that simultaneously conflicted with a Charter right and a corresponding constitutional right, the *Verfassungsgerichtshof* gave precedence to the constitutional yardstick and decided the question without considering the alleged breach of the Charter: see (AT) *Verfassungsgerichtshof*, judgment of 30 June 2015, G233/2014ua, (AT) *Verfassungsgerichtshof*, judgment of 3 July 2015, G239/2014ua and (AT) *Verfassungsgerichtshof*, judgment of 9 March 2016, G447/2015a.
66. See Article 144 of the Austrian Constitution, as amended in 2014, and C. Grabenwarter, in A. von Bogdandy, C. Grabenwarter, P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum. Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen*, p. 437, 454-457.
67. Lastly, (AT) *Verfassungsgerichtshof*, judgment of 19 November 2015, E 1600/2014-19, with reference to further similar judgments. See S. Kieber and R. Klaushofer, 23 *European Public Law* (2017), p. 222-223.
68. (DE) BVerfGE 73, 339, 366 et seq. (22 October 1986, *Solange II*).

following the criteria set out by the CJEU in *Cilfit*.[69] If not, the constitutional court will annul its decision. By doing so, the constitutional court is eager to use its means, notably the constitutional complaint, to secure compliance with Article 267(3) TFEU. The constitutional court's work benefits EU law and in particular the CJEU.

The constitutional courts of Spain, Czech Republic and Austria have developed similar doctrines too, but a deep analysis of the constitutional courts' review on the duty to raise a preliminary reference exceeds the scope of this article.[70] Here, two lesser-known judgments of the Spanish Constitutional Court are examined, in which EU law provisions other than Article 267(3) TFEU have been accepted as a substantial yardstick to review the constitutionality of judicial decisions.

Decisions 145/2012 and 232/2015 are fairly similar. In both cases, the applicants complained that a Spanish court applied a domestic law to their detriment, one whose incompatibility with EU law the CJEU had already ascertained, either in the context of an infringement procedure (judgment 145/2012) or of a preliminary reference (judgment 232/2015). The applicant claimed a violation of her constitutional right to effective judicial protection pursuant to Article 24(1) of the Spanish Constitution. According to well-established constitutional jurisprudence, this provision empowers the Spanish Constitutional Court to annul a judicial decision when the ordinary court unreasonably and arbitrarily selected the norms that were relevant to the case.[71] In utilizing this principle, the Spanish Constitutional Court determined the arbitrariness of ordinary courts' decisions to apply domestic laws that the CJEU had already found to be incompatible with EU law. Hence, deliberately refusing to comply with the CJEU decisions amounted to a violation of Article 24(1) of the Spanish Constitution.

These decisions are extremely interesting. The constitutional complaint transforms the obligation to correctly apply EU law into a constitutional obligation and allows constitutional courts to ensure that ordinary courts interpret and apply EU law correctly.[72]

Yet for the time being, this potential is confined to very exceptional cases. Both decisions concern instances of open disobedience to previous CJEU judgments. It is questionable whether the constitutional court would be eager to quash a judicial decision for non-compliance with EU law where there is no previous decision by the CJEU.[73] Currently, this jurisprudence seems to protect the CJEU and the authority of its decisions more than it secures compliance with EU law

69. (DE) BVerfGE 128, 157, 188 (25 January 2011, *Universitätsklinikum Gießen und Marburg*) and (DE) BVerfGE 135, 155, 231 (28 January 2014, *Filmabgabe*). After a conflict between its two senates, the jurisprudence of the *Bundesverfassungsgericht* has recently evolved toward a stricter scrutiny of last instance courts' compliance with their duty to refer a matter to the CJEU: see C. Finck and E.E. Wagner, 'Eine schrittweise Annäherung des BVerfG an den unionsrechtlichen Maßstab der Vorlagepflicht nach Art. 267 III AEUV beim gesetzlichen Richter?', 33 *Neue Zeitschrift für Verwaltungsrecht* (2014), p. 1286.
70. For an up-to-date overview, see C. Lacchi, 'Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU', 16 *German Law Journal* (2015), p. 1663; and C. Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References', 53 *Common Market Law Review* (2016), p. 692.
71. See (ES) *Tribunal Constitucional*, judgment 145/2012, para. 2, with further references to the jurisprudence of the *Tribunal Constitucional*.
72. The importance of these decisions is strongly emphasized by D. Sarmiento, 'Reinforcing the (domestic) constitutional protection of primacy of EU law', 50 *Common Market Law Review* (2013), p. 888: '[Judgment 145/2012] proves the willingness of a constitutional court to act as a guardian of EU law and of its ultimate interpret, putting the constitution at the service of EU law'.
73. Ibid., p. 886.

per se.[74] Nevertheless, decisions like these may indicate that constitutional courts continue to develop broader control over ordinary courts' correct application of EU law.[75]

F. Concluding remarks: unwilling or unable courts?

The analysis so far has shown that the cases in which constitutional courts use EU law as a yardstick for their decisions are exceptions to the prevailing tendency of to review domestic acts only in light of the constitution. It remains to be seen whether one must consider this tendency a precise constitutional mandate backed by domestic constitutions or rather a choice by constitutional courts themselves, which is not mandatory under constitutional law.

In this field, constitutional constraints seem to be fairly weak. The constitutions of the legal orders considered here contain neither an express duty for constitutional courts to use EU law as a standard of review nor do they contain an express prohibition to this effect. Whether or not to use EU law as a yardstick seems to depend on the will of constitutional courts rather than on the letter of the constitutions themselves, which is usually broad enough to allow both choices.

In France, for example, the French Constitutional Court relied on Article 81 -1 of the French Constitution to introduce the above-mentioned review of the correct implementation of EU directives. But there is nothing in the letter of Article 81 -1 that specifically refers to implementing EU directives and limits the constitutional obligation to respect EU law to this particular case.[76] This restriction is not a constitutional mandate but rather the French Constitutional Court's choice.

