

European Integration and National Courts: Defending Sovereignty under Institutional Constraints?

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Response of national highest courts to the ECJ's integrationist agenda – Logic behind qualified acceptance of EU law supremacy and direct effect – Several possible explanations for the observed inter-court variation: the courts' type and organisation; their power to review legislative acts under domestic law; the rules governing access to the judicial forum; the monistic tradition of the legal system and the level of public support for European integration – Assessment of empirical validity of these hypotheses using a new dataset coding the doctrinal positions and institutional constraints of 34 domestic highest courts – Most correlations small – Only one variable – the power to review statutory legislation under national law – appears to have a significant influence on the courts' doctrinal response to legal integration – Some support for the argument that the varying institutional constraints and incentives under which highest court judges operate shape the way they accommodate and reconcile two conflicting goals

INTRODUCTION

The European Union is not, at least not yet, a state.¹ Surely, it does have many features in common with federal polities. But those familiar with the inner workings of EU institutions recognize that it does not function quite like a federal state – whether we take Canada, Australia, Germany, or the United States as point of comparison. Even if we reject the view that European integration and EU policies are solely the product of historic bargains among member state governments,² it nevertheless remains the case that member states and national actors seem to have more say over the policy-making process at EU level and the implementation of

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¹ S. Hix, *The Political System of the European Union* (Palgrave 2005) p. 2.

² A. Moravcsik, *The Choice for Europe* (Cornell University Press 1998).

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EU laws at national level than the sub-units and sub-national actors of any existing federation. In the EU, the centre of gravity of political power remains closer to the periphery than is the case in most, if not all, federal states. Broadly speaking, European integration tells us a story of piecemeal, continuous and still on-going erosion of national sovereignty rather than one of wholesale, zero-sum game transfer of authority from the member states to Brussels. National and supranational institutions interact in a fragile equilibrium determined by the respective weight of centrifugal and centripetal forces.

Nowhere is the tension between national sovereignty – or whatever remains thereof – and European integration more evident than in the judicial realm. True, national courts have come to accept the twin doctrines of supremacy and direct effect and now routinely set aside national legislation when it conflicts with EU directives, regulations and Treaty provision. Yet they have not fully embraced the revolution initiated by the Court of Justice in its *Van Gend en Loos* and *Costa v. ENEL* decisions. Far from behaving as subservient lower courts of a new judicial hierarchy in which the ECJ would act as supreme federal tribunal, many of them have attached reservations to their acceptance of supremacy and direct effect. The widely publicised ruling of the German Federal Constitutional Court (GFCC) on the Lisbon Treaty can be seen as the latest flashpoint in a low-intensity conflict that goes back several decades.³

The present paper examines the response of the member states' top courts to the ECJ's integrationist agenda and tries to uncover the logic behind their qualified acceptance of EU law supremacy and direct effect. Drawing on the legal and political science literature, I discuss and develop several possible explanations for the observed patterns of judicial response: the courts' type and organisation; their power to review legislative acts under domestic law; the rules governing access to the judicial arena; the monistic tradition of the legal system and the level of public support for European integration. I then assess the empirical validity of these hypotheses using a new dataset coding the doctrinal positions and institutional constraints of 34 domestic supreme and constitutional courts.⁴ The direction of the correlation is found to be in line with that hypothesised for all predictor variables. Most of the correlations, however, prove to be small. Only one variable – the power to review statutory legislation under national law – appears to have a significant influence on the courts' doctrinal response to legal integration. While the empirical analysis does not quite capture the effect of all relevant factors – most notably judicial attitudes towards the European integration – it lends some support

³ A. Dyevre, 'The German Federal Constitutional Court and European Judicial Politics', 34 *West European Politics* (2011) p. 346-361.

⁴ Dataset and coding protocol can be obtained from the author (arthurdyevre@hotmail.com) upon request.

to the argument that the varying institutional constraints and incentives under which highest court judges operate shape the way they accommodate and reconcile two conflicting goals: (1) the imperative to ensure the application and supremacy of EU law over national legislation, and (2) the desire to keep integration under control by preserving an at least hypothetical last word for the member states and, thereby, the notion of national sovereignty.

The paper is organised as follows. First I shall review the literature on the ECJ's interactions with the member states' supreme and constitutional courts. Then, in the following section I shall try to define the dependent variable (i.e. the variable to be explained) in more rigorous fashion. It provides an analysis of the interface between the EU legal system and those of the member states, which also serve to specify the meaning of sovereignty in that context. Subsequently, I shall go on to discuss the motives, incentives and constraints that can plausibly be expected to shape the courts' response to the ECJ's integrationist push. While discussing the explanations put forward by other scholars, I present an institutionalist theory of judicial motivation drawing on Weiler,⁵ Alter⁶ and Dyevre.⁷ In the final section I shall present the dataset, the methodology used and the results of the empirical analysis. I conclude with some brief considerations for the direction of future research on the EU multi-level, non-hierarchical judicial system.

EXPLAINING JUDICIAL DISSENSUS IN THE EUROPEAN UNION: STATE OF THE ART

The reception of the supremacy and direct effect doctrines by member state courts, the friction generated by the ECJ-led constitutionalisation of European law and the hints of defiance regularly appearing in the rulings of national courts are all central themes in EU scholarship. To say that they have spawned a vast literature would be a gross understatement. Whether in English, Spanish, French, Italian or German, the legal literature on judicial interactions in the EU multi-level governance system is, if anything, plethoric. Law scholars have underlined both the growing acceptance of supremacy and direct effect on the part of national judges since the 1960s and the points of disagreement that nonetheless persist between the ECJ and national courts.⁸ While pondering on the overall coherence of the

⁵ J.H.H. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) p. 2403-2483.

