

**National constitutional courts in supranational litigation:
A contextual analysis**

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Abstract

The article examines the role of national constitutional courts in supranational litigation. It firstly illustrates their value and situates well-known judicial doctrines affecting their jurisdiction in the context of the normative claims, policy agenda and institutional framework promoted over the years by the European Union. Against this background, it gauges the potential of national constitutional courts in countering the process of intergovernmental and technocratic encroachment of national constitutional democracies characterizing the most recent evolutionary stages of the European integration process. It is claimed that constitutional courts are in the position of reinforcing, resisting or correcting Union measures with a detrimental impact on national constitutional principles. After having identified in correction the approach more coherent with their constitutional mandate, the article highlights a disturbing paradox: in remaining faithful to their constitutional role, constitutional courts contribute to the sustainability of a comprehensive institutional setting corroding the idea of constitutional democracy on which they are premised.

I. Introduction

Owing to their role in protecting fundamental rights and contributing to the legitimacy of representative government, constitutional courts are among the most respected institutions in European constitutional democracies. Yet, because of developments associated with the process of European integration, their role is increasingly overshadowed. The Union relies on a judicial system that, by privileging the relationship between ordinary courts and the European Court of Justice, marginalizes constitutional courts and undermines national constitutional legality. Within a pan-European constitutional democracy, this process should not be a reason of particular concern for the Court of Justice and supranational legality could compensate constitutional losses at national level. Preoccupation for the displacement of

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constitutional courts, however, seems justified considering the dubious constitutional credentials of both the Union and the Court of Justice.

This article discusses the role of national constitutional courts in supranational litigation, i.e. in cases in which Union norms or policy-measures are implicated.² It firstly illustrates their value and situates well-known judicial doctrines affecting their jurisdiction in the context of the normative claims, policy agenda and institutional framework promoted by Union. Against this background, it gauges the potential of national constitutional courts in countering the process of intergovernmental and technocratic encroachment of national constitutional democracies marking the most recent evolutionary stages of the European integration process. The argument begins by considering the value of national constitutional courts as participants of national constitutional democracies (section II). Constitutional courts, it is argued, are key to sustaining legal and political orders pursuing the reconciliation of private and public autonomy. Within this context, they develop a particular type of legality and style of adjudication allowing the correction of legislative decisions in the light of higher formal and substantive principles. To fulfil this task constitutional courts benefit from their specific institutional qualities and a privileged relationship with ordinary courts.

The value of constitutional courts, however, is relative for they partake also in shortcomings of national constitutional democracies such as parochialism and regulatory capture (section III). The supranational institutions introduced in Europe post World War II cope with these deficiencies and establish a complementary relationship with national constitutional democracies: while the latter provide the institutional framework to govern salient issues regarding redistribution and fundamental rights protection, supranational institutions promote allocative efficiency and individual emancipation across the borders. Complementarity emerges also as the main criterion inspiring judicial organization: following their specific institutional expertise, national constitutional courts and the European Court of Justice assert their leadership over distinct jurisdictional areas reflecting the above mentioned division of labour. To secure the effectiveness of supranational law, however, the Court of Justice develop relationships with ordinary courts which challenge the affiliation of the latter with constitutional courts. The article illustrates the doctrines leading to this outcome and maps out the jurisdictional areas remaining subject to national constitutional review. It argues that, as long as the scope of supranational law remains limited, those doctrines do not have the effect of marginalizing constitutional courts. This explains why, on the whole, the latter have accepted their redefined condition also as a matter of domestic constitutional law.

² The definition is deliberately broad to include, alongside the routine cases involving the application of Union norms or the review of their legality, cases concerning the validity or the interpretation of national measures adopted under the impulse of Union law or recommendations (see below section VI).

The position of national constitutional courts turns more controversial as the Union expands its remit (section IV). The article recognizes that this development is paralleled by a constitutional recalibration of the EU institutional framework, but it rejects the view suggesting a transformation of the Union into a fully-fledged pan-European constitutional democracy. The expansion of Union competences towards increasingly salient policy areas, it is contended, is better explained as a response to the crisis of national social government. New EU competences are instrumental to the promotion of the advanced liberalism agenda, a coherent policy strategy aimed at strengthening the competitiveness of national economies by re-orienting national welfare states. The implementation of this policy agenda, it is argued, corrodes national constitutional democracies without offering any equivalent supranational substitute. In this context doctrines such as *Simmenthal* become problematic for constitutional courts are displaced and, with them, also the possibility to oppose intergovernmental and technocratic encroachment may appear foreclosed.

However, the Union institutional framework is not blind to the potentially disintegrative effects of supranational policy-making and adjudication (section V). The article claims that the *Simmenthal* doctrine is no real impediment to represent and defend national constitutional claims in supranational litigation. The preliminary reference procedure allows constitutional courts to influence supranational litigation from the margins: while ordinary courts are in the position of conveying domestic constitutional claims to the Court of Justice, constitutional courts can still take part to litigation as a back-up option were supranational judgments to be perceived as unsustainable according to national constitutional standards. If properly employed, this opportunity creates sufficient incentives for the Court of Justice to handle carefully national constitutional materials and internalize them within the existing EU policy strategies.

Finally, the role of constitutional courts is discussed from a normative standpoint by examining the range of approaches inspiring their activity in supranational litigation (section VI). By focusing on judgments decided in the backdrop of the economic and financial crisis, the article shows that constitutional courts are in the position of reinforcing, resisting or correcting measures of structural change adopted under EU impulse. After having identified in correction the approach more coherent with their constitutional mandate, the article concludes by highlighting a disturbing paradox: in remaining faithful to their constitutional role, constitutional courts contribute to the sustainability of a comprehensive institutional setting corroding the idea of constitutional democracy on which they are premised (section VII).

II. The value of national constitutional courts

National constitutional courts are a major institutional innovation introduced in most of Western European countries in the aftermath of World War II.³ The success of constitutional democracies owes considerably to their activity. Firstly, the operation of courts entrusted with the task of protecting fundamental rights is key to sustaining a legal and political order designed to secure human dignity.⁴ Secondly, the existence of institutions constraining political power in accordance with higher formal and substantive constitutional principles is vital for the legitimacy of representative government.⁵ This explains the popularity of constitutional democracy throughout the 20th century and its contemporary almost uncontested status in European institutional imagination.⁶

The value of constitutional courts, however, exceeds their capacity to secure limited government and relates to the particular normative claims and legal language expressed by constitutional democracies in Europe. The birth and operation of constitutional courts is situated within epochal political developments taking place in the 1950s-1960s such as the transition from authoritarian to democratic rule, the growth of the social state and the consolidation of the Keynesian consensus inspiring national political economies.⁷ Human dignity, social justice, an active role of government in regulating markets emerge as the landmark normative claims of legal and political orders furthering the reconciliation of private and public autonomy as their overriding goal.⁸ As active participants to their constitutional systems, constitutional courts fully endorse those claims and develop a type of legality and style of adjudication departing significantly from that practiced by ordinary courts under liberal constitutions.⁹

³ Austria and Czechoslovakia had already experimented with constitutional courts in the interwar period, see S. L. Paulson, 'Constitutional Review in the United States and Austria: Notes on the Beginnings' (2003) 1 *Ratio Juris*, 228-237. On the experience of the German Constitutional Court, see M. Hailbronner, *Traditions and Transformations. The Rise of German Constitutionalism* (OUP, 2015). On the Italian Constitutional Court, see V. Barsotti, P. G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (OUP, 2015).

⁴ M. Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders', in M. Rosenfeld, A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012), 370-396.

⁵ M. Loughlin, *Sword & Scales. An Examination of the Relationship Between Law & Politics* (Hart Publishing, 2000), 189-195.

⁶ Political and intellectual resistance to constitutional democracy is still predominant in the United Kingdom, see R. Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (CUP, 2007). Yet, soft versions of judicial review of legislation have penetrated also into this jurisdiction, see S. Gardbaum, 'Reassessing the Commonwealth model of constitutionalism' (2010) 8 *International Journal of Constitutional Law*, 167-206.

⁷ J. Komárek, 'National constitutional courts in the European constitutional democracy' (2014) 12 *International Journal of Constitutional Law*, 533-535.

⁸ J. Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 *European Constitutional Law Review*, 423-425.

⁹ This is evident already from their earlier pronouncements: see, e.g., Italian Constitutional Court, judgment n. 1/1956, and German Constitutional Court, 7 BVerfGE 198 (1958) (*Lüth*). The importance of the distinction between ordinary (or bourgeois) and constitutional (or welfare) legality is stressed in J. Komárek, above n. 7, 531-532.

Judicial activity under liberal constitutions typically entailed a mechanical role for courts: in every given case courts were expected to decide by interpreting and enforcing clear-cut legislative rules. Operating prevalingly with open-ended constitutional principles, constitutional courts enter in a more complex relationship with legislation. Only in a minority of cases are they in the position of enforcing constitutional rules mechanically against flawed legislation. More often their task is accommodating conflicting constitutional principles or evaluating whether legislative restrictions to fundamental rights are justified.¹⁰ This requires constitutional courts to walk a difficult tightrope: on the one hand, they are expected to second-guess political decisions in the light of open-ended constitutional principles; on the other, their legitimacy relies on being perceived as non-partisan institutions.¹¹ As a rule of thumb, constitutional courts approach their task as entailing an essentially corrective function.¹² This self-restrained attitude reflects the centrality of legislative lawmaking and parliaments in post-World War II constitutions. Statutes, and not a principled construction of constitutional principles, can bring into existence the institutional structures required to pursue collective goods and render effective socio-economic rights.¹³ Thus, by allowing broad discretion in the definition of the policy objectives inspiring legislation, constitutional courts defer to contingent political majorities and avoid the charge of exploiting constitutional principles to further alternative policy agendas. By vetting government justifications to legislative limitations of fundamental rights, they fulfil their constitutional mandate of constraining political power.¹⁴

Specific institutional qualities facilitate the fulfilment of this constitutional function. Firstly, constitutional courts are conceived as specialized courts insulated from routine litigation. Endowed with time and resources, they are in a privileged position to undertake the justificatory practices associated with judicial review of legislation.¹⁵ Secondly, their composition enhances professional diversity and, to a certain extent, political responsiveness,¹⁶ which combined with their shorter term of office may result in greater democratic accountability.¹⁷ Thirdly, proceedings before constitutional courts enhance

¹⁰ M. Kumm, 'Institutionalising Socratic Contestation: the Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies*, 166.

¹¹ G. Zagrebelsky, 'La Corte in-politica' (2005) XXV *Quaderni Costituzionali*, 273.

¹² For such a characterization, see R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale* (Giuffrè, 1992), 154-169.

¹³ I am grateful to Agustín José Ménéndez for having raised this point in his comments.

¹⁴ M. Cohen-Eliya, I. Porat, 'Proportionality and the Culture of Justification' (2011) 59 *The American Journal of Comparative Law*, 463-490.

¹⁵ V. Ferreres Comella, *Constitutional Courts & Democratic Values* (YUP, 2009), 38-39.

¹⁶ *Ibidem*, 39-45.

