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RESEARCH ARTICLE

Constitutional Courts Asking Questions: A Deliberative Potential of Preliminary Reference Mechanism

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Abstract

This Article interrogates the role of national constitutional courts within the Article 267 TFEU preliminary reference mechanism from both *descriptive* and *normative* angles. First, I demonstrate that although a clear majority of the constitutional courts submit references to the ECJ on a more frequent basis, differences in individual approaches remain significant. Subsequently, I argue that the core normative attractivity of the questions submitted in the course of domestic constitutional review lies in their participative and deliberative potential. Compared to ordinary courts, constitutional courts are better suited to amplify the 'unheard' voices of immobile EU citizens. By counterbalancing the demands of the EU's functional constitution, which is primarily based on the ideals of market capitalism, constitutional courts' questions may contribute to the EU's capacity to generate legitimate decisions. Finally, I put my theoretical claims in context and analyse the main ways in which such deliberative potential can translate into practice.

Keywords: constitutional courts; ECJ; preliminary references; Article 267 TFEU; deliberative democracy; market capitalism; legitimacy

I. Introduction: National Constitutional Courts Lost in The Process of European Integration?

The process of European integration through law has put the Member States' constitutional courts[1] under a lot of pressure.[2] Ordinary courts took up their new role of 'European Union

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[1]In this Article, I use the term 'constitutional court' in the broad sense. Traditionally, the European model of constitutional review has been characterised by four constituent components: (1) constitutional courts possess a monopoly to declare infra-constitutional legal norms or individual legal acts unconstitutional; (2) they primarily deal with the disputes concerning interpretation and application of constitutional norms; (3) they resolve the cases in which specifically designated authorities or individuals ask questions challenging the constitutionality; (4) they are formally detached not only from legislative and executive branches of government, but they also stand outside the structure of ordinary courts; and (5) most constitutional courts may review the constitutionality of statutes or international treaties *in abstracto* meaning that they are empowered to review the acts independently on a specific case; other courts may also review legal acts *in concreto*. See A Stone Sweet 'Constitutional Courts' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), p 819. Under such broad sense, one can include constitutional/supreme courts of all Member States apart from the following: Denmark, Finland, Sweden, Greece, and the Netherlands. The UK is not part of the analysis for obvious reasons.

[2]On the notion of the 'integration through law', see M Cappelletti, M Seccombe, and J Weiler (eds), *Integration Through Law: Book 1: A Political, Legal and Economic Overview* (De Gruyter, 1986), p 4. A growing critique of this conception claims that the model of integration though law has been a failure in the qualitative sense. See Editorial Comments, 'The Critical Turn in EU Legal Studies' (2015) 52(4) *Common Market Law Review* 881.

courts'[3] rather swiftly as multiple fuzzy doctrines of the European Court of Justice—primacy principle, doctrine of direct effect, and *CILFIT*, to name just a few[4]—empowered them to effectively disregard any piece of domestic legislation they deemed incompatible with EU norms.[5] Consequently, under the rule of EU law, all domestic judges could perform a specific kind of *diffuse judicial review* of national legislative outputs even though such task had traditionally been in the hands of a small number of constitutional justices.[6] This naturally put the overwhelmingly privileged and entrusted institutions in an odd position.[7]

The marginalising effects of the diffuse judicial review were strengthened in 2009 when the Charter of Fundamental Rights of the European Union ('Charter') entered into force.[8] Since then, constitutional courts ('CCs') need to cope with the fact that they have to share their once-mastered agenda of human rights not only with the European Court of Human Rights in Strasbourg but also with the Court in Luxembourg.[9] As Michal Bobek aptly puts it: constitutional courts have always been rather special creatures, and by the process of accession to the EU, such creatures were caged as some parts of their former habitat were declared out of bounds.[10]

How did constitutional courts react to these unfavourable institutional dynamics? Gradually, they developed several strategies in order to claim their sphere of influence over the development of EU law as well as to regain their monopoly in reviewing national legislation. Three tactics stand out in particular.

First, although initially hesitant,[11] most of the constitutional courts have by now started to use EU law as a yardstick for constitutional review, be it *directly* or *indirectly*.[12] The former approach is well illustrated by the Austrian *Verfassungsgerichtshof*, which held that the constitutionality of national legal acts might be assessed *directly* from the perspective of rights guaranteed by the Charter.[13] We can trace down similar stances in the jurisprudence

[3]See I Maher, 'National Courts as European Community Courts' (1994) 14(2) *Legal Studies* 22. Monica Claes wrote about national courts operating under a 'Community mandate' in M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, 2006). Urszula Jaremba explains how national judges are expected to function as 'decentralised EU law judges' in U Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Brill, 2013), pp 47–112.

[4]For a good overview of fundamental doctrines which place high expectations on national judges, see T Nowak and M Glavina, 'National Courts as Regulatory Agencies and the Application of EU Law' (2021) 43(6) *Journal of European Integration* 739, pp 740–41.

[5]See W Mattli and AM Slaughter, 'Revisiting the European Court of Justice' (1998) 52(1) *International Organization* 177, pp 190–96.

[6]See K Alter 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in AM Slaughter, A Sweet, and J H H Weiler (eds), *The European Court and National Courts—Doctrine and Jurisprudence* (Hart Publishing, 1998), p 240.

[7]Constitutional courts gained the reputation of the 'democracy builders'. See S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015), p 9. But see Tom Daly, who argues that 'while it has been assumed that courts have a central role to play in democracy-building, this assumption is based on rather slim evidence and undermined by yawning gaps in existing research'. T Daly, 'The Alchemists: Courts as Democracy-Builders in Contemporary Thought' (2017) 6(1) *Global Constitutionalism* 101, p 101.

[8]On the effects of the Charter in various Member States, see M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020).

[9]See G Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 168.

[10]M Bobek, *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Hart Publishing, 2015), pp 412–13.

[11]O Pollicino and G Martinico, *The National Judicial Treatment of the ECHR and EU Laws* (Europa Law Publishing, 2010); M Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing, 2014), pp 229–80.

[12]D Paris, 'Constitutional Courts as European Union Courts: The Current and Potential Use of EU Law as a Yardstick for Constitutional Review' (2017) 24(6) *Maastricht Journal of European and Comparative Law* 792.

[13]See VfGH 14 March 2012, 19.632/2012; or VfGH 10 October 2018, G 144/2018; see H Verdino, 'The Charter of Fundamental Rights of the European Union as Review Standard in Proceedings before the Constitutional Court' (2013) 7 (1) *Vienna Journal on International Constitutional Law* 93.

of Italian,[14] Belgian,[15] and German[16] constitutional courts. As to the latter—*indirect*—approach, one can point out the case law of the Spanish *Tribunal Constitucional*. Even though it formally claims that EU law lacks constitutional status,[17] it has also confirmed that a violation of EU law may, under certain circumstances, amount to a violation of the rights guaranteed by the Spanish Constitution. In that vein, a failure of a 'court of the last instance' to refer a preliminary reference to the European Court of Justice ('ECJ'), or to grand direct effect to the provision of an EU directive, can result in a violation of the right to effective judicial protection according to Article 24 of the Spanish Constitution.[18] Such an *indirect* inclusion of EU norms into the standard for constitutional review can also be found in the jurisprudence of French *Conseil constitutionnel*,[19] and Czech,[20] Slovenian,[21] Hungarian,[22] Bulgarian,[23] or Slovak[24] constitutional courts. Putting contextual specifics aside, it is safe to claim that most of the CCs are at least sometimes willing to look at national legal acts through the EU lenses.

Turning to the second kind of anti–marginalisation tactics, most of the constitutional courts have over time also developed several defensive doctrines which pose limits on the primacy principle of EU law within national legal orders. These concepts include 'higher level of fundamental rights' review (*Solange*), *ultra vires* review, *controlimiti* doctrine, and national/constitutional identity review.[25] Even though they differ in some important aspects, they all share the same theoretical premise: the transfer of powers to the EU is limited, because domestic constitutions do not allow the Member States to surrender their sovereignty to the EU altogether.[26] Some have argued that national constitutional courts should cautiously use these concepts as *substantive* tools to counterweigh the EU's democracy-diminishing mechanisms.[27] Others have alerted against them by highlighting that their flawed potential may lead to dangerous outcomes.[28]

[14]Corte costituzionale 14 December 2017, No 269/2017; 31 March 2018, No 115/2018; 20 June 2018, No 166/2018; 23 February 2019, No 20/2019; or 21 March 2019, No 63/2019. See also D Gallo, 'Challenging EU Constitutional Law: The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure' (2019) 25(4) *European Law Journal* 434.

