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National constitutional review of European law and its democratic legitimacy

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Judging European Democracy - National Constitutional Review of European Law and its Democratic Legitimacy

Chapter I - Introduction

In a large and growing body of case law, constitutional courts from the EU Member States have reviewed EU treaties and related legal instruments, as well as secondary EU law and decisions by EU institutions, on their compatibility with national constitutional law. These EU-related judgments concern fundamental questions of the EU's constitutional order such as the EU's democratic legitimacy, the protection of persons' fundamental rights and freedoms, the division of competences between the EU and its Member States, as well as the place of national sovereignty within the EU. Through these judgments, national constitutional courts influence the EU's constitutional foundations, and by imposing constitutional limits on further integration, they shape the EU's future development. Yet are constitutional courts the institutions that should decide such issues of major constitutional importance for the EU? Or is it more democratic to leave these matters to political institutions that represent Europe's citizens and that are supposedly politically accountable to them?

In light of the contested democratic legitimacy of constitutional courts, this book's central question is how the democratic legitimacy of the national constitutional courts' review of European law should be assessed. Although democratic concerns about the national constitutional courts' review of European law have been raised occasionally, they have not yet been systemically explored. Nor has it been assessed how their judgments impact on political decision-making within the EU context. In the current literature, the role of constitutional courts is often evaluated in a positive light. The national constitutional courts' case law would help to ensure respect for the Member States' national constitutional identities, function as a check on the EU's powers, open up a space for contestation and dialogue, or serve as a justified response to pressing concerns about the democratic quality of the EU's decision-making process.

This book takes a different approach. Instead of asserting that national constitutional identities should be respected, it also addresses who should determine what respect for national constitutional identity entails. Instead of valuing dialogues about the EU's constitutional foundations, it also asks who should do the talking. And in light of democratic

concerns about the role of constitutional courts, it discusses whether one can really expect these courts to facilitate democratic deliberation or strengthen the democratic quality of the EU's decision-making process, without constraining political discussion over the most desirable institutional architecture for the EU and its further development.

In this manner the book aims to move beyond the existing scholarship in three ways. Firstly, it brings democratic concerns about the role of constitutional courts upfront in evaluating their legitimate role in relation to the EU. In this respect, the book builds upon the rich scholarship on the democratic legitimacy of judicial review in the domestic context. Secondly, the book aims to further understand how democratic considerations inform the normative assessment of the constitutional courts' role in a transnational context, where public authority is transferred to a supranational organisation that is considered to suffer from various democratic legitimacy problems. Thirdly, the book adds to a more empirically informed understanding of the constitutional courts' role in relation to political institutions within the EU context. I argue that these empirical insights allow for a better understanding of the democratic legitimacy of the national constitutional courts' review of European law.

The book is multidisciplinary in nature and draws on three related disciplines. It builds on political philosophy and constitutional theory to better understand the legitimacy problems that judicial review raises, it uses traditional legal sources to understand the existing law, and it employs qualitative empirical methods to analyse the decision-making by courts and political institutions. In this manner, the book aims to better understand the national constitutional courts' legitimate role in relation to the EU, as well as to lay the groundwork for a theory of legitimate constitutional interpretation and institutional design.

Chapter 2 - Judicial Review and Democratic Legitimacy

In order to better understand the democratic legitimacy of the national constitutional courts' review of European law, chapter 2 asks how we should assess the democratic legitimacy of judicial review of legislation in the domestic context. Liberal political philosophers commonly argue that constitutional constraints on majoritarian democracy are crucial to uphold the legitimacy of law. Democratic majority decisions that violate liberal rights cannot be considered legitimate. Judicial review in turn ensures that liberal rights are adequately protected against potentially oppressive majorities.

A crucial difficulty with this justification for judicial review is that these rights are subject to reasonable disagreement. Even if we agree on a high level of abstraction that democratic decision-making cannot legitimately violate certain rights, disagreements are still likely when we try to ascertain what this requires in concrete situations. Allowing that such reasonable disagreements about rights are settled in the democratic process appears more legitimate, because the democratic process potentially allows for careful deliberation between citizens on the basis of an equal right to participation. However, rejecting judicial review and constitutional limitations on democratic government is problematic as well. Mere majoritarian democratic decision-making cannot be considered sufficient to ground the legitimacy of legislation, because certain majority decisions appear obviously illegitimate. Majority decisions that abolish the democratic process do away with the procedure that establishes the law's legitimacy in the first place. Certain constitutional rights, such as freedom of expression and freedom of assembly, are obviously connected to democratic ideals, as they enable vibrant public debate. Beyond that, the mere fact that a majority of citizens favours a particular law seems insufficient to establish its legitimacy. For example, where democratic majorities treat racial minorities with contempt or are completely unwilling to take their interests into account, it is hard to see why these minorities should accept the authority of such majorities as legitimate.