¹⁷ *Ibidem*, 100-102.

deliberation for they capture the attention of the general public and are open to interventions by other institutions and social actors involved in policy-making.¹⁸

Owing to these qualities and institutional position, constitutional courts have established their leadership on domestic processes of constitutional interpretation. At the beginning, their cohabitation with ordinary courts is almost invariably marked by tensions.¹⁹ These typically erupt once constitutional courts adventure into statutory interpretation or supreme courts interpret constitutional principles.²⁰ Only in part can these conflicts be explained as turf battles for judicial supremacy. Originally, these tensions reflect more profound clashes between different adjudicative styles and conceptions of legality. However, with time and experience ordinary courts ease their resistance to constitutional legality and turn into trusted partners of constitutional courts. They learn the constitutional language and enter into a more constructive relationship with constitutional courts.²¹ Yet, in the same period in which constitutional legality seems to pervade national legal and political orders, developments associated with European integration redefine at least in part judicial relationships casting a shadow over constitutional courts and constitutional legality.

III. The relativisation of constitutional courts

1. Supranational legality and the relativisation of constitutional courts

The scaling down of constitutional courts and constitutional legality may be accounted for by focusing on the deficiencies of constitutional democracies. Hitherto analysis has stressed their value as if their achievements could justify unconditional support. Yet, both constitutional democracies and constitutional courts present also shortcomings motivating a more nuanced evaluation of their record. Firstly, notwithstanding the operation of constitutional courts, constitutional democracies may fail to secure sufficient levels of fundamental rights protection. Secondly, national democracies have an inbuilt tendency of sanctifying national communities and their particular conception of the human order.²² Thirdly, democratic regimes, even when subject to domestic constitutional constraints, are prone to the exclusion of outsiders and capture by vested interests.²³

¹⁸ *Ibidem*, 65-66.

¹⁹ L. Garlicki, 'Constitutional courts versus supreme courts' (2007) 5 *International Journal of Constitutional Law*, 44-68.

²⁰ *Ibidem*, 47-49.

²¹ This has proved easier in constitutional systems where access to the constitutional court is possible via constitutional complaint, see *Ibidem*, 52. However, even in these contexts an element of tension is viewed as a systemic problem, *Ibidem*, 63-66.

²² D. Chalmers, 'European Restatements of Sovereignty', *LSE Law, Society and Economy Working Papers 10/2013*, 14.

²³ See R. Dahrendorf, *The Modern Social Conflict. An Essay on the Politics of Liberty* (Weidenfeld and Nicolson, 1988), 108-110.

Of course, whether and to what extent constitutional democracies are actually exposed to this type of risks is debatable.²⁴ But from an historical point of view, their ambivalence is key to understanding the public law arrangements established in Europe post-World War II. In Europe constitutional democracies have almost never been conceived of as insulated and self-sufficient legal and political orders. Since their origins, they have developed within a complex framework of multilateral institutions aimed at reinforcing or complementing their normative claims and institutional characteristics.²⁵ Thus, concerns for the level of fundamental rights protection effectively supplied by constitutional democracies justify their participation in the Council of Europe and, notably, in the European Convention of Human Rights.²⁶ More interestingly for our purposes, risks such as parochialism and capture by vested interests motivate the instauration of a supranational legal order promoting individual emancipation across the borders²⁷ and allocative efficiency.²⁸

Already from its foundation, therefore, the value of constitutional legality is relative for it coexists with another type of legality – let’s call it supranational legality – whose goal is enhancing constitutional democracies by coping with their deficiencies.²⁹ In its capacity to challenge national identities or empowering otherwise outvoted economic and social actors, supranational legality exhibits also its own ambivalence and structural bias: while conceived of to complement and improve the functioning of constitutional democracies, it expresses also a democratic-inhibiting potential which, if not adequately managed, may end up undermining the very institutional project it is meant to serve.³⁰ For a rather long period, ‘adequate management’ has essentially meant the respect by supranational authorities of the competence boundaries and the division of labour presiding the relationship between supranational law and constitutional democracies. Whereas the former operates and specializes in market regulation, the latter flourish almost unencumbered in other more salient policy fields regarding redistribution and fundamental rights protection.³¹ Within this framework, supranational law contributes to the success of constitutional democracies without inhibiting their operation.

²⁴ See, for instance, A. Somek, ‘The Darling Dogma of Bourgeois Europeanists’ (2014) 20 *European Law Journal*, 688.

²⁵ R. Keohane, S. Macedo, A. Moravcsik, ‘Democracy-Enhancing Multilateralism’ (2009) 63 *International Organization*, 9-22.

²⁶ A. Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54 *International Organization*, 217.

²⁷ F. de Witte, ‘Emancipation through Law?’ in L. Azoulay, S. Barbou des Places, E. Pataut (a cura di), *Constructing the Person in EU law: Rights, Roles and Identities* (Hart Publishing, 2016).

²⁸ C. Barnard, S. Deakin, ‘Market Access and Regulatory Competition’ in C. Barnard, J. Scott (eds), *The Law of the Single European Market. Unpacking the Premises* (Hart Publishing, 2002), 198-204.

²⁹ R. Keohane, S. Macedo, A. Moravcsik, above n. 25, 13-16.

³⁰ *Ibidem*, 27.

³¹ G. Majone, ‘The rise of the regulatory state in Europe’ (1994) 17 *West European Politics*, 77.

This provides perspective to the redefinition of judicial relationships and the relativisation of national constitutional courts. In their first decades of operation constitutional courts are busy articulating national constitutional claims to promote the transition from authoritarian to democratic rule.³² Less noteworthy is their contribution to tackling parochialism or vested interests. When faced with discriminatory measures or obstacles to trade, constitutional courts are not keen on protecting outsiders or underrepresented groups.³³ As participants to national constitutional democracies, they seem unable to escape from the latter structural deficiencies. As a result, individuals and legal persons involved in cross-border activities³⁴ and, more in general, actors marginalised in national democratic processes³⁵ find in the European Court of Justice a much more sensitive interlocutor. As supranational legality becomes increasingly attractive for this type of litigators, the Court of Justice develop a well known series of judicial doctrines securing the effectiveness of supranational law.³⁶

This is the point at which constitutional courts and their privileged relationship with ordinary courts are challenged. To secure full effect in time and space to directly applicable supranational law,³⁷ the Court of Justice establishes relationships with ordinary courts which interfere with the above mentioned relationships between the latter and constitutional courts. In particular, the Court endows ordinary courts with the power to set aside EU incompatible domestic law without the assistance of constitutional courts.³⁸ Since the introduction of this doctrine in *Simmenthal*,³⁹ the Court of Justice has relentlessly enforced it securing the effectiveness of directly applicable EU law⁴⁰ without any concession to the role or the judgments of constitutional courts.⁴¹

This special relationship has been shielded from interferences deriving from domestic judicial organization. The Court of Justice has always been keen on protecting the prerogatives of ordinary courts in the preliminary ruling procedure. It has decided that superior courts cannot

³² For a comparative analysis of the experiences of the Italian, Spanish and Czech constitutional courts, see F. Biagi, *Corti costituzionali e transizioni democratiche* (il Mulino, 2016).

³³ See, e.g., Italian Constitutional Court judgments n. 137/1971 and 20/1980. For an analysis of these cases, see M. Dani, 'Assembling the Fractured European Consumer' (2011) 36 *European Law Review*, 364-366.

³⁴ See D. Chalmers, L. Barroso, 'What *Van Gend en Loos* stands for' (2014) 12 *International Journal of Constitutional Law*, 120-130.

³⁵ R. A. Cichowski, *The European Court and Civil Society* (CUP, 2007), ch. 3-4.

³⁶ E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 1.

³⁷ Case C-106/77, *Simmenthal (II)* [1978] ECR 629, para 14.

³⁸ *Ibidem*, paras 16-17 and paras 21-23.

³⁹ See above n. 37. In the affirmation of this doctrine, national constitutional courts have played a key role, see below section 3.2.

⁴⁰ See, e.g., Joined Cases C-188-189/10, *Aziz Melki and Sélim Abdeli* [2010] ECR I-5667, paras 43-44, and Case C-173/09, *Georgi Ivanov Elchinov* [2010] ECR I-8889, para 31.

⁴¹ See Case C-409/06, *Winner-Wetten GmbH* [2010] ECR I-8015, paras 59-61, and Case C-314/08, *Krzysztof Filipiak* [2009] ECR I-11049, para 81.

deprive inferior courts of their right to refer questions to the Court of Justice.⁴² It has affirmed that, in case of a successful appeal against a reference, it is up to the referring court to decide whether to maintain, amend or withdraw the reference.⁴³ These prerogatives apply also vis-à-vis constitutional courts: domestic systems of judicial review of legislation cannot preclude ordinary courts from referring questions to the Court of Justice.⁴⁴ The autonomy of ordinary courts is protected to the extent that in supranational litigation they are entitled to disobey to higher⁴⁵ or constitutional courts⁴⁶ if their rulings⁴⁵ breach supranational norms.

Thus, the relativisation of constitutional courts in supranational litigation seems the price to be paid for a high degree of effectiveness of supranational law. According to *Simmenthal* and its progeny, ordinary courts are encouraged to regard the Court of Justice as a competing master,⁴⁷ challenging the interpretive exclusivity attributed under domestic law to supreme or constitutional courts.⁴⁸ Within the supranational judicial framework, the special status reserved for constitutional courts by national constitutions is also neglected as, for the purposes of the preliminary ruling procedure, they are just one among many of the potential referring courts.⁴⁹

2. *The Simmenthal doctrine and the reconfiguration of constitutional jurisdictions*

The impact of *Simmenthal* on the jurisdiction of constitutional courts can be appreciated by examining three distinct scenarios. The first regards cases involving directly applicable supranational law. Here, the jurisdiction of constitutional courts is almost entirely pre-empted,⁵⁰ in particular where access to them is structured through incidental questions of constitutionality. In such circumstances, constitutional courts can be involved in supranational litigation only if ordinary courts suspect that supranational law, as interpreted by the Court of Justice, breaches supreme constitutional principles (*'controlimiti doctrine'*).⁵¹ More room for constitutional courts exists in case of access via individual constitutional complaint or in

⁴² See Case C-166/73, *Rheinmülen-Düsseldorf* [1974] ECR 33, para 3; Case C-210/06, *Cartesio* [2008] ECR I-9641, paras 93-95; *Melki and Abdeli*, above n. 40, para 52.

⁴³ See *Cartesio*, above n. 42, paras 96-97.

⁴⁴ See Case C-348/89, *Mecanarte* [1991] ECR I-3277, paras 44-46, and *Melki and Abdeli*, above n. 40, para 45.

⁴⁵ See *Elchinov*, above n. 40, paras 25-32.

⁴⁶ Case C-416/10, *Jozef Križan and Others* [2013] I-8, paras 67-71.

⁴⁷ M. Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts' in M. Claes, M. De Visser, P. Popelier, C. Van de Heyning (eds), *Constitutional Conversations in Europe. Actors, Topics and Procedures* (Intersentia, 2012), 296.

⁴⁸ *Ibidem*, 291-292 and 296-297.

⁴⁹ *Ibidem*, 301.

⁵⁰ This emerges from *Simmenthal*, above n. 37, paras 14-17.

