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LSE Law, Society and Economy Working Papers 23/2014

London School of Economics and Political Science

Law Department

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Why National Constitutional Courts Should Not Embrace EU Fundamental Rights

Jan Komárek^{*}

Abstract: In this paper I argue against national constitutional courts' welcoming approach to EU fundamental rights. This more recent development is inextricably linked to the broader phenomenon of the displacement of these courts from law and politics in Europe. The paper builds on previous work concerning the place of constitutional courts in the EU, which sought to provide a theoretical basis for what is argued here with regard to the more specific issue concerning EU fundamental rights. In the first part, I will briefly present the background argument, based on a Habermasian idea of the European constitutional democracy. Then I sketch the understanding of fundamental rights, which builds on it. On that basis I finally discuss national constitutional courts' engagement with EU fundamental rights.

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1. INTRODUCTION

Since the Charter of Fundamental Rights of the European Union (‘the EU Charter’) came formally into force on 1 December 2009, national constitutional courts’ place in law and politics has been significantly transformed.¹ The increasing number of constitutional courts’ preliminary references to the ECJ is perhaps the most visible sign of this transformation. What in the 1990s was an exception – only the Austrian and Belgian constitutional courts were semi-regularly sending references to Luxembourg – has become a general practice of many, if not most, national constitutional courts today.

The ECJ’s understanding of the principle of primacy also allowed ordinary courts to challenge the superiority of constitutional courts and the finality of their decisions. The controversy between the Czech Supreme Administrative Court and the Constitutional Court, which resulted in the latter’s finding of the ECJ’s decision to be *ultra vires*,² was only the most extreme instance of conflicts and tensions that arose between constitutional and ordinary courts. Numerous examples show that when ordinary courts dislike constitutional courts’ interpretation of the national constitution, including constitutionally protected fundamental rights, they can contest it through a preliminary reference to the ECJ. The power of ordinary courts vis-à-vis constitutional courts has recently been reinforced by the ECJ’s rulings in *Melki and Abdeli*, *Križan* and *A*.³ *Melki and Abdeli* and *A* undermine the priority of national constitutional courts’ constitutional review, whereas *Križan* makes it possible for ordinary courts to ignore decisions of constitutional courts which they find contrary to EU law. The pressure from ordinary courts can in fact explain the present willingness of national

¹ See Jan Komárek, ‘The Place of Constitutional Courts in the EU’ (2013) 9 *European Constitutional Law Review* 420-450. By ‘constitutional courts’ I mean judicial institutions specialized in constitutional adjudication, where judicial review of legislation is concentrated. For a recent overview of constitutional courts’ powers, see reports for the XVth Congress of the Conference of European Constitutional Courts, 23 – 25 May 2011, *Constitutional Justice: Functions and Relationship with the other Public Authorities*, available at <http://www.confcoconsteu.org/en/reports/reports-xv.html> (accessed 28 March 2012). The following EU Member States have constitutional courts: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. In Estonia, although there is no separate institution called the ‘constitutional court’, constitutional review is exercised by a specialized chamber within the Supreme Court, whereas in Cyprus the review is somewhat centralized at the Supreme Court, through the system of mandatory appeals and constitutional references (similarly in Portugal the ordinary courts can find a statute unconstitutional, but such decision will be subject to mandatory appeal). In Malta, on the other hand, although there is a nominal constitutional court, it is not separate and forms part of the Maltese judiciary.

² See Michal Bobek, ‘*Landtová, Holubec*, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure’ (2014) 10 *European Constitutional Law Review* 54-89. For a less conflictual, but also significant case of a clash between the German Federal Constitutional Court and the Supreme Labour Court see Alec Stone Sweet and Kathleen Stranz ‘Rights Adjudication and Constitutional Pluralism in Germany and Europe’ (2012) 19 *Journal of European Public Policy* 92-108.

³ ECJ (Grand Chamber), Judgment of 22 June 2010 in Joined Cases C-188/10 and C-189/10, *Melki and Abdeli* [2010] ECR I-5667; ECJ (Grand Chamber), Judgment of the ECJ (Grand Chamber) of 15 January 2013 in Case C-416/10 *Križan*, not yet officially reported and ECJ (Fifth Chamber), Judgment of 11 September 2014 in Case C-112/13 *A*, not yet officially reported.

constitutional courts to refer preliminary questions to the ECJ: rather than being challenged or circumvented by ordinary courts that use the ECJ and the preliminary reference procedure instrumentally in a domestic judicial conflict, constitutional courts choose to cooperate. 'If you can't beat them, join them!' one may say.