[15]See eg Cour constitutionelle 20 October 2016, No 134/2016, in which the court reviewed the compatibility of a domestic ban limiting production of certain animal furs with the TFEU.

[16]BVerfG 6 November 2019, 1 BvR 16/13, *Right to Be Forgotten I*; 1 BvR 267/17, *Right to Be Forgotten II*. See D Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review' (2020) 21 *German Law Journal* 1.

[17]See Tribunal Constitucional 18 December 2014, No 215/2014.

[18]See Tribunal Constitucional 19 April 2004, No 58/2004; 30 January 2017, No 13/2017. See also D Sarmiento, 'Reinforcing the (Domestic) Constitutional Protection of Primacy of EU Law' (2013) 50(3) *Common Market Law Review* 875, p 882; or on the similar position of other CCs', see C Lacchi, 'Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU' (2015) 16(6) *German Law Journal* 1663.

[19]Conseil constitutionnel 26 July 2018, No 2018-768 DC. See also C Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: The Recent Case-Law of the Conseil Constitutionnel and the Conseil d'État' (2007) 3(3) *European Constitutional Law Review* 436.

[20]See Ústavní soud 10 July 2018, sp zn Pl ÚS 3/16, para 94.

[21]See Ustavno sodišče 18 December. 2013, No U-I-155/11, para 14.

[22]See F Gárdos-Orosz, 'Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference' (2015) 16(6) *German Law Journal* 1569.

[23]Bulgarian Constitutional Court 19 June 2012, No 2/2012; 11 November 2010, No 15/2010.

[24]A Blisa, P Molek, and K Šipulová 'Czech Republic and Slovakia: Another International Human Rights Treaty?' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020), pp 137–38.

[25]A Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press, 2022), pt II.

[26]D Paris, 'Limiting the Counter-Limits. National Constitutional Courts and the Scope of the Primacy of EU Law' (2018) 10(2) *Italian Journal of Public Law* 205, p 210.

[27]D Grimm, *The Constitution of European Democracy* (Oxford University Press, 2017), p 206.

[28]Z Kühn, '*Ultra Vires* Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law' (2016) 23(1) *Maastricht Journal of European and Comparative Law* 185.

In any case, what once used to be the subject of rather theoretical debates has now become an acute concern for real-life European politics. Indeed, everyone who takes an interest in the EU context has read about cases in which national constitutional courts invoked the *ultra vires* and constitutional identity cards—Czech *Landtova* saga,[29] German *PSPP*,[30] and Polish K 3/21[31] need no elaborate introduction here. There is, however, one particular moment in the discussion about these major cases that deserves further attention.

Unlike their German counterparts, Czech and Polish constitutional judges were heavily criticised for the fact that they had not given the ECJ chance to rule on the validity of EU acts before proclaiming them unconstitutional.[32] In particular, the unwillingness of the Polish Constitutional Tribunal to engage in the preliminary reference mechanism according to Article 267 of the Treaty on the Functioning of the European Union ('TFEU')[33] was depicted as proof of its malign intentions to undermine the EU's authority.[34] Even though such insights are based on the rather contextual 'backlash' and 'rule of law crises' narratives, they do bridge the discussion towards the third larger tactic most of the constitutional courts have employed by now—using preliminary references as a *procedural* tool to re-centralise their position within the EU judicial system.

Now, what do we do and do not know about the national constitutional courts' involvement in the preliminary reference procedure? On the one hand, previous research has mainly focused on the approaches of CCs from the doctrinal perspective.[35] Even though studies of individual cases provided us with valuable contextual insights, a more comprehensive picture of how often and what type of questions constitutional courts submit as a group is still missing (a *descriptive* gap). On the other hand, the existing literature has so far depicted the preliminary reference mechanism in the context of constitutional courts predominantly as an appropriate tool to solve constitutional conflicts between the EU and Member States.[36] As much as this account is attractive in the current context of the EU's rule of law crisis, it fails to expound the value of constitutional courts' involvement in the formal dialogue with the ECJ outside those rather extreme instances of constitutional clashes (a *normative* gap).

[29]Ústavní soud 14 February 2012, Pl. US 5/12, Slovak Pensions XVII; J Komárek, 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*' (2012) 8(2) *European Constitutional Law Review* 323.

[30]BVerfG 5 May 20152 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, *PSPP*; F Mayer, 'The *Ultra Vires* Ruling: Deconstructing the German Federal Constitutional Court's *PSPP* Decision of 5 May 2020' (2021) 16(4) *European Constitutional Law Review* 733; see also the special issue: 'The German Federal Constitutional Court's *PSPP* Judgment' (2020) 21 *German Law Review* 944.

[31]For an insightful quick analysis, see J Jaraczewski, 'Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal', *Verfassungsblog*, 12 October 2021, https://verfassungsblog.de/gazing-into-the-abyss. A Thiele, 'Whoever Equates Karlsruhe to Warsaw Is Wildly Mistaken', *Verfassungsblog*, 10 October 2021, https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken.

[32]For the Czech perspective, see R Zbíral, 'Czech Constitutional Court, Judgment of 31 January 2012, Pl ÚS 5/12: A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed *Ultra Vires*' (2012) 49(4) *Common Market Law Review* 1475, pp 1485–87.

[33]According to Article 267 TFEU, courts of the Member States can request the ECJ to issue a preliminary ruling on the interpretation or validity of EU law.

[34]A Gliszczyńska-Grabias and W Sadurski, 'Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland' *European Constitutional Law Review* (First View), 19 January 2023, p 9, https://doi.org/10.1017/S1574019622000396 (visited 21 January 2023).

[35]On the doctrinal analysis of CCs' approaches, see the special issue 'Preliminary References to the Court of Justice of The European Union by Constitutional Courts' (2015) 16 *German Law Journal* 1317.

[36]M Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' (2015) 16(6) *German Law Journal* 1331, p 1342.

This Article aims to address some of these blind spots in the literature on national constitutional courts' place within the EU and examine the third anti-marginalisation tactic—submission of preliminary references to the ECJ—in more detail. Thus, it interrogates the role of national CCs within the Article 267 TFEU mechanism from both *descriptive* and *normative* angles. Drawing on the analysis of 122 preliminary references posed between the years 1958 and 2022, I first demonstrate that a majority of the constitutional courts have started to send questions to the ECJ on a more frequent basis. Nonetheless, the differences in how individual constitutional courts make use of the mechanism remain significant. In the second part, I explore whether such development can be regarded as *normatively* attractive. Here, I contend that due to their specific deliberative design, constitutional courts have the capacity to represent a unique part of communicative arrangements within the EU. Lastly, I put my theoretical claims in context and analyse the main ways in which such potential can translate into practice.

II. Constitutional Courts Asking Questions

It is a well-known fact that at first, constitutional courts were quite hesitant to ask the European Court of Justice any questions whatsoever. Until the year of 2009, they submitted only 29 references altogether.[37] This was traditionally explained by two sets of reasons: legal and behavioural.[38] As to the former, some of the CCs first refused to identify themselves as courts or tribunals in the meaning of Article 267 TFEU as well as they refused to use EU law as a standard for constitutional review.[39] As a result, those courts had no opportunities to apply EU law in their day-to-day adjudication.[40] As to the latter reasons, the initial reluctance to engage with the ECJ has been explained predominantly on the basis of 'judicial ego' and 'jealousy' of national constitutional judges who did not want to become subjects of the ECJ's authority and on the contrary attempted to maintain their position of 'highest courts' in the country.[41]

However, the initial hesitatnt position has changed considerably over the years. The total number of references submitted by constitutional courts every year (Figure 1[42]) suggests that constitutional courts reconsidered their negative stance as they referred multiple times more references in the following decade. Indeed, the increasing number of constitutional court referrals is not a mechanical byproduct of the fact that more EU Member States (and hence constitutional courts) joined the EU over time. The increasing trend is evident even when considering the annual referral rate, i.e, the total number of referrals from constitutional courts relative to the number of active constitutional courts across the EU (Figure 2[43]).

