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Separation of Powers and the Role of National Constitutional Courts in the EU: German Lessons for Europe?

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I. Introduction

The role of constitutional courts in the European Union (EU) is one of the most highly debated issues in EU legal scholarship. Constitutional courts from several Member States have articulated constitutional limits to the primacy of EU law and to further European integration through Treaty change. Critics argue that such review presents a problematic risk to the primacy of EU law and the stability of the EU legal order.[2] More recently, a number of authors have additionally stressed the dangers of abuse.[3] Nonetheless, a significant number of scholars have historically seen merit in the national constitutional courts' conditioning of primacy and of further European integration, although the debate knows many nuances.[4]

[1] This chapter builds on the author's recently published monograph, N de Boer, *Judging European Democracy: The Role and Legitimacy of National Constitutional Courts in the EU* (Oxford University Press, 2023). Efforts have been made not to use the same wording as in that book, but parts of the text may nonetheless bear a strong resemblance. I am very grateful for the insightful comments I received from Christina Eckes, Anna Wallerman Ghavanini and Päivi Leino-Sandberg on earlier drafts of this chapter. The usual disclaimer applies.

[2] eg D Kelemen, 'On the Unsustainability of Constitutional Pluralism' (2016) 23 *Maastricht Journal of European and Comparative Law* 136; D Kelemen et al, 'National Courts Cannot Override ECJ Judgments: A Joint Statement in Defense of the EU Legal Order' (*Verfassungsblog*, 26 May 2020), at verfassungsblog.de/national-courts-cannot-override-ECJ-judgments; JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (Cambridge University Press, 1999) ch 9.

[3] eg D Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59; F Fabbrini and A Sajó, 'The Dangers of Constitutional Identity' (2019) 25 *European Law Journal* 457.

[4] The idea of constitutional pluralism is often used as an umbrella term for such views although there are many different views and the debate is nuanced. For a number of influential views see N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *The Modern Law Review* 317; M Maduro, 'Contrapunctual Law: Europe's

Against the background of the ongoing debate on the role of constitutional courts in the EU, this chapter aims to critically assess whether and in what ways the review of European law by national constitutional courts can provide an appropriate answer to the EU's separation of powers problems.[5] The chapter studies the case of the German Federal Constitutional Court (GFCC), which is a national constitutional court that has engaged with EU law issues on several occasions and at important junctures of EU integration.[6] The GFCC's elaborate and sophisticated case law on the EU has put this court at the centre of debates on the role of national constitutional courts in the EU. While some have argued that the GFCC's review provides an answer to some of the EU's separation of powers problems, I argue that the GFCC's case law rather presents a problem in terms of separation of powers.[7] On the basis of the German case, I suggest that a more limited role, as adopted by some other national constitutional courts, is more appropriate. In this respect, I understand the notion of constitutional courts broadly, namely as all Member State courts with the power to engage in judicial review of legislation on constitutional grounds.[8] By these courts' review of European law I mean not just the review of EU law proper, but also that of EU Treaties before their entry into force, as well as instruments adopted under international law that strictly fall outside the scope of EU law, but are closely related to EU law. Examples of the latter are the Treaty on the European Stability Mechanism (ESM) and the Fiscal Compact. Some of the EU's separation of powers problems are associated precisely with the adoption of legal instruments outside the framework of EU law.[9] Using this broader notion of European law thus allows for a more balanced evaluation of the constitutional courts' role in relation to the EU.

The chapter builds on the contributions to this book that identify executive dominance and highly consensual policy making as key problems in the EU from a separation

Constitutional Pluralism in Action' in N Walker (ed), *European Constitutionalism* (Hart Publishing, 2003); M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262; M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012).

[5] The language of separation of powers or similar notions have been invoked in various influential publications on the role of constitutional courts in the EU. See eg A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417, 1453; Maduro (n 5) 523; H Schermers, 'The Scales in Balance: National Constitutional Court v. Court of Justice' (1990) 27 *Common Market Law Review* 97; D Grimm, 'The Role of National Constitutional Courts in European Democracy' in D Grimm (ed), *The Constitution of European Democracy* (Oxford University Press, 2017).

[6] More comprehensive overviews of the EU-related role of constitutional courts have been provided elsewhere, eg A Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press, 2022); LFM Besselink et al, 'National Constitutional Avenues for Further EU Integration' (Study requested by the European Parliament's Committee on Legal Affairs and Constitutional Affairs Committee of the European Parliament, DG for Internal Policies Study, 2014), at www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET(2014)493046_EN.pdf.

[7] I discuss some of these positive evaluations of the GFCC's case law in sections II and III.

[8] The notion of constitutional courts adopted in this chapter thus encompasses both specialised constitutional courts, such as the German Federal Constitutional Court (GFCC) as well as ordinary courts with the power of constitutional review, such as the Danish Supreme Court.

[9] J Habermas, *The Crisis of the European Union: A Response* (Polity, 2012); B Crum, 'Saving the Euro at the Cost of Democracy?' (2013) 51 J*ournal of Common Market Studies* 614. See also on informalisation, Gnes and Sormunen, ch 4 in this volume.

of powers perspective.[10] Such assessments echo familiar criticisms of the EU's decision-making procedures.[11] 'Executive dominance' refers to the problem that the key political actors on the European plane are institutions that would qualify as executive in a nation-state context, namely the European Council, the Council and the Commission, while the position of the directly elected European Parliament is relatively weak. The model of highly consensual policy making in the EU is a problem because it prevents political conflicts to be debated openly.[12]

Expanding on these evaluations, over-constitutionalisation and judicialisation have been regarded as important reasons why the EU lacks sufficient political conflict over different policy agendas.[13] Over-constitutionalisation concerns the problem that many policy decisions are laid down in the EU Treaties, while they would be ordinary law in the Member States. Such over-constitutionalisation removes these policy decisions from the ordinary political process. Over-constitutionalisation and the high-consensus requirements for adopting EU secondary law more generally, also empower the ECJ.[14] Authors such as Fritz Scharpf and Dieter Grimm argue that the ECJ's case law on the internal market has had a liberalising and deregulatory effect on the Member States. High consensus requirements for the adoption of EU secondary law, let alone the significant hurdles for amending the EU Treaties, make it difficult, however, to correct the ECJ's interpretations of EU law through decisions by the EU's political branches.[15] The result is that decisions of considerable political importance are made by the European court, instead of political institutions. In this sense the ECJ is often considered a motor of European integration. Leino-Sandberg and Minkkinen argue, moreover, that the ECJ has largely failed to take seriously its role of checking the EU's political branches, instead showing excessive deference.[16]

To fill the void left by the ECJ, one could argue that critical scrutiny of European law by national constitutional courts is warranted, including against the expansive case law of the European court itself. A challenge to this perspective, however, comes from the contested role of constitutional courts in a separation of powers perspective.[17] Constitutional courts are those courts equipped with the power to check the constitutionality of legislation. Yet whether courts should have that power is a matter of ongoing debate, because it allows independent judges to override the decisions of democratically

[10] On executive dominance, see Ankersmit, ch 5 in this volume, Eckes, ch 12 in this volume and Krajweski, ch 6 in this volume. On both issues, see Leino-Sandberg and Minkkinen, ch 2 in this volume.

[11] See eg: A Føllesdal and S Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravscik' (2006) 44 *Journal of Common Market Studies* 533; similarly C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013) 181–85; D Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77 M*odern Law Review* 1; Habermas (n 6) 6.

[12] Leino-Sandberg and Minkkinen, ch 2 in this volume.

[13] See also L van Middelaar, A*larums & Excursions: Improvising Politics on the European Stage* (Agenda Publishing, 2019) ch 7; Möllers (n 11) 171–74.

[14] This can also be said about the ECB, which I leave out of the discussion here. See further: N de Boer and J van 't Klooster, 'The ECB, the Courts and the Issue of Democratic Legitimacy after Weiss' (2020) 57 *Common Market Law Review* 1689. On the ECB, see also Ronkainen, ch 9 in this volume.