On the basis of a discussion of key positions in the debate over the legitimacy of judicial review, the chapter defends that judicial review is best justified if aimed at safeguarding the preconditions of democratic legitimacy, understood along the lines of Habermas' theory of deliberative democracy. On this conception, the constitution lays down the preconditions for a democratically legitimate law-making process by setting up a system of rights to private and public autonomy. At the same time, however, the constitution must be realised and specified in on-going democratic discourses, given possible reasonable disagreement about what these preconditions are and what their protection requires. This idea avoids the problem of the liberal justification of constitutionalism and judicial review, where the democratic process is subjected to the outcomes of pre-politically justified requirements of justice. On the other hand, it also clarifies how the democratic legitimacy of legislation depends on the continued guarantee of persons' rights to private and public autonomy.

On this understanding, a constitution in a democratic society functions both as a standard to assess the legitimacy of law, as expressing an ideal to be further realised in law, but also as a

set of norms that itself must be open to revision in light of new insights and arguments. Beyond certain minimal requirements, the best we can hope for is that there is on-going deliberation about whether a country's laws remain compatible with the preconditions of democratic legitimacy. This entails that legislating must be accompanied by a check of whether such legislation complies with the norms and ideals laid down in the constitution. It does not necessarily mean, however, that a court should exercise this check. Whether the institution of judicial review is necessary, what type of review a constitutional court should exercise and how this institution should be given shape, depends on an assessment of the comparative abilities of legislatures and constitutional courts to address constitutional questions. Such comparative assessments must be empirically informed. The key question is whether a political system with judicial review somehow better ensures that such deliberation on constitutional questions takes place, compared to a system without such review. Answering this question requires one to consider how legislatures debate constitutional issues in the absence of judicial review, how these legislative deliberations over constitutional issues compare to the assessment of constitutional courts on similar issues, and how judicial review impacts on subsequent legislative deliberations. To advance the debate on the democratic legitimacy of judicial review, further research is required that critically engages with legislative and judicial practice.

Chapter 3 - The National Constitutional Courts' Review of European Law and its Democratic Legitimacy

Based on the discussion in chapter 2, chapter 3 turns to the democratic legitimacy of the national constitutional courts' review of European law. The chapter argues that the national constitutional courts' review of European law generally raises a similar democratic concern as judicial review in the domestic context, but that it should be assessed against the specific institutional setting of the EU and take into account democratic legitimacy problems of the EU's decision-making process.

In this regard, the chapter first considers whether national constitutional courts should use democracy as a standard of review to correct the EU's democratic legitimacy problems. The problem with democracy as a standard of review, however, is that there is significant and reasonable disagreement about how the EU should be made more democratic. National constitutional courts that invoke democracy as a standard for review especially risk imposing themselves on the contested relationship between the EU and its Member States. Democracy

as a standard of review thus raises a democratic concern itself, unless it is aimed at addressing problems beyond reasonable political disagreement. In other cases an empirically informed comparative institutional assessment between constitutional courts and other institutions becomes crucial.

This chapter thus considers the different institutional constellations in which the constitutional courts' review of European law takes place, as well as the specific grounds for such review. A key difference in the EU context is that several political institutions located at different governance levels can be involved in the making of European law. This changes the comparative institutional assessment relevant to assessing the democratic legitimacy of the national constitutional courts' review. Next to that, the national courts' review should be assessed in relation to the specific grounds for such review: it has to be asked whether a national constitutional court is better placed than political institutions to address a specific constitutional issue and how its judgment will affect subsequent decision-making by political institutions. For example, national constitutional identity is an important standard of review in the national constitutional courts' case law and respect for such identities may be considered of key importance. Still, a key question here is whether the national constitutional courts should take on the burden of ensuring respect for such identities. The wide variety of possible interpretations of the notion seem to offer good reason for leaving it to political institutions to determine what respect for constitutional identity requires. In addition, the EU's political decision-making process gives the Member States an important role, which allows them to raise constitutional concerns within this process.