In total, CCs sent 122 preliminary questions between the years 1958 and 2022.[44] Moreover, only 4 out of 22 analysed constitutional courts have not posed any preliminary reference whatsoever—these include constitutional courts of Bulgaria, the Czech Republic, Croatia, and Hungary (see Table 1[45]).

[37]See Figure 1 below.

[38]M Claes, 'The Validity and Primacy of EU Law And the "Cooperative Relationship" between National Constitutional Courts and the Court of Justice of the European Union' (2016) 23(1) *Maastricht Journal of European and Comparative Law* 151, p 163.

[39]To the use of the first anti-marginalisation tactic, see note 11 above.

[40]Cf M Bromberg, N Fegner, and H Hansen, 'A Structural Model for Explaining Member State Variations in Preliminary References to the ECJ' (2020) 45(5) *European Law Review* 599.

[41]Claes, note 38 above, p 164; see also J Weiler, 'Judicial Ego' (2011) 9 *International Journal of Constitutional Law* 1, pp 1–4.

[42]Source: Author.

[43]Source: Author.

[44]The data are updated until 18 December 2022.

[45]Source: Author.

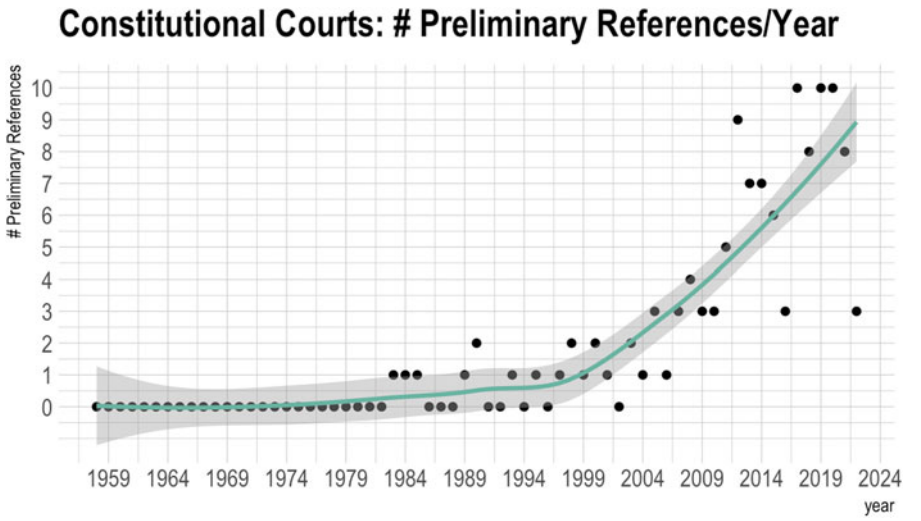

Figure 1. The figure depicts the total number of references submitted by constitutional courts per year in time.

It is clear that with their 45 and 40 preliminary references, the Irish *Supreme Court* and the Belgian *Cour constitutionelle* are without any doubt the most proactive CCs when it comes to both the total number of questions posed as well as the annual referral rate. The Irish court submitted its first question concerning the exemptions from the compulsory acquisition of

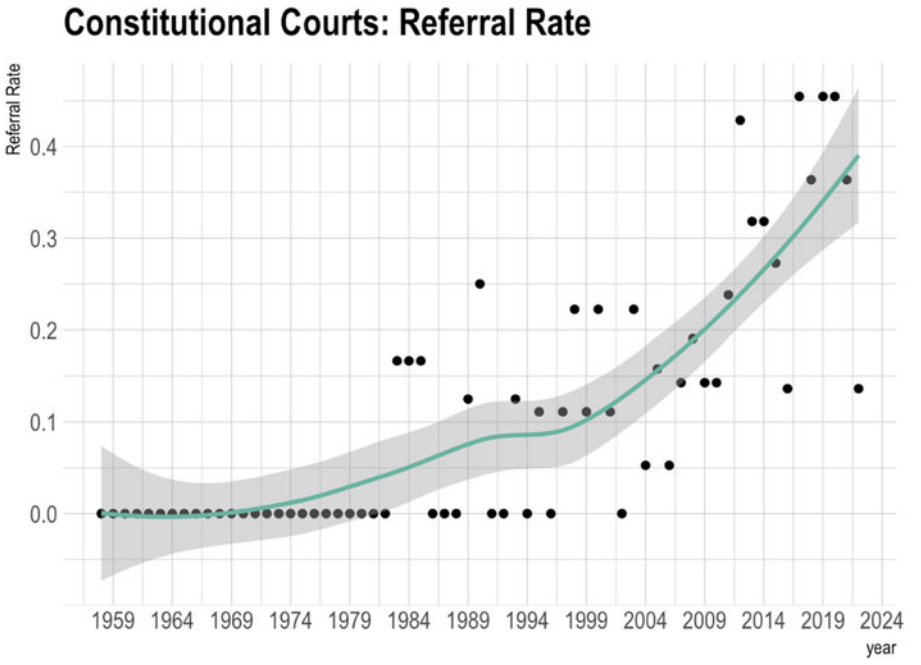

Figure 2. The figure depicts the annual referral rate, i.e, the total number of referrals from constitutional courts relative to the number of active constitutional courts across the EU.

Table 1.

Name of Constitutional Court	Member State	Number of Preliminary References 1952–2022	Referral Rate (# Prem. Ref. /Membership Years)
The Supreme Court	Ireland	45	0, 918
Cour constitutionelle	Belgium	40	0, 625
Corte costituzionale	Italy	6	0, 093
Satversmes tiesa	Latvia	6	0, 333
Verfassungsgerichtshof	Austria	4	0, 148
Anotato Dikastirio	Cyprus	4	0, 222
Ustavno sodišče	Slovenia	3	0, 166
Bundesverfassungsgericht	Germany	2	0, 031
Konstitucinis Teismas	Lithuania	2	0, 111
Qorti Kostituzzjonali	Malta	2	0, 111
Riigikohus	Estonia	1	0, 055
Conseil constitutionnel	France	1	0, 016
Cour constitutionnelle	Luxembourg	1	0, 016
Trybunał Konstytucyjny	Poland	1	0, 055
Tribunal Constitucional	Portugal	1	0, 028
Curtea Constituţională	Romania	1	0, 067
Ústavný súd	Slovakia	1	0, 055
Tribunal Constitucional	Spain	1	0, 028
Конституционен съд на Република България	Bulgaria	0	0
Ustavni sud	Croatia	0	0
Ústavní soud	Czech Republic	0	0
Magyarország Alkotmánybírósága	Hungary	0	0
Højesteret	Denmark	-	-
Korkein oikeus	Finland	-	-
Ανώτατο Ειδικό Δικαστήριο	Greece	-	-
De Rechtspraak	Netherlands	-	-
Högsta domstolen	Sweden	-	-
The Supreme Court	United Kingdom	-	-
Total Number		**122**	

rural land in 1983.[46] The Belgian one in 1997.[47] The latter case concerned the conditions for specific training in general medical practice. The Belgian CC simply asked the ECJ to interpret the provisions of the respective directive and whether they should be read as requiring persons who are

[46] *Fearon v Irish Land Commission*, C-182/83, EU:C:1984:335.

[47] *Fédération belge des chambres syndicales de Médecins v Gouvernement flamand and Others*, C-93/97, EU:C:1998:375.

about to undertake such practice to first obtain a formal diploma in medical practice.[48] It is telling that neither the ECJ, nor the AGs seemed to think that these first references should be seen as a significant moment for the EU's constitutional setting.[49] Since then, both constitutional courts have made great use of the preliminary reference procedure and referred questions concerning both the interpretation and the validity of EU acts.[50] It was probably the *Pringle* case in which the ECJ dealt with the question of unconstitutional constitutional amendment of the Treaties and which has attracted the most academic interest.[51]

The Latvian *Satversmes tiesa*, the Italian *Corte costituzionale*, the Austrian *Verfassungsgerichtshof*, and the Cyprian *Anotato Dikastirio* belong—with their six and four preliminary references—to the group of 'rather active' constitutional courts.

