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The Functions and Means of Access to National Constitutional Courts and the ECJ in Comparative Perspective

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1. Introduction

Constitutional courts are familiar to many of the Union's Member States; indeed, one can speak of a veritable explosion in the growth of these institutions in recent decades. In parallel, the Court of Justice claims in a public information brochure on its website that 'as with a constitutional court' one of its primary purposes is 'to examine the legality of Community acts'.[2] What does it mean to belong to the genus of a *constitutional* court? Can we detect commonalities in the design of such institutions across Member States and how does the European Court fare in this respect? These are the central questions that this paper seeks to address. Now, the rationales for the establishment of constitutional courts or their actual performance will not take centre stage in the ensuing discussion (but occasional references will be made to this issues). Rather, the focus will be on the characteristic judicial activities that constitutional courts engage in and the paths that lead litigants to their doors. The reason for doing so is that the mission and attributes are vital to understanding the position of these courts in the wider constitutional system. Such positions determine whether, when and by whom constitutional courts can be called upon to uphold their country's constitution. A brief example should suffice here. Under the 1958 French constitution, access to the Conseil constitutionnel was granted only to the president of the republic, the prime minister, and the presidents of the national assembly and the senate. Since these four institutions tended to belong to the same political party, they had very little incentive to exercise their right of access. Between 1959 and 1974, only eight parliamentary enactments were referred for constitutional adjudication. In 1974, however, a constitutional amendment was adopted that granted standing to 60 deputies or 60 senators. MPs reacted with gusto to their newly acquired right and today, most controversial laws will find their way to the Conseil constitutionnel for scrutiny, thereby enhancing its role and influence in the French constitutional system.

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[2] Brochure 'Your questions on the Court of Justice of the European Communities', February 2007 edition, p 3, available at curia.europa.eu.

The remainder of this article is structured as follows. Section 2 provides an overview of the various types of constitutional jurisdiction enjoyed by the Belgian Cour constitutionnelle, the Czech constitutional court, the German Bundesverfassungsgericht, the French Conseil constitutionnel, the Hungarian constitutional court, the Italian Corte costituzionale, the Polish constitutional tribunal and the Spanish Tribunal Constitucional. Explicit attention is devoted to the identification of similarities and possible explanations for differences. Section 3 repeats this exercise for rules on standing. In section 4, the Court of Justice takes centre stage: its mandate and means of access will be considered in the light of the comparative findings of the earlier sections to determine the accuracy of its characterisation as a constitutional court. Section 5 concludes.

2. The functions of national constitutional courts

It seems fitting to commence by defining the term 'constitutional court'. For present purposes, I take this to refer to a specialised institution, which is located outside the ordinary judicial hierarchy and enjoys a monopoly in adjudicating constitutional matters.[3] As such, constitutional courts are associated with a centralized or concentrated system of constitutional adjudication, which may be contrasted with a decentralized or diffused system, under which all courts are empowered to decide constitutional questions. The intellectual heritage of centralized review derives from the work of the philosopher Hans Kelsen, who was involved in the design of the constitutional court in Austria and served as its judge for a number of years.[4] Separate constitutional courts are therefore also referred to as Kelsenian courts.

Constitutional courts in this sense may exercise various types of jurisdiction. The most typical or classical concerns the assessment of acts of parliament against the constitution.[5] Two procedural avenues are associated with limiting the legislature's ability to act: the action for annulment and the preliminary reference procedure.[6] The former enables petitioners to challenge the constitutional validity of a law in the abstract, that is to say, independent of its application to real legal disputes. Such actions are brought directly before the court with constitutional jurisdiction; there is no need to first initiate litigation in the ordinary courts.

[3] Cf L Favoreu, 'La notion de Cour constitutionnelle' in P Zen-Ruffinen and A Auer (eds), *De la Constitution. Etudes en l'honneur de J-F Aubert* (Basel, Helbing 1996) and M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, Oxford 2006) at 392-397.

[4] See in particular H Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution', (1942) 4 Journal of Politics 183.

[5] It should be noted that in some countries, the monopoly of the constitutional court to declare laws unconstitutional only extends to laws adopted after the constitution entered into force. Ordinary courts retain the competence to rule on the constitutionality of legislation pre-dating the constitution. This is the case in Germany, Italy and Spain for instance.

[6] In Bulgaria, Hungary ans Slovakia, the constitutional court can also exercise this duty by means of a procedure enabling it to offer an abstract interpretation of the bare text of the constitution, not tied to any particular legal controversy or its application to a specific situation. This competence will not be further discussed here.

Annulment actions can be *a priori* or *a posteriori*. Preliminary reference procedures require ordinary judges confronted with a question regarding the constitutional validity of a statute they have to apply in the course of ongoing litigation, to stay the proceedings and certify this question to the constitutional court for resolution.

Constitutional courts may also have jurisdiction to resolve competence conflicts. These can be of a vertical nature, so between entities located at different levels of government. They can also be of a horizontal nature, so between entities located at the same level of government. This type of jurisdiction is closely linked with the conception of a constitutional court as a neutral third-party arbiter engaged in triadic dispute resolution.

A third adjudicatory function sees constitutional courts acting as a champion of the individual's rights, safeguarding these against encroachment by the state in specific instances – in short, the aim is on getting justice in the individual case. The main mechanism in this respect is the constitutional complaint, enabling individuals to directly file proceedings in the constitutional court.

Finally, constitutional courts may be involved in controlling or safeguarding democratic processes. As such, they may hear electoral petitions; decide on the constitutionality of a proposed referendum; hear impeachment proceedings against the head of state and adjudge the constitutionality of political parties.

This four-fold division in types of constitutional jurisdiction is arrived at with reference to two elements. First, the type of constitutional provision relied on by the court to deal with the constitutional question. For instance, protecting rights in specific cases is done with reference to those constitutional provisions embodying fundamental rights, to the exclusion of provisions dealing with referendums or elections, which are relevant when the court is protecting democratic processes. Second, the reason why, and the context within which, the constitutional question has reached the court. Given the nature of these two elements, it is apparent that the four functions listed above are not mutually exclusive. Courts may exercise more than one function at any given time, whereby one of the functions may be dominant, and the other, ancillary.