On the basis of these considerations, the chapter argues that the democratic legitimacy of the constitutional courts' review of European law also depends on an empirically informed comparative institutional assessment between constitutional courts and other institutions. The constitutional courts' review could be a way to better ensure that constitutional issues are given due consideration in the making of European law or even promote deliberation on such issues. Yet, to understand whether that is the case, further empirically informed research is required. That research should take into account the institutional constellation in which review takes place, how the constitutional issues that a national court raises have played a role in the prior decision-making process, as well as how the constitutional court judgments impact on subsequent political deliberations.

Chapter 4 - Research Design

Chapter 4 and the subsequent chapters address these more empirical questions in a number of case studies related to the German Federal Constitutional Court (GFCC) and political decision-making in the Netherlands. Chapter 4 more specifically deals with issues relating to the research design of the case studies.

First of all, the chapter explains why the case studies only focus on a limited number of cases. The comparison of political and judicial processes is a complex exercise. Grasping how a political process unfolded necessitates careful study and requires one to understand its context. In light of these considerations, the cases studies focus on a selected number of cases.

The case studies focus on two major constitutional episodes in the EU's history over the past twenty-five years and the role of the GFCC: the adoption and ratification process of the Maastricht Treaty and the EU's response to the Euro crisis. The choice to study Germany was made, because it has the constitutional court with the most elaborate and influential case law in relation to European law. Additionally, the case studies compare German decision-making with decision-making in the Netherlands in the same instances. The aim of this comparison is to see how a national legislature takes into account constitutional concerns relating to European integration without subsequent court review.

The different decision-making processes were selected primarily because the GFCC reviewed the Maastricht Treaty as well as several of the crisis instruments. In addition, these decision-making processes mark two important moments in time regarding the GFCC's role. The GFCC's *Maastricht-Urteil* is a landmark case with key importance for the role of constitutional courts beyond Germany and within academic debate. The study of the GFCC's role in the Euro-crisis in turn allows an appreciation of the *Maastricht* legacy and the GFCC's role for the current state of European integration.

For these case studies the study compared how political institutions on both the national and European level addressed the constitutional implications of the respective instruments with the GFCC's assessment. In addition, this study asks about the possible effects of the GFCC's review on the treatment of constitutional issues by EU and German political institutions. The chapter proposed a relatively open criterion to compare political and judicial reasoning,

namely how the constitutional issues that featured in the national constitutional courts' case law on the respective measures, were dealt with in prior and subsequent political deliberations. As data sources, the chapter explained the use of parliamentary documents, constitutional court judgments, policy documents and semi-structured interviews as the primary data sources. In addition, the chapter defended a combination of within case analysis, cross case comparison, process-tracing and counterfactual analysis to study the data sources and determine the effect of the GFCC's judgments on subsequent political decision-making.

Chapter 5 - The Rise of Judicial Euroscepticism: Maastricht

Chapter 5 then turns to the GFCC's Maastricht judgment. In line with the aims of the book, the chapter considers how the key constitutional issues raised in the *Maastricht-Urteil* were considered in the prior political deliberations by the Treaty drafters, the German *Bundestag*, as well as the Dutch *Tweede Kamer*. In addition, it considers how the judgment impacted on political debate in its immediate aftermath.

A prominent justification for the GFCC's *Maastricht-Urteil* is that despite the judgment's shortcomings, the GFCC raised key constitutional issues that the political institutions had failed to fully consider. In this vein, it has been argued that the GFCC identified democratic deficiencies of the EU at a time when few politicians dared to speak about these problems. The chapter shows how this justification for the Court's intervention cannot be maintained: the constitutional implications of the Maastricht Treaty and its democratic shortcomings in particular, were amply discussed in the Treaty negotiations and the ratification debates. In the German *Bundestag* there was widespread agreement that the Treaty had major democratic shortcomings that needed to be remedied in the future. Regarding the deliberations on the monetary union, the story is slightly different. In this respect, it seems rather that both the GFCC as well as the various political institutions failed to fully address EMU's implications.

A second justification for the Maastricht-judgment is that political debates on the Treaty would not have had the constitutional quality if the GFCC's prior EU related case law had not raised key constitutional questions and if there was no threat of subsequent review. This justification is difficult to uphold as well. The wish to strengthen the EU's democratic legitimacy was a long-held one of German political elites. Furthermore, there are few references to this prior case law in German parliamentary debate, and in the Netherlands

constitutional questions were considered in a similar way, despite the absence of a constitutional court with a body of case law on the EU.