⁵¹ See Italian Constitutional Court, judgments n. 183/1973 (*Frontini*) and n. 170/1984 (*Granital*). This course of action has been recently experimented by Italian Supreme Court and the Court of Appeal of Milan in response to Case C-105/14, *Taricco and others*, not yet reported. See Cass., sez. III, notizia di decisione n. 2/2016, ud. 30 marzo 2016, ric. Cestari e a.

litigation between domestic constitutional organs.⁵² In these situations, constitutional courts operate as genuine supreme courts⁵³ and maintain the possibility of enforcing national constitutional principles.⁵⁴ Admittedly, at this stage questions on the interpretation or validity of supranational acts or their implementing measures may certainly arise. Yet, given the subsidiary nature of constitutional complaints, there is usually plenty of time for ordinary courts to formulate a preliminary reference to the Court of Justice before the case reaches the constitutional court. If a reference is made, the judgment of the constitutional court will be almost entirely pre-empted as only in case of egregious breaches of supreme constitutional principles will they consider departing from a previous ruling by the Court of Justice.⁵⁵ Instead, if the case reaches the constitutional court without a previous preliminary reference, the latter is in the position of involving the Court of Justice⁵⁶ and, subsequently, decide whether supranational rulings fits supreme constitutional principles.⁵⁷

The second scenario concerns cases regarding non directly applicable supranational law. In these circumstances, only apparently constitutional courts regain their original place. To be sure, in these cases we may find them busy reviewing national measures in the light of supranational norms,⁵⁸ with the possibility of interacting directly with the Court of Justice on the interpretation or validity of the latter.⁵⁹ However, even in these circumstances their position suffers from limitations deriving from the case law of the Court of Justice. Ordinary courts are encouraged to refer preliminary questions even in the absence of direct effect.⁶⁰ In particular, constitutional courts are sidelined if ordinary courts seek guidance from the Court of Justice on the interpretation or validity of non directly applicable supranational norms relevant for the case,⁶¹ or if they suspect that the supranational measure at hand may have indirect effect.⁶²

⁵² See, e.g., Italian Constitutional Court, order n. 103/2008.

⁵³ M. Bobek, above n. 47, 290. See Austrian Constitutional Court, U 466/11-18 and U 1836/11-13, para 33.

⁵⁴ In this context the Austrian Constitutional Court has even accepted to enforce the EU Charter of fundamental rights, see U 466/11-18 and U 1836/11-13, paras 33-35.

⁵⁵ See, e.g., German Constitutional Court, 2 BvR 2661/06 (*Honeywell*), paras 56 and 61.

⁵⁶ See, e.g., Austrian Constitutional Court, above n. 53, paras 40 and 44; Spanish Constitutional Court, order n. 86/2011, and German Constitutional Court, 2 BvR 2728/13 (*OMT reference*).

⁵⁷ See, e.g., German Constitutional Court, 2 BvR 2728-2731/13, 2 BvE 13/13 (*Gauweiler*), and Spanish Constitutional Court, judgment n. 26/2014, applying the judgement C-399/11, *Stefano Melloni* [2013] ECR I-107. For a complete survey on the *Melloni* litigation, see A. Torres Pérez, 'Melloni in Three Acts: from Dialogue to Monologue' (2014) 10 *European Constitutional Law Review*, 308.

⁵⁸ See Italian Constitutional Court, judgments n. 28/2010 and n. 227/2010.

⁵⁹ Italian Constitutional Court, order n. 207/2013.

⁶⁰ See *Križan*, above n. 46, para 56.

⁶¹ See, e.g., Joined Cases C-22-61-63-418/13, *Raffaella Mascolo and Others*, not yet reported.

⁶² See, e.g., Case C-105/03, *Maria Pupino* [2005] ECR I-5285.

Finally, there are ‘supranational law free zones’ where the jurisdiction of constitutional courts remains intact.⁶³ True, even in this third scenario the Court of Justice sporadically meddles in constitutional jurisdictions, in particular where the boundaries with supranational jurisdiction are blurred such as in purely internal situations⁶⁴ or fundamental rights issues.⁶⁵ But apart from these cases, constitutional courts operate in these areas by and large unencumbered.⁶⁶

When *Simmenthal* was decided, this was a rather broad jurisdictional domain. Although already expanding at that time, the areas governed by directly applicable supranational law included a rather limited set of non salient policies only occasionally litigated before courts.⁶⁷ Evaluated in its context, therefore, *Simmenthal* was hardly a judgment marginalizing constitutional courts. The latter were not prevented from contributing to the achievements of constitutional democracies for only if they left unanswered questions regarding individual emancipation and allocative efficiency could their activity be challenged. *Simmenthal* was coherent with a complex institutional arrangement relying on the synergy between supranational law and constitutional democracies. As long as a similar relational paradigm remained in place, also its legitimacy was not a matter of concern.

It is well known that the acceptance of direct effect and supremacy was gradual and, in particular circumstances, national constitutional or supreme courts defied the most daring doctrines put forward by the Court of Justice.⁶⁸ On the whole, however, constitutional courts gave in rather easily. They endorsed *Simmenthal* and its corollaries relatively soon⁶⁹

⁶³ M. Bobek, above n. 47, 302. For an example in which the German Constitutional Court affirms its jurisdiction denying a preliminary reference to the Court of Justice see 1 BvR 1215/07 (*Counter-Terrorism Database*). See also the Decision n. 2014-439 QPC of 23 January 2015 (*Mr. Amhed S. – Revocation of Citizenship*).

⁶⁴ The Court of Justice seemed inclined to decide in purely internal situations in cases like Joined Cases C-321-324/94, *Jacques Pistre and Others* [1997] ECR I-2343, and Case C-34/09, *Gerardo Ruiz Zambrano* [2011] I-1177. The more traditional approach has however been followed in cases like Case C-86/12, *Adzo Domenyo Alopka and Others* [2013] ECR I-645, and Case C-14/13, *Gena Ivanova Cholakova* [2013] ECR I-374.

⁶⁵ The Court of Justice has extended its fundamental rights jurisdiction in Case C-617/10, *Hans Akerberg Fransson* [2013] I-105. A more cautious approach emerges in cases like Case C-206/13, *Siragusa* [2014] ECR I-126 and Case C-265/13, *Emiliano Torralbo Marcos* [2014] ECR I-187.

⁶⁶ In this category fall also the cases concerning the legality of measures adopted under EU impulse to cope with the economic and financial crisis (see below section VI). In these circumstances, constitutional courts operate as a rule without explicit interferences by the Court of Justice. Yet, it is difficult to regard these judgments as completely disentangled from the normative claims, policy agenda and the institutional framework underpinning the Union economic governance.

⁶⁷ D. Chalmers, ‘The positioning of EU judicial politics within the United Kingdom’ (2000) 23 *West European Politics*, 169.

⁶⁸ It is well known that in one of its first judgments on Community matters the Italian Constitutional Court failed to recognize specific qualities to Community law and denied its supremacy (see judgment n. 14/1964 (*Costa v. Enel*)). The acceptance of direct effect and supremacy in France was also tormented (see, e.g., the Decision of 1 March 1968, *Syndicat Général de Semoules de France* by the Council of State). In Germany, instead, concerns were expressed in particular for the impact of Community law on constitutional rights (see BVerfGE, 37/271 (*Solange I*)).

⁶⁹ M. Claes, B. De Witte, ‘The Role of National Constitutional Courts in the European Legal Space’ in P. Popelier, A. Mazmanyan, W. Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia, 2013), 92-94. Occasionally, there are still cases that may raise eyebrows. See, for instance, the order n. 536/1995, where the Italian Constitutional Court denied its judicial nature for the purposes of article 267 TFEU. See also, more recently, the *Holubec* case (Pl. ÚS 5/12), where the Czech Constitutional Court declared *ultra vires* a previous ruling by the Court of Justice. Also the way in which the German Constitutional Court has raised its

contributing as accomplices of the Court of Justice to the reconfiguration of the European judicial architecture.⁷⁰ This cooperative attitude emerges in at least three types of judgments. First of all, constitutional courts have incorporated the doctrines of primacy and direct effect in domestic constitutional systems.⁷¹ By doing so, they have accepted that ordinary courts exercise parallel judicial review of legislation in partnership with the Court of Justice.⁷² Perhaps more importantly, in a second series of cases, constitutional courts have agreed to the jurisdictional implications of those doctrines. They have accepted to be sidelined in cases dealing with directly applicable supranational law, for instance by declaring that enforcing it is not their task.⁷³ They have dismissed as inadmissible and re-directed to Luxembourg issues incorrectly framed as questions of constitutionality.⁷⁴ They have reinforced the faculty or the duty of ordinary courts to use the preliminary ruling procedure.⁷⁵ Even more radically, in a third line of cases, constitutional courts have contributed to the effectiveness of supranational law (and the Court of Justice's rulings) within their redesigned jurisdiction. By relying on domestic constitutional integration clauses, they routinely review national legislation in the light of non-directly applicable supranational law.⁷⁶ They have secured the correct application of supranational law by ordinary courts, public authorities and regulators, even reacting against the inertia or rebellions of ordinary courts.⁷⁷ They have enforced rulings adopted by the Court of Justice through EU consistent interpretations of domestic constitutions,⁷⁸ or generalised the effects of those judgments even beyond their original remit.⁷⁹

All these judgments have not been issued out of blind loyalty or judicial generosity. According to national constitutional courts, compliance with supranational law does not contradict but emanates from domestic constitutions.⁸⁰ Indeed, through those judgments constitutional courts not only have accepted their relativisation, but they have transformed it

first preliminary ruling justifies doubts as to its effective cooperative intent, see *OMT reference*, above n. 56 and section VI.

⁷⁰ D. Sarmiento, 'Reinforcing the (domestic) constitutional protection of primacy of EU law' (2013) 50 *Common Market Law Review*, 890.

⁷¹ See K. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (OUP, 2001), chapters 3 and 4.

⁷² M. Claes, B. De Witte, above n. 69, 89-90.

⁷³ Austrian Constitutional Court, U 466/11-18 and U 1836/11-13, paras 19-24.

⁷⁴ See, e.g., Italian Constitutional Court, orders n. 132/90 and n. 144/90. A similar approach is signalled in the early case-law of constitutional courts of Central-Eastern Europe by M. Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45 *Common Market Law Review*, 1629-1630.

⁷⁵ Spanish Constitutional Court, judgments n. 58/2004 and n. 78/2010.

⁷⁶ Italian Constitutional Court, judgments n. 28/2010, n. 227/2010 and order n. 207/2013.

⁷⁷ Spanish Constitutional Court, judgment n. 145/12.

⁷⁸ Greek Council of State, judgment n. 3470/2011, giving effect to the ruling adopted by the Court of Justice in Case C-213/07, *Michaniki* [2008] ECR I-9999.

⁷⁹ See Italian Constitutional Court, judgment n. 443/1997, extending to purely internal situations the ruling adopted by the Court of Justice in Case C-90/86, *Zoni* [1988] ECR I-4285.

⁸⁰ P. Kapotas, 'Greek Council of State. Judgment 3470/2011' (2014) 10 *European Constitutional Law Review*, 171 and 174.

in a constitutive element of national constitutional legality. Thus, a profound meaning may be ascribed to the national judgments incorporating the *Simmenthal* doctrine: committing to supranational law is not for constitutional courts just a matter of securing its enforcement and accepting the jurisdictional implications of the doctrines defined by the Court of Justice. Those judgments validate also as a matter of domestic constitutional law the notion that constitutional legality is partial and requires to be complemented by supranational legality.