National constitutional courts' embrace of EU fundamental rights is another sign of this transformation. The Austrian Constitutional Court went perhaps the farthest when it ruled that the EU Charter forms part of its standard of constitutional review, albeit only in areas delimited by Article 51(1).⁴ But EU fundamental rights have become part of national constitutionality by less obvious means too: some national constitutional courts use them as interpretive guidance when giving meaning to fundamental rights guaranteed formally by their respective constitutions.⁵

In this paper I will raise some doubts as regards this last mentioned development, which is, however, inextricably linked to the broader phenomenon described above. It builds on my previous work on constitutional courts' place in the EU, which sought to provide a theoretical basis for what is argued here with regard to the more specific issue concerning EU fundamental rights.⁶ I will shortly present this background argument in the following part. Then I sketch the understanding of fundamental rights, which builds on it. On that basis I then discuss national constitutional courts' engagement with EU fundamental rights.

2. CONSTITUTIONAL COURTS IN A CONSTITUTIONAL DEMOCRACY⁷

In this part I will defend the view of constitutional courts that is linked to the discourse (or deliberative) theory of law and democracy. As will become apparent, this theory favours the separation of constitutional and ordinary adjudication, which is undermined by the transformation of constitutional courts resulting from different doctrines of EU law and from constitutional courts' own embracing of EU fundamental rights.

⁴ Austrian Constitutional Court, Judgment of 14 March 2012, U 466/11-18 and U 1836/11-13, English translation available at http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf.

⁵ On the variety of possible approaches see Giuseppe Martinico and Oreste Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws* (Europa Law Publishing, Groningen 2010).

⁶ Jan Komárek, 'National Constitutional Courts and the European Constitutional Democracy' (2014) 12 *International Journal of Constitutional Law*.

⁷ Part of this section reproduces, in a slightly amended form, Komárek, n 6, section 3.

2.1 CONSTITUTIONAL DEMOCRACY

All current EU Member States aspire to be constitutional democracies.⁸ They respect and in their constitutions positively provide for (albeit in different forms) the principles of political morality which were traditionally understood as constraints on democracy: the rule of law, fundamental rights or, at a more general level, equality and human dignity. These principles are often associated with constitutionalism, which established itself as an important independent value after World War II.⁹

Democracy and constitutionalism, understood narrowly, are sometimes presented as being in opposition to each other. This opposition can be expressed with different concepts and at a different level of abstraction: as a tension between positive and negative liberty, between public and private autonomy, between political and individual self-determination or between liberalism and communitarianism.

In the narrow understanding of the term, democracy is to be achieved through the political process (or politicians), whereas the latter is the domain of courts and lawyers and constrains democracy or political will. The achievement of constitutional democracy is thus seen as a balancing act: fundamental rights and the rule of law apply *at the expense* of democracy, and vice versa. This is justified with reference to the need to control democracy's undesirable outcomes, such as the oppression of minorities, and/or to make the democratic process work properly. The precise contours of this balancing act differ according to the understanding of democracy and constitutionalism respectively, but the central point is that the two are seen as being in an irreconcilable tension with each other.¹⁰

Habermas's conception of constitutional democracy seeks to reconcile the two through the 'co-originality thesis': citizens can act as members of a political community (and thus decide democratically in the narrow sense) only if their individual rights (associated with the narrow understanding of constitutionalism) are guaranteed. In the 'post-metaphysical world', however, where no pre-established truth exists, the content of such individual rights can be determined only in common with others through the discursive process of opinion- and will-formation. The discursive process can 'lead to convincing positions to which all

⁸ According to Article 49 TEU, in order to become a member of the EU, European states must respect the values listed in Article 2 TEU. These are 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' and 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

⁹ See Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press 2011), 146-150.

¹⁰ For an overview, see Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge: Cambridge University Press 2007), chapter 2.

individuals can agree without coercion'¹¹ and is able to produce decisions with legitimacy. Individual and public autonomy is thus intertwined in a constitutional democracy.

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

Although Habermas contends that this superior position of the legal discourse to others leaves the inner logic of other discourses intact, the legal form nevertheless imposes important constraints: temporal, social, and also substantive.¹² Habermas implicitly envisions a 'deliberative division of powers':¹³ 'the distribution of the possibilities for access to different reasons and to the corresponding forms of communication that determine how these reasons are dealt with'.¹⁴ He does not further develop what kind of institutionalization is required (although his reconstruction draws on the practise of the Federal Republic of Germany and its Constitutional Court). As I will argue below, what is required is precisely the separation of constitutional courts (and constitutional legality) from ordinary ones, especially since the creative role of courts in the sphere of constitutional adjudication concerns the fundamental principles embodied in the Constitution. The transformation of constitutional courts, briefly described in the introductory part of this paper, threatens this separation of national constitutional courts from the rest of the judiciary and their superior authority necessary for maintaining the communicative arrangement.

2.2 DELIBERATIVE SEPARATION OF POWERS

The superior position of legal discourse has been criticized from many sides.¹⁵ Gunther Teubner observed that Habermas's account 'underestimates the single-mindedness of legal dynamics which does far more than just filtering out

¹¹ Jürgen Habermas (W Rehg transl), *Between Facts and Norms* (Cambridge: Polity Press 1996), 103.

¹² Ibid.