⁶ K. Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2001).

⁷ A. Dyevre, 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour', 2 *European Political Science Review* (2010) p. 297-327.

⁸ M. Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006); P. Craig and G. de Burca, *European Law – Texts, Cases and Materials* (Oxford University Press 2007); F. Mayer, 'The European Constitution and the Courts – Adjudicating European Constitutional Law in a Multilevel System', Jean Monnet Working Paper 9/03 NYU, <centers.law.nyu.edu/

doctrinal edifice that has emerged from the decisions of the various tribunals,⁹ they have reflected on the character and evolution of the ‘dialogue’ between the ECJ and constitutional courts.¹⁰ Going beyond pure doctrinal analysis, those of a more interdisciplinary or more comparative bent have even advanced some hypotheses to explain why domestic courts, especially those at the bottom of the judicial heap, have been willing to cooperate with the ECJ¹¹ and why higher courts have shown more resistance to the federalist implications of *Van Geend en Loos* and *Costa v. ENEL*.¹² Nonetheless, with regard to the specific research question addressed in the present paper, the account offered by this literature of the EU top court’s frictional relationship with its counterparts at domestic level suffers from three limitations. First, the dominant methodology is not analytical and positive but, rather, a blend of the descriptive and normative. When not purely idiographic, many legal narratives of the constitutional frictions characterising the encounter of EU law with national law conflate descriptive statements of what the law is with the author’s normative philosophy as to how the law ought to develop. Second, legal scholars tend to explain the positions of judicial actors in terms of legal logic and the application of legal principles, with no room for political and strategic considerations. Third, law as an academic discipline remains fragmented along national lines, which leads authors to privilege the perspective of their own system. To be sure, several studies profess to offer a comparative treatment of the issue. But they typically take the form of country reports, which provide valuable information but lack a unifying theoretical framework.¹³ Many accounts of the

jeanmonnet/papers/03/030901-03.pdf>, visited 13 Oct. 2011; Weiler, *supra* n. 4; M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, 11 *European Law Journal* (2005) p. 262-307; B. de Witte, ‘Direct Effect, Supremacy, and the Nature of the Legal Order’, in P. Craig and G. de Burca (eds.), *The Evolution of EU Law* (Oxford University Press 1999) p. 177-213.

⁹J. Baquero Cruz, ‘The Legacy of the Maastricht Urteil and the Pluralist Movement’, 14 *European Law Journal* (2008), p. 389-422; N. MacCormick, *Questioning Sovereignty* (Oxford University Press 1999); M. Poyares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003) p. 501-537; C. Schmid, ‘From Pont d’Avignon to Ponte Vecchio: The Resolution of Constitutional Conflicts between the European Union and the member states through Principles of Public International Law’, 18 *Yearbook European Law* (1998) p. 418-476.

¹⁰G. Martinico et al. (eds.), *Shaping the Rule of Law through Dialogue: International and Supranational Experiences* (Europa Law Publishing 2009).

¹¹Weiler, *supra* n. 5.

¹²M. Claes and B. de Witte, ‘Report on the Netherlands’, in A.-M. Slaughter et al. (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998) p. 171 at p. 190; Claes, *supra* n. 8, ch. 9; Mayer, *supra* n. 8, p. 35.

¹³See, e.g., A. von Bogdandy et al., *Handbuch Ius Publicum Europaeum*, vol. II (C.F. Müller Verlag 2008); A. Lazowski, *The Application of EU Laws in the New Member States – Brave New World* (TMC Asser Press and Cambridge University Press 2010); G. Martinico and O. Pollicino, *The*

'jurisprudence of constitutional conflict'¹⁴ seek to incorporate insights from the experience of several member states.¹⁵ Yet the choice of jurisdictions included in the analysis rarely, if ever, seem to obey any recognisable, systematic criteria. Generally speaking, legal scholars have advanced interesting explanations for cross-country and inter-court variations in jurisprudential response to supremacy and direct effect. But they have failed to ground them in a well-developed theory of judicial motivation, just like they have failed to substantiate them through systematic data collection.

Political scientists have displayed more interest in the extra-legal determinants of judicial behaviour. But they have focused their attention on the more harmonious aspects rather than the tensions in the relationship member state courts have developed with the ECJ. The focus has been on explaining how and why national courts have been willing to help the ECJ further European integration through its activist jurisprudence. The process through which EU law supremacy came to establish itself in the member states has become a testing ground for grand theories of European integration, with neo-functionalists using it as evidence that the supranational dynamic is the driving force of European integration¹⁶ while neo-realists have insisted that the judiciary has merely acted as agent of national governments.¹⁷ From a more empirical standpoint, efforts to gather quantitative data on the EU multi-level court system have concentrated on the preliminary ruling mechanism¹⁸ and the external constraints faced by the ECJ in adjudicating legal challenges against national legislation.¹⁹ Karen Alter's seminal study on the establishment of EU law supremacy²⁰ is one of the rare social science studies focusing on the more conflictual aspects of judicial integration. Tracing the reception of the ECJ's case-law by French and German judges from the early 1960s to the late 1990s, her research shows how domestic courts in two founding member states

National Treatment of the ECHR and EU Laws (Europa Law Publishing 2010); A.-M. Slaughter et al., *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998).