So what can be said about the scope of constitutional jurisdiction of the courts considered here? The table below offers a graphic presentation:

Types of constitutional jurisdiction	**BE**	**FR**	**DE**	**IT**	**ES**	**HU***	**PL**	**CS**
Annulment actions	X	X (only *a priori*)	X		X	X	X	X
Preliminary references	X	X	X	X	X	X	X	X
Vertical conflict resolution	**		X	X	X			***
Horizontal conflict resolution		X	X	X	X		X	
Constitutional complaint			X		X	X	X	X
Electoral disputes		X	X					X
Impeachment			X	X		X		X
Referendums		X		X				X****
Proscription of political parties			X				X	X

* This table is still based on the old constitution, since the new law on the constitutional court has not yet been adopted.

** No special procedure for the judicial resolution of disputes over the vertical division of competences exists; such claims can be brought before the constitutional court by means of an action for annulment or using the preliminary reference procedure.

*** The Czech Republic is not a federation, but the constitutional court has a small part to play in vertical dispute resolution as it may adjudicate complaints by municipalities and regions asserting that the central state has infringed their constitutional right to self-government.

**** The constitutional court was granted jurisdiction to adjudicate petitions brought in connection with the organisation of the referendum on accession of the Czech Republic to the EU. This jurisdiction is no longer salient today.

At this juncture, a number of comments are warranted. First, while none of the constitutional courts enjoys all of the functions outlined above, their portfolios all extend beyond controlling whether acts of parliament stay within constitutional boundaries. In particular, of our sample, many courts are involved in deciding competence conflicts and protecting citizens' fundamental rights. The reasons for this state of affairs may be explained as follows. One function of a constitution is to define the competences of each of the state's entities. It is clear that there may be disputes concerning the precise ambit of those powers and that there may consequently be a need for an arbiter, like an independent court, to resolve conflicts. This line of reasoning is particularly relevant in (quasi-)federal states, where collisions in the competences of the sub-units and those of the central bodies seem unavoidable.[7] Moving to the adjudication of alleged infringements of constitutional rights in specific cases, the constitutional courts competent to receive constitutional complaint are all located in countries seeking to leave their fascist, authoritarian or communist past behind – and the horrors this had entailed – and transition to democracy. There was a strongly felt sensitivity to human rights as these had often had been trampled during the previous regime, and a keen desire to avoid backsliding. In this context, the mechanism of the constitutional complaint could serve a number of useful functions. It indicated to the citizens that the long lists of rights included in the new constitution would be meaningful and that their enforcement was not dependent on

[7] See M Shapiro, 'The Success of Judicial Review and Democracy', in M Shapiro and A Stone Sweet, *On Law, Politics & Judicialization* (Oxford University Press, Oxford 2002).

the state authorities that many citizens had come to distrust. For public actors, the complaint procedure enabled the court to explain how they ought to conduct themselves in accordance with the constitution in the daily exercise of their responsibilities.

Second, the procedural palette ranges from the rather basic to the highly sophistiated. Thus, on the one hand we have Belgium, where only annulment actions and preliminary references are provided for and these procedures are used not only for controlling the legislature, but also for adjudicating jurisdictional conflicts between the different state levels. On the other hand, we find Germany, with specially designed procedures matching the multiple types of jurisdiction of the Bundesverfassungsgericht. In practice, however, the distinction is arguably not as stark. There is an evolution towards consolidation in that some procedures are used more frequently than others and/or are used in a wider variety of situations than the drafters contemplated. For instance, in none of the countries that allow their constitutional court to adjudicate presidential impeachment cases has this procedure actually been initiated. For an example of the second type of consolidation, while the special procedure for vertical conflict resolution in Germany was quite popular in the early years of the Bundesverfassungsgericht's existence, the federation and the states now tend to use the action for annulment to resolve competence conflicts.[8]

Third, the main procedural similarity is the availability of the preliminary reference mechanism in all countries under study. This procedure is intimately linked to the logic of a centralised system of constitutional adjudication, whereby only the constitutional court may decide questions of constitutional law. It provides the connection between this court and the ordinary judiciary. As such, the availability of this procedure raises important issues concening the relationship between the two judicial branches, in addition to the relationship between the constitutional court and the legislature as a natural consequence of the former scrutinizing the latter's enactments. Salient issues in this respect are whether the constitutional court can correct improperly framed references of ordinary courts; whether it judges the relevance or appropriateness of the question certified and whether ordinary courts respect the authority of constitutional court judgments when disposing of the case at hand and in similar future cases.

Fourth, in rare cases constitutional courts can also perform non-constitutional functions. A clear example can be found in the Czech Republic, where sub-statutory norms may be

[8] See also W Heun, *The Constitution of Germany – A Contextual Analysis* (Hart Publishing, Oxford 2011), 73.

challenged before the constitutional court, which are measured not only as against the constitution, but also examined for compliance with statutes.[9]

A couple of further observations are due, which cannot be directly deduced from the above table, yet nevertheless warrant mention here for an acurate understanding of the jurisdiction of constitutional courts. Thus, their mandates are not static. They evolve over time. A good illustration is offered by the experience of the Belgian court. Its establishment was prompted by the federalisation of the Belgian state in the 1970s and its original mandate of the court was accordingly confined to the adjudication of jurisdictional conflicts among the three levels of government (the federal state, the communities and the regions). The court was aptly baptized as the *Arbitragehof* (Court of Arbitration). In a second wave of federalization, competences with regard to education were transferred from the central government to the communities and the *Arbitragehof* acquired the competence to assess laws against the rights and liberties in respect of education and the principles of equality and non-discrimination. The court proceeded to extend its jurisdiction through the prism of these two principles, holding that it could rule on alleged discrimination in the exercise of any of the fundamental rights guaranteed in the constitution.[10] This judicial interpretation was confirmed by the legislature in 2003, when the set of constitutional reference norms was officially broadened to include all the fundamental rights and liberties laid down in the constitution, the principle of legality in fiscal matters and the principle of the equal treatment of foreigners.[11] Finally, during the constitutional revision of 2007, the name of the court was changed from *Arbitragehof* to *Grondwettelijk Hof* (Constitutional Court) to better reflect its actual mandate.