¹³ The term was not used by Habermas himself, but by Conrado H Mendes, 'Neither Dialogue Nor Last Word: Deliberative Separation of Powers III' (2011) 5 *Legisprudence* 1.

¹⁴ Habermas, n 11, 192.

¹⁵ I do not consider the various critiques of Habermas' theory of constitutional democracy as such, since they are not central to the issue at heart here: the separation of constitutional courts from ordinary judiciary.

arguments'.¹⁶ Teubner further questions the ability of law 'to decide between economic, political and moral rationality and claim to be binding for all society'.¹⁷ The response to this objection can be twofold: firstly, by further distinguishing between ordinary and constitutional legality law becomes much more open to rationalities other than those Teubner acknowledges. Coherence, which in Teubner's view dominates law's internal logic, can be achieved to differing degrees and at different levels. That is also why Habermas distinguishes two opposing paradigms of law: bourgeois formal law, related to the 19th century idea of a free-market economy, and welfare-state materialized law, which appeared in reaction to the injustices of the former after World War I.¹⁸ The bourgeois paradigm highlights formal justice and legal certainty, whereas the welfare paradigm puts emphasis on substantive justice in the individual case. The discourse theory of law and democracy envisioned by Habermas in *Between Facts and Norms* is realized through a third, procedural, paradigm, which is able to arbitrate between the other two.¹⁹

Habermas envisions another separation of discourses: that between discourses of justification and application.²⁰ In the first, the validity of norms is established, whereas the second examines the appropriateness of their application to concrete situations. Habermas does not deny the creative role for courts – on the contrary: 'To the extent that legal programs are in need of further specification by the courts because decisions in the gray area between legislation and adjudication tend to devolve on the judiciary, all provisos notwithstanding juristic discourses of application must be visibly supplemented by elements taken from discourses of justification'.²¹ In other words, the creative role of courts requires 'another kind of legitimation than does adjudication proper'.²² It must, in Habermas' view, entail 'additional obligations for courts to justify opinions before an enlarged critical forum specific to the judiciary. This requires the institutionalization of a legal public sphere that goes beyond the existing culture of experts and is sufficiently sensitive to make important court decisions the focus of public controversies'.²³

The second response to Teubner concerns revisability. Legal decisions, which arbitrate between different systems, can possibly claim binding force – or finality –

¹⁶ Gunther Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895-1995* (Oxford: Clarendon Press 1997), 163.

¹⁷ Ibid, emphasis added.

¹⁸ Habermas, n 11, 195 and Chapter 9.

¹⁹ Ibid.

²⁰ Ibid, 217-218. This distinction has been criticized in the literature: see particularly Robert Alexy, 'Justification and Application of Norms' (1993) 6 *Ratio Juris* 157, who nevertheless recognizes the distinction between the two contexts and its importance for adjudication, which is central for the argument made here.

²¹ Ibid, 439.

²² Ibid, 440.

²³ Ibid.

from their own perspective only. The socio-political reality is different and the ‘final word’ has at least two temporal dimensions: one concerning the concrete case at hand and the other oriented beyond it. There are many possible ways in which ‘the finitude of a procedural round’ can be turned into ‘the permanently possible continuity of political mobilization’. The last word is therefore always ‘provisional’.²⁴ The question therefore is how to balance the desire for finality with that of revisability and change, while acknowledging that one can be achieved only at the price of the other.

2.3 CONSTITUTIONAL COURTS

The dual separation of ordinary and constitutional legality and the discourses of application and justification, together with the desire for revisability, are best realized through the institutional separation of constitutional adjudication in concentrated constitutional courts.²⁵ They form an important part of the communicative arrangement of constitutional democracies. This is for the following reasons:

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

The separation of constitutional and ordinary courts does not concern ‘democratic legitimacy’, which we usually relate to political institutions, especially not in terms of what Robert Alexy calls ‘decisional’ or ‘volitional’ representativeness centered around the concepts of election and majority rule.²⁶ The point is not to make constitutional courts democratically legitimate in terms of majoritarian democracy, but to employ them in the communicative arrangement, which legitimates decisions, adopted in the given constitutional democracy. For that aim it is therefore not so important that elected officials

²⁴ Mendes, n 13, 22.

²⁵ The following draws on V Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale UP 2009), chapter 4, who also considers the ‘classical’ justification for concentrated constitutional courts, based on the separation of powers and legal certainty, presented by the father of the idea, Hans Kelsen.

²⁶ See Robert Alexy, ‘Balancing, Constitutional Review, and Representation’ (2005) 3 *International Journal of Constitutional Law* 572, 579.

mostly appoint the judges of constitutional courts, but rather that the appointment is somewhat responsive to the communicative power generated in society.