¹⁴ Kumm, *supra* n. 8.

¹⁵ See, e.g., Mayer, *supra* n. 8.

¹⁶ W. Mattli and A.-M. Burley, 'Europe before the Court: A Political Theory of Legal Integration', 47 *International Organization* (1993) p. 41-76; A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

¹⁷ G. Garrett, 'International Cooperation and Institutional Choice: The European Community's International Market', 46 *International Organization* (1992) p. 533-560; G. Garrett and B. Weingast, 'Ideas, Interests and Institutions: Constructing the EC's Internal Market', in J. Goldstein and R. Keohane (eds.), *Ideas and Foreign Policy* (Cornell University Press 1993) p. 173-206.

¹⁸ A. Stone Sweet and T. Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', 92 *APSR* (1998) p. 63-81.

¹⁹ C. Carrubba et al., 'Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice', 102 *American Political Science Review* (2008) p. 435-452.

²⁰ Alter, *supra* n. 6.

have gradually altered their doctrines to accommodate supremacy and direct effect while seeking to keep the ECJ's activist tendencies in check. However, although her results speak directly to the topic of the present paper, it is not clear how far they can be generalized beyond her two case studies.

Picking up where Alter and others left, the present contribution is an attempt to construct a more comprehensive picture of the response of domestic courts to legal integration.

NATIOCENTRISM, EUROCENTRISM, SOVEREIGNTY AND THE ACCOMMODATION OF SUPREMACY AND DIRECT EFFECT

To arrive at an accurate picture of the positions of national courts *vis-à-vis* the ECJ and to understand how they try to preserve the notion of national sovereignty in the context of European integration, we first need to sharpen our grasp of the way in which distinct legal systems may possibly relate.

In the present section I contrast two ways of looking at the relationship between EU law and national law. One takes the Treaty of Rome as its reference point. I call it 'Eurocentrism'. The other takes the national constitution and I call it 'Natiocentrism'. The distinction is helpful in making sense of that otherwise elusive concept, sovereignty. Eurocentrism, I shall contend, entails the end of national sovereignty. But a Natiocentric view of the relationship between national law and EU law can accommodate a variant of the integrationist doctrines of supremacy and direct effect while preserving sovereignty in the form of a general constitutional claim to competence-competence and of additional limits to integration.

The legal system and its reference point

'Legal system' is often taken to be synonymous with the 'court system' or the 'judiciary'. Here I use the phrase in a broader sense to designate a certain kind of normative, coercive order, of which judicial institutions constitute only one subpart. In short, a legal system is a normative order that is at once institutionalised, hierarchically structured, backed by sanction, and globally effective.²¹ A characteristic distinguishing legal systems from other rule systems – such as morality, etiquette, etc. – is that they themselves institutionalise the production, revision and destruction of legal rules. All these operations are endogenous, as it were, to the system. They are made possible by legal rules which H.L.A. Hart called 'power-conferring rules.'²² Power-conferring rules have a constitutive character in that

²¹O. Pfersmann, 'La constitution comme norme', in L. Favoreu et al. (eds.), *Droit constitutionnel* (Daloz 2005) p. 49-110; R. Walter, *Der Aufbau der Rechtsordnung* (Manz 1974).

²²H.L.A. Hart, *The Concept of Law* (Clarendon Press 1961).

they lend the meaning of a rule of the legal system to the behaviour of the empowered individuals.²³ They identify what counts as a rule of the system and establish who can change old rules and how they can be changed, as well as how new ones can be enacted. More concretely, these are the rules that constitute the law-making bodies of a legal system – the legislature, the executive, the courts etc. – as well as the procedure those bodies have to follow in order to make rules.

The sophisticated theory of norm hierarchy developed by Adolf Merkl and Hans Kelsen was designed to shed light on the structure of legal systems precisely on the basis of this insight about the constitutive nature of law – the fact that legal rules are themselves constituted as such by other legal rules. From the viewpoint of this theory,²⁴ two norms are said to stand in a hierarchical relation if one constitutes the other. In the hierarchy thus defined, the norm N_1 is superior to the norm N_2 if N_1 lays down the conditions for enacting N_2 . A law constituting an administrative agency and defining the procedure by which the agency can enact regulations will be, in that sense, hierarchically superior to the regulations thereby enacted. Likewise, under this conception of the hierarchy of norms, the rules establishing a legislative assembly and the procedure by which the assembly may pass legislation will be superior to the legislative rules thereby adopted. The same reasoning may be applied to the rules constituting courts and the rules produced by judicial bodies. Since constitutive rules themselves owe their legal nature to constitutive rules higher up in the hierarchy, one can reconstruct the hierarchical structure of any legal system from the rules empowering private parties to make contracts all the way up to the rules empowering the legislature to pass laws. Of course, the hierarchy will stop somewhere. At the top of the hierarchy, there will be a norm that is not itself constituted by another. Kelsen famously argued that what he called a ‘*Grundnorm*’ had to be assumed in order to identify that ultimate norm,²⁵ whereas Hart defended the view that the ultimate norm of a legal system was identified by what he termed a ‘rule of recognition.’²⁶ What matters for the purpose of the present paper is that we can view this ultimate norm as providing

²³ Sociologists and legal theorists seldom speak to each other. Yet there seems to be a real affinity, if not proximity, between the view that legal norms (at least some of them) have a constitutive nature and the view, central to the sociological variant of the neo-institutionalist paradigm (R. Hall and P. Taylor, ‘Political Science and the Three New Institutionalisms’, 44 *Political Studies* (1996) p. 936–957), that one of the functions of social norms is to constitute and to give meaning to social activity.