The Austrian CC referred its first question already in 1999.[52] Due to its friendly approach to the preliminary reference mechanism and the use of the Charter in general, it has been suggested that in the future, the Austrian CC might act as sort of a 'gatekeeper' or a 'privileged partner' of the ECJ. Particularly, Austrian constitutional judges were expected to first filter domestic cases relating to fundamental rights, clarify, and prepare them for the ECJ, and then adapt the preliminary rulings for the peculiarities of the domestic legal order in the follow-up cases.[53] Nevertheless, the Austrian *Verfassungsgerichtshof* has not sent any reference to Luxembourg since 2012. Indeed, the fairly low annual referral rate (0, 148) do suggest that the Austrian CC might not be excessively active when compared to other CCs.

Unlike its Austrian counterpart, the Italian Constitutional Court had denied for a long time its status of a 'court' or a 'tribunal' in the meaning of (current) Article 267 TFEU.[54] Its position has, however, changed significantly over time as it started to accept EU law as a standard for abstract constitutional review. Consequently, it referred its first preliminary reference in 2008.[55] One can identify the case *MAS and MB*, which concerned the limitation periods in regard to VAT frauds, as the most significant preliminary reference.[56] In that case, the Italian CC re-sent the question after the ECJ had already issued one preliminary ruling regarding that matter based on the preliminary reference of an ordinary Italian court (the so-called *Taricco saga*).[57] The Italian CC provided the ECJ with the necessary constitutional context (mostly highlighting the fundamental principle which requires that rules of criminal law are precisely determined and are not retroactive) and provided Luxembourg judges with an opportunity to reconsider their initial position. Such approach has been praised as a positive example of constitutional dialogue within the EU.[58]

Finally, a slightly different development can be traced in Latvia. The Latvian CC started to actively supply the Luxembourg Court with the questions only quite recently – it posted its first

[48]Ibid.

[49]There is no mention of the specific constitutional character of referring courts in nether the AG's opinions, nor the ECJ's judgments.

[50]See the overview of all cases and all steps of the preliminary reference procedure in the special section designated to it on the official website of Belgian Constitutional Court. Available at: https://www.const-court.be/en/judgments/preliminary-rulings-from-the-court-of-justice-of-the-european-union.

[51]*Pringle*, C-370/12, EU:C:2012:756.

[52]*Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598.

[53]See A Orator, 'The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?' (2015) 16(6) *German Law Journal* 1429, p 1445.

[54]See for instance Corte costituzionale 29 December 1995, Case No. 536/1995.

[55]*Presidente del Consiglio dei Ministri v Regione Sardegna*, C-169/08, EU:C:2009:709; see also A Kustra, 'The First Preliminary Questions to the Court of Justice of the European Union Referred by Italian Corte Constituzionale, Spanish Tribunal Conctitucional and French Conseil Constitutionnel' (2013) 16(1) *Comparative Law Review* 159.

[56]*MAS and MB*, C-42/17, EU:C:2017:936.

[57]G Piccirilli, 'The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey' (2018) 14(4) *European Constitutional Law Review* 814.

[58]M Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union' (2018) 25(3) *Maastricht Journal of European and Comparative Law* 357.

reference in 2017[59] and then five other references in 2020. Indeed, when considering the annual referral rate, the Latvian CC is the third most active constitutional court. Such an unparalleled activity has, however, remained without a further response from the side of scholarship so far. Similarly, academia seems not to pay great attention to the questions posed by the Cyprian Supreme Court which submitted its first reference in 2009.[60]

Now, as it is evident from Table 1, the remaining constitutional courts, which have made at least some use of the Article 267 mechanism, have submitted not more than one or two references, and their annual referral rates are fairly low. Yet, academia has paid enormous attention especially to the questions sent by the German *Bundesverfassungsgericht*. Such interest is probably caused by the fact that in cases *Gauweiler and Others*[61] and *Weiss and Others*[62] (which both concerned the competencies of the European Central Bank and its economic and monetary policies), German constitutional judges 'played hardball' and raised *ultra vires* and *constitutional identity* arguments while questioning the validity of Union legal acts for their incompatibility with the TFEU and German *Grundgesetz*.[63] Similarly, the literature has closely covered the preliminary reference in the case of *Melloni*, in which the Spanish *Tribunal Constitucional* questioned the validity of the execution of European Arrest Warrant with regard to judgments issued *in absentia*.[64] It has been claimed that the Spanish CC showed great effort by elaborating its interpretations of the right to a fair trial and of Article 53 of the Charter from the perspective of the Spanish Constitution on the one hand, and by expressing respect for the ECJ's authority and the autonomy of EU fundamental rights regime on the other. The ECJ's preliminary ruling, however, has been criticised for an acute lack of responsivity.[65] The remaining preliminary questions of other CCs have clearly not enjoyed the same level of attention of existing scholarship.

Now, what do these *descriptive* insights tell us about the constitutional courts' involvement in the preliminary reference mechanism? One can highlight at least a couple of broader points. The overview of submitted questions seems to confirm the expectations of the proponents of the so-called 'second' emancipation theory. According to them, the initial phase of 'judicial empowerment' of lower courts needs to be perceived merely as a self-eroding Act I because national high courts are now beginning to engage in the formal dialogue with the ECJ on a more frequent basis in order to reassert their control over national judicial hierarchies and to substantively influence the development EU law.[66] Indeed, the statistics show that the constitutional courts that have not yet referred any preliminary questions to the ECJ now represent a clear minority. Thus, from an overall perspective, the upward trend is clear—national constitutional courts collectively submit more and more preliminary references each year.

At the same time, however, it must be stressed that the differences in the number of questions raised by the various constitutional courts remain significant. The Belgian *Cour Constitutionelle* and the Irish Supreme Court are evident outliers in this respect as they clearly stand out from the crowd.

[59] *Administratīvā rajona tiesa v Ministru kabinets*, C-120/17, EU:C:2018:638.

[60] Admittedly, the first reference did not turn out quite well for the Cyprian court as the ECJ only answered by means of the reasoned decision. See *Giorgos Michalias v Christina A Ioannou-Michalia*, C-312/09, EU:C:2010:357.

[61] *Peter Gauweiler and Others v Deutscher Bundestag*, C-62/14, EU:C:2015:400.

[62] See *Weiss and Others*, C-493/17. EU:C:2018:1000.

[63] With regards to the older case, see 'Special Issue – The OMT Decision of the German Federal Constitutional Court' (2014) 15 *German Law Journal* 107; I Pernice, 'A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU' (2014) 21(1) *Maastricht Journal of European and Comparative Law* 3. As to the newer case, see M Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10(2) *European Constitutional Law Review* 263.

[64] *Stefano Melloni v Ministerio Fiscal*, C-399/11, EU:C:2013:107.

[65] A Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10(2) *European Constitutional Law Review* 308, p 330.

[66] T Pavone and D Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' (2019) 25(4) *European Law Journal* 352.

Only four other courts can be classified as more active ones while the rest of the courts remain rather passive. Similarly, there are evident differences in the types of questions various constitutional courts submit.

It is important to highlight here that such evident inter-court variation in the number and type of submitted preliminary references cannot be explained by the mere 'willingness' of individual constitutional courts to engage in the formal dialogue with the ECJ. Indeed, it is crucial to further explore *why* a few 'prominent' CCs (the Belgian and Irish CCs) have asked many more questions compared to those courts that have referred few (if any) cases to the ECJ. In other words, what matters in not only that CCs as a group submit more references collectively, but also *which* courts make use of the Article 267 TFEU procedure and *how* they do so.

Elsewhere, I argued that the constitutional courts' decision to engage with the ECJ depends on quite complex mix of factors—*legal*, *institutional*, *personal*, and *strategic*.[67] Thus, it is for instance understandable from the strategic perspective that the Polish Constitutional Tribunal—following its illegal unconstitutional capture—have not submitted other preliminary references in cases in which it openly pushes against the authority of the ECJ and EU fundamental principles in general.[68] Moving swiftly along, from the institutional perspective, the low activity of the French *Conseil constitutionnel* might have something to do with the fact that the constitutional review conducted by means of the *question prioritaire de constitutionnailité* mechanism adheres to strict time limits which clash with the rather lengthy preliminary reference mechanism.[69]

Thus, although the descriptive statistics provides us with valuable insights regarding the increasing 'referencing' activity of the collective of constitutional courts in time, these should be taken in caution when it comes to the context of individual Member States. The differences in approaches are significant and dependent on numerous legal and extra-legal factors. This—as we shall see in the following Part—matters not only for descriptive analysis, but also for the purposes of evaluating the activity of constitutional courts from the normative angle.