Whether concentrated constitutional courts are better than other institutional alternatives and whether the above reasons for their superiority are valid in reality depends on their specific powers and the overall design of a given political system. These differ greatly from country to country, which makes it difficult to present a truly universalizable argument. Yet, the analysis provided here offers a more general theoretical framework which can be used to justify the more specific institutional settings of individual Member States. The separation of constitutional and ordinary legality thus does not preclude the involvement of other actors in constitutional review. On the contrary, this is what deliberative theories of democracy explicitly envision.²⁷ That is also why I consider many of the arguments presented here as directly relevant for the defense of such other arrangements, if threatened by the requirements of European integration.

There seem to be two kinds of reactions to the transformation of constitutional courts and their loss of exclusivity in constitutional adjudication. One is principled, offering different kinds of normative theories that justify the transformation. The other is pragmatic, suggesting that it can simply be the only viable strategy for constitutional courts if they want to remain influential actors in constitutional law and politics. Both need to find justification in (positive) law in order to be usable in the actual practice of European courts. In this part I will argue that the competing normative theories justifying the greater involvement of national constitutional courts in EU fundamental rights adjudication are problematic. In the following part 4 I will then argue that the pragmatic strategies do not really deliver on what they promise and that some doctrinal legal arguments made by the proponents of both approaches are problematic.

3. THE NATURE OF FUNDAMENTAL RIGHTS IN EUROPE

The authors who welcome the greater involvement of national constitutional courts in EU fundamental rights adjudication share one important assumption: that *the nature* of fundamental rights is the same whatever their formal legal source (be it a national constitution, the ECHR or the EU Charter). Instances of possibly different (or even conflictual) *application* of the rights in concrete cases do not undermine their essential identity. On this point see sections 3.1 to 3.4.

Some authors then add that if this different application leads to a 'greater' protection of rights (while the greater protection is usually given by European

²⁷ These can, for example, be self-review panels with legislatures and regulatory agencies, mechanisms for interbranch debate and decisional dispersal, making it easier to amend constitutions and, finally, the establishment of civic constitutional fora. See Zürn, n 10, chapter 9.

courts), we should understand this as an enhancement of fundamental rights in Europe (section 3.5). This should also be the case when there is a ‘gap’ in the protection of fundamental rights, usually because a particular right cannot be effectively enforced at the national level, and a supranational court (either in Strasbourg or in Luxembourg) fills in the gap (section 3.6). I think all three assumptions are problematic. In this part I will explain why.

3.1 THE DUALITY OF FUNDAMENTAL RIGHTS

The supposed identity of fundamental rights in Europe seems to follow from the universality of fundamental rights. The most well-known fundamental rights documents in the Western political tradition claim to be ‘universal’: the Universal Declaration of Human Rights adopted by the United Nations in 1948, or its archetypes from the 18th century revolutions in America and France. The state or another public authority can at best guarantee or declare such rights, but their true source comes from somewhere else and is not amendable to will. That in the liberal tradition fundamental rights protect individuals from the excessive encroachments by the state and the individual lies at the centre of any political project both contribute to this understanding.

Whereas in the 18th century the ultimate source of fundamental rights could be the intentions of a divine creator,²⁸ in our secular, or as some call it, post-metaphysical, world this is no more possible. Morality therefore became the alternative source of fundamental rights, providing them with universal validity.²⁹ This, for Habermas, would however overlook their structure and content, which are quite different from moral norms.³⁰ Habermas explains that while it is true that similarly to moral norms fundamental rights ‘are equipped with a universal validity claim because they can be justified exclusively from the moral point of view, [...] this form of justification by no means robs the [fundamental] rights of their juridical character’.³¹ This is because fundamental rights are ‘actionable individual rights whose meaning at least in part is to free legal persons in a carefully circumscribed manner *from the binding force of moral commands* by creating domains of legal conduct in which actors can act in accordance with their own preferences’.³² In other words, Habermas sees law and morality as separate and this separation is one of the points of positive law.

²⁸ As Martin Loughlin points out, this was precisely what Thomas Jefferson did when drafting the American Declaration. See Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart 2000), 201.

²⁹ This of course assumes that moral norms are universal. I shall not enter the debate on whether this is the case here.

³⁰ For Habermas’ conception of fundamental rights see Habermas, n 11, chapter 3. See also his essay ‘Kant’s Idea of Perpetual Peace: At Two Hundred Years’ Historical Remove’ in C Cronin and P De Greiff (eds), *The Inclusion of the Other* (Polity 1999), particularly at 188-193. For a concise introduction, which also considers Habermas’ main critics, see Jeffrey Flynn, ‘Habermas on Human Rights: Law, Morality, and Intercultural Dialogue’ (2003) 29 *Social Theory and Practice* 431-457.

³¹ Habermas, n 30, 191.

³² Ibid, emphasis added.