IV. The displacement of constitutional courts

1. Beyond the complementarity paradigm: constitutional compensation or constitutional recalibration?

The period following the *Simmenthal* decision is marked by outstanding transformations regarding both the structure of supranational law and its relationship with national constitutional democracies. The European Union evolves into a more ambitious legal and political order whose tasks exceed the mandate of complementing national constitutional democracies. As the Union expands its competences and complementarity loses significance, also the position of constitutional courts becomes problematic. In the emerging institutional framework, *Simmenthal* is no longer a rather innocuous judgment relativising constitutional courts; it turns into a more contentious doctrine contributing to their displacement.⁸¹

Admittedly, most of legal commentaries offers a rather benign and gratifying account for the evolution of the European integration process in this period. This highly influential literature puts a lot of emphasis on the constitutional transformation of supranational legality.⁸² As the Union expands its remit, we are told, also its ethos and institutional architecture undergo remarkable changes: once a mainly intergovernmental and technocratic entity, the Union acquires a more robust political and constitutional profile narrowing down its distance from national constitutional democracies. Compensation, therefore, seems to replace complementarity as the most adequate paradigm to explain the relationship between supranational legality and constitutional democracies in this phase. Losses in constitutional government at domestic level are compensated by gains generated by equivalent pan-European institutions. No one, therefore, should be concerned for the displacement of national constitutional courts: their jurisdiction may be shrinking, but the Court of Justice has taken up constitutional adjudication and offers standards of review equivalent to those existing at national level.⁸³

⁸¹ J. Komárek, above n. 7, 526-528

⁸² See, e.g., G. Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review*, 595-614, I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review*, 703 and K. Lenaerts, D. Gerard, 'The Structure of the Union according to the Constitution for Europe: the Emperor is getting dressed' (2004) 29 *European Law Review*, 289.

⁸³ This notion is best encapsulated in the judgment of the German Constitutional Court 2 BvR 197/83 (*Solange II*).

Most of the elements inspiring this account for the European integration process deserve careful consideration. After *Simmenthal* the Union has been increasingly involved in more salient policy fields. With the shift to qualified majority voting in the Council, it has gained political capacity in a growing set of policies. With the rise of the European Parliament and the involvement of national parliaments, it has witnessed a process of democratization of its decision-making. Finally, it has incorporated in its institutional framework principles inherited from the tradition of constitutional democracy such as fundamental rights, citizenship and social justice.

Yet, for all of these constitutional transformations, the Union has not completely abandoned its original institutional setting. Developments associated with the incorporation of fundamental rights substantiate this claim. In the last decade and, even more, with the entry into force of the Lisbon Treaty, fundamental rights have grown more influential in supranational legal and political culture. In legislative deliberations political institutions are to assess legislative proposals in the light of fundamental rights.⁸⁴ An increasing number of preliminary references to the Court of Justice revolve around fundamental rights issues,⁸⁵ and also the number of judgments in which fundamental rights feature not simply as rhetorical devices is rising.⁸⁶ In contemporary Union law fundamental rights language is not used only as window-dressing;⁸⁷ it is a genuine source of legal and, at least potentially,⁸⁸ political mobilization. Many authors welcome this development and rightly suggest it may open a new phase in the European integration process.⁸⁹ But how would this phase look like? What is the effective impact of fundamental rights language on supranational institutional structures? Does it entail a rupture with previous normative claims or just their recalibration?

Support to the compensation paradigm implies radical answers to these questions and, indeed, in a number of writings the incorporation of the language of fundamental rights is presented as a revolutionary process⁹⁰ replacing the original vocation of supranational legality to promote individual emancipation across the borders and allocative efficiency. Admittedly,

⁸⁴See *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* COM (2010) 573 final, and *Better Regulation Guidelines* COM (2015) 215 final.

⁸⁵ J. Komárek, above n. 7, 527.

⁸⁶ Particularly salient seem Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke* [2010] ECR I-11063; Case C-236/09, *Association Belge des Consommateurs Test-Achats* [2011] ECR I-773; Joined Cases C-411/10 and 493/10, *N. S.* [2011] ECR I-13905; Case C-131/12, *Google Spain SL*, not yet reported; Joined Cases C-293/12 and 594/12, *Digital Rights Ireland and others*, not yet reported; Case C-528/13, *Geoffrey Léger*, not yet reported.

⁸⁷Although it performs that function too: see U. Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 *European Law Journal*, 14, and G. Itzcovich, 'Più vicino ai cittadini? Processi costituzionali europei, politica della comunicazione e pubblicità' (2010) XXIV *Filosofia Politica*, 467.

⁸⁸ See S. Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 *Journal of Common Market Studies*, 45, and the proposals put forward by M. Dawson, 'Re-generating Europe through Human Rights? Proceduralism in European Human Rights Law' (2013) 14 *German Law Journal*, 651.

⁸⁹ M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5 *European Constitutional Law Review*, 5-6.

⁹⁰ See, for instance, J. Komárek, above n. 7, 527, or M. Bobek, above n. 47, 306.

also among the authors emphasizing this normative turn of supranational law there are voices cautioning against the interchangeability of domestic and EU protection of fundamental rights.⁹¹ However, what these analyses fail to grasp is the structural nature of the divergences in the protection of fundamental rights offered by national constitutional courts and the Court of Justice. Despite the appropriation of the fundamental rights language, supranational law remains profoundly influenced by *long durée* elements related to its original structure.⁹² This aspect is largely overlooked by authors supporting the compensation paradigm. In their views, the fundamental rights language has converted the Union to constitutionalism, and no traces of the original integration project seem to bear into its current structure. As a result, national constitutional courts and the Court of Justice compete now in the same business: fundamental rights protection.

Yet, supporters of the compensation paradigm should probably be reminded that traditionality in law is inescapable.⁹³ This emerges also in the field of fundamental rights protection, where the EU Charter has made *tabula rasa* neither of the common market project nor of the intergovernmental and regulatory structure of supranational policies. The Union undertakes fundamental rights protection for a different purpose: to humanize its original institutional framework by revising the contents of its regulatory projects in the light of constitutional culture.

Even before the rise of fundamental rights litigation supranational law was open to the accommodation of its regulatory projects with non-economic principles. This occurred essentially through derogations to market principles or exceptions inserted in regulatory measures, generating the impression that market building was a task by and large disconnected from the protection of fundamental rights. The appropriation of the language of fundamental rights introduces a more sophisticated notion of market regulation and, more generally, of Union policy-making. The Union admits explicitly that fundamental rights are involved in most of its activities and accepts the idea of revising its regulatory strategies by taking them into account. This humanizing tendency leads increasingly the Court of Justice to employ EU fundamental rights as a key source in legislative interpretation,⁹⁴ or engage

⁹¹J. Komárek, above n. 8, 444-445. See also M. Cartabia, above n. 89, 18, distinguishing an individualistic/libertarian interpretation of fundamental rights by the Court of Justice and a personalistic/dignitarian conception inspiring national constitutional courts.

⁹² For an in-depth analysis, see M. Dani, *Il diritto pubblico europeo nella prospettiva dei conflitti* (Cedam, 2013), chapter IV.

⁹³ M. Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy*, 237. It may also be noted that this literature conveniently overlooks the developments connected with the Euro-crisis where fundamental rights are sidelined. On this issue, see below section VI.

⁹⁴ See, e.g., Case C-275/06, *Promusicae* [2008] ECR I-271; Joined Cases C-244-245/10, *Mesopotamia Broadcast A/S METV* [2011] ECR I-8777; Case C-418/11, *Textdata Software GmbH*, not yet reported; Case C-528/13, *Geoffrey Léger*, not yet reported.

explicitly with the fundamental rights implications of market principles.⁹⁵ The phenomenon emerges clearly also in Union policy-making, where the Commission seems keen on reframing the impact assessment of its proposals by factoring EU fundamental rights into the equation.⁹⁶ In all these instances, however, the new language of fundamental rights promotes a revaluation,⁹⁷ not a revolution of supranational law. It may induce a significant reconsideration of its substantive contents,⁹⁸ but it does not upset its overriding goals, institutional culture and style of government. It contributes to an axiological *convergence* of supranational legality towards constitutional democracy, but it does not entail its *conversion* to the latter legal and political culture. In other words, and contrary to what the compensation paradigm suggests, the appropriation of fundamental rights by the Union amounts only to a constitutional recalibration of the original institutional setting. This is neither to say that this is a minor phenomenon nor that it is inconsequential in the discussion of the role of constitutional courts. The constitutional recalibration of supranational law indirectly bears on the condition of constitutional courts, and reviewing its genesis may help explaining why their place in the European judicial architecture has become a source of concern.

2. Real reasons for concern: the expansion of Union competences and the advanced liberalism agenda

Constitutional recalibration sets forth in a period in which supranational law was still complementary to national constitutional democracies and a rather clear division of labour existed between those two projects.⁹⁹ Fundamental rights had been the tool employed by the Court of Justice to consolidate its doctrine of unconditional supremacy of supranational law and assuage the concerns raised by the Italian and German constitutional courts.¹⁰⁰ Yet, by borrowing from national constitutional democracies the language of fundamental rights, the Court was not only strengthening supremacy. It was also preparing the ground for another equally important development taking place in those years: the expansion of supranational competences.

⁹⁵ The impact of fundamental rights is variable: see Case C-368/95, *Familiapress* [1997] ECR I-3689, Case C-112/00, *Eugen Schmidberg* [2003] ECR I-5659, Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609, Case C-438/05, *Viking Line* [2007] ECR I-10779, Case C-244/06, *Dynamic Medien Vertriebs* [2008] ECR I-505, and Case C-390/12, *Robert Pflieger* [2014] ECR I-281.

⁹⁶ See above n. 84.

⁹⁷ L. Azoulay, 'The European Court of Justice and the duty to respect sensitive national interests' in M. Dawson, B. De Witte and E. Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2013), 180-183.

⁹⁸ Until recently, however, the effects on legislation were marginal, see I. De Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' (2012) 37 *European Law Review*, 379.

⁹⁹ See above section III.1.

¹⁰⁰ See, respectively, *Frontini*, above n. 51 and *Solange I*, above n. 68.

Several convincing accounts for the material expansion of supranational law have been put forward¹⁰¹ and pointing at a single one would certainly be reductive. However, it is noteworthy that the period in which the expansion of supranational competences begins to unfold under the shadow of the incipient fundamental rights jurisprudence coincides with the crisis of national social government. Until then, the welfare state had been at the centre of the conflicts governed by means of national democratic constitutions.¹⁰² With the economic crisis in the mid-1970s, social government and the institutions of the industrial society become target of vocal criticism.¹⁰³ As the post-war class compromise unravels, national governments are pressured to transform the social state with a view to reform or marginalise national corporatist structures.¹⁰⁴ Boosting the competitiveness of national economies by countering vested interests arises as the priority of what Nikolas Rose has termed the advanced liberalism agenda,¹⁰⁵ the new policy strategy developed to counter the crisis of social government. Yet, only a minority of countries succeeds in implementing these ambitious programmes of transformation. To overcome difficulties, national governments initiate to look at supranational law as a more effective vehicle to prompt reform.¹⁰⁶

Against this background, it is not surprising to see in those years supranational institutions operating in policy areas previously ring-fenced against supranational interferences. If the expansion of supranational policy initiatives towards social regulation¹⁰⁷ is still coherent with an holistic notion of market regulation,¹⁰⁸ the inroads made into social, economic and monetary policy with the Treaty of Maastricht are signs that the original division of labour between the (national) redistributive state and (supranational) regulatory structures is on the wane. By relying on the legitimacy dividend of fundamental rights and other constitutional reforms, supranational law achieves a predominant position in both policy-making and adjudication. But the driving motive of this expansion is not the transformation of the Union into a pan-European constitutional democracy. As said, the attribution of new competences to the Union responds primarily to the pressing institutional demand by national governments to implement the advanced liberalism agenda.¹⁰⁹ Thus, interest in supranational policy-making is

¹⁰¹ See, for instance, A. Stone Sweet, W. Sandholtz, 'European integration and supranational governance' (1997) 4 *Journal of European Public Policy*, 297.

¹⁰² See above section III.1.