In Italy too, the letter of the constitution has proven to be of little relevance. Admittedly, Article 117(1) thereof currently reads: 'Legislative powers shall be vested in the State and the Regions in compliance with the constitution and with the constraints deriving from EU-legislation and international obligations'. This certainly offers a strong constitutional basis to use EU law as a yardstick in constitutional review proceedings. But the current text of Article 117 is the result of a constitutional amendment passed in 2001, whereas the constitutional court's decision to use EU law as a yardstick dates back to 1975 (regarding the concrete review of legislation) and to 1994 (concerning the abstract review of legislation).[77] At that time, the Italian Constitution contained no express provision concerning EU law. The Italian Constitutional Court nevertheless decided to undertake,

74. Ibid., p. 885.

75. In this regard, see X. Arzoz Santisteban, *La tutela de los derechos fundamentales de la Unión Europea por el Tribunal Constitucional*, p. 111 et seq., 148. More recently, in line with the approach of (ES) decisions 145/2012 and 232/2015, see (ES) *Tribunal Constitucional*, judgment 148/2016; (ES) *Tribunal Constitucional*, judgment 223/2016; and (ES) *Tribunal Constitucional*, judgment, 75/2017.

76. See A. Levade, 'La constitutionnalité de transposition entre conformité et compatibilité', in *Renoveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu* (Dalloz, 2007), p. 1296; B. Mathieu, 'Le contrôle de transposition des directives communautaires par le Conseil constitutionnel ou le difficultés du cartésianisme', in *Renoveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu*, p. 1314; C. Charpy, 'Note sous décision n° 2006-540 DC du 27 juillet 2006', 18 *Revue française de droit constitutionnel* (2007), p. 105, who stresses that in light of Article 81 -1 of the French Constitution, there is no reason to limit the *Conseil constitutionnel*'s use of EU law as a yardstick to the directives only and that an extension to the whole panoply of EU law seems logical; similarly, S. Mouton and J. Roux, 'La protection des normes internationales par le juge constitutionnel', in X. Magnon et al. (eds.), *L'office du juge constitutionnel face aux exigences supranationales* (Bruylant, 2015), p. 289-290. Gaïa sees the limitation to the directives only as a question of 'judicial politics': see P. Gaïa, 'Le Conseil constitutionnel et le droit de l'Union européenne', in *Annuaire International de Justice Constitutionnelle 2012* (Economica, Presses Universitaires d'Aix-Marseille, 2013), p. 588.

77. See Section 2.B. above.

as far as possible, the task of reviewing domestic legislation's compliance with EU law. The constitutional amendment in 2001 only confirmed its previous choice.

Also in Austria, constitutional provisions have played a rather marginal role. What made the constitutional court overrule its previous well-established jurisprudence in 2012 was not a constitutional amendment but as a result of the Lisbon Treaty coming into force. However, as Austrian scholars have stressed, the reference to the Lisbon Treaty did not constitute a convincing reason. Rather, it offered a pretext to justify the desired overruling.[78]

Thus, constitutional courts seem to have great flexibility in determining whether to use EU law as a yardstick. A comparison between the Italian and the Spanish Constitutional Court is fairly telling in that regard. In 1975, the Italian Constitutional Court stated that a statute that violates EU law indirectly also violates the constitution. In 1991, the Spanish Constitutional Court decided that it does not. One would hardly look for a difference in the constitutional texts to explain these divergent approaches. Neither Article 11 of the Italian Constitution nor Articles 93 and 96 of the Spanish Constitution directly refer to the EU. If at all, it is the Spanish Constitution that more clearly affirms the Parliament's duty to comply with the state's international obligations.[79]

If that is true, it follows that a constitutional amendment is not strictly necessary to overcome the currently predominant practice of eschewing EU law as a yardstick for constitutional review. Instead, it suffices that constitutional courts overrule their own jurisprudence. Admittedly, this might not hold in the case of constitutional complaints. As has been shown above, both in Germany and in Spain and to some extent in the Czech Republic as well, the constitutional provisions are sufficiently clear in mentioning which rights benefit from the constitutional complaints' guarantee and in excluding the rights conferred by EU law.[80] The recent decisions of the Spanish Constitutional Court, however, show that if constitutional courts are eager to open the constitutional complaint's proceeding to the review of the correct application of EU law, they enjoy a certain leeway to do so without needing to await a constitutional amendment.

3. EU law as a yardstick for constitutional review: the CJEU's perspective – between equivalence and primacy

The previous section highlighted the current state of the art regarding the use of EU law as a standard for constitutional review. This section examines its further potentials and limits from the perspective of the CJEU. It aims to clarify whether the CJEU requires constitutional courts to accept EU law as a standard for review or whether conversely, under certain circumstances, it prevents them from doing so.

78. To this effect, see F. Merli, 'Umleitung der Rechtsgeschichte', 20 *Journal für Rechtspolitik* (2012), p. 356. Pöschl argues that the decision of the Austrian Constitutional Court of 2012 is an 'act of constitutional politics', giving the Charter constitutional rank despite the lack of a constitutional amendment to this effect: see M. Pöschl, 'Verfassungsgerichtsbarkeit nach Lissabon: Anmerkungen zum Charta-Erkenntnis des VfGH', 67 *Zeitschrift für öffentliches Recht* (2012), p. 607.

79. Compare, in particular, Article 93 of the Spanish Constitution (*Constitución española*) and Article 11 of the Italian Constitution (*Costituzione della Repubblica Italiana*).