[15] F Scharpf, 'Legitimacy in the Multi-Level European Polity' in P Dobner and M Loghlin (eds), The Twilight of Constitutionalism? (Oxford University Press, 2010); F Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8 *Socio-Economic Review* 211; Grimm (n 5).

[16] Leino-Sandberg and Minkkinnen, ch 2 in this volume, 11.

[17] Möllers (n 11) 128.

elected legislatures.[18] This democratic concern also applies to the role of constitutional courts in relation to the EU. Where a national court imposes constitutional limits on possible Treaty change, such limits constrain the leeway of its national legislature in deciding on further integration through Treaty change. Where a national court imposes constitutional limits on EU law, this can restrict the ability of the Member State's government to agree to secondary EU law or mean that certain provisions of EU law will be inapplicable within the national legal order.

In this chapter, I argue that the example of the GFCC does indeed affirm the risk that the national constitutional courts' review of European law can turn these courts into arbiters over contested political issues on the EU better decided by legislative institutions.[19] Rather than providing an adequate answer to the EU's separation of powers problems, the GFCC oversteps the bounds of its appropriate role. To avoid this dilemma, I suggest that the role of constitutional courts in relation to the EU should be limited and focus on safeguarding the space for legislatures to decide on fundamental constitutional questions regarding the EU. The GFCC has done so in some cases by countering executive dominance through demands of parliamentary participation and rights to adequate information at the national level. Possibly this is a role that constitutional courts could fulfil as well in other Member States.

My argument is structured as follows. Section II discusses the view that national constitutional courts introduce welcome opposition as a counterweight to the lack of political conflict over EU-related decisions. I argue that the judicial route is not the appropriate one for such opposition. Using the example of the German Constitutional Court (GFCC), I show that constitutional courts risk elevating a particular contested political viewpoint to the level of constitutional law, ultimately limiting rather than facilitating political contestation. Section III assesses whether constitutional courts should nonetheless act as a counterweight to the power of the ECJ, given the EU's over-constitutionalisation. I argue, however, that review by constitutional courts does not provide an obvious solution and can even exacerbate over-constitutionalisation. On a more positive note, section IV argues that constitutional courts can play a legitimate role in countering executive dominance. In this respect, I offer a number of positive examples from the GFCC's case law. The conclusion sums up the overall argument, discusses limitations that stem from this chapter's focus on the GFCC, and offers further reflections on how courts could possibly promote contestation and deliberation, while not limiting legitimate political choices.

[18] See for different views: J Rawls, *Political Liberalism* (Columbia University Press, 2005); R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996); R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *The Yale Law Journal* 1346; J Waldron, *Law and Disagreement* (Oxford University Press, 1999); M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000).

[19] The German Federal Constitutional Court is more often accused of showing insufficient restraint towards the political branches in its EU-related rulings: F Mayer, 'Rebel Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 *German Law Journa*l 111; C Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigonies At Sea' (2009) 10 *German Law Journal* 1201; C Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon' (2009) 10 *German Law Journal* 1259; C Möllers, 'Legalität, Legitimität Und Legitimation Des Bundesverfassungsgerichts' in M Jestaedt et al (eds), *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp, 2011).

II. Constitutional Courts as Fora for Opposition?

One possible way to justify the national constitutional courts' review of European law is to argue that the proceedings before constitutional courts are a way to reintroduce the political conflict missing in the European political process. Such arguments have been voiced especially for the role of the GFCC in relation to the EU. Peter Huber, former Justice of the GFCC and rapporteur in several of the major cases on the EU, has contended that the Court functions as an 'opposition to the mainstream'.[20] This idea has been echoed in the context of the GFCC's *Maastricht-Urteil*. Reflecting on that judgment, Mattias Herdegen argued for example that the proceedings in Karlsruhe had been 'been widely conceived as a kind of substitute for a public debate on the monetary union before parliamentary approval', while the 'large consensus within Parliament did not allow for a profound discussion of Maastricht's implications, of the quality the political class of France and of other Member States has offered to its citizens.'[21] Similarly, Juliane Kokott evaluated the judgment as 'partly a compensation for the lack of a proper political debate on the implications of the Maastricht Treaty and the monetary union.'[22] In her view, such a debate 'took place too late and too superficially in Germany' furthering 'ambiguous feelings in the population' that the *Maastricht-Urteil* partly addressed, leading to better acceptance of European integration in Germany.[23]

These views, reflected in the arguments of other commentators, in fact appear to contain two justifications for a constitutional court's review of European law.[24] One is that the courts compensate for an apparent deficient *quality* of the political debate on European integration. The other is that the courts compensate for *a lack of opposition and political conflict* over European integration in the political process. Although these concerns about deficient quality and lack of opposition can be connected, they are conceptually distinct and stand in some tension. The idea that constitutional courts compensate for the deficient quality of political deliberations is familiar from legal constitutionalists' thought. Here the idea is that constitutional courts provide a better forum for deliberation on constitutional matters than the ordinary political process. Judicial review of legislation on this understanding is a way to ensure that issues of constitutional principle are duly considered. This feature justifies that constitutional matters are

[20] F Mayer, 'Rebel Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 *German Law Journal* 142; see also M Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 *European Constitutional Law Review* 263, 283.

[21] M Herdegen, 'Maastricht and the German Constitutional Court – Constitutional Restraints for an Ever Closer Union' (1994) 31 *Common Market Law Review* 235, 249.

[22] J Kokott, 'Report on Germany' in JHH Weiler, A Slaughter and A Stone Sweet (eds), *The European Court and national courts – doctrine and jurisprudence: legal change in its social context* (Hart, 1998) 131.

[23] ibid.

[24] For similar views see J Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001* (Oxford University Press, 2015) 280; M Claes, 'The National Courts' Mandate in the European Constitution' (PhD Thesis, Maastricht University, 2004) 10–11; Kumm (n 4) 282 fn 54. Perhaps such views are also echoed in J Reestman, 'Legitimacy through Adjudication: The ESM Treaty and the Fiscal Compact before the National Courts' in T Beukers, B De Witte and C Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press, 2017). Reestman argues that the constitutional court judgments on the Euro crisis 'provided a legitimacy that the political process was unable to provide on its own' (267).

decided ultimately by constitutional courts instead of legislatures. Constitutional court judgments, in turn, are thought to have a subsequent salutary effect on the quality of public and political debate. So precisely because the political branches cannot be trusted to adequately address constitutional issues by themselves, it is justified to 'depoliticise' these matters by removing them from ordinary political contestation and leaving the 'final' say to constitutional courts.

This justification for the intervention of constitutional courts stands in tension, however, with the idea that a constitutional court can provide a forum for opposition. Here the argument appears to be that the political process is in fact not political enough and that the court intervention brings in political viewpoints not sufficiently considered in that political process. Yet, where a constitutional court starts acting as a forum for opposition, it risks elevating a particular and contested political viewpoint to the level of constitutional law in a way that will ultimately constrain the room for political contestation in the ordinary political process. The proceedings before a court may be seen as offering citizens an additional route of political participation. Yet, parties to a court case are not necessarily representative of all the societal interests affected, while the parties are not the decision-makers in any case: the judges decide. In this sense, representative political institutions have a better comparative democratic legitimacy.[25] That is the case even for the democratically deficient EU legislature. European citizens directly elect the European Parliament, while Member State representatives in the Council are democratically accountable to their national parliaments. However deficient in practice these mechanisms are for the EU institutions, no similar mechanisms of democratic accountability exist for constitutional court judges. The comparative legitimacy of courts and legislative institutions is the crucial issue here, as constitutional courts can override the assessments of legislatures based on a constitutional framework that binds ordinary politics. Constitutional courts police the limits of legitimate political action and this is a role that sits uneasily with facilitating opposition.