¹⁰³ N. Rose, *Powers of Freedom. Reframing Political Thought* (CUP, 2008), Ch. 4.

¹⁰⁴ C. J. Bickerton, *European integration. From Nation-States to Member States* (OUP, 2012), 92-99.

¹⁰⁵ N. Rose, above n. 103, 139-142.

¹⁰⁶ C. J. Bickerton, above n. 104, 99-108.

¹⁰⁷ G. Majone, 'The European Community Between Social Policy and Social Regulation' (1993) 31 *Journal of Common Market Studies*, 153.

¹⁰⁸ A. Somek, *Individualism* (OUP, 2008), Ch. 7.

¹⁰⁹ This applies in particular to the Economic and Monetary Union. See K. Featherstone, 'The Political Dynamics of the *Vincolo Esterno*: the Emergence of EMU and the Challenge to the European Social Model', Queen's Papers on Europeanisation No. 6/2001.

only superficially related to vague federalizing aspirations. Supranational policy-making is attractive because of its distinct normative and institutional qualities: its capacity to constrain national representative policy-making, its ability to overcome national legal and political hurdles and its promise to counter vested interests opposing the transformation of social government.¹¹⁰

In newly acquired policy areas such as monetary, economic and social policy, supranational institutions push forward in an apolitical and regulatory style reforms experimented in avant-garde countries.¹¹¹ By extending to increasingly salient policy fields its original role of *vehiculo externo*,¹¹² they amplify the challenge posed by supranational legality to national constitutional democracies. From being an element originally enhancing national constitutional democracies, supranational policy-making turns into a variable potentially undermining or inhibiting their role. Once transferred to supranational institutions, policy fields that used to be the terrain for open contestation between alternative courses of political action are transformed into competences with pre-defined policy objectives.¹¹³ The advanced liberalism agenda restricts the room for legitimate political contestation and, by doing so, corrodes the open nature of constitutional democracy.¹¹⁴

This may help explaining why in this period *Simmenthal* may appear controversial. Increasingly, the ‘supranational law free zones’ in which constitutional courts operated unencumbered are regarded as lands of exportation of the Union constitutionally-recalibrated regulatory culture. Even when adjudicating in these areas, ordinary courts are encouraged to refer to the Court of Justice to have national measures tested against the Union regulatory benchmarks. As a result, constitutional legality undergoes considerable stress. Particularly in reviewing national measures, the Court of Justice departs from the corrective standards of adjudication inspiring constitutional courts. Its rulings are frequently conceived as contributions to the transformative efforts of supranational law and the advanced liberalism agenda.¹¹⁵ In an ever-expanding supranational litigation, therefore, *Simmenthal* ends up

¹¹⁰ C. J. Bickerton, above n. 104, 127-129.

¹¹¹ *Ibidem*, 131-136.

¹¹² This has become particularly evident with the further expansion of competences occurred to deal with the financial crisis, see below section VI.

¹¹³ See, for instance, articles 127, 145 and 173 TFEU prioritising the goals of price stability, empowerment and competitiveness in, respectively, monetary, employment and industrial policy.

¹¹⁴ On the purposive character of Union policies and over-constitutionalization see, respectively, G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21 *European Law Journal*, 2, and D. Grimm, ‘The Democratic Cost of Constitutionalisation: the European Case’ (2015) 21 *European Law Journal*, 460-473.

¹¹⁵ See, e.g., Case C-446/03, *Marks&Spencer plc v David Halsey (Her Majesty’s Inspector of Taxes)* [2005] ECR I- 10837, Case C-438/05, *The International Transport Worker’s Federation and The Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 and Case C-73/08, *Nicolas Bressol and others* [2010] ECR I-2735.

displacing national constitutional courts and, more broadly, overshadowing constitutional legality.

Admittedly, supranational legality is not blind to the potentially disintegrative effects of Union policy-making. The need to contain its expansion and to contrast its corroding impact on domestic political structures and constitutional principles has long been a core concern in European integration, repeatedly signalled by the most perceptive constitutional courts.¹¹⁶ The Lisbon Treaty makes explicit these preoccupations through a renovated emphasis on the principles of conferral¹¹⁷ and subsidiarity,¹¹⁸ and the new vocabulary¹¹⁹ of national constitutional identity.¹²⁰ While conferral and subsidiarity have shown until now a weak constraining capacity on supranational policy-making,¹²¹ constitutional identity may reveal a more promising tool in confronting the corrosion of constitutional democracy. By transforming national constitutional resistances to supranational law into treaty obligations, the Lisbon Treaty expresses the idea that the Union institutional framework is sufficiently porous to absorb domestic constitutional claims.¹²² Arguments grounded on national constitutional principles may be voiced in inter-institutional bargaining or taken into account in proportionality review.¹²³ By means of this strategy, constitutional claims can be articulated and mediated with competing supranational claims associated with allocative efficiency, individual emancipation across the borders and the advanced liberalism agenda.

Overall, this approach aims at promoting more sustainable supranational legislation and judgments. But to appreciate whether constitutional identity and other revaluation mechanisms may succeed, it is important to identify the actors and channels through which constitutional claims can be voiced in supranational policy-making and litigation. For instance, it can certainly be argued that the expansion of Union competences has been accompanied by strong guarantees for national governments which remain in the position of

¹¹⁶ See, e.g., German Constitutional Court, 2 BvR 2134/92, 2 BvR 2159/92 (*Brunner*) and 2 BvE 2/08 (*Gauweiler*).

¹¹⁷ Obsessively repeated throughout the Treaty: see articles 4 (1) and 5 (2) TEU and 7 TFEU. See also Declaration n. 18 annexed to the Lisbon Treaty.

¹¹⁸ Article 5 (3) TEU and Protocol (No. 2) on the application of the principles of subsidiarity and proportionality.

¹¹⁹ M. Claes, 'Negotiating Constitutional Identity or Whose Identity Is It Anyway?' in M. Claes, M. de Visser, P. Popelier, C. Van de Heyning (eds), above n. 47, 206.

¹²⁰ Article 4 (2) TEU.

¹²¹ S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal*, 827.

¹²² This notion is key to order n. 24/2017, where the Italian Constitutional Court has formulated a preliminary ruling urging the Court of Justice to reconsider its ruling in *Taricco* (see above n. 51) by taking into account the fundamental principles of constitutional legality presiding criminal law expressed by the Italian Constitution. In this order, a lot of emphasis is put on the capacity of the Union legal and political order to include and protect national constitutional identities (see, in particular, para 6). Were this not the case, it is observed, the European Treaties would contradictorily aim at dissolving the constitutional foundations from which they originated.

¹²³ G. Van der Schyff, 'The Constitutional Relationship between the European Union and its Member States: the role of National Identity in article 4(2) TEU' (2012) 37 *European Law Review*, 563.

representing national constitutional claims in decision-making processes.¹²⁴ National governments, however, are only one and not the most authoritative of the institutions when it comes to voice and defend national constitutional cultures.¹²⁵ If we follow certain accounts for European integration, we are even entitled to suspect that national governments use the Union legal framework precisely to escape or challenge national constitutional or democratic constraints.¹²⁶ To ensure the representation of national constitutional claims, thus, we need the contribution of other institutions, namely national parliaments and constitutional courts. If not adequately involved, there is a concrete danger that the predominance of supranational law may become unsustainable and constitutional democracies suffer from intergovernmental and regulatory corrosion.

Signs that this is already happening are evident in supranational litigation. As said, the Court of Justice is routinely requested to review salient national measures in the light of supranational strategies of integration.¹²⁷ The judgments delivered in these cases have often been viewed as overreaching and destabilising national welfare states.¹²⁸ Critics have lamented the economisation inherent in these rulings¹²⁹ and the uneven consideration of economic and social values.¹³⁰ Admittedly, these judicial outcomes may reflect a contingent activist orientation of the Court of Justice, namely its attempt to prioritise goals such as individual emancipation across the borders and allocative efficiency. Yet, the possibility to pursue a similar agenda is premised on an important institutional prerequisite: in the European judicial architecture, constitutional courts have been displaced and, short of any meaningful possibility to intervene, they do not seem in the position to counter judicial centralisation and the predominance of supranational normative claims.

V. Influence from the margins in supranational litigation

Considering the actual challenges to constitutional democracy, rehabilitating national constitutional courts in supranational litigation may rightly be perceived as a move in the right

¹²⁴ P. Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies*, 83.

¹²⁵ A. Torres Pérez, above n. 57, 327.

¹²⁶ See, for instance, C. J. Bickerton, above n. 104, 60-71, observing that in supranational law national executives commit to limit their own powers in order to contain the political powers of domestic populations and downplay state-society relations.

¹²⁷ L. Azoulay, 'The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Conditions for its Realization' (2008) 45 *Common Market Law Review*, 1335.

¹²⁸ See above n. 115. For a critical assessment, see F. W. Scharpf, 'Legitimacy in the Multi-Level European Polity' in P. Dobner, M. Loughlin (eds), *The Twilight of Constitutionalism?* (OUP, 2010), 113-117.

¹²⁹ A. J. Menéndez, 'European Citizenship after *Martínez Sala* and *Baumbast*: Has European Law Become More Human but Less Social?' in M. Maduro, L. Azoulay (eds), *The Past and Future of EU Law. The Classics of EU Law revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010), 391.

¹³⁰ M. Dawson, 'The political face of judicial activism: Europe's law-politics imbalance' in M. Dawson, B. De Witte and E. Muir, above n. 97, 24-29.

direction.¹³¹ In this regard, sensible proposals have been aired to revive their role and define a more balanced division of labour with the Court of Justice. Constitutional courts could be allowed to intervene in proceedings before the Court of Justice with *amicus curiae* briefs, or heard as co-respondents through a priority involvement mechanism.¹³²

But the idea of strengthening constitutional courts could inspire also more questionable proposals. A way to counter the predominance of supranational law without tinkering with the existing judicial architecture could be promoting its retreat from the newly acquired policy fields. In a recent past, the idea of disconnecting certain sensitive issues from supranational law¹³³ with a view to granting them immunity from structural change was quite popular among the critics of the Court of Justice's activism.¹³⁴ Among other advantages, a similar move could certainly revive the role of constitutional courts, but at the cost of difficult boundaries disputes and, more critically, of renouncing to any type of constraint against the deficiencies of constitutional democracy.¹³⁵

If a 'retreat strategy' is scarcely realistic¹³⁶ and, ultimately, undesirable, another quite radical option could be considered. In a recent proposal the application of the *Simmenthal* doctrine in the field of fundamental rights protection has been questioned.¹³⁷ Here, a partial abandonment or relaxation of the terms of engagement between the Court of Justice and national courts could allow constitutional courts to regain the opportunity to decide cases within the scope of Union law. Once re-admitted in salient supranational litigation, constitutional courts could interact with the Court of Justice via preliminary references with a view to prevent excessive centralisation and keep pluralism alive.¹³⁸ Less clear are the new terms of engagement and how the field of fundamental rights protection ought to be defined: would it include only cases in which the EU Charter is invoked? Would it extend to the application of free movement principles? And what about the fundamental rights clauses inserted in supranational legislation?

While these remain questions waiting for an answer, a reflection is in order on the possibilities associated with the existing judicial architecture. If we are interested in developing supranational law with a view to internalising national normative claims, it is not

¹³¹ J. Komárek, above n. 7, 542.

¹³² See M. Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 *European Constitutional Law Review*, 83-84.

¹³³ L. Azoulay, above n. 97, 176-179.