80. However, see J. Griebel, 'Europäische Grundrechte als Prüfungsmaßstab der Verfassungsbeschwerde', *Das Deutsche Verwaltungsblatt* (2014), p. 204; and M. Bäcker, 'Das Grundgesetz als Implementationsgarant der Unionsgrundrechte', 50 *Europarecht* (2015), p. 411, arguing that the *Bundesverfassungsgericht* does not need to wait for a constitutional amendment in order to use EU fundamental rights, and the Charter in particular, as a yardstick.

A. The weak constraint of the principle of equivalence

EU law grants Member States a wide margin of discretion in determining how to protect the rights stemming from EU law. In the CJEU's own words, in the absence of EU law procedural rules, 'it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [EU] law'.[81] Only the principles of effectiveness and equivalence can limit the Member States' procedural autonomy. The former demands that domestic procedural rules 'do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law'. The latter requires that 'such rules are not less favourable than those governing similar domestic actions'. Both principles, but in particular the principle of equivalence, hardly support the claim that constitutional courts are obliged to use EU law as a yardstick for constitutional review.[82]

As for the review of legislation, according to the principle of equivalence, an obligation to use EU law as a yardstick may only arise if EU rights can more easily be limited by domestic legislation than constitutional rights. Only in that case would the procedural rules for safeguarding EU rights be less favourable than those governing similar actions against domestic legislation. No doubt the mechanism to protect EU rights from undue legislative limitations differs from the one used to protect constitutional rights. The former rests on the ordinary courts' power to set aside domestic legislation that conflicts with EU law, the latter on the constitutional courts' power to nullify unconstitutional legislation. But it is hard to claim that the diffuse review is not only different but also less favourable than the centralized one. In the case of EU rights, all courts can set aside contrasting legislation. In the case of constitutional rights, only the constitutional court can annul the offending legislation. This can hardly be termed 'discrimination' against EU rights prohibited by the principle of equivalence. It is one thing to say that the constitutional courts' use of EU law as a yardstick may generally enhance the protection of EU rights – as is argued in this article –, but it is quite another to claim that EU rights' current protection is insufficient in light of the principle of equivalence, if constitutional courts do not use EU law as a yardstick.

Where the concrete review of legislation in particular is concerned, as Advocate General Bot pointed out in his opinion in *A v. B*, it is difficult to see

> how refraining, in a given dispute, from applying a national statute that is contrary to EU law would be less favourable for the individual than initiating an interlocutory procedure for the review of constitutionality with a view to having that statute struck down. On the contrary (. . .) the implementation of such a procedure is relatively cumbersome, involving expense and additional delays for the parties to

81. *Ex multis*, Joined Cases C-222/05 to C-225/05 *van der Weerd*, EU: C:2007:318, para. 28, which is also the source of the following quotations. See K. Lenaerts, 'The Decentralised Enforcement of EU Law: The Principles of Equivalence and Effectiveness', in *Scritti in onore di Giuseppe Tesauro* (Volume II, Editoriale Scientifica, 2014), p. 1057.

82. For the opposite view that the principle of equivalence requires constitutional courts to use EU law as a standard of review, see M. Claes, *The National Courts' Mandate in the European Constitution*, p. 462; D. 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), p. 135; and, similarly, M. Bäcker, 50 *Europarecht* (2015), p. 412. For a comprehensive discussion of the arguments for and against the application of the European Mandate to constitutional courts, see X. Arzoz Santisteban, *La tutela de los derechos fundamentales de la Unión Europea por el Tribunal Constitucional*, p. 24 et seq.; and D. Piqani, in B. de Witte et al. (eds.), *National Courts and EU Law. New Issues, Theories and Methods*, p. 38 et seq.

> the proceedings, whereas the national court is able, directly in the course of the proceedings before it, to establish that a national statute is incompatible with EU law and to disregard that statute, thus securing immediate protection for the parties.[83]

Similar observations apply to constitutional complaints. It cannot be said that EU rights are discriminated against if constitutional courts do not open constitutional complaint proceedings to claims pertaining to the violation of EU law rights. Again, the mechanisms to secure the rights that an individual derives from EU law differ from those which are enacted to secure domestic rights, but they are not necessarily less favourable. EU rights enjoy the benefit of every court to set aside conflicting laws but do not have direct recourse to the constitutional court, while the opposite applies in the case of constitutional rights.

In sum, the principle of equivalence does not mandate constitutional courts to use EU law as a standard for constitutional review. Although procedural rules governing actions to safeguard rights which individuals derive from EU law differ from those that control similar domestic actions, they cannot be viewed as being less favourable.[84]

B. The limits set by the principle of primacy to concrete review of legislation

While the principle of equivalence does not oblige constitutional courts to accept EU law as a standard of review, the principle of primacy makes this use extremely difficult in the context of a specific jurisdiction of constitutional courts: the concrete review of legislation.

Among the jurisdictions of constitutional courts, the concrete review of legislation is one such control mechanism whereby reviewing legislation in light of EU law is most problematic, if not impossible.[85] Even if constitutional courts are eager to review domestic legislation in terms of EU law – which, as has been previously shown, is generally not the case – this is anything but easy in proceedings relating to the concrete review of legislation. This is because ordinary courts' power to raise a question of constitutionality when domestic legislation violates EU law necessarily overlaps with and jeopardizes their duty to secure the primacy of EU law by refusing to apply those domestic statutes that contrast with EU law. Instigating an interlocutory procedure before the constitutional court prevents ordinary courts from immediately setting aside those domestic statutes that clash with EU law. The CJEU has thus imposed strict limits on constitutional courts' potential use of EU law as a yardstick in the context of the concrete review of legislation, in order to protect the primacy of EU law and the preliminary reference procedure.