The GFCC's case law on the EU provides a practical example of this problem. The German experience highlights how the German court has acted as a forum for opposition. Yet it is much less clear that this Court has compensated for deficiencies in the quality of political debates, or that it improved the quality of subsequent political debates. In terms of the *quality* of the political debate, it is key to compare the constitutional issues raised by the GFCC with the prior deliberations of the relevant political branches and consider whether the GFCC's deliberations on these matters were of a better quality. Taking the *Maastricht-Urteil* as an example, the key question then becomes whether the Court compensated for lack of attention in the political process to the constitutional issue of democracy. The compatibility of the Maastricht Treaty with the constitutional principle of democracy was after all the key issue in the *Maastricht-Urteil*.[26] However, if one looks at the ratification debates in the *Bundestag* it becomes clear quite quickly that the issue of democracy was also a major topic of discussion in those political debates. There was widespread disappointment among the *Bundestag* members about

[25] On these arguments, see R Bellamy, 'The Democratic Qualities of Courts: A Critical Analysis of Three Arguments' (2013) 49 *Representation* 333.

[26] BVerfg, Judgment of 12 October 1993, 2 BvR 2134/ 92 (*Maastricht*) (translation in [1994] 1 CMLR 57).

the Treaty's democratic shortcomings. Some parties even called for quick revisions to the Treaty in order to strengthen the Union's democratic credentials.[27] Moreover, the aspiration to democratise the EU was laid down in the Constitution: a new Article 23 was introduced in the Basic Law which demanded that the EU would have to respect 'democratic, social and federal principles' in addition to the rule of law, the principle of subsidiarity and fundamental rights. The issue of democracy thus played an important role in the German ratification debates on the Maastricht Treaty. Yet, the Treaty was accepted by the *Bundestag* as a compromise, while its democratic shortcomings would have to be remedied in the future.[28]

Hence, the GFCC was not the first institution to raise the principled question of how the new EU Treaty had to be assessed in democratic terms. The key difference between the Court and the *Bundestag* was ultimately that the Karlsruhe judges relied on a more national understanding of democracy. The German Court voiced doubts about the idea that the EU could ever become fully democratic. It considered that the sociological preconditions for democracy – a sufficiently shared European collective identity and shared European public sphere – were missing at the European level. What shines through in the *Maastricht-Urteil* especially is that the powers of the EU would have to be limited in order to maintain a viable democracy in the Member States. Germany's politicians by contrast predominantly sought the answer for the EU's democratic problems in a strengthening of the European Parliament. Moreover, the link between democracy, people and statehood as drawn by the German Court was, and remains, contested.[29]

If one accepts that both the *Bundestag*'s more pro-European view of democracy and the German Court's more national reading are both legitimate interpretations of the constitutional principle of democracy, then it is difficult to argue that the GFCC compensated for a lack of attention to this principled issue in the political process. In that case, and as I have argued elsewhere, the German Court's *Maastricht-Urteil* is better understood as having provided an outlet for more critical views on European integration not fully considered in prior political debate.[30] Public opinion surveys at the time did indicate that German citizens had more preoccupations about the Treaty than the political debates reflected.[31] German politics was characterised by a large pro-European consensus and it could be difficult to raise critical arguments about European integration. In fact, within the German political climate of the time, influential political actors framed the choice between accepting and rejecting the Maastricht Treaty as a choice between peace and stability on the European continent on the one hand, and disorder

[27] See De Boer (n 1), 131.

[28] On the deliberations see inter alia: Beschlußempfehlung und Bericht des Sonderausschusses 'Europäische Union (Vertrag von Maastricht)', BT- Dr 12/ 3895 of 01.12.1992; Bericht der Gemeinsamen Verfassungskommission gemäß Beschluß des Deutschen Bundestages— Drucksachen 12/ 1590, 12/ 1670— und Beschluß des Bundesrates – Drucksache 741/ 91 (Beschluß), BT- Dr 12/ 6000 of 05.11.1993; Plenarprotokoll 12/ 110, Stenografischer Bericht der 110. Sitzung des Deutschen Bundestages am 8. Oktober 1992; Plenarprotokoll 12/ 126, Stenografischer Bericht der 126. Sitzung des Deutschen Bundestages am 2. Dezember 1992.

[29] De Boer (n 1), 130–140.

[30] De Boer (n 1) ch 4.

[31] R Knoben, 'Public Opinion in the European Union' in F Laursen and S Vanhoonacker (eds), *The Ratification of the Maastricht Treaty* (Brill Nijhoff, 1994).

and disunity on the other.[32] One parliamentarian went so far as to suggest that the choice against Maastricht was tantamount to opting for a return in the direction 'of the thirty years' war'.[33]

The Karlsruhe proceedings that led to the *Maastricht-Urteil* can be seen as having provided room for more critical viewpoints on European integration. First, the GFCC provided a forum to those who had concerns about the Treaty, and the proceedings generated significant public attention. Second, the Court itself provided such a more critical perspective by adopting a national understanding of democracy and articulating constitutional constraints on the course of European integration. There is also little evidence that the Court's Maastricht ruling constrained subsequent political debate in the direct aftermath of the case. The possible limits to European integration still seemed far away at the time and the Maastricht judgment could be interpreted by German politicians as offering support for their previously held viewpoints.[34]

Yet, while the limits to European integration set by the GFCC could still be considered fairly theoretical at the time of Maastricht, this appeared to be no longer the case when the German Court handed down its 2009 *Lissabon-Urteil* and several subsequent judgments on the Euro crisis. While the *Lissabon-Urteil* upheld the Treaty of Lisbon, the Court returned to the main principles of its *Maastricht-Urteil*, placing more stringent restrictions on European integration than before.[35] Particularly contested was the part of the ruling in which the Court judged that extensive competence transfers would not be permissible in certain areas, for example, decisions affecting the budget right of the *Bundestag*. Yet, when the Euro crisis began shortly afterwards, in the spring of 2010, it was the budget rights of national parliaments that were affected by the manifold European measures taken to tackle the crisis.

Within this context of the Euro crisis, the German Court continued to function as a forum for Euro-critical voices within Germany. All the major parties in the *Bundestag* remained strongly pro-European during this time, which meant that there were large majorities in support of most of the Euro- risis measures. Only in 2017 did a Eurosceptic party – the Alternative for Germany (AfD) – obtain seats in the German Parliament. Before that, politicians with more Eurosceptic viewpoints were instead minorities within the bigger mainstream parties, especially within the parliamentary groups of the Christian Democrats and the liberal Free Democratic Party (FDP). Given that the views of these minorities departed from the party line, parliamentary debates did not always reflect the full range of political positions on the Euro crisis measures.[36] The GFCC provided an avenue for these critical *Bundestag* members, as well as for a broader extra-parliamentary opposition to contest the Euro crisis measures. These measures touched

[32] C Schrag Sternberg, *The Struggle for EU Legitimacy Public Contestation, 1950–2005* (Palgrave Macmillan, 2013) 155.

[33] P Kittelmann, Plenarprotokoll 12/ 110, Stenografischer Bericht der 110. Sitzung des Deutschen Bundestages am 8. Oktober 1992, 9387.

[34] See Plenarprotokoll 12/ 181, Stenografischer Bericht der 181. Sitzung des Deutschen Bundestages am 20. Oktober 1993; Presseerklärung des Bundeskanzlers, Nr 386/ 93 von 12. Oktober 1993, reprinted in I Winkelmann (ed), *Das Maastricht- Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993, Dokumentation des Verfahrens mit Einführung* (Dunckler & Humblot, 1994).

[35] BVerfg, Judgment of 30 June 2009, 2 BvE 2/ 08 ('*Lisbon* judgment').