²⁴ A.J. Merkl, ‘Das doppelte Rechtsantlitz’, *Juristische Blätter* (1918), p. 425–465; Walter, *supra* n. 20.

²⁵ H. Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Oxford University Press 1992).

²⁶ Hart, *supra* n. 22. I do not wish to enter a debate about the respective merits of the two conceptualisations. For a comparative analysis of the views of Kelsen and Hart on that and other issues, see M. Pawlik, *Die Reine Rechtslehre und die Rechtstheorie H.L.A. Harts: Ein kritischer Vergleich* (Duncker & Humblot 1993).

the reference point of the legal system: for anything to count as a norm of the legal system one must be able to trace its existence back to the ultimate norm in its hierarchical structure. An important implication, obviously, is that we will have a different legal system – that is a system with a different hierarchy and different rules – if we operate with a different reference point.

Validity and supremacy

For the sake of clarity and precision, it is crucial when discussing the relations between two legal systems to distinguish the issue of legal validity from the issue of legal supremacy. In a nutshell, validity is about the question ‘what counts as a norm of the legal system?’ whereas supremacy is about the question ‘what happens when two legal norms, already identified as such, contradict each other?’ It is important to bear in mind that when we ask which of two norms prescribing incompatible behaviours should take priority we already presuppose that the two norms are valid norms of the legal system. The question of supremacy always comes after that of validity, for it does not really make sense to ask whether something that is not a valid norm of the legal system should prevail or should not prevail over a valid norm of that legal system. Suppose a foreign tourist visiting the United States writes a series of statements contradicting the American Constitution and calls it ‘A law of the Congress of the United States’. No one, short of a madman, will seriously challenge its constitutionality before the US Supreme Court or any another federal court, because it clearly does not meet the minimum requirements to qualify as a federal statute or as any norm whatsoever in the American legal system. Similarly, no one will challenge the Japanese Highway Code before the German Federal Constitutional Court, because the Japanese Highway Code is clearly not law at all from the viewpoint of the German legal system.²⁷

What does happen when two incompatible rules are simultaneously valid within the same legal system? The answer depends on the solution adopted by the legal system under consideration and on the existence of conflict rules. Conflict rules are norms of the legal system that specify which norm should prevail in case of conflict between two valid norms. Of course, conflicts between norms may arise in situations where there is no conflict rule, in which case the authority applying the norm will have discretion to decide which norm to apply. Yet it seems that all legal systems must comprise at least some conflict rules.²⁸

²⁷C. Kletzer, ‘Kelsen’s Development of the Fehlerkalkuel-Theory’, 18 *Ratio Juris* (2005) p. 46-63.

²⁸Admittedly, a legal system can neither function properly nor maintain itself over time without the rule *lex posterior derogat legi priori*. A legislature that could never overturn its past decisions would gradually lose all its legislative power. In practice, the rule *lex posterior derogat legi priori* is

Eurocentrism vs. natiocentrism

Conflict rules may, of course, differ widely in generality, scope and degree of precision. But what matters, for the purpose of the present paper, is that a conflict rule must be valid from the vantage point of the norm taken as reference point of the legal system in order to be regarded as a rule of that legal system. In the relation between two legal systems, it is ultimately the system taken as starting point that will decide how conflicts are to be resolved and what the relevant conflict rules are. In a federal state, the ultimate reference point of the legal system is the federal constitution. Hence it is the federal constitution which is understood to identify the relevant conflict rule whenever cases of divergence between federal and state legislation arise. A prime example of a conflict rule in a federal setting is Article VI of the American Constitution, which stipulates that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Note that this remarkable provision does not only stipulate a conflict rule for the relation between federal law and state law, it also commands judges at state level to disregard any other conflict rule in the laws or constitution of their state. By all accounts, this conception of the relationship between federal and state law is well accepted. A Texan or Californian judge would not even think about looking at the state constitution to resolve a conflict between state and federal legislation. Not so in the EU.

Summarizing the foregoing analysis, we can contrast two ways of looking at the order comprising the EU legal system and the legal systems of its member states.

If we take the national legal system and its constitution as a reference point, EU law must be applied only to the extent that it is incorporated – that is made valid – by the national legal system. In that view, if EU law is not incorporated by a valid norm of, say, the Italian legal system, then EU law is no more law from the viewpoint of that system than the Japanese Highway Code or Plato's *Republic*. Moreover, to the extent that EU law is incorporated, conflicts between incorporated EU rules and other rules of the national legal order will ultimately be resolved by the rules of that same legal order. Various solutions are possible under this Natiocentric conception of the legal order. The legal system of a member states may incorporate the conflict rules of EU law. But it may equally well impose its own conflict rules.

seldom spelled out explicitly in the statute book or in the constitution. Rather, it is implicitly assumed in the institutional arrangement in the absence of any unequivocal provision to the contrary.