III. A Deliberative Potential of Constitutional Courts' Questions

The previous Part provided us with a more comprehensive *descriptive* picture of how constitutional courts as a group make use of the Article 267 TFEU mechanism. Let us now inquire whether the phenomena of constitutional courts asking more EU law questions may be in any way regarded as *normatively* attractive.

Preliminary references submitted by CCs have been mainly valued in the context of constitutional conflicts between the EU and its Member States. The references have been recognized as 'one of the more powerful procedural connectors among courts serving the cause of constitutional pluralism'.[70] The mechanism ought to represent 'the only appropriate forum' for constitutional dialogue because it provides the national CCs with an opportunity to challenge EU law, alert the ECJ and inform it of arguments why an EU measure may be problematic.[71] Under the right conditions, such dialogue can serve a productive 'auto-correct function' and result in a full agreement between the rivalling parties.[72] From this perspective, constitutional courts *should* participate in the formal dialogue

[67]M Pivoda, 'Constitutional Courts and Preliminary References to the CJEU: A Sophisticated Strategy or a Matter of Coincidence?' (2023) 31(2) *Journal of Jurisprudence and Legal Practice* 253.

[68]See Polish Constitutional Tribunal, 7 October 2021, Case No K 3/21.

[69]O Jouanjan, 'Constitutional Justice in France' in AV Bogdandy, P Huber, and Ch Grabenwarter (eds), *The Max Planck Handbooks in European Public Law* (Oxford University Press, 2020), p 257.

[70]M Cartabia, 'Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling' (2015) 16(6) *German Law Journal* 1791, p 1794.

[71]Claes, note 38 above, p 169.

[72]See A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice' (2017) 18(6) *German Law Journal* 1395; L Burgorgue-Larsen, 'The

with the ECJ because diplomacy and mutual engagement are essential when solving constitutional conflicts.[73] Correspondingly, the engagement is perceived as *valuable* because it has the capacity to prevent constitutional crises and preserve the 'coexistence equilibrium' between the high judicial authorities within the EU.[74]

While this narrative highlights an important function of preliminary references submitted by CCs, it hardly reveals their full normative potential outside the rather extreme instances of open constitutional conflicts. Against this background, I argue that the core normative attractivity of questions submitted by CCs lies in their *participative* and *deliberative* democratic capacity. In order to support my claim, I will first show that preliminary references submitted by ordinary courts do not represent a tool that would effectively supplement the well-identified EU's democratic legitimacy gaps. Secondly, I will contend that compared to ordinary courts, constitutional courts are better designed to use preliminary references in order to channel through the voices of immobile EU citizens who have not benefited from the EU integration as much as those participating in cross-border economic activity.

A. Fighting EU's Inherently Anti-democratic Constitution through Ordinary Courts?

The Treaty on European Union ('TEU') formally commits the EU to the ideal of *representative* democracy. However, many have argued that despite numerous institutional attempts, the EU's complex system of democratic legitimation is ultimately insufficient to approximate such principal traditionally tailored to nation-states.

Indeed, it would be unproductive to lament here again about the lack of the European Parliament's legislative and oversight competencies, low involvement of national parliaments, fragmented elections, and other institutional roots of the EU's representative democracy 'deficit'.[75] It suffices to highlight the underlying argument: the EU's decisions with far-reaching consequences for the Member States' constituencies are primarily made through executive, administrative, judicial, and technocratic avenues (most importantly, the Council, the Commission, the ECJ, and the ECB) which are inherently anti-majoritarian.[76] In that way, the EU's formal commitment to the ideal of representative government is emasculated in practice and remains unfulfilled.

In trying to rectify this so-called democratic deficit, it has been suggested that what the EU lacks on the side of representation might be substituted by various institutional channels of *participation* and *deliberation*. After all, the TEU also formally declares that all EU citizens ought to 'have the right to participate in the democratic life of the Union' and 'receive equal attention from [EU] institutions'.[77] In line with such account, the legitimacy of the decisions made on the EU level is to be based on the normative principle of deliberative supranational democracy under which mutual reflection about various preferences is facilitated not through traditional tools of representation, but by means of productive institutional discourse.[78]

Following this logic, some have argued that the preliminary reference mechanism might embody one of the effective avenues for citizens' participation in the EU's decision-making processes. When

Constitutional Dialogue in Europe: A "Political" Dialogue' (2015) 21 *European Journal of Current Legal Issues*, https://webjcli.org/index.php/webjcli/article/view/412/526.

[73]See Claes, note 36 above, p 1342.

[74]A Dyevre, 'Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law?' (2016) 35(1) *Yearbook of European Law* 106.

[75]For a general discussion on the roots of EU's democratic deficit, see G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4(1) *European Law Journal* 5.

[76]Grimm, note 27 above, p 196.

[77]Articles 9–12 TEU.

[78]Ch Joerges and J Neyer, 'Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuffs Sector' (1997) 4(4) *Journal of European Public Policy* 609.

mixed with the ECJ's doctrines of supremacy, direct effect, state liability, and individual freedoms, the Article 267 TFEU procedure was said to empower not only domestic courts, but EU citizens as well (at least in an indirect way).[79] As Mancini and Keeling argued, the involvement of the citizens in the decentralised system of judicial review was a 'dramatically democratising factor' that took the EU law out of the hands of politicians and bureaucrats, and gave it to the people.[80]

Seen from this perspective, the preliminary reference procedure is democratically significant because it gives EU citizens an opportunity to be listened to, to open or reopen a conversation based on arguments about the EU's policies, so that explicit and reasoned justifications for and against them become available for public deliberation. In this way, citizens are empowered to make effective use of their right to participate in ongoing political struggles for determining the proper scope, content, and limits of the EU's regulative actions.[81] To put it differently, this specific form of judicial review ought to give voice to interests which are largely excluded from the EU's political processes and which might not otherwise be heard.[82]

But does the ordinary preliminary reference procedure really meet such a robust democratic narrative? To answer this question, it is first important to highlight that the participative and deliberative reading of the Article 267 TFEU mechanism necessarily presumes that the procedure secures effective participation among *all citizens on equal terms*.[83] In other words, all EU citizens ought to have an equal right to legal contestation of EU's policies by means of the preliminary references submitted to the ECJ. Although this might seem unproblematic at first sight, more critical inspection reveals some serious conceptual difficulties of the democratic account of the procedure.

First and foremost, due to the fuzzy *CILFIT* criteria[84], the domestic courts enjoy wide discretion in deciding whether to pose the reference or not. This allows them to act as 'critical gatekeepers' in the formal dialogue between the citizens and the ECJ.[85] One could argue that the deliberative purpose of the procedure might be fulfilled even in cases where domestic judges decide not to submit the question, but only deal with citizens' arguments without the involvement of the ECJ. However, that line of reasoning seems rather naïve. Due to their primary rationale of solving the disputes before them, ordinary courts often employ a wide range of tactics which allow them to avoid thorough engagement with the arguments of the citizens who ask them to initiate the procedure. Consequently, more often than not, parties to the proceedings will be left out with no answers to their EU law questions. More importantly, their arguments might not even be documented in the judgment's reasoning for the future engagement of the public. This necessarily questions the existence of an equal opportunity for the citizens to even engage in the deliberative discourse about the EU's policies.

There is, however, a deeper concern that challenges the democratising effect of the ordinary preliminary reference procedure. Although the mechanism undeniably enables the political agency of some citizens, one cannot overlook that it has predominantly been used by the ECJ to further a very specific purpose: to enable the pro-integration preferences enhancing the material scope of market freedoms and economic union.

[79]M Shapiro, 'The European Court of Justice: Of Institutions and Democracy' (1998) 32(1) *Israel Law Review* 3, p 42.

[80]G Mancini and D Keeling, 'Democracy and the European Court of Justice' (1994) 57(2) *Modern Law Review* 175, pp 183–84.

[81]Cristina Lafont makes this argument in relation to judicial review in general, see C Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press, 2020), p 238.

[82]G de Búrca 'The Language of Rights and European Integration' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995), p 53.

[83]See Lafont, note 81 above, p 219.