[36] eg 'Streit um Rederecht für Euro-Rettungskritiker' *Handelsblatt* (Düsseldorf, 30 September 2011).

on the budgetary powers of the *Bundestag* and the Court's case law appeared to rule out more extensive European economic and fiscal integration. In fact, in an interview for the *Frankfurter Allgemeine Zeitung* of September 2011, the then President of the German Constitutional Court, Andreas Vosskuhle, stated as much. He declared that the room for further European integration under the German Constitution was 'probably largely exhausted'.[37]

The German example indicates that the role of facilitating opposition to European integration sits uneasily with the position of constitutional courts. Ultimately, constitutional courts interpret the legal framework that is supposed to provide the framework in which ordinary politics takes place. Their interpretations must therefore stand above the legitimate political contests taking place in the ordinary political process. One may of course conclude that the rulings of the GFCC on the EU were the only proper interpretations of Germany's constitutional framework and for that reason properly beyond political contestation. However, the German Constitutional Court's case law on the EU is highly contested by German legal scholars, even in the academic writings of Doris König, a current judge of the constitutional court.[38] A more deferential approach by constitutional courts towards the political process therefore seems appropriate. The Czech Constitutional Court and Danish Supreme Court have chosen this path, leaving their respective national legislatures with wide discretion in deciding on the desirable power transfers to the EU.[39]

III. Constitutional Courts as Counterweight to the ECJ?

The previous section discussed the pitfalls with a general role for constitutional courts in providing room for opposition to European integration, even if one accepts that decision-making on EU matters lacks sufficient political conflict. Yet, national courts could possibly avoid these downsides where they aim to correct the excessive power of the ECJ. While the constitutional courts' review raises problems when directed at the acts of political branches, this seems less of a worry when the national courts check the power of the EU's top judicial institution.

Such a case for national courts as a counterweight to the ECJ has been articulated by former German constitutional justice Dieter Grimm. In fact, he has argued that 'In the current constellation, national constitutional courts are the only available counterweight to the democracy-diminishing mechanisms at work in the EU.'[40] Grimm bases

[37] M Mann and I Kloepfer, 'Mehr Europa Lässt Das Grundgesetz Kaum Zu' *Frankfurter Algemeine Zeitung* (Frankfurt, 25 November 2011), at www.faz.net/aktuell/wirtschaft/eurokrise/im-gespraech-andreas-vosskuhle-mehr-europa-laesst-das-grundgesetz-kaum-zu-11369184.html.

[38] D König, *Die Übertragung von Hoheitsrechten Im Rahmen Des Europäischen Integrationsprozesses – Anwendungsbereich Und Schranken Des Art. 23 Des Grundgesetzes* (Duncker & Humblot, 2000). See for example p 503, where she states that 'the thesis that only strong national parliaments can provide sufficient democratic legitimacy cannot be convincingly justified with constitutional arguments' (my translation).

[39] The Supreme Court of Denmark (Højesteret), Case 361/ 1997, decision of 6 April 1998 (Maastricht) (summary translated in [1999] 3 CMLR 854); The Constitutional Court of the Czech Republic (Ústavní soud), judgment of 3 November2009, Pl ÚS 29/ 09 (Treaty of Lisbon II) [110]–[111].

[40] Grimm (n 5) 25.

this argument on the problems of over-constitutionalisation and the high-consensus requirements in the EU's decision-making processes discussed in the introduction. To recall, these features have turned the ECJ into a powerful institution that is difficult to correct politically. Political institutions have therefore only limited opportunities to address what Grimm sees as the undemocratic consequences of this non-political mechanism of decision-making.

Within this setting, Grimm argues that national constitutional courts offer a crucial contribution to European democracy by constraining 'the undermining of national democracy through European law, and to urge European institutions towards greater respect for the results of national democratic processes.'[41] Through identity and ultra vires review, national constitutional courts help safeguard that the EU – and the ECJ in particular – respects the Member States' constitutional identities, does not overstep its competences and would thus hollow out national democracy.

Grimm's reliance on national constitutional courts to correct the ECJ's power is nonetheless paradoxical. The excessive judicial power of the European court resulting from over-constitutionalisation is to be countered by the judicial power of national constitutional courts. The idea can be likened to combating fire with fire, which can be effective, but it carries the risk that the controlled fire burns out of control. While trying to counter the supposedly 'political' judgments of the ECJ, constitutional courts may fall into the trap of handing down 'political' judgments themselves, overstepping the bounds of legitimate judicial authority and worsening the problem of judicial power, instead of addressing it.

In this context, it is important to address in three ways the idea that constitutional courts should provide a counterweight to over-constitutionalisation and the powers of the ECJ. First, most of the case law by national constitutional courts does not concern merely the ECJ's role, but deals with constitutional questions of European integration more broadly. These rulings also have repercussions for legislative institutions at the Member State and EU level. The GFCC's case law presents the most obvious example, where key cases – *Maastricht*, *Lissabon* and several cases on the Euro crisis – concerned the ratification of Treaties. While the German Court does articulate limits to the ECJ's powers, these limits are rooted in a more general reading of the constitutional framework. That reading also limits the powers of the *Bundestag* and European legislative institutions, as these must respect German constitutional identity and competence limits as interpreted by the German Court. As Christoph Möllers commented in 2011, the GFCC seemed 'more ready to rhetorically fight the European political process than to effectively review the European courts.'[42]

A second and related problem is that the constitutional courts' review may in fact exacerbate the problem of over-constitutionalisation. While the power of the ECJ is one consequence of over-constitutionalisation, the more general problem is the skewed balance between law and politics at the EU level, resulting from the many policy decisions laid down in the EU Treaties. The Economic and Monetary Union (EMU) provides

[41] ibid 206. Komárek may be seen to offer some considerations that point in a similar direction: J Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12 *International Journal of Constitutional Law* 525.

[42] C Möllers, 'Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell' (2011) 7 *European Constitutional Law Review* 161, 167.

an example, where overriding importance is given to price stability at the expense of certain other possibly relevant considerations, such as high employment, or environmental sustainability.[43] Yet in this respect ultra vires review by national courts is liable to worsen over-constitutionalisation. The GFCC's *Maastricht-Urteil* is again instructive, as it is the case from which ultra vires review is commonly seen to originate.[44] The Court's reasoning there was that the EU's democratic legitimacy derives primarily from the national parliaments, given democratic deficits at the EU level and the missing sociological preconditions for well-functioning democracy beyond the nation-state. The statute by which powers are conferred to the EU is consequently of great democratic significance. It is through this Act that the German Parliament – the *Bundestag* – democratically authorises the Union's powers.[45] Yet, to ensure that it is truly the *Bundestag* that decides on the scope of the Union's competences, it is pivotal that these competences are sufficiently certain and predictable. Open-ended transfers of powers would give the democratically deficient EU potentially unlimited competences without democratic authorisation from the German parliament. This reasoning provided the basis for ultra vires review: the German Court would review whether the EU institutions remain within the bounds of their conferred competences.[46]

Yet, the result of this reading is that it makes the problem of over-constitutionalisation worse rather than better for the EMU. The German Court did not see as democratically problematic the elevation of contested goals and policy prescriptions to the level of constitutional law. Instead, the Court reasoned that abidance by them was a democratic requirement. Germany was allowed to participate in the monetary union precisely because it was conceived as a *Stabilitätsgemeinschaft*: a community based on stability. It was this orientation that made the development of the monetary union sufficiently certain and predictable. The Court thus considered that the Member States' duty to avoid excessive deficits or the prohibition for Member States to assume debts of other Member States were vital ingredients of this *Stabilitätsgemeinschaft*, not democratically problematic restrictions on government action.[47] Through the *Maastricht-Urteil*, the German Constitutional Court was able to offer its own interpretation of the EMU provisions and use them as the basis for future review of EU acts, including those of the political branches. The consequences of this vision became clear during the Euro crisis. When the economic and political assumptions underlying the EMU framework failed to match reality, European government leaders sought to solve Europe's developing debt crisis. Yet in this context, a number of German citizens immediately and predictably threatened to challenge mechanisms of financial assistance before the Karlsruhe court as an illegal departure from the *Stabilitätsgemeinschaft*.[48]

[43] M Herdegen, 'Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom' (1998) 35 *Common Market Law Review* 9; M Dani, 'Openness, Purposiveness, and the Realignment of the EU and the Democratic and Social Constitutional State' (2023) 24 *German Law Journal* 1099, 1118–20.