¹³⁴ See S. Deakin, 'Regulatory Competition After Laval' (2007-2008) *Cambridge Yearbook of European Legal Studies*, 606-607, and C. Joerges, F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections After the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 *European Law Journal*, 11-13.

¹³⁵ See above section III.1.

¹³⁶ Particularly with a view to the difficulties encountered in containing the EU competences creep.

¹³⁷ M. Bossuyt, W. Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment' (2011) 7 *European Constitutional Law Review*, 388-389.

¹³⁸ M. Cartabia, above n. 89, 23-27.

said we have necessarily to forgo *Simmenthal*. Before adventuring into institutional reform or reconsidering consolidated precedents, it might therefore be appropriate to gauge the potential inherent in the current institutional framework. The displacement of constitutional courts could not be co-extensive with the displacement of constitutional principles, and the current judicial architecture could contain sufficient opportunities and incentives for the articulation of the latter and the mediation with supranational normative claims.

In order to assess this possibility, a useful preliminary step is considering the quality of supranational litigation. A quite recent empirical study¹³⁹ has revealed that cases appearing before the Court of Justice can be classified in two categories, depending upon the type of supranational norm at issue. A first line of cases focuses on the interpretation and validity of Union secondary law. These are normally not very salient cases, often promoted by public or private actors already involved in the legislative procedure.¹⁴⁰ In this type of cases, the representation of constitutional claims depends on the capacity of the legislative procedure to absorb them *ex ante*.¹⁴¹ Of course, the Court of Justice is always in the position to interpret or invalidate Union secondary law on the basis of article 4 (2) TEU or other principles borrowed from national constitutional culture. Yet, in these cases national executives and national parliaments already had the opportunity to voice constitutional claims in decision-making, and it is mainly through these political guarantees that the sustainability of supranational law ought to be secured.

A different situation emerges in the second category of cases, that in which principles enshrined in the Union treaties or secondary law are invoked by actors interested in contrasting or transforming national policy measures.¹⁴² According to the Court of Justice, these are often the most salient cases,¹⁴³ where national policies are challenged in the light of market principles or EU fundamental rights. In these circumstances the articulation of national constitutional claims occurs essentially *ex post* during litigation, for it is hard to take them into account at the stage of enacting principles in the treaties or in secondary legislation. This invites an appraisal of the potential inherent in the preliminary reference procedure, namely the possibility for courts (and the other actors involved) to voice arguments based on national constitutional law and, critically, to have them considered by the Court of Justice. From this standpoint, the preliminary ruling procedure offers opportunities largely unexplored. If adequately interpreted, it may allow the articulation of constitutional claims

¹³⁹ D. Chalmers, M. Chaves, 'The reference points of EU judicial politics' (2012) 19 *Journal of European Public Policy*, 25.

¹⁴⁰ *Ibidem*, 35-36.

¹⁴¹ A. Von Bogdandy, S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' (2011) 48 *Common Market Law Review*, 1443.

¹⁴² D. Chalmers, M. Chaves, above n. 139, 36-37.

¹⁴³ Judgments are qualified as salient by the Court of Justice in its annual reports. See *Ibidem*, 27.

and provide an opportunity of clarifying and rationalising the frictions existing between supranational and domestic law.¹⁴⁴ To understand how this result can be achieved, it is useful to review the sequence of the preliminary ruling procedure by paying particular attention to the different roles played in it by ordinary courts, the Court of Justice and, yes, constitutional courts.

The opportunity of articulating national constitutional claims in supranational litigation largely rests on the capacity of the referring courts of framing their questions accordingly. This is the stage at which first-hand information¹⁴⁵ on national constitutional identity can emerge;¹⁴⁶ thus, the illustration of relevant constitutional precedents¹⁴⁷ alongside questions of validity and interpretation of Union law should not be viewed as a singular feature of preliminary references, but as a normal practice directed at situating the question within its original legal context.¹⁴⁸ A cooperative disposition should inspire this move,¹⁴⁹ for there is a subtle and yet critical distinction between expecting the Court of Justice to take into account national constitutional arguments in interpreting Union law, and requiring it to restrict its activity within spaces imperatively defined in the light of domestic constitutional precedents.¹⁵⁰

Indeed, if a question is sent to the Court of Justice, the latter has first of all the task of articulating supranational normative claims and, if needed, promote the transformations or corrections of national measures required by Union law. As a rule, a range of interpretations are possible and it is here that constitutional claims could be enhanced. Within the available solutions to the case, the Court of Justice could opt for the most sustainable in the light of national constitutional claims.¹⁵¹ In this regard several possibilities are made available by the

¹⁴⁴ F. C. Mayer, 'The European Constitution and the Courts' in A. Von Bogdandy, J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, 2007), 306.

¹⁴⁵ D. Thym, 'Attack or Retreat? Evolving Themes and Strategies of Judicial Dialogue between the German Constitutional Court and the European Court of Justice' in M. Claes, M. de Visser, P. Popelier, C. van de Heyning, above n. 47, 247.

¹⁴⁶ M. Claes, above n. 119, 221.

¹⁴⁷ A noteworthy example is provided by the *OMT reference*, above n. 56, paras 17-32.

¹⁴⁸ See the Opinion of Advocate General Cruz Villalón in Case C-62/14, *Peter Gauweiler and others*, not yet reported, paras 30-31. By contrast, a shortage of information to the Court of Justice is likely to produce problematic outcomes. On this regard see M. Bobek, above n. 132, 80.

¹⁴⁹ See the reference to the principle of loyal cooperation in para 6 of the order n. 24/2017 of the Italian Constitutional Court. See also F. C. Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 *German Law Journal*, 131-133.

¹⁵⁰ This approach is evident in the *OMT reference*, above n. 56, paras 99-100, where the German Constitutional Court, after the presentation of national constitutional precedents on *ultra vires* and *constitutional identity* limits to European integration, suggests to the Court of Justice an interpretation of Union law in line with national constitutional claims on the assumption that the latter are not negotiable. This seems also the content of the preliminary reference formulated in order n. 24/2017 by the Italian Constitutional Court. In this ruling the Constitutional Court does not seem to challenge directly the interpretation of article 325 TFEU put forward by the Court of Justice in *Taricco*, but it asks it to recognize the validity of the domestic constitutional principles preventing its application in the case at issue (see, in particular, para 8).

¹⁵¹ L. Azoulay, above n. 97, 167.

principle of proportionality, and also the practice of open judgments¹⁵² offers plenty of opportunities to mediate supranational and constitutional claims.¹⁵³

This leads to the follow-up to supranational judgments in domestic courts. In accordance with the duty of loyal cooperation,¹⁵⁴ referring courts are to enforce supranational rulings.¹⁵⁵ They must interface these judgments with national law and procedures, an activity which is facilitated if the Court of Justice has already taken into account the characteristics of the terrain on which its ruling is destined to land. This is the easiest way to gain the loyalty of referring courts, but one cannot rule out a scenario in which the Court of Justice either overlooks or deliberately disregards national constitutional claims. This is part of the physiognomy of supranational law and of its disciplinary vocation;¹⁵⁶ as a consequence, also in these circumstances referring courts ought to keep faith to their loyalty. Nevertheless, similar judgments may justify also different reactions. If the referring courts find that the Court of Justice has not paid sufficient attention to national constitutional claims, or if they simply find its rulings untenable, they may legitimately refer back the case to the Court of Justice urging a reconsideration of its previous judgment.¹⁵⁷ Another more controversial possibility is offered by national constitutional law: ordinary courts can refer the case to national constitutional courts that, in the light of the '*controlimiti* doctrine', could buttress supreme constitutional principles.¹⁵⁸

The preliminary reference procedure, therefore, does not necessarily displace national constitutional principles, which can be voiced by ordinary courts and, as a back-up option, defended by their supreme interpreters.¹⁵⁹ To be sure, the possibility of reiterating the preliminary reference and, even more radically, the enforcement of *controlimiti* are exceptional and largely unexplored scenarios that one would avoid to test too frequently.¹⁶⁰ But contrary to the opinion whereby the stabilizing effect of *controlimiti* remains only on a threat,¹⁶¹ there may be cases in which constitutional courts could play strategically this card to

¹⁵² T. Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' (2011) 9 *International Journal of Constitutional Law*, 737.

¹⁵³ D. Sarmiento, 'Half a case at a time: dealing with judicial minimalism at the European Court of Justice' in M. Claes, M. de Visser, P. Popelier, C. van de Heyning (eds), above n. 47, 22-29.

¹⁵⁴ Article 4 (3) TEU.

¹⁵⁵ See Advocate General Cruz Villalón in *Gauweiler and others*, paras 63-67.

¹⁵⁶ Although there are more considerate ways than others to undertake this move, see M. Dani, 'Intersectional Litigation and the structuring of a European interpretive community' (2011) 9 *International Journal of Constitutional Law*, 730-735.

¹⁵⁷ T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary reference Procedure' (2003) 40 *Common Market Law Review*, 39-41.

¹⁵⁸ As witnessed by order n. 24/2017 of the Italian Constitutional Court, this move is not necessarily unilateral, but may involve a further preliminary reference.

¹⁵⁹ M. Claes, B. De Witte, above n. 69, 101-104.

¹⁶⁰ All the more if *controlimiti* are interpreted as trump cards unsusceptible of any sort of balancing, see *OMT reference*, above n. 56, para 29.

¹⁶¹ F. C. Mayer, above n. 149, 139.

signal that national constitutional claims are for real. In this regard the history of the European Parliament veto rights in the ordinary legislative procedure may be instructive. As widely known,¹⁶² the Parliament has been extremely cautious in using this prerogative. Yet, the handful of cases in which veto rights have been exercised have increased its standing in the ordinary legislative procedure and, most importantly, have contributed to a more cooperative attitude by the other supranational political institutions.¹⁶³

In the end, therefore, there is probably no need to reconsider the *Simmenthal* doctrine. Conceived along the coordinates illustrated above, the preliminary ruling procedure could encourage interpretations of supranational law more sensitive to national constitutional claims in salient supranational litigation. Each judicial actor is given the opportunity to represent its particular legal culture and engage with the normative claims formulated by its interlocutors. A key role in this regard is assigned to ordinary courts. Regarding their constitutional sensibility, one should not be too sceptical. Ordinary courts are no longer the exponents of an ordinary legality restricted to the application of legislation and impermeable to constitutional reasoning. Decades of cooperation with constitutional courts have improved their constitutional record and transformed them into trusted partners in constitutional adjudication.¹⁶⁴ Thus, in their relation with the Court of Justice, ordinary courts deserve more credit, although efforts should be made at encouraging an interpretation of the preliminary ruling procedure including the consideration of national constitutional principles.¹⁶⁵

Admittedly, the outlined perspective leaves constitutional courts at the margins of supranational litigation. In the European judicial architecture their role of framing and reframing constitutional precedents for domestic purposes remains vital, although their direct contribution to cases falling within the scope of Union law is negligible. Nonetheless, their influence in supranational litigation may still result strategic. In principle, the preliminary ruling procedure and the '*controlimiti* doctrine' create sufficient incentives for the Court of Justice to handle carefully the constitutional materials received via ordinary courts. The fact

¹⁶² According to D. Chalmers, G. Davies, G. Monti, *European Union Law* (CUP, 2014), 119, between 1 May 1999 and 1 January 2013 the Parliament has used the veto only five times in 1,166 procedures (0,4 per cent of the time).

¹⁶³ It is important to remark that in the case of the European Parliament the right to veto legislation is enshrined in the Treaties, while the possibility for constitutional courts to de-authorize EU law is based on national constitutional norms. Important as it is from a formal and theoretical perspective, this difference does not seem to preclude the analogy proposed in the text.