[84]On the problematic functioning of the criteria, see Opinion of Advocate General Bobek in *Consorzio Italian Management e Catania Multiservizi*, C-561/19, EU:C:2021:799.

[85]L Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press, 2002), p 84; D Hübner, 'The Decentralized Enforcement of European Law: National Court Decisions on EU Directives with and without Preliminary Reference Submissions' (2018) 25(12) *Journal of European Public Policy* 1817, p 1821.

Following Scharpf's logic, the use of the mechanism by the ECJ asymmetrically empowers private parties who have a major stake in increased capital or personal mobility as well as the financial and organizational resources to pursue their interests through litigation against laws of the Member States. On the contrary, the ECJ has historically been less responsive to the interests of the *less mobile* majority of European individuals and firms that benefit from existing national laws and regulations.[86] Indeed, preliminary rulings of *Viking* and *Laval* where the ECJ effectively subordinated the right to strike/collective bargaining to the freedom of establishment,[87] or of *Omega* where the Court did not uphold the ban on the video games simulating murder on the basis of the freedoms to sell and buy them, are instructive of such asymmetry.

Indeed, the 'asymmetry' narrative is also supported by number of studies on European legal mobilization, which in short suggest that individuals—'have nots'—are disadvantaged in EU litigation while the corporate 'haves' necessarily come out ahead.[88] Thus, it is claimed that the EU law decentralised enforcement mechanisms increase opportunities for participation of citizens and firms, but only if they possess domestic courts access and sufficient resources to use it.[89] Similarly, Tommaso Pavone illustrated how group of prominent 'Euro-lawyers' managed to lobby some Member States' judges against their domestic governments.[90]

As a result, by now, it is clear that 'integration through law' has been uneven.[91] Accordingly, as with other EU's representative institutions, the preliminary reference mechanism may be criticised for purposefully and systematically favouring economic freedoms that outweigh the personal, communicative, social, and cultural commitments of national policies.[92]

Now, it has been suggested that the fact that the EU's representative institutions (among which we included the preliminary reference procedure) give cross-border market actors privileged platforms should not be perceived as accidental, but rather as illustrative of the EU's material constitution.[93] In her powerful account, Turkuler Isiksel argues that the EU's institutional mechanisms illuminate the distinctive configuration of its system of functional constitutionalism, whose normative claim to authority is founded primarily on the promise of effective government through the free market and economic union rather than on the principle of collective autonomy.[94] In this vein, the so-called democratic deficits are not bugs, but systematic features of the EU.[95]

Indeed, others have argued that the EU's inherently anti-majoritarian processes are *indispensable* for both the affirmation and perpetuation of the EU's economic and monetary order

[86]F Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8 *Socio-Economic Review* 211, p 221.

[87]*The International Transport Workers' Federation v The Finnish Seamen's Union*, C-438/05, EU:C:2007:772; *Laval un Partneri*, C-341/05, EU:C:2007:809.

[88]M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95; L Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press, 2002). But see S Hermansen, T Pavone Tommaso, and L Boulaziz, 'Leveling and Spotlighting: How International Courts Refract Private Litigation to Build Institutional Legitimacy' (February 16, 2023), https://ssrn.com/abstract=4361479 or http://dx.doi.org/10.2139/ssrn.4361479. They argue that the ECJ disbalances such asymmetry by supporting individual claims over businesses boasting larger and more experienced legal teams.

[89]TA Börzel, 'Participation through Law Enforcement: The Case of the European Union' (2006) 39 *Comparative Political Studies* 128.

[90]T Pavone, *The Ghostwriters Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press, 2022).

[91]L Conant, A Hofmann, D Soennecken, and L Vanhala, 'Mobilizing European Law' (2018) 25(9) *Journal of European Public Policy* 1376, p 1378.

[92]Grimm, note 27 above, p 196.

[93]See M Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press, 2021).

[94]T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016), p 132.

[95]Ibid, p 12.

and the particular kind of capitalism it serves.[96] Since at the very heart of the functional constitution of the EU lies a radical conception of private property based on the neo-liberal ideals of 'sound' money, economic freedoms, and 'free' competition, these ideals represent the key parameters by reference to which the validity and soundness of all national policies are determined.[97] Thus, it should not come as a surprise that the powers of the Member States are constrained not by the democratic popular will of 'the people', but rather by the will of 'the market'.[98]

As a result, it seems that the suggested participative and deliberative democratic reading of the Article 267 TFEU mechanism is at odds with the specific material and functional constitution of the EU. At the very least, it is reasonable to argue that the democratic potential of the procedure has been historically weakened by the ECJ which asymmetrically favoured the mobile cohort of the EU's citizens while leaving the voices of those who benefit from the national social-policy choices unheard. In what follows, I will contend that the normative attractivity of the questions submitted by national constitutional courts lies precisely in their institutional capacity to amplify these 'unheard' voices of immobile EU citizens.

B. Rectifying the Asymmetries: A Deliberative Potential of Constitutional Courts' Design

Unlike ordinary courts, constitutional courts have the general power to challenge, oversee, and usually override the acts of elected national parliaments in the name of constitutional supremacy.[99] As we have seen, such capacity alone loses its uniqueness in the matrix of the EU since essentially every court and every administrative agency with or without the help of the ECJ may determine the incompatibility of national parliament's policies with the higher law—the EU law.[100] What has been mostly overlooked, however, is that the 'uniqueness' of the constitutional courts is not only mirrored in the enumeration of their formal powers, but also in their institutional design. Indeed, constitutional courts were specifically designed to represent 'deliberative forums of a distinctive kind' within the communicative processes of deliberative democracy.[101] It is because of this specific design, CCs are said to be better equipped than ordinary courts to perform responsive judicial review—to counter the risks of anti-democratic monopoly power, democratic blind spots, and burdens of legislative inertia.[102]

It is obviously not possible, nor desirable to deeply analyse all the institutional features that ought to secure this deliberative democratic promise of constitutional courts here.[103] Nevertheless, one can highlight at least a few such institutional traits.

First, unlike ordinary courts, CCs 'communicate' through various institutions of participation, intervention, and *amici curiae* with a larger number of privileged and non-privileged political actors. Higher diversity of litigants is supposed to maximise the range of arguments that are part of the formalised constitutional dialogue.[104] In this sense, the different types of constitutional proceedings as well as the relaxed means of formal involvement are intended to contribute to the

[96]E Nanopoulos and F Vergis 'The Inherently Undemocratic EU Democracy' in E Nanopoulos and F Vergis (eds), *The Crisis Behind the Eurocrisis* (Cambridge University Press, 2019), p 122.

[97]AJ Menéndez 'The "Terrible" Functional Constitution of the European Union: "Sound" Money, Economic Freedom(s) and "Free" Competition' in M Goldoni and M Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press, 2023), p 351.

[98]W Streeck, 'Markets and Peoples: Democratic Capitalism and European Integration' (2013) 73 *New Left Review* 63.

[99]For a good account of the CC's role within national states, see V Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, 2009).

[100]Grimm, note 27 above, p 195.

[101]See C Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013). On the overview of the many aspects of deliberative democracy, see R Levy, H Kong, G Orr, and J King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018).

[102]R Dixon. *Responsive Judicial Review* (Oxford University Press, 2023).

[103]See Ch Zurn, *Deliberative Democracy and the Institutions of Judicial Review (*Cambridge University Press, 2007).

[104]Mendes, note 101 above, p 107.

creation of an open, inclusive and participatory discourse on the content of the constitution, in which a wide range of actors—state institutions (government, parliament, administrative bodies, ombudsman, etc), private actors (individuals, corporations, NGOs) and supranational institutions (European Court of Human Rights)—can participate. In other words, constitutional review is meant to institutionalise the diverse democratic debate on the concrete meaning of constitutional norms in the life of society.[105] Importantly enough, not resolving disputes between two parties, but deliberation about the legitimacy of democratic policies is the primary goal of the constitutional review.