If, by contrast, we take EU law and the Rome Treaty as a reference point, EU rules do not depend upon national rules for their validity. Nor are they, in the absence of an EU rule to the contrary, subject to the conflict rules of national law. Under the Eurocentric conception, the Rome Treaty is the uppermost rule of recognition standing at the apex of the hierarchy of legal rules. Its validity does not derive from national law and it can impose its own conflict rules. The Court of Justice's assertions in its *Van Gend en Loos* and *Costa v. ENEL* rulings can be interpreted as articulating such a Eurocentric view. In *Van Gend en Loos*, the Court claimed that Community law has direct effect 'independent from the legislation of member states.'²⁹ In *Costa v. Enel*, it argued that the 'law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.'³⁰

From the viewpoint of judicial actors, the choice between these two conceptions has huge political implications. Basically, under a Eurocentric conception of the legal system, the member states become the subunits of a European federal state. They are no longer the ultimate arbiter of what counts as a valid legal rule on their territory. As in any federal polity, the federal constitution – regardless of whether it nominally remains a treaty – stands as the supreme reference point from which all rules derive their validity, anything in the laws or constitutions of the member state to the contrary notwithstanding. Under a Natiocentric conception, by contrast, even if a member state incorporates each and every EU rule into its legal system and confers complete supremacy upon those rules, it still is the ultimate arbiter of the relationship between the two legal orders. Indeed, in principle, it retains the power to change the rules incorporating and granting supremacy to EU law. Under that conception, what a member state has given, a member state is still able to take back.

Defining sovereignty in the context of European integration

This characterization of the relationship between EU law and national provides us with a good basis to make some sense of the concept of sovereignty, which would otherwise appear so slippery as to defy rigorous defining. Obviously, I have no intention of reviewing four centuries of political thought here. Nor do I pretend to arrive at a definition that everyone will find satisfactory. Because of its political and historical connotations, the notion of sovereignty is often debated in essentialist terms, as if there were such thing as a true definition of sovereignty. This sort

²⁹ ECJ 5 Feb. 1963, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Belastingen*.

³⁰ ECJ 15 July 1964, Case 6/64, *Costa v. ENEL*.

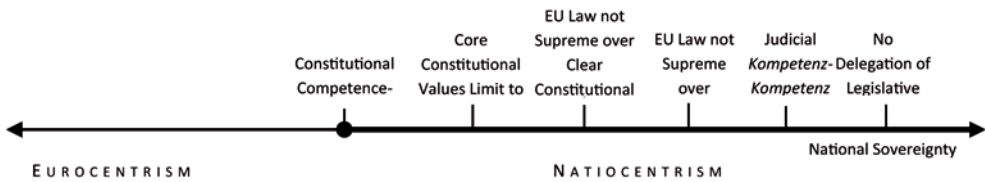


Figure 1.1. Judicial doctrines on European integration in one-dimensional space

of approach to concept formation, however, can hardly produce more than an endless and fruitless controversy. So the only sensible thing to do is to propose a preliminary definition and see if it generates interesting analyses or hypotheses. Just like the proverbial tree, the definition should ultimately be judged by its fruits.

Sovereignty can certainly be defined in terms of influence and power-relations, using standard political science concepts of political power. But the approach I take is more juristic. Basically, sovereignty here is about legal authority. It is about the authority to make legal rules, the authority to police the limits of the authority conferred upon rule-makers, and, ultimately, it is about the authority to decide who has the authority to make legal rules.³¹ To use a terminology closer to the continental public law tradition: sovereignty is about *competences*. Figure 1.1 suggests a way of arraying the doctrines of national courts on supremacy and direct effect on a one-dimensional space ranging from Eurocentrism to Natiocentric positions expounding a more or less expansive conception of sovereignty. Sovereignty here is defined as a left-closed interval. At a minimum, sovereignty is the competence to decide upon the distribution of competences. Constitutional Competence-Competence³² is sovereignty's core. An EU member state can retain its Constitutional Competence-Competence only under a Natiocentric conception of the relation between EU law and national law. Were national courts to embrace a Eurocentric conception of the legal system, the member states would lose their Constitutional Competence-Competence and would thus become the subunits of a European federal state. Constitutional Competence-Competence would no longer be vested in the national constitution and in the body holding the authority to amend it. Instead, it would reside in the European Treaties and in the authorities holding the power to alter these legal instruments. Now, while minimal when reduced to Constitutional Competence-Competence, sovereignty is maximal when all competences are exercised by national authorities and none are delegated to the supranational level. For reasons discussed below, however, such position

³¹ Compare with O. Pfersmann, 'Etat et souveraineté', in L. Favoreu et al. (eds.), *Droit constitutionnel* (Daloz 2005) p. 31-46.

³² The concept of 'competence-competence' (*Kompetenz-Kompetenz*) goes back to the German jurist Paul Laband, who thereby sought to provide a legal-positivistic definition of sovereignty (see P. Laband, *Das Staatsrecht des Deutschen Reiches* (Mohr 1901) p. 64-67 and p. 85-88).

appears incompatible with EU membership. At the level currently reached by legal and political integration, EU membership presumes that member states accept the transfer of some competences to EU institutions and some degree of direct effect and supremacy for the rules adopted on the basis of this transfer of authority. Nevertheless, between maximum and minimum sovereignty, a national court may go for one of several variants of Natiocentrism. Provided the court's institutional environment affords it sufficient latitude, a court may place substantive limits on the supremacy of EU law and claim Judicial *Kompetenz-Kompetenz*³³ – the authority to declare that EU rules go beyond the boundaries of the competences transferred to EU institutions.³⁴ The same idea about the dimension underlying the positions of domestic courts on legal integration can be conveyed by a series of concentric circles around sovereignty's core – Constitutional Competence-Competence – as in Figure 1.2. (Note that the representation is purely heuristic and not meant to indicate a two-dimensional legal or ideological space.)