Firstly, in *Simmenthal*, as a response to the Italian Constitutional Court, the CJEU stated that the power to solve a conflict between domestic legislation and EU law cannot be withheld from

83. Opinion of Advocate General Bot in Case C-112/13 *A v. B*, EU: C:2014:207, para. 68.

84. Up until now, only the Austrian Constitutional Court has held the opposite view, in its 2012 decision on the Charter. Not only did this attract strong criticism in legal scholarship (see e.g. M. Pöschl, 67 Zeitschrift für öffentliches Recht (2012), p. 594), but also the same CJEU in *A v. B* did not seem very convinced by this argument (see Case C-112/13 *A v. B*, EU: C:2014:2195, para. 29).

85. Notice that here only the possibility for constitutional courts to review domestic legislation in light of EU law, i.e. using EU law as a yardstick, is taken into account. However, using the constitution as a yardstick in the concrete review of legislation is also highly problematic, when the same norm appears to be in conflict both with the constitution and with EU law: see the famous CJEU judgment in *Melki and Abdeli* (Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli*, EU C:2010:363).

ordinary courts and reserved exclusively to the constitutional court.[86] Put differently, *Simmenthal* ruled out the possibility of granting constitutional courts a monopoly over conflicts between domestic legislation and EU law.

Secondly, in *A v. B*, in which the CJEU expressed its view on the above-mentioned 2012 decision of the Austrian Constitutional Court, it made clear that a shared responsibility between ordinary courts and the constitutional court is also highly problematic. In the CJEU's view, domestic courts are not entirely precluded from initiating an interlocutory proceeding to review legislation before the national constitutional court when a law is considered to breach EU law, in particular the provisions of the Charter. But this possibility should not affect the ordinary courts' power to refer the same issue to the CJEU and to set aside any domestic legislation that they feel contradicts EU law. This means that, when confronted with a domestic law that allegedly violates EU law, ordinary courts can refer the matter to the constitutional court for a concrete review of the legislation in of EU law, provided that three conditions are respected. They must, first, remain free to refer the matter to the CJEU, regardless of what stage the proceedings are at and when they deem this appropriate to do so; second, they must adopt any measure necessary to ensure interim judicial protection of rights conferred by the EU legal order and third, they must set aside, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be in contravention of EU law.

Compared to the strictness of *Simmenthal*, the decision in *A v. B* is clearly a compromise that tries to take into account both the primacy of EU law and the jurisdiction of constitutional courts.[87] It qualifies *Simmenthal* by accepting that the immediate primacy of EU law is postponed to make room for the review of the constitutional court. Yet it still protects EU law's primacy by ensuring that the interlocutory proceeding before the constitutional court in no way affects the ordinary courts' wide discretion in referring matters to the CJEU and in setting aside domestic legislation. In this way, the *A v. B* compromise might be unsatisfactory from both points of view: It jeopardizes EU law's primacy without adequately protecting the interlocutory proceeding before constitutional courts.[88] The final outcome is to broaden the discretion of ordinary courts when confronted with a domestic statute that does not comply with EU law, allowing them to choose which court, if any, they call upon regarding a preliminary reference. For the sake of legal certainty, ambiguities of what ordinary courts have to do when confronted with a conflict between domestic legislation and EU law should be avoided as much as possible.[89] The last thing that the complex European multilevel system for the protection of fundamental rights and the rule of law needs, are further uncertainties.

The Italian Constitutional Court is currently pursuing a third possible interaction between the interlocutory proceeding for the review of constitutionality and the preliminary reference to the CJEU/direct disapplication. As was mentioned above, the Italian Constitutional Court does not

86. See Section 2.B. above.
87. See M. de Visser, 'Juggling Centralized Constitutional Review and EU Primacy in the Domestic Enforcement of the Charter: A v. B', 52 *Common Market Law Review* (2015), p. 1324.
88. For the first criticism, see R. Mastroianni, 'La Corte di giustizia ed il controllo di costituzionalità: *Simmenthal revisited*?', 59 *Giurisprudenza costituzionale* (2014), p. 4097; for the second, see D. Paris, 'Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU', 12 *European Constitutional Law Review* (2015), p. 404.
89. Similar concerns about legal certainty have been expressed by M. Pöschl, 67 Zeitschrift für öffentliches Recht (2012), p. 60, with reference to the Austrian Constitutional Court's decision of 2012.

claim a sole or concurring jurisdiction over conflicts between domestic and EU law. Rather, it agrees to step in only when neither the CJEU nor the ordinary courts can solve such a conflict. That is the case when domestic legislation clashes with a norm of EU law that lacks direct effect. Ordinary courts cannot give precedence over domestic legislation to an EU-law norm that they cannot immediately apply. Therefore, if the domestic statute cannot be interpreted in conformity with EU law, the constitutional court must intervene to free the ordinary courts from the obligation to respect a domestic statute that is in contravention of EU law. However, this mechanism is not likely to be employed very often.[90]

In sum, given the limits set by the CJEU in the name of the primacy of EU law and of Article 267 TFEU, there is little room to review legislation in light of EU law in concrete review proceedings. *Simmenthal* precludes constitutional courts from substituting themselves for ordinary courts/the CJEU when the task involves securing the primacy of EU law. *A v. B* makes the concurrence between constitutional courts and ordinary courts/CJEU detrimental to the principle of legal certainty. The experience of the Italian Constitutional Court shows that there is only very limited room for a constitutional court's subsidiary jurisdiction, although it does exist.

It therefore seems as if concrete review of legislation is not the procedure through which constitutional courts can contribute to guaranteeing the primacy of EU law.[91] Apparently, ordinary courts cannot serve two masters – the CJEU and their constitutional court – when confronted with a domestic statute that is contrary to EU law in the course of a proceeding. In these cases, it is wise to follow the EU law's ultimate interpreter, and that is the CJEU.