From a more normative perspective, we need to reflect on what believe ought to be the main purpose of judicial constitutional review and how the real legal organization and practical operation of such review compares to this. So, in his book on constitutional courts, Victor Ferreres Comella speaks about the 'purity' of such courts, which concerns the relative prominence of constitutional review of legislation within the overall portfolio of the constitutional court, whereby purity is clearly seen as a desirable feature.[12] Similarly, Ginsburg and Elkins talk about the 'ancillary functions' of constitutional courts,[13] which they

[9] Art 87(1) of the Czech constitution and §64(2) and (3) of the act on the constitutional court.
[10] Arbitragehof nr 23/1989 of 13 October 1989.
[11] Title II of the Belgian constitution, entitled 'The Belgians and their rights' and Articles 170 and 191 of the Belgian constitution, respectively.
Art 191 of the Belgian constitution.
[12] V Ferreres Comella, *Constitutional Courts & Democratic Values* (Yale University Press, New Haven, 2009), 6-7. He fears that the more the constitutional court is charged with other tasks, the less time and energy it will have for this core task of constitutional review and this may result in the advantages he associates with the centralized model not being fully realized.
[13] T Ginsburg and Z Elkins, 'Ancillary Powers of Constitutional Courts', (2009) 87 Texas Law Review 1431.

take to refer to those tasks in addition to the core mandate of controlling the legislature. These perspectives are understandable: for national constitutional courts, this is considered their 'defining function'.[14] Yet, in practice, this function – and the associated modes of access, annulment actions or preliminary references – is not always responsible for the bulk of the workload of constitutional courts. Regrettably, there are no precise data available for all of the courts covering the same period that enables us to draw any conclusions about the prominence of particular functions as compared to others. All that will be mentioned here is that constitutional courts are generally keen to emphasize their role as a guardian of fundamental rights.

3. Means of accessing constitutional courts

Recall the example involving the French Conseil constitutionnel in the introduction to this article: it showed that even if a constitutional court can in principle exercise a certain type of jurisdiction, its ability to actually do so is dependent on the existence of litigants willing to submit an issue to constitutional adjudication. While political or financial incentives undoubtedly have a part to play here, a vital prerequisite is that the party concerned has a legal right of audience with the court. This section accordingly inquires who is authorized to trigger the various types of jurisdiction just identified.

The four tables below offer a comparative overview of the standing rules in the selected country, divided per procedure.

[14] Ibid, at 1432.

Placing limits on the legislature's exercise of powers	BE	FR	DE	IT	ES	HU	PL	CS
Actions for annulment	- Central, regional or community government - Central, regional or community parliament (2/3 majority) - Individual	- President - PM - Presidents of lower and upper house - 60 MPs of either house *Only a priori*	- Federal government - Land government - 1/3 MPs lower house	n/a	- PM - 50 MPs - Government or parliament of the autonomous communities - Ombudsman	- Everyone	- President - PM - Presidents of lower and upper house - 50 MPs lower house - 30 MPs upper house - Chief justice - Chief justice admin court - Public prosecutor-general - President central audit body - Ombudsman	- President - 40 MPs lower house - 17 MPs upper house - PM
Preliminary references	- Courts	- Courts	- Courts	- Courts	- Courts	- Courts	- Courts	- Courts

Protecting rights in specific cases	BE	FR	DE	IT	ES	HU	PL	CS
Constitutional complaint procedure	n/a	n/a	- Natural persons - Legal persons	n/a	- Natural persons - Legal persons - Ombudsman	- Anyone	- Natural persons - Legal persons	- Natural persons - Legal persons

Resolving competence conflicts	BE	FR	DE	IT	ES	HU	PL	CS
Vertical conflict resolution	n/a (see actions for annulment table)	n/a	- Federal government - Land government	- State - Regions - Provinces of Trento and Bolzano	- Central government - Executive bodies of the autonomous communities	n/a	n/a	n/a
Horizontal conflict resolution	n/a	- PM - President national assembly	- President - Federal government - Lower house - Upper house - Bodies vested with independent constitutional rights	- Government - Lower house - Upper house - Ordinary courts - President - PM - Ministers - Superior council of the judiciary - Council of state - Council of economy and labour	- Government - Lower house - Upper house - General council for the judiciary	n/a	- President - PM - Presidents of lower and upper house - 50 MPs lower house - 30 MPs upper house - Chief justice - Chief justice admin court - Public prosecutor-general - President central audit body - Ombudsman	n/a

Safeguarding democratic processes	BE	FR	DE	IT	ES	HU	PL	CS
Electoral disputes	n/a	- Registered voters - Candidates	- Affected MP -Parliamentary faction (of at least 1/10 of total MPs) - Individual voter (if supported by 100 voters)	n/a	n/a	n/a	n/a	- Affected MP - Affected political party - Individual voter
Impeachment	n/a	n/a	- Lower house (2/3 majority vote) - Upper house (2/3 majority vote)	- Parliament in joint session (absolute majority vote)	n/a	- Parliament (2/3 majority vote)	n/a	- Upper house
Referendums	n/a	- Individual voters - State officials	n/a	- Individual voters - Regional government	n/a	n/a	n/a	n/a
Proscribing political parties	n/a	n/a	- Lower house - Upper house - Federal government	n/a	n/a	n/a	- President - PM - Presidents of lower and upper house - 50 MPs lower house - 30 MPs upper house - Chief justice - Chief justice admin court - Public prosecutor-general - President central audit body - Ombudsman - Warsaw district court	- Affected political party

There will be no attempt to summarize or comment upon every aspect of the standing rules presented in the tables above. Instead, a few salient issues will be identified. To the extent that the legal systems recognise the same type of procedure, there is a considerable degree of similarity in the make-up of the list of eligible petitioners. Or, perhaps more accurately, there seems to be a common basis in terms of composition, with some countries at times being more generous in granting standing. This is particularly apparent when considering annulment actions:[15] all of the systems accord standing to the government (including federated governments in the federal systems) and a certain proportion of parliamentarians.[16] As for this last group, their standing is often considered to make the relevant procedure more politically charged. In practice, the MPs concerned tend to belong to the opposition and their decision to initiate judicial constitutional review will not always or only be inspired by considerations of general public concern in making sure that their country's constitution is respected. In Germany and Belgium, no other public institutions can initiate annulment actions. The Spanish rules are somewhat more generous and also permit the Ombudsman to go to court.