Secondly, in comparison with ordinary courts, CCs typically enjoy larger financial and personal resources (including a high number of law clerks or analytical departments) that ought to enable them to carefully consider all the parties' arguments from a rather systemic perspective.[106] Also, CCs usually enjoy greater docket-control discretion so they can filter out the most important cases—this in turn gives them more time to adjudicate. Such benefits ought to help CCs to provide all citizens with explicit and well-reasoned justifications for and against the contested policies that are then made publicly available, so that they can be inspected and challenged with counterarguments potentially leading to a change in public opinion.[107]

Thirdly, the decision making of constitutional courts is of greater interest to the public and media, which places greater demands on the decision making of the constitutional judges in terms of both results and reasoning. It should therefore be more difficult for specialised constitutional courts to avoid 'hard cases' through classical formalistic judicial techniques which once again serves deliberative purposes.[108]

Fourthly, unlike in case of ordinary judges, the appointment procedures for constitutional judges are intended to reflect the higher political importance of their office, and therefore typically involve a wider range of institutions (Senate, judicial council, etc). Moreover, the public and media typically place higher demands on the diversity of justices in terms of both personal characteristics (gender, colour of skin, sexual orientation, etc),[109] as well as professional backgrounds (professional lawyers, academics, politicians, ethicists, philosophers, etc).[110] Thus, the deliberative logic is pursued once again—the higher the diversity of the deliberators, the more inclusive the decision-making process is supposed to be.

Now, the exact scope of the deliberative potential of individual constitutional courts obviously very much depends on the particular mixture of deliberative devices they have at their disposal. For instance—recalling the descriptive part of the Article here—the deliberative potential of Italian Constitutional Court and Belgian Constitutional Court might be lower in comparison to their Czech and German counterparts when it comes to the diversity of political actors they might engage into the constitutional review. Since the former CCs lack jurisdiction to hear individual complaints, their deliberative potential might be limited by their ability to hear arguments originating only from the 'privileged' political institutions, not individual citizens directly.

Nevertheless, the above-described standard characteristics of most of the European constitutional courts are illustrative of the point I am trying to highlight here: constitutional courts are specifically designed to be—at least abstractly—responsive to the interests of the 'unvoiced, marginalised, and insular minorities' within the national democratic process.[111] By having the institutional capacity to

[105]A Farahat 'The German Federal Constitutional Court' in A von Bogdandy, P Huber, and Ch Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press, 2020), p 315.

[106]See M Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press, 2013), p 167.

[107]See Lafont, note 81 above, p 232.

[108]See J Jaegere, *Judicial Review and Strategic Behaviour* (Intersentia, 2019), pp 104–06.

[109]See M Valdini and Ch Shortell, 'Women's Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices' (2016) 69 *Political Research Quarterly* 865.

[110]See A Vermeule, 'Should We Have Lay Justices?' (2007) 59(6) *Stanford Law Review* 1569.

[111]Mendes, note 101 above, p 46.

take all citizens' arguments seriously, constitutional courts aim to generate substantively attractive outcomes that are later subjected to the ongoing process of contestation from the side of other political actors.[112] Accordingly, national constitutional courts represent by their design one of the avenues that generate legitimacy of collective decisions made by the state.

How does such specific deliberative potential of constitutional courts translate in the context of the EU? In his insightful account, Jan Komárek argued that national constitutional courts form 'an important component of communicative arrangements, which generate decisions that remain open to further revision, and are subject to communicatively generated legitimacy' within the space of European Constitutional Democracy.[113] Against this background, constitutional courts' primary role is not to further promote the benefits of those who are well served at the EU level, but to amplify and protect the interests that are systematically ignored by the process of European integration—which are primarily those of the cohort of immobile citizens.[114]

Following this logic (but unlike Komárek[115]), I contend that the constitutional courts' involvement in the preliminary reference procedure might be normatively attractive precisely because of their deliberative institutional design. Unlike ordinary courts that have not been able to rectify EU's democratic 'deficits' through preliminary references, constitutional courts are better equipped to channel through the interests of the less mobile majority of European citizens and firms who mostly benefit from existing national laws, and who might want to challenge the omnipotent pro-integration market logic of the EU's functional constitution.

Indeed, thanks to the mix of various kinds of constitutional proceedings, high diversity on the side of both participants and judges, and larger resources, constitutional courts have better chances of identifying and amplifying the arguments that might outweigh the predominant perspective of the neo-liberal ideals of 'sound' money, economic freedoms, and 'free' competition. This can, in turn, generate overall higher legitimacy of the EU's decision making.

To be sure, I do not claim that preliminary references submitted by constitutional courts are necessarily *participative* and *deliberative*. As it was suggested in the descriptive part above, it matters *which* constitutional courts and in *what context* submit the references. Although some constitutional courts are by design more accessible to a variety of actors and the 'immobile citizens' than others and thus, they might have higher deliberative potential as a starting point, having such preconditions by design does not necessarily mean that they will use the actual potential when making the decision to submit the reference. Following this logic, even if the Polish and German Constitutional Courts might enjoy higher deliberative potential by their institutional design, their references do not have to necessarily fulfil it either due to the 'rule of law crises' context, or due to their inability to be responsive to the arguments of the less privileged EU citizens in the particular case.

As we shall see in the next Part, one needs to put particular references in concrete perspective in order to assess whether constitutional courts managed to engage with and convey the 'still overlooked' arguments to the ECJ in a persuasive manner. I only contend that the above-described

[112]Ibid, p 119.

[113]J Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9(3) *European Constitutional Law Review* 420, p 427.

[114]J Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12(3) *International Journal of Constitutional Law* 525, p 543.

[115]Komárek cautions against impetuous submitting of preliminary references by stating that 'it can be wiser not to engage in direct "dialogue", which could turn into a direct confrontation'. Komárek, note 114 above, p 543. Furthermore, he claims that 'constitutional courts' reluctance to submit preliminary references can result from the ECJ's authoritative style of reasoning' and that it can 'judicial wisdom' not to obediently subordinate oneself to the ECJ's authority. Komárek, note 113 above, pp 541–43. Even though I share Komárek's fear of unreasonably high number open constitutional conflicts, I believe that the described deliberative benefits of CCs' preliminary references might outbalance such risk. Furthermore, I contend that the lack of the ECJ's responsivity towards the concerns of the constitutional courts does not devalues the deliberative potential of their preliminary references itself. In other words, what Komárek criticises is the decision making of the ECJ, not the use of preliminary reference mechanism as such.

trend of constitutional courts asking more and more questions might be perceived as normatively attractive because constitutional courts' involvement in the Article 267 TFEU procedure has the potential to rectify some of the asymmetries present in the EU's decision-making processes. Thus, since constitutional courts have a better capacity than ordinary courts to maximise the deliberative potential of the formal dialogue with the ECJ, their increasing activity in that regard might intensify the political legitimacy of the EU's policies as well.

IV. Assessing Constitutional Courts' Deliberative Performance in Context

So far, I hope to have shown that the constitutional courts' tendency to submit more preliminary references to the ECJ might be perceived as normatively appealing due to their deliberative capacity. In what follows, I try to put this theoretical claim into practical context. Obviously, it is not possible to assess here the deliberative performance of all constitutional courts in all references. Nevertheless, drawing on the contextual analysis of two cases, I will try to argue that the constitutional courts' deliberative potential might evolve in two main directions in practice. The first story shows how that potential can translate into productive questions channelling diverse institutional voices to the ECJ. The second one then demonstrates how constitutional courts leave their institutional potential unfulfilled while ending up not addressing, but rather intensifying the EU's legitimacy concerns sketched out above.

Let us start with the more promising story—the case of the bargaining power of Lithuanian milk farmers.[116] In Lithuania, the raw milk market is quite specific as on the one hand, there were more than 20,000 very small milk producers who usually owned only a handful of cows, while there were only six companies processing and further selling 97% of the raw milk. In Case C-2/18, the Lithuanian Constitutional Court asked the ECJ whether EU law precludes national measures which ought to combat the unfair practices of the dominantly concentrated milk processors (buyers) who would simply inform producers (farmers) of the purchase price of the milk, without prior negotiation, leaving those individual farmers with no option but to accept the conditions imposed.

In the order for preliminary ruling, the Lithuanian constitutional judges communicated the arguments that were presented before them prior to the submission of the question to the ECJ. In particular, the reference included not only the arguments of the group of MPs who challenged the national measure, but also of the rest of the Lithuanian Parliament, the Ministry of Justice, and the Competition Council as well.[117] It is precisely the inclusion of a number of national institutions which makes the involvement of the Lithuanian Constitutional Court in the preliminary reference mechanism normatively attractive. From our deliberative perspective, only by bringing more institutional views to the table, the Constitutional Court increased the ECJ's likelihood of generating a 'good' outcome in a way which would not be possible in the course of the judicial review conducted by an ordinary court.