This approach enables us to systematically compare the positions of domestic courts. Because it rested the application of EU law in Belgium squarely on the jurisprudence of the ECJ, the position articulated by the Belgian *Cour de Cassation* in *Fromagerie Franco-Suisse Le Ski v. Etat belge*,³⁵ for example, would qualify as Eurocentric. At the other end of the scale, the GFCC's jurisprudence on European integration is both clearly Natiocentric and strongly Sovereigntist. Not only has the Court made it plain that it sees the German Constitution as the true foundation for the application and primacy of EU law in Germany. Over four decades, it has also developed a doctrine of core constitutional limits to the supremacy of EU law and has claimed Judicial *Kompetenz-Kompetenz*.³⁶ This classification informs the theorising as well as the empirical analysis that follows.

³³J.H.H. Weiler and U.R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial *Kompetenz-Kompetenz*', in A.-M. Slaughter et al. (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998) p. 331-364.

³⁴Judicial *Kompetenz-Kompetenz* is not the same thing as what I call 'Constitutional Competence-Competence' and a claim to Judicial *Kompetenz-Kompetenz* is not the same thing as a claim to Constitutional Competence-Competence. Judicial bodies are themselves ultimately constituted by the constitution (or the Treaty taken as reference point of the legal system). Hence, even if a national court acted as the ultimate *judicial* authority over the conformity of EU secondary legislation with the Rome Treaty, it could not yet be regarded as the ultimate authority on the allocation of competences. Indeed, from a strictly legal point of view, the constitution- or, alternatively, the treaty-amending power may always roll back the court's jurisdiction or even abolish it altogether.

³⁵Decision of 27 May 1971 (English translation in A. Oppenheimer, *The Relationship between European Community Law and National Law* (Cambridge University Press 1994) p. 245-268).

³⁶Dyevre, *supra* n. 3; J. Kokott, 'Report on Germany', in A.-M. Slaughter et al. (eds.), *The European Courts and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998) p. 77-131.

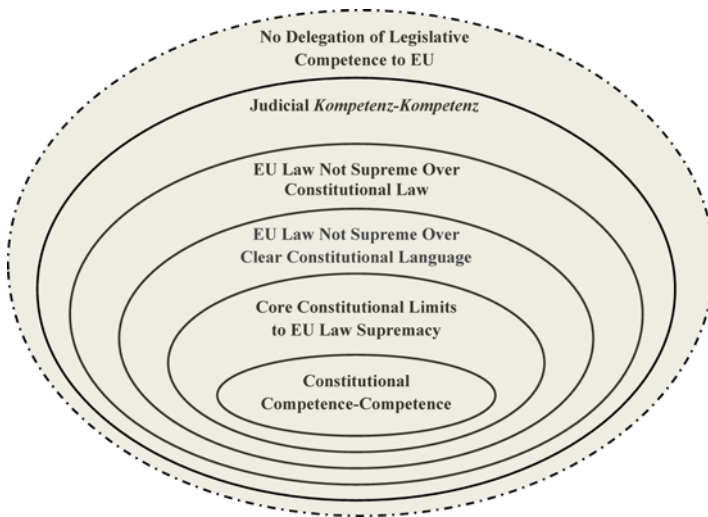


Figure 1.2. Degrees of sovereignty in the context of European integration

THE POLITICAL AND INSTITUTIONAL DETERMINANTS OF THE JURIDICAL RESPONSE TO INTEGRATION

Now that we have an analytical framework to analyse how the positions of domestic courts regarding European integration may vary, we can turn to the task of explaining why they do in practice.

As I have argued elsewhere,³⁷ the factors that may be expected to influence the response of supreme and constitutional courts to integration can be grouped into micro-, meso- and macro-level determinants. Lower-level determinants, according to this theory, are thought to be nested within higher-level ones. This means that a lower-level variable can produce significant variations in judicial outcomes only when the higher-level variables take a certain value or remain below or above a specific threshold. For example, variations in the judges' ideological outlook – a micro-level determinant of judicial behaviour – will have little effect on judicial outcomes when and where political fragmentation and public support for the courts – both macro-level determinants – are low. Also, the effect of judicial ideology may be further limited by meso-level factors such as access rules, the size of the majority required to strike down legislation, and so on.

Micro-determinants: judicial interests and preferences

Starting with the micro-level determinants, we are forced to admit that judicial preferences are peculiarly difficult to measure. Ideally, we would be able to break

³⁷ Dyevre, *supra* n. 7.

down the aggregate preferences of the collective body ‘court’ into its individual component parts. Identifying the preferences of individual judges, however, is rendered difficult by the secrecy generally surrounding the judicial deliberation process. In most jurisdictions, judges are not allowed to file dissenting opinions and the vote tally is seldom made public. Moreover, the proxies commonly used to study the impact of ideology on the rulings of constitutional courts – to wit, the party affiliation of the judges and the party affiliation of the appointing authority – are far from being available for all supreme courts. Except for the UK and Ireland, which belong to the Common Law tradition, the judges sitting on domestic supreme courts (as opposed to those sitting on domestic constitutional courts) are usually career judges appointed from within the judiciary and with no known party affiliation. Where the proxies exist – i.e., for constitutional courts such as the GFCC, the French Constitutional Council and the two Iberian constitutional tribunals – scholars have been able to assess the influence of ideology on judicial outcomes.³⁸ But the same cannot be said of the French Council of State, the Italian Court of Cassation or the Danish and Finnish supreme courts, to name but few.