[15] But see also the column dealing with *locus standi* rules for the purposes of horizontal conflict resolution.
[16] That said, it should be noted that the proportion of MPs, and hence their ease of access, is not the same across the countries. For example, the Belgian rules stipulate a threshold of two-thirds of all MPs, whereas in Spain, the signatures of 50 out of a total of at least 300 MPs (or approximately 16 per cent) suffices for the initiation of proceedings.

This extension 'can be understood as a kind of compensation for the fact that the individuals are not included amongst the legitimated parties'.[17] In contrast, the catalogue of potential litigants is far more comprehensive in the three central-eastern European countries. Now, this could suggest that patterns of accessibility in actions for annulment can be roughly organized along an east-west divide, whereby the younger constitutional systems in central and eastern Europe are more forthcoming in granting access to the court and for the purpose of challenging a broader palette of legal norms. There is a certain truth to this: ombudsmen, audit bodies or supreme courts are more likely to have the power to initiate actions for annulment in central and eastern Europe than in western Europe.[18] These choices can to a large extent be explained by the reasons prompting the establishment of a constitutional court in those countries, the desire to ensure the utmost respect for the rule of law and take the commitment to fundamental rights protection seriously. Yet, some caution is also due: it should be realized that this divide is a crude one. For instance, Estonia only allows its legal chancellor to initiate annulment actions,[19] whereas Belgium has extended access to 'any person that can prove an interest'.[20]

Moving from public institutions to private individuals, they usually enjoy direct access to the constitutional court only in the context of constitutional complaints and electoral disputes. Their right to petition the constitutional court under the former procedure is qualified by admissibility conditions: petitions must first try to obtain redress using the ordinary judicial process and bring their complaint within a certain time limit. Once these hurdles are crossed, constitutional complaints may in certain circumstances be used to impugn legislative acts as unconstitutional,[21] but it is more common for individuals to argue before an ordinary court that a given law is unconstitutional and ask for the initiation of the preliminary reference procedure.

Two notable exceptions to this trend are Belgium and Hungary, which contemplate the possibility for individuals to initiate annulment actions. As just mentioned, in Belgium, any

[17] A Medrano, 'Active Legitimization in Constitutional Proceedings: The Spanish Case', Spanish Report for the 26th International Congress of Comparative Law, Brisbane, Austrialia 2002. The Tribunal Constitucional has held that individuals cannot act as petitioners in actions for annulment, even if they act on behalf of a collective or a group, sentencia 48/1980 and sentencia 76/1980.

[18] For instance, ombudsmen are granted standing in the context of annulment actions also in Latvia, Portugal, Romania and Slovenia; audit bodies in Latvia and Slovakia; and supreme courts in Bulgaria and Slovenia.

[19] § 142 of the Estonian constitution and §6(1)(1) constitutional review court procedure act.

[20] Art 142 of the Belgian constitution.

[21] For instance, in Germany this is possible provided that the legislative act did not require any implementation by an executive act and in Spain, the constitutional tribunal may of its own motion extend the examination from the contested judgment or executive decision to the law that formed the basis for the judgment or decision under scrutiny. In Poland and Hungary, however, constitutional complaints are directed squarely against the legislative act constituting the basis for a specific decision or judgment, whereby the latter merely serve as the entry ticket to gain admission to the constitutional court.

person that can prove an interest may refer matters to the constitutional court.[22] The constitutional legislature has intentionally refrained from defining what qualifies as an 'interest' in the context of this procedure. It though it better to leave this for the constitutional court to flesh out in its case law, thereby giving it some measure of control over the size of its docket.[23] The court has duly done so. A guiding principle in this respect has been the need to avoid turning the procedure into an *actio popularis*.[24] An individual is granted standing if she can demonstrate that she is liable to be personally, directly[25] and unfavourably[26] affected by the law complained of. The petitioner's interest must further be current and legal and cannot be of a moral nature. In Hungary, the constitution grants 'everyone' the right to initiate proceedings challenging legal norms and, crucially, this route of access to the constitutional court is unconditional: there are no further standing rules or conditions that must be complied with.[27] In other words, the Hungarian procedure is a true *actio popularis*. Reflecting on the practical significance of this procedure, a commentator has noted:

> [I]t is a special type of abstract and posterior review not requiring any individual standing but considering the individual person as a trustee of the public good. In this invention lies one of Hungary's major contributions to the spectrum of the constitutional judiciary.[28]

Concern about the workload generated by this type of jurisdiction has however led to calls for a revision of the procedure, also from within the court, in particular in the form of the introduction of stricter admissibility criteria.

This brings us to another, more general point. The constitutional courts discussed here officially have no control over their docket in the same way that the US Supreme Court does, which can decide whether or not to grant *certiorari* and consider a case on its merits. This means litigants are important in determining which type of constitutional jurisdiction is the most salient in practice. For example, citizens flock in overwhelming numbers to the courts in the quest for the judicial vindication of their constitutional rights – a development that was

[22] Art 142 third indent of the Belgian constitution.
[23] Memorie van Toelichting, Parl. St., Senaat, G.Z. 1988-1989, nr 483/1, 5; verslag Lallemand and Baert, Parl. St., Senaat, G.Z. 1988-1989, nr 483/2, 46 and 63, verslag Onkelinx and Merckx-Van Goey, Parl. St., Kamer, G.Z. 1988-1989, nr 633/4, 6, 13, 21 and 22.
[24] This is standing case law. One of the first pronouncements of this view can be found in Arbitragehof nr 9/89 (S) of 27 April 1989, B.3.
[25] An interest is considered to be direct if there is a sufficiently causal link between the contested legal norm and the allegedly suffered disadvantage, Arbitragehof nr 85/95 of 14 December 1995, B.1.7.
[26] According to the case law of the Court, for the position of the applicant to be unfavourably affected, it is not relevant that the new situation is less unfavourable than the previous state of affairs: Arbitragehof nr 72/93 of 7 October 1993, B.1.1 to B.1.3; Arbitragehof nr 26/90 of 14 July 1990.
[27] Art 32/a (3) Hungarian constitution and Art 1(b) read together with Art 21(2) Act XXXII of 1989 on the Constitutional Court.
[28] G Brunner, 'Structure and Proceedings of the Hungarian Constitutional Judiciary' in L Solyom and G Brunner, *Constitutional Judiciary in a New Democracy – The Hungarian Constitutional Court* (The University of Michigan Press, Ann Arbor 2000), 96.