[44] Although the French Conseil d'Etat's judgment of 22 December 1978 (*Ministre de l'intérieur c Cohn-Bendit*) was probably the first ultra vires ruling by a national court.

[45] BVerfG, *Maastricht* (n 26) [37] and [46]–[47].

[46] ibid [48]–[49].

[47] ibid [80].

[48] M Brackmann and J Münchrath, 'Finanzhilfe für Griechenland: "Wir ziehen wieder nach Karlsruhe"' *Handelsblatt* (Düsseldorf, 22 February 2010).

A third problem is that even in cases where national constitutional courts point their review directly at the powers of the ECJ, courts still need to justify such decisions on the basis of underlying constitutional principles. The interpretation of these principles, in turn, is removed from democratic political contestation. In addition, where national constitutional courts judge an ECJ judgment unconstitutional, such a ruling has potential negative repercussions for the stability of the EU legal order.[49] Assuming these courts care about the stability of the EU legal order, they should take into account such possible negative consequences. As a result, the task of controlling the ECJ is complicated.

The response of the GFCC and the Danish Supreme Court to the ECJ's 2005 *Mangold* ruling presents one of the best examples of a situation where national constitutional courts have grappled directly with the ECJ's powers. The *Mangold* case concerned Directive 2000/78 on equal treatment in employment and occupation, the prohibition of age discrimination more specifically.[50] Mr Mangold argued that his employment contract was incompatible with the prohibition of discrimination on grounds of age. However, Germany had not yet transposed the Directive, as its implementation deadline had not yet passed. Moreover, the dispute was one between two private parties – Mr Mangold and his employer, Mr Helm – while the ECJ had only accepted the direct effect of Directives when invoked against state authorities.[51] These circumstances appeared a significant obstacle for Mangold to win his case. Nonetheless, the European judges considered that the principle of non-discrimination on grounds of age was 'a general principle of Community law', which the national courts had to apply and give priority over conflicting provisions of national law.[52] Many legal scholars saw the *Mangold* ruling as problematic. It sparked a particularly fierce reaction from Lüder Gerken and Roman Herzog, a former President of the German Constitutional Court. They criticised the European Court for no longer acting as 'part of the judiciary', but as the 'legislative authority'.[53]

Questions about the permissibility of the *Mangold* ruling ended up with the GFCC in the *Honeywell* case. Yet, when this case was decided in 2010, a majority of the justices declined to hold Mangold ultra vires. This majority also laid down stringent conditions for ultra vires control given its downsides:

> If each Member State claimed to be able to decide through their own courts on the validity of legal acts of the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk.[54]

For that reason, ultra vires review would have to be exercised in a manner 'open towards European law'.[55] Ultra vires rulings could only be given when competence transgressions

[49] Weiler and Haltern likened this option to the 'use of tactical nuclear weapons' carrying 'the risk of a nuclear domino effect'. Weiler (n 2) 320.

[50] Case C-144/04 *Werner Mangold v Rüdiger Helm* EU:C:2005:709, [2005] ECR I-09981.

[51] Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133, [1974] ECR 1337; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* ECLI:EU:C:1986:84, [1986] ECR 723.

[52] *Mangold v Helm* (n 50) [75].

[53] R Herzog and L Gerken, 'Stoppt Den Europäischen Gerichtshof' *Frankfurter Allgemeine Zeitung* (Frankfurt, 8 September 2008) (author's translation).

[54] *Mangold v Helm* (n 50) [57].

[55] BVerfG, Judgment of 6 July 2010, 2 BvR 2661/ 06 (*Honeywell*) [58].

would be 'manifest' and 'highly significant in the structure of competences between the Member States and the Union'.[56] Before declaring an EU act ultra vires, moreover, the GFCC would have to give the ECJ the opportunity to state its view through the preliminary ruling procedure. The ECJ also had 'a right to tolerance of error.'[57] Based on these criteria, the Karlsruhe judges ruled that the *Mangold* judgment was not ultra vires.

Justice Landau dissented. In his view the *Mangold* judgment was ultra vires and considered the requirements of the majority 'excessive'.[58] These would render ultra vires review practically meaningless as a means for controlling the European Court. Relying expressly on the views of Grimm and Scharpf, he saw this outcome as problematic. Because political institutions lack effective means to correct the ECJ, national constitutional courts were critical to safeguard democratic legitimacy.[59] Nor could he accept that competence transgressions would have to be 'structurally significant'. The loss of competences usually resulted from a gradual process. The majority had ignored that minor competence transgressions 'accumulate to have significant consequences'.[60]

The controversy did not end with the German judges, however. The acceptability of the *Mangold* ruling also became an issue for the Danish Supreme Court in the *Ajos* case. The reason was that Danish employment legislation conflicted with the general principle on the prohibition of age discrimination as first developed in *Mangold*. The Danish Supreme Court, however, had reservations about applying this general principle in a dispute between private parties, because that would clash with the principle of legitimate expectations.[61] In a preliminary ruling, the ECJ had held, however, that the principle of legitimate expectations could not justify the continued application of the Danish rules.[62] Disagreeing with this outcome, a majority of the Danish judges then refused to follow the ECJ, effectively declaring ultra vires the European Court's judgment as well as the prior *Mangold*-ruling.[63]

Still, the conclusion of the Danish Supreme Court was not merely based on a democratic critique of the ECJ. The Danish judges instead justified their verdict with a more general reading of the constitutional relation between Danish law and EU law, similar to that of the GFCC. In the eyes of the Danish Supreme Court, the Danish Act of Accession served as the crucial basis for the effect of EU law in the Danish legal order. The Court therefore devoted significant attention to what had been discussed in the Danish parliamentary debates on the law on accession. The challenge with constructing the authority of the EU in this way, is that it is not directed at the ECJ as such. Instead, it seems to locate the authority of the EU as a whole decisively in the assent of the national parliament. Such a vision appears to favour a narrow interpretation of the EU's competences, including those of its legislative branch, reducing the authority of the EU to what has been accepted in the national ratification debates.

[56] ibid [61].
[57] ibid [66].
[58] Dissent Landau in BVerG, Judgment of 6 July 2010, 2 BvR 2661/ 06 (*Honeywell*) [95].
[59] ibid esp [99].
[60] ibid [103].
[61] See the preliminary reference as quoted in The Supreme Court of Denmark (Højesteret), Case 15/ 2014, decision of 6 December 2016 (*Ajos*) (translation at doms tol.dk/media/2udgv vvb/judgm ent-15-2014.pdf, 5 [6.12].
[62] Case C-441/14 *Dansk Industri v Estate of Karsten Eigil Rasmussen* ECLI:EU:C:2016:278.
[63] Højesteret (n 61).

The controversy over the ECJ's *Mangold* ruling illustrates the difficulties for national constitutional courts in checking the ECJ. First, they have to assess the possible repercussions for the EU legal order that come with an ultra vires ruling. As ultra vires rulings threaten the unity of EU law, national courts are faced with a dilemma between 'destruction and inaction'.[64] Here it seems hard to get the balance right. The German judges were criticised for falling on the side of 'inaction' with their *Honeywell* judgment.[65] Yet, when the GFCC did hand down its first ultra vires judgment in the *PSPP* case, this ruling was widely criticised, even as a 'bomb under the EU legal order'[66] and 'the decisive turning point in Europe's history towards disintegration.'[67] Secondly, if the goal is to check judicial power, national courts should refrain from relying on contested readings of the underlying constitutional framework that would restrict legislative choices.[68] In this respect, national constitutional courts appear to have distinguished insufficiently between the role of the ECJ and the EU political process.