By way of contrast, it must be stressed that the principle of primacy does not prevent constitutional courts from using EU law as a yardstick in proceedings other than concrete review of legislation. Both in the abstract review of legislation and in the context of constitutional complaints, the constitutional courts' review and ordinary courts' power to set aside legislation contradicting EU law and to refer a question to the CJEU coexist without any friction arising.[92]

90. See Section 2.B. above. Skepticism on this mechanism has been expressed by V. Onida, 'A cinquanta anni dalla sentenza "Costa/ENEL": Riflettendo sui rapporti fra ordinamento interno e ordinamento comunitario alla luce della giurisprudenza', in B. Nascimbene (ed.), *Costa/ENEL: Corte costituzionale e Corte di giustizia a confronto, cinquant'anni dopo* (Giuffrè, 2015), p. 45. The author rightly points out that ordinary courts, when confronted with a statute that allegedly violates an EU law provision lacking direct effect, can de facto choose between referring a preliminary reference to the CJEU or a question of constitutionality to the constitutional court.

91. There are however interesting proposals to enable constitutional courts to play a more significant role in assuring the respect of EU law even in the context of the concrete review of legislation. In particular, see V. Ferreres Comella, *Constitutional Courts and Democratic Values*, p. 131, suggesting that 'the constitutional court should be allowed to step in and unify the domestic legal answer' when a CJEU decision expresses some principles to evaluate the compatibility of domestic legislation with EU law but delegate the final decision to the domestic courts. Another interesting proposal can be found in: 'Informe del Consejo de Estado sobre la inserción del derecho europeo en el ordenamiento español', *Consejo de Estado* (2008), www.consejo-estado.es/bases.htm, p. 240-243. It suggests that one must oblige 'an ordinary court that has handed down a final judgment setting aside a legal provision found to be contrary to Community law' to refer the question to the *Tribunal Constitucional* to remove such non-compliant laws from the Spanish legal system.

92. See, with regard to the abstract review of legislation, D. Piqani, in B. de Witte et al. (eds.), *National Courts and EU Law. New Issues, Theories and Methods*, p. 41 and 45.

4. Should constitutional courts embrace EU law as a yardstick for constitutional review?

The previous sections have discussed whether, how, and to what extent constitutional courts currently accept and could further resort to EU law as a yardstick for their decisions. Now, the normative question this section aims to answer is: should they do so? In my view they should. This section will explore three arguments to support the use of EU law for constitutional review.[93]

The first argument relates to an *enhanced domestic compliance with EU law*.[94] Indeed, constitutional courts can contribute to this goal in a way that other courts cannot. Nullifying statutes is generally considered to be the most characteristic power of constitutional courts.[95] Its centralization in one specific court is the core element of the European, 'Kelsenian', model of judicial review of legislation.[96] Were this power to be put at the service of the principle of EU law's primacy as well, domestic compliance with EU law would necessarily benefit too.

Admittedly, at least since *Simmenthal*, EU law knows how to overcome a legislative obstacle to its application. However, the same CJEU pointed out that it does not suffice that courts set aside domestic provisions that conflict with EU law on a case-by-case basis. Member States are instead required to remove them from their legal order. In the CJEU's words,

> the primacy and direct effect of the provisions of Community law do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with Community law, since the maintenance of such provisions gives rise to an ambiguous state of affairs in so far as it leaves persons concerned in a state of uncertainty as to the possibilities available to them of relying on Community law.[97]

The additional guarantee that constitutional courts can provide by nullifying statutes with general effect might then improve the effectiveness of the primacy of EU law. In particular, it can reduce the legal uncertainty that is inherent in the potential conflict between domestic legislation and EU law in two ways.

Firstly, a constitutional court can intervene more quickly than an ordinary court. For a law to be set aside as a result of the fact that it conflicts with EU law, the domestic law's application must first be sufficiently contested to cause litigation. By way of contrast, the abstract review of the conformity of a statute with EU law can be instigated in advance without any connection to a specific case. The contested law can then be brought before a judge more expediently. This

93. An interesting pro-and-con discussion of the two models of integration and separation between the constitutional and the European yardstick can be found in X. Arzoz Santisteban, *La tutela de los derechos fundamentales de la Unión Europea por el Tribunal Constitucional*, p. 133 et seq., with a particular focus on the protection of fundamental rights.
94. See D. Piqani, in M. Cremona (ed.), *Compliance and the Enforcement of EU Law*, p. 136.
95. See for instance, A. Harding, P. Leyland and T. Groppi, 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective', in A. Harding and P. Leyland (eds.), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill, 2009), p. 7. Interestingly, Favoreu cites the lack of power to nullify a national law in order to claim that the CJEU and the ECtHR cannot be considered constitutional courts: see L. Favoreu, 'Les Cours de Luxembourg et de Strasbourg ne sont pas des Cours constitutionnelles', in *Au carrefour des droits. Mélanges en l'honneur de Louis Dubouis* (Dalloz, 2002), p. 43.
96. See footnote 7 above.
97. Case 104/86 *Commission v. Italy*, EU: C:1988:171. See also Case 167/73 *Commission v. France*, EU: C:1974:35, and, more recently, Joined Cases C-231/06 to C-233/06 *Jonkman*, EU: C:2007:373, para. 38.

decreases legal uncertainty and prevents a statute that conflicts with EU law from being applied and causing subsequent litigation.

Secondly, legal uncertainty is reduced not just before but also after its conformity with EU law is reviewed by a court. When an ordinary court refuses to apply a statute, that statute continues to be part of the domestic legal order. Consequently, other courts can take opposite views on the same issue, until the CJEU authoritatively settles the matter. By contrast, when the constitutional court sets aside a statute for contradicting EU law, that statute is removed from the legal order so that no other judge can apply it anymore.