arguably not intended or expected by the drafters of the constitution or the acts on the constitutional courts, as may be deduced from the scant regulation of aspects of this procedure when compared to the far more numerous provisions regulating the action for annulment or preliminary reference mechanism. More lenient access rules typically translate into a fuller case list, which may also include a higher proportion of politically sensitive issues: if it is relatively easy to access the constitutional court for a relatively wide set of organs, then this 'makes it more likely that politicians will be challenged in court should they fail to abide by constitutional limitation'.[29] In response, the constitutional courts have developed techniques to exert some control over their docket. For instance, many have devised simplified procedures to dispose of constitutional complaints, which often includes letting smaller sections of the court take decisions on admissibility and a progressive tightening of admissibility criteria in the case law. In addition, constitutional courts generally have discretion in deciding when to hand down their decisions. While this may be criticized from the perspective of legal certainty, it can give the constitutional court some flexibility in dealing with political 'hot potatoes'. Consider the following comment about the practice of the Spanish Tribunal Constitucional:

> Were it not for the significant delay involved with deciding most cases (up to ten years from the filing of an appeal), such effects [those of the court's ruling on public opinion] could substantially threaten the Court's legitimacy. Yet, since so much time passes, the original controversy is diminished, and the Court is able to deliberate without the pressure of political consequences for its decisions.[30]

The postponement of judgments can thus be used as a strategic tool to regulate the court's influence on constitutional questions. Whether this is considered desirable is of course a different question: in particular as their jurisdiction to control the legislature by means of the action for annulment, the argument can also be made that the whole point of having a separate constitutional court (as opposed to going the decentralization route), is precisely so that it will confront allegations of perceived unconstitutionality head-on.[31]

4. The ECJ as a constitutional court: jurisdiction and access

This section moves the discussion from a horizontal comparative analysis to a vertical one. How does the ECJ compare to the national constitutional courts when it comes to matters of institutional design? To be sure, the Court of Justice was not created as a constitutional court

[29] T Ginsburg, *Judicial Review in New Democracies – Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge 2003) 36-37.
[30] E Guillén Lopez, 'Judicial Review in Spain: The Constitutional Court', (2008) 41 Loyola of Los Angeles Law Review 529, 546.
[31] Along those lines: see V Ferreres Comella, *Constitutional Courts & Democratic Values – A European Perspective* (Yale University Press, New Haven 2009) in particular chapter 7 (Overcoming Judicial Timidity).

and mandated to uphold the European treaties as the EU's constitution.[32] In fact, at the time of its inception, the constitutional court was still a largely unfamiliar institution in the original six Member States. Today, matters are rather different. It is by now quite generally accepted that the Court of Justice can also be labelled as a constitutional court and that the EU has its own constitution and the Court itself has been a key catalyst in spreading these views.[33] Similar evolutions in role and conception have also taken place at the national level. Arguably the best example is still Belgium, where, as we have seen, the constitutional court was initially cast in the limited role of a third party arbiter in the event of competence disputes between the various levels of government in the newly federated state before morphing into a fully-fledged constitutional court.

4.1. Issues of jurisdiction

The starting-point for an examination of the judicial activities engaged in by the ECJ is Article 19(1) TEU, providing that the Court 'shall ensure that in the interpretation and application of the Treaties the law is observed'. For a more specific understanding of the forms of adjudication we need also consider the various procedures that give access to the Court, laid down in the TFEU. Familiarity with the basics of each of these procedures will be presumed and they will accordingly not be elaborated below, except for where necessary for the purposes of the comparison with national constitutional courts.

Using the four-fold division in types of constitutional jurisdiction developed in section 2, it is clear that the ECJ is also involved in controlling the legislature by reviewing Union instruments for compatibility with the European constitution. It does so by means of the same procedures that are available for this purpose at the national level, that is to say annulment actions pursuant to Article 263 TFEU and the preliminary reference procedure found in Article 267 TFEU.[34] Example of the use of the former procedure to this effect are the challenge by the Netherlands to the biodiversity directive for infringing the right to human

[32] Cf M Shapiro, 'The European Court of Justice' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford 1999) and M Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court' in I Pernice, J Kokott and C Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos Publishers, 2006), 33.

[33] On the judicial characterization of the Treaties as a European constitution, see Opinion 1/76 *Laying-up Fund* [1977] ECR 741 [12]; Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339; Opinion 1/91 *EEA Agreement* [1991] ECR I-6079; Case C-15/00 *Commission v European Investment Bank* [2003] ECR I-7281 [75]; Joined Cases C-420/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 [281].

[34] It should be noted that prior to the entry into force of the Lisbon Treaty, the jurisdiction of the ECJ in relation to acts adopted under the second and third pillars was extremely limited, see also A Hinarejos, *Judicial Control in the European Union – Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press, Oxford 2009). The position of the Court at that moment was different from that in which national constitutional courts found themselves: while the latter may practice restraint as regards laws dealing with similar topics (for instance by means of a stronger presumption of constitutionality or a more relaxed standard of review), they do in principle have jurisdiction.

dignity and the petition by the Parliament against the directive on family reunification for violating the right to family life;[35] the latter procedure was successfully invoked in *Schecke* for instance.[36]

The European Court is also competent to, and actively engaged in, adjudicating competence conflicts, both those of a vertical and of a horizontal nature. Challenges based on an infringement of the allocation of authority between the European and the national level may be brought to the Court using the action of annulment, the preliminary reference procedure or the infringement procedure.[37] A well-known example is the judgment in *Tobacco Advertising*.[38] Horizontal boundary conflicts usually reach the Court of Justice by means of the annulment action, with reliance placed on the notion of institutional balance between Council, Parliament and the Commission. The judgment in *Meroni* is a classic example.[39]

Moving on, while the Court of Justice in its case law has repeatedly asserted that it is a guardian of the fundamental rights of EU citizens, there is no European equivalent of the constitutional complaint procedure. In practice, it primarily falls to the national courts to protect the rights that citizens derive from EU law and to the extent that the ECJ is involved, this is through the preliminary reference procedure: individuals cannot directly petition the Court for this particular purpose.