So even if national constitutional courts could theoretically provide a counterweight to the ECJ, the example of the GFCC indicates how complicated it is to adequately fulfil such a task in practice. This finding provides reasons to doubt that national constitutional courts are the appropriate institutions to counter the power of the ECJ. Political alternatives seem better. Grimm himself has advocated a downscaling of the EU Treaties that would limit them 'to their truly constitutional elements and downgrade all other treaty provisions of a non-constitutional nature to the status of secondary law.'[69] Such a deconstitutionalisation would in turn make political correction of the ECJ easier. Scharpf has proposed the institutionalisation of a political override for judgments of the ECJ.[70] The advantage of such mechanisms would be their political nature: how to protect the space for democratic politics would itself be a political rather than a judicial question.

IV. Constitutional Courts as Bulwarks against Executive Dominance?

The previous sections showed that where constitutional courts review European law, they risk deciding contested issues on which there exists reasonable disagreement,

[64] Möllers (n 42) 166.

[65] ibid; Dissent Landau *Honeywell* (n 58).

[66] M Sandbu, 'German Court Has Set a Bomb under the EU Legal Order' *Financial Times* (5 May 2020), at www.ft.com/content/79484c01-b66b-4f81-bdc6-fd4def940821.

[67] M Wolf, 'German Court Decides to Take Back Control with ECB Ruling' *Financial Times* (16 May 2020), at www.ft.com/content/37825304-9428-11ea-af4b-499244625ac4. It also seemed that the Court had not abided by its own *Honeywell* standards: F Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020' (2021) 16 *European Constitutional Law Review* 733.

[68] Both challenges were arguably nicely summed up by dissenting Justice Lübbe-Wollf in the case of the GFCC on the ECB's programme of Outright Monetary Transactions (OMT). There she criticised as an 'anomaly of questionable democratic character' the reliance of 'some few independent German judges' on 'the German interpretation of the principle of democracy' to 'make a decision with incalculable consequences for the operating currency of the euro zone'. Dissent Lübbe-Wollf in BVerfG, Order of 14 January 2014 2 BvR 2728/ 13 (*OMT referral*) [28].

[69] D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 *European Law Journal* 460, 473.

[70] Scharpf (n 15).

limiting the room for legitimate political decision-making. This problem does not disappear when courts use democracy as a standard of review. Reasonable disagreement also exists about what democracy requires.[71] A particular difficulty in the EU is that there is disagreement about whether democracy is fully possible at the EU level. Such disagreement leads to diverging views on whether the EU's democratic problems should be addressed primarily through enhancing the powers of the European Parliament, or by giving intergovernmental institutions the main power, checked by national parliaments.[72] Courts that employ democracy as a review standard in relation to the EU consequently risk deciding deeply contested constitutional issues. This is precisely the problem with the EU-related case law of the GFCC, as it has cast doubts on the possibility of creating European-wide democratic institutions based on a contested understanding of democracy.[73]

Is there a way out of this dilemma? Is there still an appropriate role to play for constitutional courts in addressing separation of powers problems in the EU? It seems that the answer must lie in a type of review that facilitates democratic politics and political contestation, without constraining it. One way in which I believe constitutional courts can fulfil such a role is by countering executive dominance in the EU's decision-making processes. National constitutional courts could possibly do this by relying on democratic norms to demand better parliamentary oversight of the executive, without deciding the more contentious questions of EU democracy, such as the proper relationship between the EU and its Member States.

Member States' constitutional courts are not always capable or willing to engage in this type of review, as Cristina Fasone and Nicola Lupo show in a comparative overview from 2017. For Italy, they note, for example, that the limited rights of access to the Italian Constitutional Court make it 'extremely unlikely' that this Court would render 'a decision on the parliamentary powers in EU affairs.'[74] For Spain they consider that the Constitutional Tribunal was not confronted with this issue, primarily because of the lack of questions on this matter and the limited use of actions in which such questions could be raised.[75]

The GFCC, however, has strengthened the position of the national parliament vis-à-vis the executive in European matters. A number of judgments during the Euro crisis show how the German judges in this manner helped counter executive dominance by ensuring better parliamentary oversight. The German example suggests, moreover, that parliaments themselves may fail to protect their own position in relation to the executive. A reason is that a parliamentary majority commonly has an interest to support the Government.[76] In such a context, court interventions may be instrumental

[71] Möllers (n 19) 156–57; J Waldron, 'Democracy' in D Estlund (ed), *The Oxford Handbook of Political Philosophy* (Oxford University Press, 2012); Waldron (n 18) 282–312.

[72] For differing views see eg: Føllesdal and Hix (n 16); R Bellamy, *A Republican Europe of States: Cosmpolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press, 2019).

[73] Schönberger (n 19); Mayer (n 19); Wendel (n 20).

[74] C Fasone and N Lupo, 'Constitutional Review and the Powers of National Parliaments in EU Affairs: Erosion or Protection?' in D Jancic (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (Oxford University Press, 2017) 69.

[75] ibid 70.

[76] P Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, 2010) 178; E Benvenisti and G Downs, 'The Democratizing Effects of Transjudicial Coordination' (2012) 8 *Utrecht Law Review* 166–67.

in overcoming the unwillingness of a parliamentary majority to create strong parliamentary oversight.[77] German politics during the euro-crisis provides an example of precisely this phenomenon.

A first area in which the German Court strengthened the rights of the *Bundestag* concerned the *Bundestag*'s rights in decisions on financial assistance, first concerning the European Financial Stability Facility (EFSF) and later the European Stability Mechanism (ESM).[78] During the initial stages of the Euro crisis, the German Government had been unwilling to give the *Bundestag* an extensive say on decisions concerning financial assistance. Take the parliamentary debates of May 2010 on Germany's participation in the EFSF. At that time Finance Minister Schäuble still appeared mostly concerned about the EFSF's credibility in the eyes of capital markets, which a parliamentary veto on financial assistance decisions could endanger.[79] Instead, the Government preferred to restrict the *Bundestag*'s involvement in the EFSF mainly to a single approval of the mechanism. Although the *Bundestag*'s rights were strengthened to some degree during the parliamentary proceedings, they remained ambiguous. The legislation merely required the Government to 'endeavour to reach agreement' with the *Bundestag's* budget committee prior to giving financial guarantees and exceptions were possible.[80]

The *Bundestag*'s position in the financial assistance mechanisms became a topic for debate again in the spring and summer of 2011. The GFCC's judgment of 7 September 2011 on the EFSF and financial aid to Greece played a decisive role. There, the Court ruled that the legislation on the EFSF had to be interpreted in a specific manner in order to protect the *Bundestag*'s budgetary rights. It was not enough for the Government to merely endeavour to reach an agreement with the budget committee. The Government was instead 'obliged to obtain the prior consent of the budget committee', although the GFCC did retain the room for exceptions.[81] The judgment subsequently played a key role in the parliamentary debates on the modifications of the EFSF and the changes to the national legislation governing Germany's participation in the EFSF.[82] The ruling led to both enhanced rights for the *Bundestag* in decisions on financial assistance, as well as a change in rhetoric within the Government. Finance Minister Schäuble now declared that 'the budget right of the Bundestag is the basic principle of our parliamentary democracy'.[83]

Nonetheless, a major issue with the revised legislation remained. The legislation provided that the rights of the *Bundestag* plenary – which had been significantly

[77] Critical of this case law is F Meinel, 'The Merkel Court: Judicial Populism since the Lisbon Treaty' (2023) 19 *European Constitutional Law Review* 111, 124–26 and 128–29.

[78] For more examples and a more elaborate discussion see De Boer (n 1) ch 6.

[79] See Plenarprotokoll 17/44, Stenografischer Bericht der 44. Sitzung des Deutschen Bundestages am 21. Mai 2010 (EFSF second plenary) 4427; 'Bundestagspräsident blockiert Schäubles Blankoscheck- Pläne' *Handelsblatt* (Berlin/ Brussels, 24 August 2011).

[80] Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus vom 22. Mai 2010, Bundesgesetzblatt I 2010, 627 (StabMechG) Art 1(4).