So we can still speculate about the preferences of highest court judges. But for the purpose of developing empirically falsifiable causal models judicial preferences will have to be treated as latent variable whose effect on judicial outcomes is not directly observable and is itself moderated by the judges’ institutional environment, as in Figure 2.

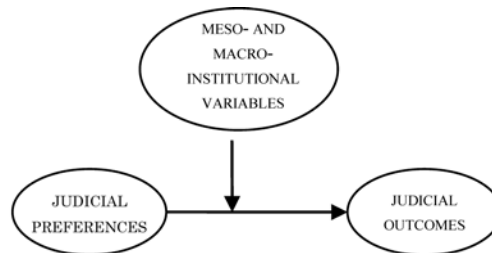


Figure 2. Judicial preferences as latent variable moderated by institutional environment

Evidently, we should expect the judges’ attitude towards European integration in general and their degree of attachment to the independence and autonomy of their nation-state in particular to have an effect on the courts’ choice of doctrines.

³⁸ See, e.g., C. Hönnige, ‘The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts’, 32 *West European Politics* (2009), p. 963-984; C. Hanretty, ‘Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals’, 51 *European Journal of Political Research* (2012) p. 671-692.

Judges who are hostile to the European project will be keener to set limits to the doctrines of direct effect and supremacy and will push their court in a Sovereignist direction. Inversely, we should expect Europhile judges to be more comfortable with the federalist implications of the ECJ's jurisprudence. In the absence of a general, Europe-wide survey of judicial attitudes, it seems reasonable to assume that, on the whole, judges, as their fellow citizens, are still attached to the nation-state and the view that there should be a high degree of congruence between the national and the political unit.³⁹ After all, society still makes Spaniards, French, Czechs, and Germans. It does not yet produce Europeans primarily owing their allegiance to Brussels rather than Madrid, Paris, Prague or Berlin.⁴⁰ The notion that domestic courts primarily owe their allegiance to the national constitution, rather than to the Treaties, is thought to be widely shared in the legal community at large. As one prominent EU scholar puts it:

The national courts conceive themselves primarily, and quite naturally, as organs of their state, and have tried to fit the 'European mandate' formulated by the European Court of Justice within the framework of the powers attributed to them by their national constitutional system. For these courts and, indeed, for most constitutional law scholars throughout Europe, the idea that EU law can claim its primacy within the national legal orders on the basis of its own authority seems as implausible as Baron von Munchhausen's claim that he had lifted himself from the quicksand by pulling on his bootstraps. The national courts consider the domestic authority of EU law to be rooted in their own constitution, and seek a foundation for the primacy and direct effect of EU law in that constitution.⁴¹

This leads us to the following hypothesis:

Hypothesis 1: National courts will tend to take a Natiocentric view of the relationship between EU law and national law.

The permanence of their nation-state, however, is unlikely to be the judges' sole preoccupation at the moment of crafting doctrines.⁴² As do other public decision-

³⁹ Eurobarometer surveys have shown that national elites tend to be more favourably disposed towards European integration and European institutions than their average fellow citizen, *see* Hix, *supra* n. 1, p. 165-166.

⁴⁰ L. Hooghe and G. Marks, 'National Identity and European Integration – A Contextual Analysis of Public Opinion', Paper prepared for delivery at the 2003 Annual Meeting of the American Political Science Association, Aug. 28 – Aug. 31, 2003 (2003).

⁴¹ B. de Witte, 'The Lisbon Treaty and National Constitutions: More or Less Europeanisation?', in C. Closa (ed.), *The Lisbon Treaty and National Constitutions*, ARENA Report 3/09 (2009) p. 25-48.

⁴² This all the more as the EU's current political configuration makes the choice between Natiocentrism and Eurocentrism appear somewhat less consequential. First, no court can single-handedly turn an independent country into the regional subunit of a federal state. Unless there

makers, judges also care about power, prestige, income, reputation and leisure time.⁴³ Unlike pure policy preferences (preferences for specific policy outcomes), however, these preferences largely coincide with the interests of their institution. The prestige enjoyed by a judge is inseparable from the prestige of the court on which she serves. So too is her reputation. Likewise, the extent to which a judge may hope to influence the policy-making process closely depends on the powers wielded by her court. Income and leisure time are similarly contingent respectively upon the court's budget and upon the court's caseload. We must thus turn to the institutional setting in which judges operate in order to explain how these elements create constraints and shape judicial incentives.

Macro-level factors: public support and political fragmentation

Regarding the judges' desire to expand, or at least to maintain, their powers, there is a broad agreement in the judicial politics literature that the fear of a public or political backlash damaging the court's institutional standing or leading legislators to scale-back its jurisdiction constitutes an important constraint on judicial behaviour.⁴⁴ This implies that judges will avoid adopting positions which they believe could trigger such a backlash.