Fundamental rights are a modern phenomenon, tied to a ‘new form of political rule’, which privileges the rights of individual over the duties elaborated from a religious or metaphysical perspective.³³ This ‘new form of political rule’ was established through positive law – hence the conceptual affinity of fundamental rights and positive law. The fact that many political liberals have been adherents of what we would call today ‘legal positivism’ (from Jeremy Bentham to Joseph Raz) reflects this conceptual affinity. It is important to understand that this claim about fundamental rights is conceptual, not simply practical: fundamental rights are *inherently* tied to a *particular* legal system. They are not merely ‘universal in abstraction but national in application’, as a senior British judge observed.³⁴ Their very establishment (their creation ‘in abstract’) is ‘particularistic’, that is tied to a particular legal and political system: not only national one, but also those of the ECHR and the EU. Legal systems, in turn, are formed by norms and institutions: there are those created by states as the most institutionalized (and comprehensive) type, but there is also the ECHR containing a system of norms implemented by its own institutional structure (the Strasbourg Court in particular), and then of course the EU.³⁵ They are distinctive, whatever the level of the mutual interlocking or the ‘fusion’ of them.³⁶

3.2 IMPLICIT SOCIAL THEORY AS THE BASIC DISTINCTION BETWEEN EU AND NATIONAL FUNDAMENTAL RIGHTS

The distinctiveness of various fundamental rights legal systems in Europe manifests itself at different levels. Analytical jurisprudence would look at ‘the existence and practices of certain kinds of institutions as providing the key to questions regarding the identity of legal systems’.³⁷ Scholars working in this tradition would look at either law-creating or law-applying institutions in order to find answers. As Julie Dickson shows, the identification and separation of particular legal systems in Europe can be quite difficult if such an approach is used.³⁸

Critical legal positivism developed by Kaarlo Tuori thus adds to this kind of examination a deeper one, looking at legal-cultural elements. These are for Tuori general legal concepts and principles, legal theories or doctrines, and patterns of

³³ See Loughlin, n 28, 198.

³⁴ Lord Hoffmann, ‘The Universality of Human Rights’ (2009) 125 *Law Quarterly Review* 416-432.

³⁵ For a sketch of the approach to law as an ‘institutional normative order’ see Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999), chapter 1.

³⁶ For an analysis see Julie Dickson, ‘Towards a Theory of European Union Legal Systems’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012). See also Kaarlo Tuori, *European Constitutionalism: Towards a Constitutional Theory of the EU* (forthcoming in CUP, manuscript on file with the author).

³⁷ Dickson, n 36, 40.

³⁸ Dickson, n 36.

argumentation, which lie at the ‘sub-surface level’ of the legal order.³⁹ This sub-surface level also contains an ‘implicit [or ‘hidden’] social theory’: ‘a particular view of the respective social field’ regulated by the legal order as a whole or its component part under examination.⁴⁰ This implicit social theory helps to distinguish legal systems where the analytical approach of analytical legal positivists gets into difficulties. As I explain below, constitutional and political systems of Western European states were established after World War II on different foundations (different ‘implicit social theory’) than the European integration project. The transformation of national constitutional courts and the ‘nationalization’ of European rights is part of a larger process whereby this distinction disappears.

What the implicit social theory of law in post-war Europe is (or should one rather say ‘was?’) depends on the discipline one takes when articulating the view. Political and constitutional theorists would probably observe that constitutions in Western Europe established regimes of ‘constrained democracies’, where popular sovereignty was explicitly (and quite strongly) limited by fundamental rights, protected by specialized constitutional courts.⁴¹ Constitutional courts mediated claims based on individual rights and those referring to democracy and popular sovereignty and became central to the maintenance of constrained democracies. This is what Peter Lindseth calls the ‘post-war constitutional settlement’.⁴² Political economists and historians speak of the era of constrained or coordinated capitalism, which recognized a strong role for the state, committed to providing for the welfare of its citizens while at the same time respecting the market.⁴³ The success of coordinated capitalism depended heavily on the organization of labour and the ability of trade unions to commit the labour force to agreements achieved with the government and employers.⁴⁴ Importantly, neither political and constitutional theory, nor political economy saw the market as the dominant social sphere or organizational principle, quite the contrary. The former simply ignored the market (and economy) for most of the time, whereas the latter recognized the need to regulate it – in order to constrain it. It is plausible to interpret the post-war constitutional settlement as a project of emancipation from economic insecurity and dependence on the market, which were perceived after the war as its root causes.⁴⁵

This relates to the role of constitutional adjudication in the mediation of social conflicts in the post-war constitutional settlement. By this I do not mean just express provision for social rights (which did not, for example, appear

³⁹ See Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002), chapters 5-7. For a summary see Tuori, n 36, Prologue.

⁴⁰ Tuori, n 36.

⁴¹ See Müller, n 9, 146-150.

⁴² Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010), 17.

⁴³ See Christopher J Bickerton, *European Integration: From Nation-States to Member States* (OUP 2012), 76-90.

⁴⁴ See particularly Barry Eichengreen, *The European Economy Since 1945: Coordinated Capitalism and Beyond* (Princeton UP 2007).