A third and more nuanced justification is that the GFCC's Maastricht judgment catalysed further debate by raising issues not previously considered. In this sense, some have argued that the proceedings before the Court provided a substitute for a public debate in Germany on the Treaty. The chapter considers that this view holds more merit. In the pro-European political climate of German politics, it could be difficult to voice arguments critical of European integration. Opposition to European integration as such missed from political debate. The Court eventually provided such a more critical viewpoint and allowed critics to use the Court as an avenue to voice their concerns. The paradox, however, is that the GFCC's Euro-critical stance apparently meant to 'politicise' a debate that was too apolitical, a role that does not seem to sit very well with the court's position as guardian of a constitutional framework that is supposed to bind democratic politics. At Maastricht, the Court arguably still played this role successfully, as its judgment was sufficiently open to various possible interpretations and did lead to debate about new issues outside parliament. Nonetheless, over the long term this role appears to have become increasingly problematic. If the Maastricht Treaty failed to put in place a political and democratic structure that would make EMU viable as a democratic project, the GFCC put into question the idea that such a union could ever be achieved. The Court thus turned the failure of Maastricht into a potentially larger constitutional problem. Around twenty years later the Court's position has become a pressing concern in the context of the Euro crisis.

Chapter 6 – The Euro Crisis and the Judicialisation of Euro-Politics

Chapter 6 discusses the role of the GFCC in the Euro crisis. In 2009, the GFCC returned to the core tenets of its *Maastricht* judgment with its ruling on the Lisbon Treaty. The Court's ruling approved the Treaty, but this time the constraints it imposed on European integration appeared much more restrictive than at Maastricht: Germany could not accede to a European federal state under the Basic Law and the Court was highly critical of the EU's democratic credentials. In addition, the Court determined that extensive competence transfers were not permitted in several areas, including decisions on fundamental fiscal decisions. Just a few months later, however, it materialised that the euro area could face a significant crisis when problems with Greece's sovereign debts became clear. In response, the euro area Member States and the EU institutions adopted a range of measures that have changed the face of the

monetary union: mechanisms of financial assistance to aid euro area Member States in financial difficulties, more extensive supervision on national budgets and strengthened economic governance, as well as an EU Banking Union. In this manner the crisis has led to an important increase in the Union's powers, which touches upon the budgetary powers of national parliaments.

These changes have raised various constitutional concerns in the EU Member States and a great deal of litigation before the GFCC. In multiple judgments related to the crisis, the German Court has maintained that the *Bundestag* must retain control over essential budgetary decisions. This case law, however, largely ignores the significant interdependencies that already exist between the EMU Member States. Several commentators contend that by acceding to EMU, its Member States have greatly restricted their decision-making capacity in economic policy and can be faced with adverse economic developments that they no longer control. On this line of reasoning budgetary powers should be transferred to the EU in order to make the monetary union viable and ensure political control over economic policy.

Within this context, the chapter describes how the GFCC's crisis-rulings constrain political debate over various alternatives for EMU's future. On the one hand, the GFCC has continued to provide an additional avenue for Euro-critics to voice their dissent, while such voices are not always fully represented within the *Bundestag*. Still, it is highly doubtful that a constitutional court should provide an avenue for opposition to European integration. The GFCC's case law affects different political positions unevenly. Political positions that see public debt as the main problem in the monetary union are more easily compatible with the Court's case law than positions that perceive the role of financial markets and lack of a shared European economic policy as key problems. The Court's case law reinforces and reifies a politics in which budgetary discipline and retaining German budgetary sovereignty is of overriding importance. Moreover, the Court makes the achievement of political alternatives more burdensome and, in the name of democracy, constitutionalises a type of politics that several commentators see as the antithesis of democratic government. The idea that the GFCC's interventions have simply enriched German political debate on the EU's future is difficult to maintain, because the Court's judgments are rarely contested in German politics. Instead, the Court is accorded the final authority in interpreting the German Constitution. It thus limits the room for political contestation over different possible interpretations of the constitution and over how constitutional ideals should be realised within

the EU. Finally, the chapter compares the German context to political decision-making on the crisis in the Netherlands. The discussion shows how sovereignty concerns are a key part of Dutch political debate and rejects the idea that the Netherlands should introduce constitutional review to ensure better consideration of constitutional issues in political debates on European integration.