Nevertheless, what is more important is that the Lithuanian Constitutional Court not only amplified a higher number of institutional voices in general, but that it amplified specific kind of those voices in particular. One cannot overlook that in comparison with the arguments of the other institutions, the Lithuanian Constitutional Court predominantly highlighted the Parliament majority's position that maintained that the freedom of negotiation is not absolute. The Parliament specifically argued that the restrictive measure in question ought to ensure equity and justice because the bargaining power of raw milk producers, on the one hand, and processors or buyers, on the other hand, is unbalanced in favour of the latter.[118] In that regard, constitutional judges described the

[116] *Lietuvos Respublikos Seimo narių grupė v Lietuvos Respublikos Seimas*, C-2/18, EU:C:2019:962.
[117] Ibid, paras 17–26.
[118] Ibid, para 19.

Lithuanian milk market wider context in detail (main actors, history etc.). Moreover, they also referred to the explanatory notes accompanying the draft law on the prohibition of unfair practices and emphasized that one of the purposes of that law was to limit the exercise of disproportionate market power by milk processors and the unfair advantage that operators trading in milk products obtained from a reduction in wholesale prices of such products.[119]

Indeed, this way of communicating the Parliament's majority arguments in the order for preliminary ruling illustrates well how constitutional courts might use the participatory and deliberative potential of the national constitutional review in order to highlight the interests of the less mobile part of the EU's citizens who mostly benefit from national legislation. Even though Lithuanian Constitutional Court was not explicit about its view on the outcome of the question it submitted,[120] it made sure that the voice of the historically marginalised group of EU citizens was heard.

Nevertheless, there are also clear instances where the deliberative potential of the constitutional courts' preliminary references submitted is not fulfilled. The well-known case of *Coman and Others*[121] serves as a good example in that regard. To put it shortly, in that case, the Romanian Constitutional Court asked whether a Member State has an obligation to recognise, for the purpose of granting a right of residence to a national of a non-EU state, the marriage of that national to an EU citizen of the same sex lawfully concluded during the period of genuine residence in another Member State, in accordance with the law of that Member State.[122] Importantly enough, in the order for preliminary ruling, the Romanian constitutional judges mainly argued that if the right of residence were not granted, interference with the freedom of movement of EU's citizens might occur—the possibility of moving in one or another Member State would vary depending on whether provisions of national law allow marriage between persons of the same sex.

Now, it should be first highlighted that unlike the Lithuanian Constitutional Court in the previous example, the Romanian Constitutional Court did not include in its order any observations of other institutions besides the arguments of the parties of the original dispute. Although the constitutional review in that case was not initiated by MPs, but rather by an ordinary court by means of question constitutionality referral (ie a form of 'concrete constitutional review'), the Romanian Constitutional Court could have also obtained submissions from the presidents of the two chambers of the Romanian Parliament, the Romanian government, and the Romanian Advocate of the People in that kind of proceedings as well.[123] The fact that it did not do so—or it did not communicate it in the order for preliminary ruling—suggests a lower deliberative value of that question.

Nevertheless, there is a deeper aspect of that Romanian referral that ultimately diminishes its potential. The normative ideal of participative and deliberative decision making requires that even if some external actors are not officially included in the process of persuasion and thus cannot formally present their arguments, the court nevertheless forms its stance inclusively, empathically, and responsively.[124] Consequently, the referring judges are expected not only to engage with the arguments they heard, but also to imagine hypothetical and unheard arguments that could appear in the public sphere including those of marginalised groups. One cannot but notice that the Romanian constitutional judges presented only one specific paradigm of the question—that of free movement.

Indeed, in its order, the Romanian Constitutional Court emphasised that the issue of non-recognition of same-sex marriages had come about in a situation relating to free movement within

[119]Ibid, para 22.

[120]According to the official ECJ's recommendations to national courts on the use of the preliminary ruling procedure, the referring court 'may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling'. See Recommendations to national courts on the use of the preliminary ruling procedure C 380/01 [2019] OJ C 380.

[121]*Coman and Others*, C-673/16, EU:C:2018:385.

[122]Ibid, press release.

[123]Art 30, Romanian Law No 47 of 1992, On the Organisation and Operation of the Constitutional Court.

[124]Lafont, note 81 above, pp 45–46.

the European Union and cannot be addressed separately. In that way, the Constitutional Court framed the issue as a question of market freedom, not as a question of human rights more broadly.

By highlighting that the case only concerns the EU citizens who have already made use of the freedom of movement and entered the same-sex marriage in the Member States where they 'genuinely' resided, the Romanian judges necessarily left out the concerns of the remaining EU LGBTQ+ citizens who have not decided to live the truly 'cosmopolitan' way of life and have not travelled, worked, and lived in other Member States. In other words, by framing the issue in this very specific way, the Romanian Constitutional Court ignored the interests of the 'bad EU citizens', who unlike the 'good EU citizens', fail to boost the internal market and live by the ideology of the cross-border movement.[125]

As a result, the preliminary reference in *Coman and Others* is illustrative of the way in which constitutional courts may not make use of their participative and deliberative potential. More significantly, it also shows that by means of preliminary references, constitutional courts can further contribute to the reproduction and exacerbation of the dominating EU's paradigm of economic union and market freedoms. Thus, the example uncovers how the lack of constitutional courts' responsivity to the 'unheard voices' can diminish their ability to generate overall higher legitimacy of the EU's decisions.

V. Conclusions: A Yet Unfulfilled Promise?

Even though constitutional courts have always been rather 'special creatures' of the jungle of the European Union, their institutional potential within the EU's legitimating mechanisms has been mostly overlooked both from *descriptive* and *normative* perspectives.

In this Article, I showed that national constitutional courts have developed a third anti-marginalisation tactic as they started to submit more preliminary references to the ECJ. Although constitutional courts, which have asked no question whatsoever, represent a clear minority by now, the differences in the involvement of individual courts in the Article 267 TFEU mechanism remain significant. I argued that the most normatively attractive way to assess such development is to appreciate the unique participative and deliberative institutional design of constitutional review. Indeed, due to their institutional capacity allowing them to be more responsive, constitutional courts can use preliminary references to channel the voices of the less mobile part of EU citizens to the ECJ and thus balance the inherently anti-democratic material constitution of the EU that hinges on the neo-liberal ideals of 'sound' money, economic freedoms, and 'free' competition. Nevertheless, as the contextual analysis of the two cases demonstrated, the legitimacy-enhancing potential of preliminary references translates in contradictory directions in practice. On the one hand, the more promising story of Lithuanian farmers showed that in comparison with their ordinary counterparts, constitutional courts have used the mechanism to amplify specific arguments of various institutional actors – including national parliament – which have in turn provided the ECJ with an opportunity to consider the interests of the less vocal members of the EU's community. On the other hand, the story of *Coman and Others* demonstrated a riskier side of the potential. Instead of addressing the existing asymmetries at the EU level, constitutional courts may by means of preliminary references contribute to the reproduction and exacerbation of the dominating EU's paradigm of the economic union and market freedoms.

Now, it is crucial to emphasise that the specific deliberative reading of the constitutional courts' role in the preliminary reference mechanism presented here does not claim to be something more than it could be. Even if all constitutional courts used their deliberative potential to the fullest in every reference, they could not distort the EU's material constitution based on the specific version

[125]See D Kochenov and U Belavusau, 'After the celebration: Marriage Equality in EU Law Post-*Coman* in Eight Questions and Some Further Thoughts' (2020) 27(5) *Maastricht Journal of European and Comparative Law* 549, p 565.

of market capitalism on their own. Constitutional courts' questions do represent only one part of an iterative sequence of unceasing political communication in the long run.[126] Consequently, even deliberative preliminary questions should be perceived cautiously as mere catalysers of a wider democratic discourse.

Nonetheless, I hope to have shown that it is important to be receptive to the deliberative performance of individual preliminary references in order to be able to assess whether constitutional courts in fact help to generate more legitimate decisions on the EU level, or whether their unique institutional design still remains in the sphere of unfulfilled promise. A detailed 'deliberative' analysis of the (future) individual questions seems to be a rather productive research agenda in that regard.

[126]See Mendes, note 101 above, p 46.

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