[81] BVerfG, Judgment of 7 September 2011, 2 BvR 987/ 10 (*Greek loan facility and EFSF*) [141].

[82] See BT- Dr 17/ 6945 of 07.09.2011: Antrag der Fraktionen der CDU/ CSU und FDP Parlamentsrechte im Rahmen zukünftiger europäischer Stabilisierungsmaßnahmen sichern und stärken; Gesetz zur Änderung des Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus vom 9. Oktober 2011, Bundesgesetzblatt I 2011, 1992 (amended StabMechG).

[83] Plenarprotokoll 17/ 124, Stenografischer Bericht der 124. Sitzung des Deutschen Bundestages am 8. September 2011, 14551.

strengthened – could be taken over by a special committee of nine parliamentarians chosen from the ranks of the budget committee for situations of particular urgency and confidentiality.[84] Two *Bundestag* members of the Social Democratic Party – Peter Danckert and Swen Schulz – challenged the constitutionality of this special committee, also known as the *Neuner Gremium*, before the GFCC. The Court ultimately ruled in their favour. According to the Karlsruhe judges, the delegation of the rights of the *Bundestag* plenary to the *Neuner Gremium* violated the democratic rights of the *Bundestag* members. The Court conceded that the *Bundestag* plenary could in principle delegate rights to a special committee, and that the information provided to the plenary could similarly be limited. However, the need to maintain confidentiality could only be justified in very specific circumstances. Many EFSF decisions would require public preparation measures. This meant that there was no justification for keeping subsequent decisions secret. The Court also held that reasons of urgency could not justify delegation of responsibilities to the *Neuner Gremium*, as again, many EFSF decisions would require significant preparatory measures.[85]

The GFCC's ruling on the *Neuner Gremium* led to a further improvement in the *Bundestag*'s rights concerning decisions of the EFSF, as well as of the ESM.[86] In this way the Court can be seen to have countered executive dominance: decisions taken by executives would now be subject to more stringent parliamentary oversight. What makes the ruling on the *Neuner Gremium* a particularly convincing instance of judicial intervention is that the Karlsruhe court took into account countervailing considerations. The way in which national parliaments should be involved in EU decision-making is an issue on which different reasonable viewpoints may exist. Parliamentary involvement may curtail the effectiveness of a government operating in EU decision-making when its room for manoeuvre is significantly limited, which also may be detrimental to the national interest. Nonetheless, in the *Neuner Gremium* case the German court assessed the reasons for urgency and confidentiality and found that they lacked plausibility in most cases. The case thus presents an example of a court correcting curtailments of democratic oversight that lack plausible justification.[87]

A second area in which the GFCC helped strengthen the *Bundestag*'s position concerned the Government's information provision on legal instruments adopted outside the EU legal framework but closely related to EU law, such as the EFSF and ESM. A recurring problem during the Euro crisis was that the German Government provided little information on the negotiation of such instruments, limiting the ability of the *Bundestag* to debate and influence their design.

[84] Amended StabMechG (n 82) Art 3(1).

[85] BVerfG, Judgment of 28 February 2012, 2 BvE 8/ 11 (*Neuner Gremium*).

[86] See eg, BT- Dr 17/ 9145 of 27.03.2012: Gesetzentwurf der Fraktionen CDU/ CSU, SPD, FDP und Bündnis 90/ Die Grünen Entwurf eines Gesetzes zur Änderung des Stabilisierungsmechanismusge setzes (BT- Dr 17/ 9145); BT- Dr 17/ 9435 of 25.04.2012: Beschlussempfehlung und Bericht des Haushaltsausschusses (8. Ausschuss) zu dem Gesetzentwurf der Fraktionen CDU/ CSU, SPD, FDP und Bündnis 90/ Die Grünen—Drucksache 17/ 9145 – Entwurf eines Gesetzes zur Änderung des Stabilisierungsmechanismusgesetzes; Zweites Gesetz zur Änderung des Stabilisierungsmechanismusgesetzes vom 23. Mai 2012, Bundesgesetzblatt I 2012, 1166 (second amended StabMechG); and Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus vom 13. September 2012, Bundesgesetzblatt I, 1918.

[87] Such an approach resembles the justification of judicial review offered by M Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studie*s 28.

In the spring of 2010, the *Bundestag* received only limited information on the design of the Greek loan facility, the European Financial Stabilisation Mechanism (EFSM) and EFSF.[88] The problem re-emerged when the German Government fell short in informing the *Bundestag* on the negotiations about the ESM and Euro Plus Pact in the spring of 2011. The German Government repeatedly failed to provide key documents and often only provided information orally. Remarkably, the *Bundestag* obtained several drafts of the ESM Treaty from the Austrian Lower House of Parliament, rather than from its own Government. These shortcomings in the Government's information provision elicited significant criticism from various parties in the *Bundestag*, not just from the opposition parties, but also from those of the governing coalition. For example, the *Bundestag*'s EU affairs committee protested across party lines against the Government's failure to provide a draft of the ESM Treaty in the beginning of May 2011.[89]

Yet, ultimately, an intervention by the GFCC proved to be a decisive factor in strengthening the *Bundestag*'s information position. In a case brought by the parliamentary group of the Greens, the GFCC decided on 19 June 2012 that the German Government had indeed failed to adequately inform the *Bundestag* on the ESM and Euro Plus Pact negotiations.[90] That failure constituted a breach of the Government's constitutional obligations. With its judgment, the Karlsruhe judges laid down detailed requirements on the provision of information to the *Bundestag*, requiring that it be comprehensive, continuous, extend to informal meetings, and come early enough to still allow the *Bundestag* to influence European decision-making.[91]

This judgment ultimately led to an overhaul of the German legislation on the *Bundestag*'s participation and information rights in EU affairs supported by all parties. These changes clarified, among other things, that the Government's duty to provide information also applies to EU-related activities that strictly fall outside the EU legal framework, that information would have to be provided in writing, and that the Government would also have to provide information on 'unofficial' documents.[92]

The GFCC's judgment of 19 June 2012 can be seen as having provided an important check against executive dominance in EU affairs. The adequate provision of information is a precondition for democratic oversight and political debate on EU affairs. During the Euro crisis, Germany's parliamentarians had protested about the insufficient information provision by the Government, but ultimately failed to protect their own position. The coalition parties in the *Bundestag* would have had to engage in an open conflict with the Government, an option that one observer dubbed 'virtually impossible politically'.[93] Significant change only occurred after the Constitutional Court in Karlsruhe intervened.

[88] See also D Kietz, 'Politisierung Trotz Parteienkonsens: Bundestag, Bundesrat Und Die Euro-Krise' in Bertelsmann Stiftung (ed), *Politisierung trotz Parteienkonsens* (Bertelsmann Stiftung, 2013) 21–23.

[89] On these events, see BVerfG, Judgment of 19 June 2012, 2 BvE 4/ 11 (*Information on ESM and Euro Plus Pact Negotiations*) [2]–[42].

[90] ibid.

[91] ibid [117]–[132].

[92] Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europaïschen Union (4. Juli 2013) Bundesgesetzblatt I 2013, 2170 (EUZBBG 2013 version).

[93] Kietz (n 88) 27.

Comparative research indicates that partly as a result of the GFCC's interventions, the *Bundestag* emerged as one of the most powerful national parliaments in EU affairs.[94] The GFCC's strengthening of the *Bundestag's* information and participation rights helped to secure better parliamentary oversight of the executive operating at the EU level and thus safeguard the space for democratic politics on European matters. Moreover, such court-ordered strengthening of parliaments appears possible without constraining the room for parliaments to decide themselves on Europe's future development.