Lastly, the jurisdiction of the European Court can also be said to include democratic aspects.[40] Pursuant to Article 247 TFEU, the ECJ may retire a Commissioner if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. This can be seen as a European equivalent to the adjudication of presidential impeachment cases that certain national constitutional courts are involved in.

Turning to a comparative assessment, a first point of note is that the above description is under-inclusive. While the Court can certainly be said to exercise various functions common

[35] Case C-377/98 *The Netherlands v Council and Parliament* [2001] ECR I-7079 and Case C-540/03 *European Parliament v Council* [2006] ECR I-5769.
[36] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert* v. *Land Hessen* [2010] ECR I-0000.
[37] A more detailed comparison between this function of the ECJ and federal constitutional courts can be found in M Claes and M de Visser, 'The Court of Justice of the EU as a federal constitutional court? Some observations from a comparative perspective', forthcoming.
[38] Case C-376/98 *Germany v Parliament and Council ('Tobacco Advertising')* [2000] ECR I-8419.
[39] Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR 133.
[40] See also the proposal made by Prof Weiler reported in F Hoffmeister, 'The Constitutional Functions of the European Court of Justice', in I Pernice, J Kokott and C Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos Publishers, 2006) at 144: '[The Court] could use its powers as an arbiter between the institutions to call for more democratic practices within the institutions. ECJ judgments could lead, for example, to enhanced transparency in law-making and a revision of the comitology system'.

to national constitutional courts, it does more than that. In particular, an important task is to provide unity in the interpretation of Union law so as to prevent the emergence of different understandings and applications of the legal rules across the Member States, primarily by means of the preliminary reference procedure.[41] Now, Joseph Weiler has observed that technically every time the ECJ is called upon to interpret the relevant European treaties which are constitutive of the Union, it engages in constitutional review.[42] As such, safeguarding the unity and coherence of EU law could be conceived as an aspect of constitutional adjudication. However, such a broad understanding of constitutional jurisdiction goes beyond the approach taken at the national level in relation to constitutional courts. Two factors account for the difference in understanding. The first is related to the debate on whether the European treaties can be considered as a 'constitution' in the way this concept is used within the nation-state, given that it includes provisions that are not seen as typical of those that appear in national constitution. A broader understanding of the notion constitution concomitantly leads to a broader understanding of the scope of constitutional jurisdiction, which may then encompass functions that at the national level are entrusted to the ordinary judiciary, in particular the supreme court(s). Second, national constitutional courts may of course help to guarantee the unity of national law, but they cannot avail themselves of a dedicated procedure for this purpose: the national preliminary reference procedure is intended to answer questions of unconstitutionality and any interpretation of constitutional reference standards is incidental in this context, and clearly not the aim of the exercise. In light of the comparative dimension pursued here, it is submitted that the better view is to consider the need to safeguard unity as belonging to the non-constitutional jurisdiction of the ECJ. There is thus a clear difference with national constitutional courts, which only rarely perform non-constitutional functions. Moreover, to the extent that they can do so, those aspects of their activity are clearly of an ancillary nature. Conversely, there is no real or supposed hierarchy between the constitutional duties of the ECJ and its role as a guarantor of consistency: both are perceived and treated as equally important.[43] In this light, the ECJ could be described, using the terminology of Louis Favoreu, as a 'part-time constitutional court'.[44]

Second, bringing the focus on the constitutional jurisdiction of the ECJ, it should be reiterated that many of the adjudicatory functions that national constitutional courts engage in, can also be exercised by the European Court. As such there is a large degree of similarity – at the

[41] The ECJ also operates in other (non-constitutional) guises, for instance as administrative court when reviewing decisions adopted by the Commission in the field of competition law, or as an international court.
[42] J Weiler, 'Epilogue: The Après Nice' in G de Burca and J Weiler (eds), *The European Court of Justice* (Oxford University Press, Oxford 2001) at 220.
[43] See e.g. the information brochure mentioned in (n 2) and also B Vesterdorf, 'A Constitutional Court for the EU?', (2006) 4 International Journal of Constitutional Law 607, 607.
[44] L Favoreu, 'La notion de Cour constitutionnelle' in P Zen-Ruffinen and A Auer (eds), *De la Constitution. Etudes en l'honneur de J-F Aubert* (Basel, Helbing 1996).

formal level at least. Now, the archetypical function of a constitutional court is generally taken to be that of keeping the legislature within its constitutional confines, but we have also seen that in practice, this is not always the essential function for all the national constitutional courts surveyed here. For the European Court of Justice, the most salient constitutional function is arguably the resolution of vertical competence conflicts, so the demarcation of authority between the Union and the Member States. Indeed, the Court does not have a track record of controlling the European legislature that is as well-developed as the majority of national constitutional courts and from this comparative perspective, there is certainly room for improvement in this respect. Two reasons can be adduced to explain the salience of competence conflicts in the European Court's docket. On the one hand, the vertical division of competences in those Member States that have a (quasi)federal structure is quite settled. Disputes tend to be resolved by political instead of judicial means. However, if and when there are changes to the constitutional allocation of competences (either through a constitutional amendment or as a result of case law), there may be an increase in litigation to determine the precise power and position of each of the levels, again followed by periods of relative calm because a new competence equilibrium has been established.[45] The conditions prevailing within the European system are more akin to the former than to the latter scenario. The division of authority between the national and the Union level is continuously developing. In addition, the relevant provisions in the Treaties are not always particularly clear, leaving more room for competing interpretations of the scope of competences of each of the level which are no longer very amenable to a political solution. On the other hand, the ECJ may also have an intrinsic motivation to favour competence disputes over controlling the legislature. Consider the following statement by Martin Shapiro:

> If it is true that strong judicial review courts in general, and the ECJ in particular, gain much of their institutional advantage from their near indispensability in the operation of areal division-of-powers systems, decisions that essentially 'oppose' co-equal branches of their own government are likely to be the most risky. They tend towards high visibility, and they escape the areal dynamic in which the Court receives the support of all other Member States against the rule-breaking of any one. Court versus Council is a more dangerous game than Court versus one Member State. Court cheered on by Council minority versus Council majority may be the most dangerous

[45] For instance, in Italy there has been a marked increase in the proportion of vertical competence disputes in the docket of the constitutional court in the wake of the 2001 'quasi-federal' state reform, see T Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?', (2008) 3 Journal of Comparative Law 100, 114, who mentions an increase from 2% in 2002 to 24.41% in 2006. See also L Del Duca and P Del Duca, 'An Italian Federalism? – The State, its Institutions and National Culture as Rule of Law Guarantor', (2006) 54 American Journal of Comparative Law 799 at 815.

game of all, even when the Court purports to defend the Member States against Council overreaching.[46]

Turning to the procedures that give access to the ECJ, a relatively basic set is provided for, positioning the European system formally closer to the Belgian than to the detailed German system. The annulment action and the preliminary reference procedure can be seen as 'jacks-of-all-trades', used not only for controlling the legislature, but also for the adjudication of competence disputes (as well as for the exercise of non-constitutional functions). The fact of the availability of this second procedure is another similarity shared with national constitutional courts.[47] Having said that, in line with what was remarked earlier, there is a difference in the use and function of the preliminary reference procedure. At the national level, it is conceived as an instrument to query the constitutionality of a law while safeguarding the monopoly of the constitutional court to decide such questions. At the EU level, conversely, the preliminary reference is the primary tool by means of which the Court of Justice seeks to guarantee the uniform interpretation of Union law.[48]

4.2. Issues of access

Our exploration of the functions of the ECJ must, as it was done for national constitutional courts, be complemented by a foray into the rules on *locus standi* to uncover which organs can use the pathways that lead to the Kirchberg.

The observations below will concentrate on the annulment action, for two related reasons. First, because this procedure enables litigants to directly access the ECJ, as opposed to being dependent on the willingness of a national court to send a preliminary reference; and second, because of the available direct avenues, the annulment action is used most frequently and in relation to various purposes of constitutional adjudication, including that of keeping the legislature in check.

Under Article 263 TFEU, there are two categories of public institutions enjoying a right of referral: Member States, the European Parliament, Council and Commission enjoy an unqualified right of access, while the Court of Auditors, the European Central Bank and the

[46] M Shapiro, 'The European Court of Justice' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford 1999), 343.

[47] This also raises the question of whether to have a filter in this procedure and if so, what form this filter should take. See e.g. P Craig, *EU Administrative Law* (Oxford University Press, Oxford 2006) 301-304. The use of strict(er) admissibility criteria would fit in with similar tendencies in a number of Member States, such as Germany and Italy.

[48] While questions regarding the validity of Union measures can also be raised through this procedure, interpretation questions – which are more closely related to the need to safeguard consistency – outnumber the references quering the validity of Union measures.

Committee of the Regions have standing only to vindicate infringements of their prerogatives. Compared to the state of affairs at the national level, the Union system holds the middle ground between the generally more closed western approach and the generally more open estern approach. The current state of play has been the result of a gradual development, whereby the 1957 version of the rules on *locus standi* was rather more restrictive than is the case today as far as the public institutions are concerned. While there are also instances at the national level of changes to the access rules – think for instance of the 1974 amendment of the French constitution, giving a proportion of MPs standing before the Conseil constitutionnel – these are relatively uncommon. Indeed, the developments at the European level exhibit a greater degree of dynamism. To the extent that this would continue, a word of caution may be in order. To be sure, access to court is an important constitutional principle, that warrants due respect. Yet, certain limits may be in order: more eligible petitioners can mean more cases, including more politically contentious or otherwise sensitive cases, especially if the court – like national constitutional courts and the ECJ – has limited control over its own docket.[49] The upshot can be a greater visibility of the court in the constitutional system, which may fuel allegations of judicial activism. In addition, the effectiveness of its performance may be negatively affected. Such consequences are damaging to national constitutional court, but take on an additional dimension for supranational courts, as the recent discussions surrounding the European Court of Human Rights so clearly demonstrate.

Nevertheless, one further extension of the current rules on *locus standi* can perhaps be contemplated. Many central and eastern European countries allow their Ombudsman to lodge an action for annulment, and this institution has often risen to the occasion. For instance, in Poland, the Ombudsman brought 16 applications in 1998, 15 in 1999, 19 in 2000 and 14 in 2001, as compared to 2, 3, 4, and 7 challenges filed by members of parliament.[50] The Ombudsman is conceived as a defender of people's rights;[51] someone who is less (easily) susceptible to the political pressures that may prevent the political institutions from referring constitutionally controversial laws to court. Recall in this context also the justification adduced in Spain to justify the right of the Ombudsman to petition the Tribunal Constitucional: this was precisely to compensate for the inability of citizens to do so. There

[49] See e.g. in Hungary, which allows individuals to initiate annulment proceedings, a move which has been explained as enabling the constitutional court 'to review the entire legal system because the more people had access, the more issues would get to the court' (H Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (The University of Chicago Press, Chicago, 2000) 81). The upshot has been that the Hungarian court in its first years of existence was considered the most activist constitutional court in the region, which has led to a backlash in 2010 when its jurisdiction was curtailed.

[50] L Garlicki, 'The Experience of the Polish Constitutional Tribunal', in W Sadurski (ed), *Constitutional Justice, East and West* (Kluwer Law International, The Hague 2002), 274.

[51] See also the name given to this body in for instance Spain (*Defensor del Pueblo*), reflecting this.

might be a case for emulation here at the European level, in particular if the ECJ continues to reaffirm *Plaumann* as the test for admissibility for individuals.

At this juncture, it is worthwhile to reflect in some more detail on the right of individuals to petition the ECJ. We have seen that at the national level, private litigants do not usually enjoy standing to file annulment actions asserting the unconstitutionality of an act of parliament. If they are able to directly seize the constitutional court, it is in the context of a constitutional complaint or an electoral dispute. It will be recalled, however, that many of the courts that can receive the former type of petitions have been eager to stem the incoming tide of complaints by tightening admissibility criteria.