⁴⁵ See Alexander Somek, *The Cosmopolitan Constitution* (OUP 2014), 10-11.

explicitly in the German Basic Law),⁴⁶ but rather the structure of rights which presupposed the express balancing of classical liberal rights, including the right to property, with certain public goods and policies.⁴⁷ Europeans thus have always had many weak rights, which are not ‘trumps’, but rather tickets to deliberative forums: constitutional courts.⁴⁸ Such a conception of rights thus fits very well with the notion of constitutional democracy sketched above, presupposing mediation between private and public autonomy. It allows constitutional courts to form part of the communicative arrangement established by post-war European constitutions. This explains why the controversy concerning constitutional review in Germany was always limited to the proper method of interpretation of constitutional rights, rather than the very existence of the institution, whose legitimacy was undisputed from the very beginning.⁴⁹ The new method of constitutional interpretation, defended by the advocates of the Federal Constitutional Court, stressed ‘the community-embedded and community-bound nature of persons without however diminishing their inherent independent value’.⁵⁰

The place of the market, however, changed dramatically with the rise of what we call neoliberalism, for which the market is of paramount importance as ‘the universal law governing our social existence’.⁵¹ We do not need to decide at this point whether the ‘original’ implicit social theory of the European Communities was that of constrained democracy and capitalism or whether it already contained the seeds of neoliberalism, which started to flourish with the help of the integration structures after the 1970s.⁵² It is clear, however, that EU fundamental rights rest firmly on the foundations of a market integration project and not the

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

⁴⁷ For an excellent account of the history of the idea of balancing in the European and American legal thinking in the 20th Century, see Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Post-War Legal Discourse* (CUP 2013).

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

⁴⁹ Christoph Möllers, ‘The Scope and Legitimacy of Judicial Review in German Constitutional Law – the Court versus the Political Process’ in H Punder and C Waldhoff (eds), *Debates in German Public Law* (Hart 2014).

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

⁵¹ Alexander Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law* (OUP 2011), 85. The term ‘neoliberalism’ is now used in ideological battles much like ‘communism’ used to be and as Somek, n45, 84 notes, it has become ‘the battle cry of last resort used by those who bemoan the demise of economic alternatives to global capitalism’. In this essay, I essentially mean ‘a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong property rights, free markets, and free trade’. The role of the state is minimal. See David Harvey, *A Brief History of Neoliberalism* (OUP 2005), 2.

⁵² See Bickerton, n 43, 125-140.

emancipatory project of post-war liberal constitutionalism that underlies national constitutions.

This has been argued by many people with reference to the priority of market freedoms over classical liberal freedoms as exemplified by the *Schmidberger* case,⁵³ or pointing to the shift from ‘the traditionally labour-friendly thrust of horizontal direct effect’ to ‘an instrument that can be used even against internationally concerted trade union action, such as combating the reflagging practice at issue in *Viking*’.⁵⁴ At the deepest level, however, the major difference consists in the fact that while national systems of fundamental rights are tied to a functional political system, this is not the case of EU rights.⁵⁵ This coupling is, however, necessary for their legitimacy, since rights simply ‘do not come from heaven’, to paraphrase one ECJ Advocate General,⁵⁶ but are always formulated in the context of a political system and the community of citizens who occupy it. This also explains why we should worry about the ECJ adjudicating classical liberal rights in the context of the EU security constitution (especially in the context of the Area of Freedom, Security and Justice),⁵⁷ which are not concerned with the emancipation from the market.

This can help us to understand why national constitutions seem to be resistant to the complete neoliberal transformation. It is due, I believe, to the embeddedness of national fundamental rights in the communicative arrangement of a constitutional democracy described above in section 2.1.⁵⁸ No such mechanisms exist at the EU level, despite the recent efforts to ‘politicize’ it. In this sense the legitimacy of EU fundamental rights depends on the legitimacy of the EU political process – which is very contested, to say the least.

At this point one can object to my analysis that this is just another biased leftist critique of the EU and market integration project. The point is, however, to realize the fundamental difference between the post-war logic of constrained democracy and capitalism, which informed the formation of national constitutions of that era (including their bills of rights), and the shift to neoliberalism, which exerts pressure on that settlement. It is of course possible to argue that neoliberalism is what Europeans truly want, but this should be done openly and

⁵³ ECJ, Judgment of 12 March 2003 in Case C-112/00 *Schmidberger* [2003] ECR I-5659. See in general Daniel Augenstein, ‘Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law’ (2013) 14 *German Law Journal* 1917-1938.

⁵⁴ Somek, n51, 49. ECJ (Grand Chamber), Judgment of 11 December 2007 in Case C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen’s Union (“Viking”)* [2007] ECR I-10779.

⁵⁵ Speaking comparatively, at least, since national democracies were also considerably hollowed out in the course of the neoliberal transformation and it would be a mistake to present them as an ideal. See e.g. Wendy Brown, ‘Neoliberalism and the End of Liberal Democracy’ in *Edgework: Critical Essay on Knowledge and Politics* (Princeton UP 2005).