Chapter 7 - Court-ordered Parliamentary Oversight

Chapter 7 discusses a more positive side to the GFCC's crisis case law, which is that the Court has contributed to a progressive strengthening of the *Bundestag*'s participation and information rights, both in EU affairs generally, as well as regarding decisions on financial assistance more specifically. By doing so the Court has created space for democratic politics rather than constrained it and has contributed to democratic control of the executive. There is also considerable evidence that this strengthening of the *Bundestag*'s position would not have occurred without the GFCC's interventions. Nonetheless, a comparison with the Netherlands shows that some of the dynamics between the national parliament and its government were specific to the German context. Although the GFCC's interventions ultimately helped bring about a much more elaborate system of parliamentary rights in Germany, the Dutch parliament took several measures to protect its own position. Evidence from other countries also indicates that other parliaments have been able to protect their own prerogatives without being pushed to do so by a constitutional court. On the basis of these insights, the chapter submits that constitutional review geared towards strengthening the position of national parliaments vis-à-vis their own governments in EU affairs can help to counter democratic legitimacy problems in a fairly uncontroversial manner. Especially where national constitutional courts take into account countervailing concerns, the courts' review seems positive. In Member States that have already introduced judicial review, constitutional courts can probably legitimately require enhanced parliamentary oversight, especially if these courts take into account countervailing considerations that militate against such oversight in some cases. For Member States without judicial review, the German example does not offer a clear reason to introduce it. As the previous chapter indicated, such review can have several other negative repercussions, and once a court is given the power to review legislation, it is not clear that it can be controlled.

Chapter 8 - Conclusion

Chapter 8 concludes the book and discusses the main findings in light of the overall research question and objectives of the study. Firstly, it reiterates why a critical engagement with judicial and legislative practice is pivotal in assessing the democratic legitimacy of the constitutional courts' role, both in the domestic context and the EU context. The almost exclusive focus of current scholarship on courts to the neglect of political institutions is an important deficiency. It can only lead to incomplete assessments of the legitimacy of these courts' role.

Secondly, it argues that two key conclusions follow from the case studies. On the one hand, a key problem is that the GFCC's rulings on European integration ultimately raise several democratic problems. That is essentially the case because the Court has adopted a contested understanding of democracy according to which democracy is tied to the nation-state, which limits the ability of political actors to put forward different visions on the future of European integration. Portraying constitutional courts as 'forums of principle' or as necessarily better placed to deliberate on constitutional matters related to European integration, is inaccurate. The case studies showed how both in Germany as well as in the Netherlands, constitutional questions often formed a considerable part of political debate on the EU. These political debates showed more openness to a variety of possible understandings of constitutional principles. Moreover, the idea that the GFCC's judgments have contributed to an improvement of democratic debate on constitutional matters, has limited empirical support. On the other hand, the case studies also considered how the GFCC strengthened the position of the German parliament in EU affairs and thus countered the dominance of the executive in this area of decision-making. Such review, which is more limited in nature and focuses more on the relationship between the executive and national parliaments, promotes democratic politics instead of constraining it.

Thirdly, the concluding chapter discusses what these case studies suggest for the legitimate role of national constitutional courts in the EU more generally and how these insights may contribute to laying the groundwork for a theory of legitimate constitutional interpretation and to inform ideas for institutional design. In this respect, the study suggests that the democratic legitimacy of constitutional identity review and *ultra vires* is doubtful. Instead, it is argued that courts should adopt a type of review that is more sensitive to legitimate political disagreement. In addition, it is argued that the courts should direct their review at correcting democratic legitimacy problems of the EU's decision-making processes that are

less subject to reasonable disagreement. A promising way for national constitutional courts to strengthen the EU's democratic legitimacy in this manner is to enhance the information and participation rights of national parliaments in EU affairs. In addition, the chapter suggests that weakening judicial review institutionally could engender a more balanced relation between courts and political institutions and allow a more dialogic process between these institutions. The study suggests also that the reasons for Member States with limited or no institutions for judicial review of European law to set up such institutions are weak. For such Member States it seems more appropriate to invest in strengthened constitutional scrutiny of European law within the political institutions. The full implications of this study for constitutional interpretation and institutional design, however, should be worked out in further research. In addition, further research should enrich the case studies of this book, as a number of aspects to the case studies are not fully generalizable to other cases.