¹⁶⁴ V. Ferreres Comella, above n. 15, 112. See above section II.

¹⁶⁵ Entrusting to ordinary courts the key role of representing national constitutional cultures in supranational litigation may entail the risk of having constitutional principles exposed to varying interpretations. The risk of a cacophony, however, should not be overestimated. Firstly, in referring to the Court of Justice ordinary courts ought to stick strictly to existing constitutional precedents. Secondly, if the Court of Justice has doubts on the quality of the referred materials or on the specific meaning of constitutional precedents, it is still in the position of seeking clarifications, if needed also from the parties intervened in the case. It goes without saying that, in similar circumstances, the possibility to hear the relevant constitutional court as co-respondent through a priority mechanism would certainly improve the quality of judicial deliberations.

that in a number of cases those instruments have revealed ineffective may not be a symptom of dysfunction but, more simply, of their wrong usage. But if they could work, why fix them?

VI. On the potential of the displaced: deference, resistance or correction?

A final point regarding the role of constitutional courts requires examination. Hitherto discussion has shown that, even if directly or indirectly involved in supranational litigation, constitutional courts do not seem in the position to counter the Union policy agenda. If adequately represented in adjudication, constitutional principles may inspire more sensitive interpretations of Union law or justify derogations to its regulatory principles, but they can hardly undermine its overriding goals. This contrasts with the views of other authors assessing the role of constitutional courts from a normative standpoint. In certain writings constitutional courts are depicted as the cornerstones of a would-be European constitutional democracy where public and private autonomy could be reconciled.¹⁶⁶ In others, constitutional courts are the arenas where constitutional resistance against supranational law and its policy agenda could be attempted.¹⁶⁷ National constitutional courts, it is claimed, might have a role in defending the outsiders of European integration. In the field of market regulation, for instance, they could counter the tendency of supranational law and the Court of Justice of favouring mobile individuals by protecting the immobile subjects and the capacity of member states to engage in internal redistribution.¹⁶⁸ More in general, national constitutional courts could undertake their task of reconciling private and public autonomy also in the context of measures adopted in response to the financial crisis.¹⁶⁹

To discuss these claims, an interesting test bench is constituted by the judgments adopted by constitutional courts on national measures implementing programmes of structural change devised under Union impulse as a response to the financial and sovereign-debt crisis.¹⁷⁰ In respect of their role in market adjudication, the arguments developed above on the strategic influence of constitutional courts in the preliminary ruling procedure are sufficient to show that constitutional courts are already in the position to prevent the Court of Justice from overreaching and secure the capacity of member states to defend national constitutional principles.¹⁷¹

¹⁶⁶ J. Komárek, above n. 7, 536-539.

¹⁶⁷ A. J. Menéndez, 'The Existential Crisis of the European Union' (2013) 14 *German Law Journal*, 525-526.

¹⁶⁸ J. Komárek, above n. 7, 541. See also J. Komárek, above n. 8, 426 and 445.

¹⁶⁹ J. Komárek, above n. 7, 541-543.

¹⁷⁰ The judgments considered in this section revolve around a variety of national measures adopted in very different financial circumstances. In member states experiencing severe financial distress, constitutional courts have reviewed measures detailed in agreements between their national governments, EU institutions and the IMF. In other circumstances, constitutional courts have reviewed measures adopted by national governments under the pressure of mechanisms such as the European Semester or the Excessive Deficit Procedure.

¹⁷¹ See above section V. See also F. De Witte, 'EU Law, Politics, and the Social Question' (2013) 14 *German Law Journal*, 605-610.

In the field of fiscal governance, instead, constitutional courts cope with more difficult challenges. Firstly, they are asked to review measures adopted by national governments or legislatures, often on the assumption that these measures are recommended or even required by the Union. This pushes them into a thorny position: on the one hand, they are requested to contrast or reduce the impact of measures with a remarkable impact on social rights and collective goods; on the other hand, they are also expected to be extremely cautious and deferential given the EU *imprimatur* on these policies.¹⁷² Secondly, in many respects the legal framework in which these measures are conceived radicalises the advanced liberalism agenda and, correspondingly, aggravates the corrosion of constitutional democracy. To cope with the financial crisis, the Union has imposed tighter legal constraints on national constitutional democracies, often as a *quid pro quo* for various forms of financial assistance.¹⁷³ The implications of this renovated institutional arrangement are far reaching. The Union has further expanded its competences towards salient national policy fields, often beyond the limits established by the Lisbon Treaty.¹⁷⁴ As a consequence, the Union now meddles with sensitive issues once at the core of national constitutional democracies such as national wage arrangements, industrial relations, pensions, social assistance, health care and also the organization of national judicial systems. As the Union expands its rule on national economic policy and welfare states, it also exports its particular modes of governance. Measures of structural change reflect a specific ideology, as shown by the uncontested legal status achieved by objectives such as financial stability, competitiveness and flexibility of the labour market.¹⁷⁵ Decision-making processes are structured essentially along the intergovernmental and technocratic axis,¹⁷⁶ with the European Parliament exerting negligible influence.¹⁷⁷ Regulatory constraints and intensified supervision are imposed on the budgetary prerogatives of national parliaments on the basis of a set of macroeconomic indicators that, gradually, have ended up replacing fundamental rights as the main coordinates of policy-making. All of this may invite more vocal responses by constitutional courts: supranational measures of structural change cast a shadow over their jurisdiction and contribute to an institutional setting in which

¹⁷² It will be seen below in this section that also economic or financial emergency is a circumstance pressuring constitutional courts towards deference.

¹⁷³ See article 136 (3) TFEU, requiring conditionality for financial assistance through the ESM. Also ECB programmes such as the Security Market Program and Outright Monetary Transaction rely on a strong notion of conditionality.

¹⁷⁴ M. Dawson, F. De Witte, 'Constitutional Balance in the EU after the Euro-crisis' (2013) 76 *Modern Law Review*, 824-826.

¹⁷⁵ In this regard, Euro-crisis law amplifies the purposive character of EU competences examined above in section IV.

¹⁷⁶ M. Dawson, 'The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance' (2015) 53 *Journal of Common Market Studies*, 978-983.

¹⁷⁷ C. Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?' (2014) 20 *European Law Journal*, 164.

constitutional democracies are increasingly regarded as unconditionally serving intergovernmental and technocratic rule.

In recent judgments on measures of structural change, constitutional courts have begun to cope with these challenges. They have responded with a range of different rulings reflecting certainly their varying domestic roles and the economic and political situations of their countries, but also distinct judicial understandings of their task in such a difficult juncture.

In a first series of cases, constitutional courts simply reinforce EU mandated fiscal measures. These are judgments where courts maintain a high degree of self-restraint and national constitutions are interpreted with a view to sustaining Union and national policy efforts. As a result, constitutional courts appear as loyal partners of supranational institutions and national governments: the latter are afforded broad political discretion, on the assumption that deference in politically heated disputes is the wisest course of action.¹⁷⁸

From a more technical point of view, this approach has generated two sub-types of judgments. There are first of all cases in which constitutional courts declare inadmissible constitutional complaints against national measures of structural change. This is an approach followed in particular by the Spanish Constitutional Court,¹⁷⁹ but also the Court of Strasbourg¹⁸⁰ and the Court of Justice¹⁸¹ have adopted a similar stance. There are then judgments in which constitutional courts embrace light-touch review, an approach visible in a number of decisions of the Portuguese and Italian constitutional courts.¹⁸² To grant their governments broad political discretion, these judgments acknowledge the priority of goals such as fiscal consolidation or competitiveness,¹⁸³ often relying on emergency considerations.¹⁸⁴ It is not infrequent that in following this approach constitutional courts decide to depart, at least temporarily, from their precedents on social rights protection.¹⁸⁵

¹⁷⁸ See the dissenting opinions of Judges L bbecke-Wolff, para 27 and Gerhard, para 23 in *OMT reference*, above n. 56.

¹⁷⁹ See Spanish Constitutional Court, order n. 85/2011 on the reduction of wages in the public sector; order n. 136/2014, on the elimination of the Christmas allowance for public workers; order n. 113/2011 on the protection from eviction. In this regard C. Fasone, 'Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective', *EUI Working Paper 2014/25*, 20, notes that these decisions are in line with traditional weak judicial enforcement of social rights in Spain.

¹⁸⁰ See, in particular, *Koufaki and Adely* (No. 57665/12 and 57657/12, 7 May 2013), on the cut of wages and pensions of Greek public workers, and *Mateus and Janu rio* (No. 62235/12 and 57725/12, 8 October 2013) on the reduction of pension in the public sector in Portugal. Only in *N. K. M. v. Hungary* (No. 66529/11, 14 May 2013) has the Court of Strasbourg decided a case concerning the taxation of public sector workers in Hungary.

¹⁸¹ See Case C-128/12, *Sindicato dos Banc rios* [2013] ECR I-149 and Case C-434/11, *Corpul Na ional Poli i tilor* [2011] ECR I-196.

¹⁸² But see also Spanish Constitutional Court, judgment n. 119/2014 on the flexibilisation of labour contracts and the application of collective agreements.

¹⁸³ See, e.g., Italian Constitutional Court, judgment n. 304/2013, paras 4-5 on the freeze of diplomats' wages.

¹⁸⁴ See, e.g., Portugal Constitutional Tribunal, judgment n. 399/10, on tax increases to cope with public deficit, and judgment n. 396/11 on the cut of wages of public servants.

¹⁸⁵ See, e.g., Italian Constitutional Court, judgment n. 310/2013 paras 13.2-13.5, where the Court has relaxed constitutional constraints on measures aimed at reducing public spending with a view to the economic crisis and EU reforms of fiscal governance.

Alternative ways to cope with measures of structural change may of course be envisaged. It has been argued, for instance, that constitutional courts, as participants of the post-war Keynesian constitutional settlement, should resist¹⁸⁶ technocratic encroachment by erecting constitutional barricades.¹⁸⁷ For this purpose, they could rely also on the opportunities offered by the pluralist structure of European public law and employ constitutional claims as counter-hegemonic tools.¹⁸⁸ Accordingly, measures pursuing fiscal consolidation, labour flexibility and competitiveness could be contrasted in the light of robust assertion of fundamental rights and *controlimiti* interpreted as trump cards.

At the beginning of the financial crisis constitutional resistance was a scenario imagined only by scholars, while constitutional courts appeared reluctant to adventure into such a radical path. Yet, recent judgments initiate to substantiate also this course of action. Deciding on a measure affecting the right of education for disabled pupils, the Italian Constitutional Court has established that the balanced budget rule cannot condition provision of essential social services.¹⁸⁹ More controversially, the German Constitutional Court has flirted with constitutional resistance, although for purposes contrary to those inspiring its advocates. In its *OMT reference*,¹⁹⁰ indeed, the German Constitutional Court has proffered a robust interpretation of constitutional principles, namely arguing that constitutional identity is exempted from balancing with supranational normative claims.¹⁹¹ However, it has done so for securing stricter rather than laxer fiscal discipline, given its intent of constraining the European Central Bank efforts of sustaining certain member states at pains in servicing their public debt.¹⁹²

There is finally a last category of cases in which constitutional courts approach national measures of structural change with a view to correcting them. These are cases more in line with constitutional precedents developed in less turbulent times,¹⁹³ and in which constitutional courts struggle to maintain their original role of correcting national policy-making in the light of constitutional principles.¹⁹⁴ It is a line of judgments marked by four different features. Firstly, constitutional courts are ready to defer to EU mandated policy goals.¹⁹⁵ In this

¹⁸⁶ A. J. Menéndez, above n. 167.