An appropriate use of EU law as a yardstick in abstract review can thus help to diminish the legal uncertainty concerning domestic legislation's compatibility with EU law. Undoubtedly, not all potential legislative flaws can emerge before a law is applied in a concrete case. Abstract review by constitutional courts cannot substitute for the review by ordinary courts. But it can appropriately complement it in order to improve the guarantees of domestic compliance with EU law. In this regard, the Italian Constitutional Court's consolidated praxis of abstract review of legislation in light of EU law provides an interesting example.

A second argument for constitutional courts' use of EU law as a yardstick is that this would enable constitutional courts to *participate in the process of determining the scope and the meaning of EU law* more than they currently do. This is of crucial importance, in the field of fundamental rights in particular. As Voßkuhle rightly points out, while EU law divests constitutional courts of their exclusive right to review the applicable law at the domestic level, this is compensated by

> the possibility of contributing, in the European multilevel system, towards the establishment of a binding common European constitutional order with fundamental rights standards that are applicable Europe-wide, and of expertly accompanying, in doing so, the process of coherence in the multilevel cooperation system of the Court of Justice and the European Court of Human Rights.[98]

However, the limited use of EU law by constitutional courts significantly restricts their capacity to participate in the current development of EU fundamental rights, while engaging with EU law on a deeper level is likely to enhance their contribution.

Article 6 TEU cites the constitutional traditions common to the Member States as one of the sources of EU fundamental rights. It is difficult to find another institution better equipped than constitutional courts to express the voice of these constitutional traditions and make it heard in Luxembourg.[99] Constitutional courts have the experience, the knowledge and a sensitivity that no other domestic judicial body in the field of fundamental rights can claim to possess. If constitutional courts engaged more frequently with EU law, the occasions to express their views on matters concerning fundamental rights that are protected by the Charter would certainly multiply. In sum, accepting EU law as a yardstick for constitutional review would foster constitutional courts' participation in the European judicial dialogue. In this context, the following examples should be considered.

First, when a CC is called upon to review the compatibility of a domestic law with secondary EU law, it may have to initially check whether the yardstick itself – that is, the secondary EU law in question – complies with primary EU law, in particular with the Charter. This requires the

98. A. Voßkuhle, 7 *European Constitutional Law Review* (2010), p. 197.

99. See M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 6 *European Constitutional Law Review* (2009), p. 23.

constitutional court to interpret the Charter and possibly to initiate a preliminary reference to the CJEU regarding the validity of the secondary EU law that serves as a yardstick. The constitutional court could then express its view on the Charter's interpretation, taking its own constitutional tradition into account. And the CJEU is likely to take such an eminent interpretation seriously.[100]

Second, a constitutional court could find that there is no conflict with EU law, as long as the EU law provision that serves as a yardstick is interpreted in a certain manner. In particular, the constitutional court might ground its interpretation of EU law on fundamental-rights arguments, stating that a different interpretation of secondary EU law would infringe certain fundamental rights that are enshrined in both the Charter and in the constitution. This would enable the constitutional court to express its view on the interpretation of a certain provision of EU law. Its influential decision would thus become part of the body of case law that both the CJEU and – most importantly – other national courts in the EU should consider when interpreting EU law.

Third, when a constitutional court hears a constitutional complaint for the violation of a Charter right, it first has to interpret the Charter's provision and it will most probably compare it to the corresponding constitutional right or balance it with competing constitutional rights.

The latter example leads to a third, partly imbricated, argument in favor of using EU law as a yardstick. Although the rights of the Charter and of the Convention largely correspond to those listed in national constitutions, the interpretation of the same rights by the CJEU, the European Court of Human Rights (ECtHR) and the national courts still often diverge. Nowadays there is no lack of examples of opposite views at the national and supranational level on the scope of the same rights, or on the correct balance with other competing rights.[101] If constitutional courts are willing to increase their engagement with EU law, they will multiply their opportunities to *contribute to the solution of conflicts between domestic and EU rights*. There are at least three good reasons why it is appropriate to concentrate the solution of these conflicts in the hands of the constitutional courts, as far as possible.[102]

Firstly, they benefit from a composition and legitimacy that is meant to help them look beyond the mere technical profile of a legal problem. This can be very helpful when it comes to judging conflicts between the national and the supranational dimension of fundamental rights, which frequently involve thorny issues relating to the concept of sovereignty and the relationship between the EU and its Member States.

Secondly, constitutional courts are able to exert great influence on domestic institutions, both the legislature and the courts. This becomes particularly relevant when a new interpretation of

100. See K. Lenaerts, 'Kooperation und Spannung im Verhältnis von EuGH und nationalen Verfassungsgerichten' 50 *Europarecht* (2015), p. 7, quoting *Pringle* as an example of how Member States' constitutional and supreme courts can influence the CJEU, in particular by properly phrasing the preliminary reference. See Case C-370/12 *Thomas Pringle v. Government of Ireland and Others*, EU: C:2012:756.

101. Just to mention two of the most famous cases, *Melloni* and *Taricco* both involved opposing views at the national and EU level concerning the scope of the right to a fair trial and of the *nulla poena sine lege* principle respectively: see Case C-399/11 *Melloni*, EU: C:2013:107; and (ES) *Tribunal Constitucional*, order 86/2011 and judgment 26/2014; Case C-105/14 *Taricco*, EU: C:2015:555; and (IT) *Corte costituzionale*, order 24/2017.