⁵⁶ Opinion of AG J. Mazák of 15 February 2007 in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 86.

⁵⁷ On the EU security constitution see Tuori, n36, chapter 7.

⁵⁸ Post-communist constitutions can be different in this respect, since the post-1989 transformation was based on – and helped to re-enforce – neoliberalism as the implicit social theory. See my ‘Waiting for the Existential Revolution in Europe’ (2014) 12 *International Journal of Constitutional Law* 190-212.

not under the guise of the protection of fundamental rights, which are said to be ‘universal’ or at least ‘the same’ in the EU and its Member States.

3.3 FUNDAMENTAL RIGHTS AND FUNDAMENTAL BOUNDARIES

This relates to the question of whether we should always welcome the fact that the rights of individuals are ‘better’ protected with the greater involvement of national constitutional courts and their opening to EU fundamental rights. Quarrels concerning the (im-)possibility to compare the level of protection aside,⁵⁹ Aida Torres Pérez suggested that ‘preserving a role for constitutional courts under a mutual checks and balances rationale might foster better protection for individuals, since they will seek to bring their cases before the courts that better protect them’.⁶⁰ This however amounts to individuals seeking a forum that, disembedded from the claimant’s own political system and its internal communicative arrangement, will give them the highest amount of individual autonomy at the expense of public autonomy of the relevant polity (and ultimately, the individual), which is uncoupled in the context of the supranational adjudication.

Joseph Weiler addressed the problem of the priority of rights and the individual over a community and its collective choices as the problem of boundaries: as much as individuals have their right to autonomy and self-determination, the same applies to communities. The different line drawn in different polities between these two competing rights reflects a social choice, which is an expression of the core values of the given polity.⁶¹ It is remarkable, however, how little space Weiler actually leaves for national autonomy and differentiation. First of all, he considers the ECHR to represent the ‘universal’, which transcend[s] any legitimate cultural and political difference among different societies in, at least, the universe of Europe’.⁶² As argued above, the claim of universality is based on wrongful assumptions (Weiler ultimately seems to ground his understanding of fundamental rights on the tomistic theory of natural law).⁶³

Second, he praises the ECJ’s creation of EU fundamental rights ‘as a call to acknowledge the Community and Union as a polity with its own separate identity and constitutional sensibilities which has to define its own fundamental

⁵⁹ Leonard FM Besselink, ‘Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union’ (1998) 35 *Common Market Law Review* 629–680.

⁶⁰ Aida Torres Pérez, ‘The Challenge for Constitutional Courts as Guardians of Fundamental Rights in the European Union’ in P Popelier, A Mazmanyan and W Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2012), 62.

⁶¹ Joseph HH Weiler, ‘Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space’ in *The Constitution of Europe* (CUP 1999).

⁶² Ibid, 105.

⁶³ See ibid, 103.

balances'.⁶⁴ The problem is, however, that it is a call to acknowledge something that hardly exists, at least not in the sense of a thick identity able to back up a true political system, which would underpin the legal side of fundamental rights, presupposed by their inherent duality discussed above in section 3.1.

3.4 THE INSTITUTIONAL DIMENSION

Finally, there are arguments that welcome the greater involvement of EU fundamental rights (and correspondingly national ordinary courts acting in cooperation with the ECJ) as a way to fill the gaps in judicial protections of such rights. In some countries fundamental rights are protected by different mechanism than a strong judicial review, most remarkably the United Kingdom. Weiler comments on this thus: 'One can, of course, take the view that UK constitutional arrangements and the denial of power to UK courts to apply the ECHR are matters which should be left to the UK. But in anybody's book that would hardly qualify as a position which takes human rights seriously'.⁶⁵ I suppose it was due to such statements that the rich scholarship on non-judicial protection of fundamental rights has emerged in the last 20 years and I do not have the space to dwell into this debate here.⁶⁶ In relation to the argument from the duality of fundamental rights I want to stress something else: part of the 'fundamental choice' Weiler seeks to protect is the institutional structure for the implementation of rights and communal goods. To say that those who do not think that a strong judicial review is the best way to protect fundamental rights in fact means to say that the choice is not to be taken seriously at all. It is not only about abstract norms, but also institutions that implement them and also the deliberative separation of powers thus achieved.

Weiler makes another assumption that is often shared by the supporters of the greater fundamental rights involvement, or as he puts it, 'confess[es] to a bias'. It is rebuttable, he admits, but it favours 'human rights judicial review by courts not directly part of the polity the measures of which come under review'.⁶⁷ He then gives rather horrendous examples of defending discrimination against blacks in the South of the United States or female mutilation and corporal punishments in other countries as examples of defences that make a mockery of the transcendental notion of human dignity. In his 'impressionistic view, local courts, close to local culture, are over-susceptible to this type of argument'.⁶⁸ Crucially, Weiler adds:

⁶⁴ Ibid, 117.