¹⁸⁷ This resonates with ideas put forward in W. Streeck, 'Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas' (2014) 21 *Constellations*, 219.

¹⁸⁸ On the capacity of pluralistic arrangements to enhance contestation see N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Post-National Law* (OUP, 2010), 81-85.

¹⁸⁹ See Italian Constitutional Court, judgment n. 275/2016, paras 7 and 11.

¹⁹⁰ See above n. 57.

¹⁹¹ *Ibidem*, para 29.

¹⁹² See, however, *Gauweiler*, above n. 57, where the German Constitutional Court has ultimately recognised that the OMT programme does not manifestly exceed the competences attributed to the European Central Bank.

¹⁹³ C. Fasone, above n. 179, 3-4.

¹⁹⁴ See above section II.

¹⁹⁵ See, e.g., Portuguese Constitutional Tribunal, judgment n. 187/13, recognizing the legitimate nature of the goal of fiscal consolidation.

perspective, they omit to second-guess the legitimacy of the objectives inspiring structural change measures, they admit that the protection of social rights may be financially conditioned¹⁹⁶ and they accept, at least to a certain extent, that emergency considerations justify a relaxation of the standards of judicial review.¹⁹⁷ Secondly, constitutional courts review structural change measures in the light of the principle of proportionality. This does not necessarily lead them to identifying constitutional breaches.¹⁹⁸ Yet, in a number of cases measures are declared illegitimate despite their coherence with supranational policy objectives,¹⁹⁹ and even if this may entail unilateral derogations to financial assistance programmes.²⁰⁰ Thirdly, in a significant number of cases, constitutional courts pay particular attention to the budgetary consequences of their rulings. This gives rise to judgments walking the difficult tightrope between self-restraint and correction. Along this line, constitutional court may initially dismiss constitutional challenges by emphasising emergency or the temporary nature of the measure at issue. Dismissals, however, are accompanied by guidelines aimed at binding future legislative activity.²⁰¹ Other judgments in this category, instead, ascertain the violation of constitutional principles, but suspend²⁰² or limit²⁰³ their effects recognising that otherwise governments would have hard time in figuring out alternative measures to respect EU macroeconomic objectives. Fourthly, coherent with the idea of correction are also judgments securing the procedural or democratic soundness of measures of financial assistance. Following this approach, the German Constitutional Court has inferred from the key role of tax and spending in constitutional self-government the principle that even in a system of intergovernmental administration the national parliament must retain control of fundamental budgetary decisions.²⁰⁴ Thus, it has authorised the adoption of large-scale aid mechanisms such as the European Stability Mechanism, but only

¹⁹⁶ See Italian Constitutional Court, judgment n. 248/2011.

¹⁹⁷ See Portuguese Constitutional Tribunal, judgment n. 187/13. See also C. Fasone, above n. 179, 41-43.

¹⁹⁸ See Portuguese Constitutional Tribunal, judgment n. 187/2013, authorizing for the third consecutive year the reduction of salaries of public servants, the cut of pensions and the reform of direct taxation. See also the judgment n. 603/13, leaving unaffected a two-years suspension of wage increases for overtime work, and judgment n. 572/2014, on the increased taxation of higher pensions.

¹⁹⁹ See Italian Constitutional Court, judgment n. 80/2010, on the reduction of level of educational assistance of severely disabled pupils; judgment n. 223/2012, on the wage-freeze and the cut of the judicial allowance for judges; judgment n. 10/2015, on the higher taxation of the profits of the oil sector; judgment n. 70/2015, on the two-years suspension of automatic indexation of pensions.

²⁰⁰ See Portuguese Constitutional Tribunal, judgment n. 353/2012, on the suspension of the 13th and 14th monthly allowance for public workers and pensioners; judgment n. 187/2013, on the suspension of payment of the 14th monthly allowance and the cut of unemployment and illness subsidies; judgment n. 474/13, on the new discipline for the dismissal of public servants for objective reasons.

²⁰¹ The much discussed judgments n. 187/2013 of the Portuguese Constitutional Tribunal, and n. 70/2015 of the Italian Constitutional Court can be read as the enforcement of guidelines defined in previous decisions (respectively, judgments n. 396/2011 and n. 316/2010).

²⁰² See Portuguese Constitutional Tribunal, judgment n. 353/2012.

²⁰³ See Portuguese Constitutional Tribunal, judgment n. 413/2014, and Italian Constitutional Court, judgment n. 10/2015.

²⁰⁴ See German Constitutional Court, 2 BVerfG, 2 BvR 987/10, paras 121-124.

under the condition of avoiding incalculable burdens on national budgetary autonomy²⁰⁵ and requiring specific parliamentary approval and oversight for each measure of financial assistance.²⁰⁶

Rulings in the field of fiscal governance provides a useful empirical basis to assess the role of constitutional courts. Judgments marked by self-restraint, for instance, show that even when not displaced constitutional courts may decide to abdicate from their task of constraining governments to protect social rights and collective goods. Emergency may justify a similar approach on a temporary basis, but if generalised it amounts to leaving constitutional principles at the mercy of intergovernmental bargaining.²⁰⁷ Precisely for this reason, it is an approach attractive for governments interested in shielding the products of their negotiations from judicial interferences.

For very different reasons, also constitutional resistance seems scarcely plausible. Only if structural change measures undermine fundamental rights at their core appears this approach convincing.²⁰⁸ Indeed, we may dispute their desirability and their expediency in times of crisis, but fiscal consolidation, competitiveness and labour flexibility are legitimate legislative goals.²⁰⁹ Furthermore, prescribing alternative policy directions would probably exceed the task of constitutional courts. The same can be said for interpretations of constitutional rights and constitutional identity as trump cards, especially if we agree that, beyond their inviolable core, fundamental rights are open-ended and susceptible to change.²¹⁰ Constitutional resistance entails also the risk of immunizing measures that, perhaps, do need a degree of structural change. Finally, prior to subscribing to constitutional resistance, we must be aware of the fact that it does not necessarily come in the social-democratic version,²¹¹ and that it may end up authorizing ordoliberal barricades against more sustainable interpretations of EU treaties.²¹²

In the end, the intermediate corrective approach turns out as the most reasonable and coherent with the role assigned to constitutional courts by national constitutions. Reviewing measures of structural change in the light of proportionality and constitutional principles is a sensible

²⁰⁵ *Ibidem*, paras 125-127.

²⁰⁶ *Ibidem*, paras 128 and 141.

²⁰⁷ D. Chalmers, above n. 22, 4-7. This approach would in particular undermine the notion of sovereignty as counterpoint to government.

²⁰⁸ Beyond this level, also the Italian Constitutional Court requires that the protection of social rights is sustainable according to the principle of balanced budget. See judgment n. 275/2016, para 7.

²⁰⁹ By contrast, the fact that they are the only available EU policy directions could justify constitutional resistance. Until now, however, it does not seem that measures of structural change have been challenged before constitutional courts on this ground.

²¹⁰ X. Contiades and A. Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and constitutional litigation' (2012) 10 *International Journal of Constitutional Law*, 670.

²¹¹ M. Wilkinson, 'Economic Messianism and Constitutional Power in a 'German Europe': All Courts are Equal, but Some Courts are More Equal than Others' *LSE Law, Society and Economy Working Papers 26/2014*, 25.

²¹² See Case C-62/14, *Peter Gauweiler and others*, not yet reported.

way to contribute to their sustainability while showing deference towards their objectives.²¹³ Admittedly, this may displease both the contents and the discontents of the Union policy agenda and, ultimately, entrusts constitutional courts with a profoundly ambiguous role. Under correcting judgments, policy goals such as fiscal consolidation, labour flexibility and competitiveness go unaffected, as their effect is just mitigating the impact of measures of structural change.²¹⁴ In the short term, these rulings may have destabilising consequences: while certain categories of individuals are relieved from some degree of structural pressure, national governments have to reconsider their economic plans, if not their supranational commitments.²¹⁵ In the medium and long term, instead, these judgments are likely to perform a stabilising function. By making structural change more sustainable, these judgments provide a veneer of legitimacy to otherwise dubious policy measures. With a modicum of judicial correction, structural change measures may appear more tolerable, with the result of obscuring to national publics both the need and the possibility of alternative policy strategies.²¹⁶

This exposes a disturbing paradox inherent in the current European pluralistic configuration: legal adaptation works at the expenses of political contestation.²¹⁷ Constitutional courts may well contribute to the development of structural change policies ‘with a human face’;²¹⁸ yet, by doing so, they neutralise the destabilising political potential of constitutional principles and fundamental rights.²¹⁹ As said, this role is coherent with their constitutional task, but it is bitterly ironic that, by keeping faith to their mandate, constitutional courts end up sustaining a legal and political order corroding the form of political power on which they are premised.

VII. Concluding remarks

The *Simmenthal* doctrine places national constitutional courts at the margins of supranational litigation. For a rather long period this has not been a source of major concern owing to the rather clear division of labour existing between the Court of Justice and constitutional courts. As the Union expands its scope and its normative claims and institutional culture become

²¹³ X. Contiades and A. Fotiadou, above n. 210, 672-673.

²¹⁴ *Ibidem*, 676-684.

²¹⁵ It is noteworthy that the President of the Euro-group, in the aftermath of a judgment of the Portuguese Constitutional Tribunal, has urged the Portuguese government to identify alternative measures to respect the obligations enshrined in the financial assistance program. See *Statement by the Eurogroup President – Recent ruling of Portugal’s Constitutional Court*, 20 December 2013,

²¹⁶ The suspect that sustainability is just a discourse to maintain old objectives and policies is nourished by the arguments (and quotations) used by its advocates. See K. Nicolaïdis, ‘Sustainable Integration: Towards EU 2.0?’ (2010) 48 *Journal of Common Market Studies*, 21.

²¹⁷ N. Krisch, above n. 188, 79.

²¹⁸ A similar point is made by A. Fischer-Lescano, ‘Human Rights in Times of Austerity Policy – The EU institutions and the conclusion of Memoranda of Understanding’, Legal Opinion Commissioned by the Chamber of Labour of Vienna, 45.

²¹⁹ On the ambivalent nature of fundamental rights, see B. de Sousa Santos, *Toward a New Legal Common Sense. Law, Globalization, and Emancipation* (CUP, 2004), 467.

predominant, defending national constitutional legality arises as a priority. Yet, this may not be an excuse for immunizing constitutional courts from contestation for, as participants of constitutional democracy, they partake in both its achievements and shortcomings.

Defending constitutional courts should not lead necessarily to reconsidering the *Simmethal* doctrine. Firstly, constitutional courts themselves accept this doctrine and the underlying relationship with supranational legality as part of their national constitutional culture. Secondly, notwithstanding their displacement, national constitutional courts can still exert a strategic influence in supranational litigation and encourage considerate handling of national constitutional claims by the Court of Justice.

National constitutional courts, however, cannot be expected to embark in rights-based constitutional resistance against supranational technocratic and intergovernmental encroachment. If faithful to their task, they can only correct Union policy measures in the light of national constitutional principles and proportionality. This approach may have the disturbing paradoxical effect of reinforcing a legal and political order corroding the idea of constitutional democracy. Concern for this development is certainly justified and rescuing constitutional democracy is certainly a goal worth of political resistance and contestation. But demanding constitutional courts to be the avant-garde in this struggle would probably turn out to be a self-defeating strategy.