102. Notice, in that respect, that both the German and the Italian Constitutional Courts have constantly held that only the constitutional court, and not all courts, may make use of the power to declare an EU act contrary to the most fundamental principles of domestic constitutional law: see lastly, (DE) *Bundesverfassungsgericht*, 2 BvR 2735/14, order of 15 December 2015, *EAW II*, § 43; and (IT) *Corte costituzionale*, order 24/2017, *Taricco*.

fundamental rights fostered by the CJEU has to be introduced into the domestic legal order, because the constitutional court's endorsement will significantly increase its legitimacy.[103]

Third, no other domestic judicial authority has had – and still has – as much influence on the CJEU as constitutional courts. The historical example of the CJEU developing its own fundamental-rights jurisprudence under the pressure of the German and Italian Constitutional Courts remains the best evidence of the authority of constitutional courts in Luxembourg. For a more recent case, one can recall the CJEU's jurisprudence on the Charter's scope of application. The statement of the German Federal Constitutional Court that a broad interpretation of *Åkerberg Fransson* might be considered an *ultra vires* act[104] certainly played a role in forcing the CJEU to render a more restrictive reading of Article 51(1) of the Charter.[105] The strong influence of the constitutional courts on the CJEU is crucial to guaranteeing an equal footing in the dialogue between the national and the European spheres.

Put differently, by agreeing to use EU law as a yardstick, constitutional courts might become the point of reference for domestic compliance with EU law and, more generally, for the solutions to the conflicts between domestic and EU law. Through their specific jurisdictions and powers, they might first contribute to a greater compliance with EU law by redressing its violations. But they will not only serve as mere agents of the CJEU. Their power should be exercised in the opposite direction as well, from the national to the European level. They should make the voice of constitutional traditions and identities heard in Luxembourg, in order to participate in shaping the content of EU fundamental rights and to impact future CJEU decisions. Working as intermediaries in conflicts between national and EU law, they should show judicial wisdom by using all possible powers and techniques that are available to them – including, very exceptionally, the warning or even the use of the *controlimiti* doctrines – to strike a balance between respecting the obligations that stem from the integration process and avoiding a top-down imposition that does not take into account the peculiarities of national constitutional traditions.[106]

At the present stage of European multilevel constitutionalism, a significant part of the Member States' sovereign powers have been transferred to the EU. Yet Member States are all but ready to waive the core content of their sovereignty. This necessitates a constant recalibration between the purpose of European unity and the respect for constitutional traditions.[107] The history,

103. On this issue, see A. von Bogdandy, C. Grabenwarter and P.M. Huber, 'Verfassungsgerichtsbarkeit im europäischen Rechtsraum', in A. von Bogdandy, C. Grabenwarter, P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum. Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen*, p. 9.

104. Case C-617/10 *Åkerberg Fransson*, EU: C:2013:105; and (DE) *Bundesverfassungsgericht*, judgment of the First Senate of 24 April 2013, 1 BvR 1215/07 *Counter-Terrorism Database*, para. 91. See D. Thym, 'Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice', 10 *European Constitutional Law Review* (2013), p. 391.

105. See, for example, Case C-206/13 *Siragusa*, EU: C:2014:126; Case C-265/13 *Torralbo Marcos*, EU: C:2014:187; Case C-198/13 *Julian Hernández*, EU: C:2014:2055. More recently, there is widespread agreement that the CJEU's decision on the European Arrest Warrant in *Aranyosi and Căldăraru* (Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU: C:2016:198) was strongly influenced by (DE) *Bundesverfassungsgericht* decision 2 BvR 2735/14, order of 15 December 2015, *EAW II*.

106. See M. Cartabia, 6 *European Constitutional Law Review* (2009), p. 17 et seq., who warns of the risk of a 'judicial colonialism', fostered by the CJEU, that tramples the plurality of national constitutional traditions. In the author's view, a deeper dialogue between constitutional courts and the CJEU, in particular through preliminary reference procedures, is the best antidote against this risk.

107. See K. Lenaerts, 50 *Europarecht* (2015), stressing that a cooperative relationship between domestic constitutional courts and the CJEU makes it possible for the latter to consider national peculiarities, as long as the unity und primacy of EU law are not impinged.

composition, jurisdiction and powers of constitutional courts make them extremely well-suited to fulfilling this delicate task of mediating between the national and supranational level.[108]

5. Conclusion

The 'splendid isolation'[109] of constitutional courts has often been criticized, and various voices in legal scholarship have demanded that they demonstrate a more cooperative attitude.[110] This article has suggested a procedural way to make this possible. It has argued that incorporating EU law into the constitutional yardstick would not only contribute to better compliance with EU legislation but would also enable constitutional courts to overcome their now restricted engagement with EU law and to fully participate in the current multilevel system of fundamental rights' protection that currently exists at the European level. This perspective may face several objections, however.

In particular, concerns have been raised that using EU law, and notably the Charter, as a yardstick for constitutional review would ultimately lead to a general lowering of the standard of fundamental rights protection that is offered by constitutional courts.[111] For example, Komárek made a strong case against the use of the Charter in constitutional review, claiming principally that EU fundamental rights differ in their essence from constitutional rights.[112] The former 'rest firmly on the foundations of a market integration project', the latter are based on 'a project of emancipation from economic insecurity and dependence on the market'. In his view, embracing EU fundamental rights would lead constitutional courts to surrender to the CJEU's market-oriented approach to fundamental rights and, ultimately, to the ideology of neoliberalism. This observation should consequently push constitutional courts in the opposite direction than the one supported in this article: instead of becoming European Union courts, they should maintain a separation between the constitutional sphere and the European sphere, so that they can continue to guarantee a higher standard of rights at the national level, removed from external influences.[113]

In my view, this perspective is not convincing. At the present stage of the European integration process, a rigid division between the supranational and the national level is simply not tenable.[114] If constitutional courts try to avoid dealing with EU law, they are unlikely to safeguard a higher standard of fundamental rights protection. Most probably, they will simply fail to allow constitutional traditions to contribute to the ongoing formation of EU fundamental rights. Furthermore, a deeper engagement with EU law does not necessarily mean that constitutional courts have to

108. In a broader perspective, on the constitutional courts' role of 'regulating and policing the relations between the national and the European' in a multilevel constitutional order, see M. Claes and B. de Witte, 'The Role of National Constitutional Courts in the European Legal Space', in P. Popelier, A. Mazmanyan and W. Vandenbruwaene (eds.), *The Role of Constitutional Courts in Multilevel Governance*, p. 79.