⁶⁵ Ibid, 124.

⁶⁶ Most famously perhaps see Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346-1406.

⁶⁷ Weiler, n 61, 126.

⁶⁸ Ibid, 128.

I prefer, in this respect, the bias of the transnational forum to that of the national one, tempered as it is by the doctrine of margin of appreciation and mindful that the transnational forum is, as noted, often a second bite at the apple, the national jurisdiction having already had its say.⁶⁹

Due to the doctrine of primacy (and the overall ambition of the ECJ to create a uniform legal order), there is however little room for a doctrine of the margin of appreciation to emerge, contrary to the ECHR. And due to the current structure of the preliminary ruling procedure, the ECJ actually gets ‘the first bite at the apple’, while national constitutional courts remain often excluded.

4. ‘IF YOU CAN’T BEAT THEM, JOIN THEM!’

For a self-proclaimed ‘realist’ the normative question about the fundamental difference between national and EU fundamental rights, discussed in the previous part, does not seem to arise: ‘focus[ing] on aspects of control and power’,⁷⁰ it will always depend on the vantage point from which one assesses the role of national constitutional courts in the EU. From the point of view of national constitutions it is a matter of course to demand their special position being preserved, so as they keep their superior position in domestic legal orders. And it is equally legitimate (or perhaps ‘rational’, in the language of such ‘realist’ analysis) to displace constitutional courts and put the ECJ in control, if one looks at the matter from Plateau Kirchberg in Luxembourg. Michal Bobek thus suggests a kind of trade, or a “‘give and take” compromise’:⁷¹ national constitutional courts would have ‘to come out of their national constitutional splendid isolation’⁷² and accept ‘the Charter as a part of national constitutionality [...] using it either directly or indirectly for the purpose of constitutional review’.⁷³ This, in Bobek’s view, will lead to their ‘regaining the power of review of national implementing measures they have previously abdicated to ordinary courts in cooperation with the Court of Justice’.⁷⁴

There are several problems with this suggestion – even if ignoring its normative dimension, discussed in the previous part of this paper. If the argument covers the area where constitutional courts decide on questions referred to them by ordinary courts, then constitutional courts get precisely nothing by embracing

⁶⁹ Ibid.

⁷⁰ Michal Bobek, ‘The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts’ in M de Visser and C Van De Heyning (eds), *Constitutional Conversations in Europe* (Intersentia 2012).

⁷¹ Ibid, 308.

⁷² Ibid, 305.

⁷³ Ibid.

⁷⁴ Ibid.

EU fundamental rights as their standard of review. This is so because it is still the ordinary courts that have the first say in cases where issues concerning the compatibility of national legislation with EU fundamental rights arise. National constitutional courts cannot change this by making EU fundamental rights part of national constitutional standard, since according to *Simmenthal II*,⁷⁵ ordinary courts must decide *immediately* on the basis of EU law, including the Charter, *without referring the matter* to another national institution, including national constitutional courts.⁷⁶

The true change could come from the ECJ's recognition of the desirability of having the national measure (which possibly implements EU rules) reviewed first in the light of the national constitution. This has however little to do with constitutional courts' embrace of EU fundamental rights – and one can hardly find a reason in EU law, which would support this. The possible invocation of judicial subsidiarity makes little sense here, since what is at stake under this reading, is the review by national courts of a national measure in the light of the national constitution, whereas subsidiarity is based on an idea of a shared normative area.

The only change could therefore come if national constitutional courts started to use the Charter to review national legislation in the abstract review, which is independent from ordinary courts and can take place before a dispute concerning the Charter ever arise before ordinary courts. This would be true especially for those systems, which allow for *ex ante* review. Here, however, it is a question whether recognizing the Charter as part of the standard of review really enhances the power of the constitutional court in question, since it at the same time means that the court must refer questions of interpretation of the Charter to the ECJ – and obey its rulings or face a direct conflict. It seems questionable whether this, even from a 'realist' point of view, increases national constitutional courts' autonomy.

5. CONCLUSION: NOWHERE TO GO?

If my diagnosis is correct, the change cannot come from either the ECJ or national constitutional courts. The first would have to give up its most cherished doctrines of primacy and effective judicial protection of EU rights, whereas the latter have much lesser room for manoeuvre than it is usually assumed. In my view, therefore, the change must come from within the ordinary judiciary, which should realize that constitutional courts were established with a special purpose and philosophy in mind and that their too assertive approach may undermine the very foundations of constitutional democracy they also operate within. This would however require a sort of existential revolution, changing minds of the judges

⁷⁵ ECJ, Judgment of 9 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.

⁷⁶ This is precisely what the ECJ stresses in *Melki and Abdeli* and later in *A* (see n 3).

from those of rational actors to virtuous individuals, whose work has a purpose that goes beyond their institutional self-interest. There are many reasons to be sceptical of such ‘existential revolution’.⁷⁷

⁷⁷ See Komárek, n 58.