As such, the provision made in Article 263 TFEU for individuals to access the European Court can be considered quite remarkable – that is, to the extent that the annulment procedure can be used to ensure that the legislature does not overstep its constitutional boundaries. However, in practice, the position of individuals in Luxembourg is not much better than in those national systems which do not grant them this type of access, as few litigants manage to convince the European Court that they have the requisite concern to render their claim admissible. What remains to be considered is how the approach of the ECJ to the standing of individuals compares to that adopted by the Belgian constitutional court, which has a comparable text to work with.[52] Now, in *Plaumann*, before formulating its test of individual concern, the Court held that:

> The words and the natural meaning of this provision [Art 263 TFEU] justify the broadest interpretation. Moreover, provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively.

So why did the Court proceed to do precisely this? The answer can arguably be found in the Court's assumption that the European Treaties have established 'a complete system of legal remedies and procedures'[53] for the review of, inter alia, legislative acts adopted by the EU institutions. The idea is that if a claimant is not able to file a complaint with the Court of Justice due to admissibility problems, she can challenge the national implementation thereof before the national court and in that context raise the argument that the underlying EU act is invalid, which can result in the initiation of the preliminary reference procedure. The Belgian constitutional court has a different conception of the relationship between the paths to get to it.

[52] Although Hungary also enables individuals to file annulment actions, the constitutional legislature (in the constitution) and the Hungarian parliament (in the act on the constitutional court) have refrained from including admissibility conditions, thereby denying the constitutional court leeway in deciding how generous access should be. In that sense, the Hungarian system is different from the Belgian and EU system and will for that reason not be discussed here. Recall however that the Hungarian court has called upon the constitutional legislature to actually introduce (strict) admissibility criteria for this category of petitioners.

[53] This term was first used by the Court in Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339 [23].

They are seen as independent, rather than interchangeable. Thus, while the Belgian court is also competent to receive preliminary references, the availability of this procedure does not appear to have influenced the court's case law fleshing out the interest requirement for the purposes of the action for annulment.

5. Concluding remarks

This paper has sought to examine the jurisdiction and means of access to constitutional courts in a comparative perspective so as to detect commonalities and divergences. It has explicitly included the European Court of Justice in this endeavour, in light of its self-perception as a constitutional court. Now, this characterization holds true largely as far as constitutional jurisdiction and means of access are concerned, although the ECJ – more than national constitutional courts – is also involved in non-constitutional adjudication. There is thus a degree of similarity between the ECJ and national constitutional courts, and this can have an effect on the way in which stakeholders and the outside world perceive the Court and the wider Union legal system. Constitutional courts are increasingly seen as one of the hallmarks of being a constitutional democracy and – at least in the Member States examined here – they are generally well respected, if not revered, institutions. More specifically, the ECJ considers national constitutional courts as particularly powerful interlocutors and to the extent that the latter recognise similar traits in the design and functioning of the former,[54] judicial dialogues may be facilitated. This, in turn, may be beneficial for the development of EU constitutional law as a joint enterprise of national constitutional court and the ECJ.

The horizontal comparison has not yielded an archetypal constitutional court: while there certainly are similarities in the functions that national constitutional courts engage in – notably the conception that controlling the legislature is particularly salient – and in access rules, so too are there differences in the scope of constitutional jurisdiction and the make-up of lists of eligible petitioners that may bring matters before the court. These are in large part due to historical factors motivating the establishment of a constitutional court in the Member State concerned.[55] As such, care must be taken when using a particular national constitutional court as a yardstick to measure the ECJ against.[56] In this context, mention can be made of the notion of 'constitutional expectations'.[57] Constitutional expectations 'are intuitions about how

[54] This is what in political science parlance is known as a shared 'logic of appropriateness'.
[55] In terms of the substantive case law produced by national constitutional courts, growing similarities may be detected. This may be due to various factors, such as membership of the EU and the ECHR, comparable internal pressures or triggers that constitutional courts are subject to and a certain degree of mutual learning, through the use of comparative law in deciding cases and participation in networks grouping constitutional courts, such as the Conference of European Constitutional Courts.
[56] This may be different as far as the substantive case law is concerned.
[57] The term was coined by R Primus, 'Constitutional Expectations', Public Law and Legal Theory Working Paper Series No 173, November 2009.

the system is supposed to work. They arise from a combination of experience, socialization and principles'. Given that Europeans do not all share a single, precisely defined set of expectations as to the existence and design of a constitutional court, this may thus result in actors arriving at different assessments of the quality of the ECJ as such a court.

Notwithstanding the explanatory relevance of historical factors, constitutional courts are also dynamic institutions and change as their environment does. For the ECJ, it will be interesting to see which aspects of its judicial activity will continue to be, or become, prominent in practice. There is first the balance between constitutional and non-constitutional functions, in particular safeguarding the unity of EU law. In this respect, Dieter Grimm has observed that 'This argument [the need to ensure unity] plays no role on the domestic level. One could ask, however, whether unity of the law is less important on the national level. This is hardly the case. Is it less endangered on the national level? This is probably so. But is a certain degree of plurality tolerable or even inevitable in a very heterogeneous community like the EU?'[58] If judgments such as that on the European Patent Court[59] are anything to go by, then the ECJ seems more likely to treat its constitutional and its supreme court functions as equally important, rather than develop a hierarchy between them. Second, within the realm of its constitutional duties, will the European Court become more focused on controlling the legislature, notably for compliance with fundamental rights, perhaps resulting in a lesser significance of the adjudication of vertical competence conflicts? The judgment in *Schecke*[60] can be read as an encouraging signal in this respect. Such a development would reinforce the perception of the ECJ as a constitutional court, given that this function is so intimately connected to the *raison d'etre* of such institutions.

[58] D Grimm, 'Constitutional Issues in Substantive Law – Limits of Constitutional Jurisdiction', in I Pernice, J Kokott and C Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos Publishers, 2006), 281.
[59] Opinion 1/09 *Draft agreement on the creation of a European and Community Patent Court* [2011] ECR I-0000.
[60] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert* v. *Land Hessen* [2010] ECR I-0000.