109. M. Bobek, in M. Claes et al. (eds.), *Constitutional Conversations in Europe*, p. 302.

110. M. Cartabia, 6 *European Constitutional Law Review* (2009).

111. But see for the opposite view, M. Bäcker, 50 *Europarecht* (2015), p. 395 et seq., arguing that it is the current refusal by the *Bundesverfassungsgericht* to use EU fundamental rights as a standard for constitutional review that entails the risk of a general lowering of fundamental rights' protection.

112. J. Komárek, 'Why National Constitutional Courts Should not Embrace EU Fundamental Rights', in S. de Vries, U. Bernitz and S. Weatherill (eds.), *The EU Charter of Fundamental Rights as Binding Instrument. Five years Old and Growing* (Hart, 2015), p. 75. Following quotations are taken from p. 87 and 85 respectively.

113. This corresponds to what Thym calls the 'separation thesis' of the *Bundesverfassungsgericht*, which, unlike the 'fusion thesis' supported by the CJEU, 'aims at safeguarding national autonomy by means of a strict demarcation of national human rights and the Charter': see D. Thym, 10 *European Constitutional Law Review* (2013), p. 401.

114. See D. Thym, 'Vereinigt die Grundrechte!', 70 *Juristenzeitung* (2015), p. 56.

passively accept whatever comes from Luxembourg.[115] In fact, it means quite the opposite: only if they agree to deal with EU law will they be in the position to influence the CJEU and to exercise, if need be, the counter-limits doctrines that they have announced. In other words, embracing EU law as a standard for constitutional review does not entail waiving constitutional pluralism and does not pave the way to a hierarchical pyramid with the CJEU at its apex. Rather, it will force constitutional courts to play a stronger role in the European multilevel and pluralistic constitutionalism.

More pragmatically, it might be objected that the shift in the role of constitutional courts that was proposed in this article does not fit the constitutional courts' own interests.[116] In a nutshell, by consenting to serve as European Union courts, constitutional courts would risk losing their 'right to the last word' and subordinating themselves to the CJEU. After all, the more often constitutional courts deal with EU law, the more likely it will be that they have to follow the CJEU's guidance.

In my opinion, it does not only benefit the protection of fundamental rights and the rule of law in Europe, if constitutional courts engage more robustly with EU law. It accommodates the interest of constitutional courts too.[117] Admittedly, the ongoing process of European integration strongly affects the position and authority of constitutional courts. In the complex system of European multilevel constitutionalism, constitutional courts are no longer the only judicial authorities that limit the state's highest powers, but just one of the judicial authorities entrusted with this task. A state-centered constitutionalism, grounded in sovereign states with limited international obligations and in the unconditional supremacy of the constitution over all other sources of law, certainly offers a more reassuring scenario for constitutional courts. But if they do not want to represent a mere stumbling block in the current integration process, they have to adapt their role to the constantly changing constitutional landscape. In this perspective, what constitutional courts should fear now is their marginalization from the European circuit of fundamental rights protection, rather than the loss of their ultimate say in matters pertaining to fundamental rights. Ordinary courts increasingly rely on the Charter and on its concomitant interpretation supplied by the CJEU – not to mention the ECHR and the ECtHR – to solve disputes involving questions of fundamental rights. Constitutional courts should ensure that they are not excluded from this circuit. It is worse to be denied the opportunity to speak at all than to be occasionally contradicted in a dialogue.

Author's note

Research fellow of the Alexander von Humboldt Foundation at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, paris@mpil.de. This article considers case law until 31

115. See J.I. Ugartemendia Eceizabarrena and S. Ripol Carulla, 50 *Revista española de derecho europeo* (2014), p. 144 et seq., who rightly stress, with regard to the *Tribunal Constitutional*, that even if constitutional courts were to assume the task of guaranteeing EU fundamental rights – a prospect that the two authors support – they should nevertheless not give up being the constitutional rights' ultimate guarantors and should therefore keep exercising the *controlimiti* review, when appropriate.
116. For example, M. de Visser, 52 *Common Market Law Review* (2015), p. 1335, stresses that in terms of authority, the CJEU benefits much more than constitutional courts from using the Charter as a standard of review.
117. Similarly, D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', 50 *Common market Law Review* (2013), p. 1298 et seq.; M. Bäcker, 50 *Europarecht* (2015); and M. Bobek, in M. Claes et al. (eds.), *Constitutional Conversations in Europe*, p. 305, who stresses that using the Charter for the purposes of constitutional review would lead to constitutional courts 'regaining the power of review of national implementing measures, which they had previously abdicated to ordinary courts in cooperation with the court of Justice' and 'regaining a direct voice, a voice they lost by choosing to remain silent in their isolationist constitutional structure'.

December 2015. Some further references to scholarship and case law have been added in the course of proofreading (September 2017), especially in the footnotes. Unless otherwise indicated, courts' judgments and constitutional provisions are quoted in the English translations available on the websites of the respective constitutional courts. I had the opportunity to discuss an earlier version of this article at the Max Planck Institute in Heidelberg, at the Masaryk University in Brno, and at the LUISS University in Rome. I am grateful to all participants for their valuable comments, and in particular to Armin von Bogdandy, Russel Miller, Christoph Krenn, Lucas Marlow, David Kosař, Ladislav Vyhnánek, and Giovanni Piccirilli, as well as to the anonymous reviewers. The usual disclaimers apply.