Yet, although the GFCC was instrumental in countering executive dominance in the German context, parliaments in other Member States were able to develop strong oversight positions without being so required by a court. Moreover, at least some of the political developments to which the GFCC responded appear to have been specific to Germany. Take the Netherlands, where there is no constitutional court and it falls to the Parliament itself to provide oversight of the Government's operations within EU affairs. Yet unlike the German Government, the Dutch Government did not seek to restrict the House of Representatives' involvement in decision-making of the EFSF and ESM. Nor did the Dutch Government consider that the intergovernmental nature of various crisis instruments constituted a justification for withholding information to Parliament.[95] The Dutch House of Representatives was better able to safeguard its own oversight position than the *Bundestag*, even though the *Bundestag* may have ultimately emerged as stronger after the GFCC's interventions.[96]

The Finnish Parliament, the *Eduskunta*, provides another example. The *Eduskunta* has been judged both institutionally the most powerful, as well as the most active in EU affairs compared to other Member States' parliaments.[97] In contrast to Germany, this strong position is not the result of intervention by a constitutional court. Key factors instead appear to be the constitutional provisions on the role of the *Eduskanta* in EU matters and the role of this Parliament's constitutional law committee.[98] This is a political committee with a quasi-judicial function, whose opinions have a high authority. Many of the crisis measures that formally fell outside the framework of the EU Treaties were treated as EU issues in Finland, because the constitutional law committee considered

[94] K Auel, O Rozenberg and A Tacea, 'Fighting Back? And, If So, How? Measuring Parliamentary Strength and Activity in EU Affairs' in C Hefftler et al (eds), *The Palgrave handbook of national parliaments and the European Union* (Palgrave Macmillan, 2015); O Höing, 'Differentation of Parliamentary Powers: The German Constitutional Court and the German Bundestag within the Financial Crisis' (2012) *OPAL Online Paper Series* 9/2012.

[95] On these issues see more elaborately: N de Boer, 'Judging European Democracy' (2018) (PhD Thesis, University of Amsterdam, 2018) ch 7, s 3. See also Tweede Kamer, 'Aandacht voor het parlementair budgetrecht in Europees perspectief. Rapport van een werkgroep uit de commissie voor de Rijksuitgaven van de Tweede Kamer der Staten-Generaal' (9 September 2014) Bijlage bij Kamerstuk 31 597, nr 7, 26–27.

[96] The German information arrangements are wider in scope and more precise, particularly on EU-related negotiations that strictly fall outside the EU Treaty framework. See also Commissie Meijers, 'De meerwaarde van een Nederlandse Europawet voor parlementaire informatievoorziening: een verkenning' (*Commissie Meijers*, 2016), at www.commissie-meijers.nl/nl/comment/de-meerwaarde-van-een-nederlandse-europawet-voor-parlementaire-informatievoorziening-een-verkenning.

[97] Auel, Rozenberg and Tacea (n 94) 79.

[98] P Leino and J Salminen, 'The Euro Crisis and its Constitutional Consequences for Finland: Is there Room for National Politics in EU Decision-Making?' (2013) 9 *European Constitutional Law Review* 451; T Raunio, 'The Finnish Eduskunta and the European Union: The Strengths and Weaknesses of a Mandating System' in C Hefftler et al (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan, 2015) 408–09 and 414.

them comparable to EU matters. Consequently, the Finnish Parliament kept both extensive information and participation rights in relation to negotiations on the Euro crisis instruments, as well as regarding decision-making within the ESM and EFSF.[99]

In sum, while the GFCC helped to counter executive dominance and strengthen parliamentary oversight during the Euro crisis, other Member States' parliaments were able to safeguard their own position in a better way than the *Bundestag*. The idea that parliaments cannot be relied on to provide adequate oversight of the executive is therefore too simple. Where parliaments decide on the proper arrangements for parliamentary oversight, formal rights are likely to be more meaningful in practice. Moreover, where a court mandates parliamentary oversight, it risks deciding against a parliament's preference for a reasonable alternative arrangement. For such reasons, constitutional courts should be careful to intervene in the political process. The case for judicial intervention is strongest when there are clear signs that the political branches have failed to safeguard democratic accountability.

V. Conclusion

Executive dominance and a lack of political conflict over policy decisions are two key problems in the EU's institutional set-up and functioning from a separation of powers perspective. Studying the case of the GFCC in this chapter, I have argued, however, that the review of European law by national constitutional courts does not provide a straightforward solution to these problems.

I first assessed whether national constitutional courts should serve as a forum for political conflict on EU-related politics – conflict that is not sufficiently present in the political process in the EU context. Yet, I argued, the risk is that constitutional courts will then end up making contested decisions on constitutional questions and actually restrict the possibility of political conflict over European issues. The GFCC's EU-related case law presents a troublesome example in which, because of the Court's contested and national understanding of democracy, precisely this risk materialised.

Review of European law by national constitutional courts is more easily justifiable when directed at the power of the ECJ. A challenge is nonetheless that it is complicated for courts to conduct such review properly. It requires constitutional courts to balance the harms for the EU legal order against countering the democratically problematic judgments of the ECJ. At the same time, courts will have to justify their review on the basis of a constitutional framework that is removed from democratic politics. The peril is that national constitutional courts adopt politically contested interpretations of this constitutional framework and thus limit the scope for legitimate political choices. So, although the position of the ECJ in the EU legal order raises serious questions from a separation of powers perspective, these concerns may be better addressed by political means than through review by national constitutional courts.

Nonetheless, section IV discussed how a number of judgments by the GFCC helped safeguard a space for democratic politics on EU affairs during the Euro crisis. The GFCC

[99] Leino and Salminen (n 98); Raunio (n 98).

did so by countering executive dominance. The GFCC's example suggests that national constitutional courts can invoke democratic norms to demand better parliamentary oversight of the executive, without deciding on the more controversial issues of EU democracy. The extent to which courts in other jurisdictions can and should perform such a role, however, still requires further research.

Possibly there are other ways in which constitutional courts could raise constitutional questions while not limiting the room for legitimate political decision-making. Recently, some scholars have embraced the idea of weak-form review for constitutional courts in relation to the EU.[100] Weak-form review is a type of review that allows courts to assess the constitutionality of legislation, but leaves it to legislatures to address judicial findings of constitutionality or allows legislatures to override the courts.[101] Judicial review critics favour weak review, because it obviates the main democratic objection to stronger forms of review, while allowing an enduring deliberation between institutions on constitutional norms.[102] Where national courts would weaken their review, arguably they could continue to facilitate opposition and contestation of European law, without overriding legislative decisions and undermining the stability of the EU legal order. Such arguments for weak review deserve further consideration elsewhere.

The focus on the German example in this chapter comes with certain limitations, which would also have to be addressed in further research. Firstly, the instances of review by the GFCC discussed in this chapter do not exhaust all possible scenarios in which such review may be exercised. Possibly there are other settings in which a national constitutional court's review can be justified more easily. Secondly, judgments of Member States' constitutional courts other than the GFCC may command less authority, both in the domestic and European political process. If so, a constitutional court judgment may be less of a constraint on political decision-making and more a catalyst of political and public debate. Thirdly and related to the previous point, in some Member States the quality of political deliberations on constitutional matters may be considered significantly lower compared to Germany. If so, deliberations in the judicial process could be more positively evaluated as compensation for a failing political process.

Still, as I have argued in this chapter, the German case appears to confirm the warnings of those who say that constitutional courts risk curtailing legitimate political decision-making. Constitutional courts may help safeguard space for democratic politics in EU matters in some cases, but it appears that the appropriate role of constitutional courts in addressing separation of powers in the EU should be a limited one. To address the issues of executive dominance and a lack of political conflict the solution lies not primarily with the courts, but in the political process.

[100] O Garner, 'Squaring the PSPP Circle' (*Verfassungsblog*, 22 May 2020), at verfassungsblog.de/squaring-the-pspp-circle; T Violante, 'Bring Back the Politics: The PSPP Ruling in Its Institutional Context' (2020) *21 German Law Journal* 1045.

[101] M Tushnet, *Weak Courts, Strong Rights* (Princeton University Press, 2008).

[102] R Bellamy, 'Democracy as Public Law: The Case of Constitutional Rights' (2013) 14 *German Law Journal* 1017.