Now the probability of a judicial decision bringing about a backlash is determined by two main factors. One is political fragmentation. Generally speaking, the more divided a political system, the more latitude courts have to make policies.⁴⁵ When there are many veto-players in the legislative or constitution-amending process and the ideological distance between them is large, attempts to override

is coordination among the main political actors at domestic level, a judicial move to European federalism is likely to remain isolated. Revolutions, even juridical ones, give rise to coordination problems which may often prove insurmountable, leaving the revolution, as it were, nipped in the bud. Second, as long as each member state government retains a veto over Treaty revisions and no Treaty amendment taking away this power stands a chance of being ratified, national actors remain in position to block initiatives that have the potential to change the institutional system governing the relations of the EU with its member states in radical fashion. In the words of Trevor Hartley: 'If the *Grundnorm* of the legal system of the European Union were to change, things would at first be much the same as before' (T. Hartley, 'The Constitutional Foundations of the European Union', 117 *Law Quarterly Review* (2001) p. 225-246).

⁴³ R.A. Posner, 'What Do Judges Maximize? (The Same Thing Everyone Else Does)', 3 *Supreme Court Economic Review* (1993) p. 1-41; R.A. Posner, *How Judges Think* (Harvard University Press 2008).

⁴⁴ See Alter, *supra* n. 5, p. 45; Garrett and Weingast, *supra* n. 16, p. 200-201; M. Troper and V. Champeil-Desplats, 'Jalons pour une théorie des contraintes juridiques', in M. Troper et al. (eds.), *Théorie des contraintes juridiques* (Bruylant/L.G.D.J. 2005) p. 11-23; G. Vanberg, *Constitutional Politics in Germany* (Oxford University Press 2005).

⁴⁵ Dyevre, *supra* n. 7; G. Tsebelis, *Veto Players: How Institutions Work* (Princeton University Press 2002).

the courts are bound to fail more frequently. On the other hand, if the veto-players are few and the distance between is small, the judiciary will enjoy less political autonomy. From an empirical standpoint, political parties – the real veto-players in the overwhelming majority of cases – do differ, and sometimes substantially, in their attitude towards European integration. However, government parties, even the more Eurosceptic ones, usually agree about the fact of EU membership.⁴⁶ This entails that the courts cannot afford to make decisions that would imperil their country's full membership in the supranational club. Concerning the accommodation of supremacy and direct effect, this suggests an upper limit on the courts' capacity to defend national sovereignty. Indeed, the doctrines of direct effect and supremacy are now part – though not necessarily in the form expounded by the ECJ in its jurisprudence – of what is known in EU-jargon as the '*acquis communautaire*.'⁴⁷ Hence, judges in old and new member states are expected to uphold the doctrines and to set aside national legislation when it conflicts with EU law. The situation was different in the early stages of European integration when German, French and Italian courts openly rejected the view that the Treaty on the European Economic Communities (EEC) could be given direct effect and supremacy over posterior legislation.⁴⁸ But, today, a court rejecting any form of supremacy or direct effect would damage the credibility of its government in negotiations at EU level and would be seen as an obstacle to full membership in the supranational organisation. Our second hypothesis thus looks uncontroversial:

Hypothesis 2: National courts will accept that some legislative competences have been transferred to the EU and that in these areas EU law should take precedence over ordinary legislation.

A more controversial hypothesis derives from the argument that judicial behaviour is also determined by public opinion.⁴⁹ If public opinion matters, the argument goes, then we should expect national courts to produce more EU-friendly doctrines where public support for integration is stronger and more Sovereignist ones where public support for integration is lower:

Hypothesis 3: Courts in member states where support for European integration is high will tend to adopt a more Euro-friendly stance on supremacy and direct ef-

⁴⁶ P. Taggart and A. Szczerbiak, 'The Party Politics of Euroscepticism in EU Member and Candidate States', *SEI Working Paper No. 51* (2002), <www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/turin/ws25/taggartszczerbiak.pdf>, visited 25 May 2011.

⁴⁷ F. Mayer, 'Sovereignty – Lost? – Comment on Roman Kwiecień', 6 *German Law Journal* (2005) p. 1497 at p. 1499.

⁴⁸ Alter, *supra* n. 6.

⁴⁹ Vanberg, *supra* n. 45.

fect, whereas courts in member states with low public support for integration will tend to defend more Sovereignist positions.

It could also be the case that the facts and perceptions which shape public attitudes determine judicial attitudes on integration too. In that case, the position of the public at large would be a proxy for the judges' preferences.

Meso-level determinants: institutional incentives and constraints

In explaining the behaviour of national courts in the EU, it is hard to overstate the importance of the court's position in the court hierarchy. At supranational level, it would seem that the Court of Justice might have been able to enforce its Eurocentric vision of the legal system on more Natio-centric judges, if it had been granted the power to invalidate the decisions of national courts. The jurisprudence of constitutional conflict arises in part from the absence of such power at EU level.

The domestic court system, on the other hand, has formally retained a hierarchical makeup. Yet European integration alters the incentives of domestic judges in asymmetrical fashion, potentially driving a wedge between higher and lower courts. As expounded by Karen Alter,⁵⁰ the Court Competition Theory presumes that lower courts want to expand their doctrinal freedom. From their perspective, EU law offers itself as an effective means to challenge established precedents and to counter the influence of higher courts. By referring a case to the ECJ under the preliminary ruling mechanism (Article 267 of the TFEU) or simply by invoking EU law, lower court judges can thus increase their bargaining power in negotiating doctrinal positions with judges higher up in their judicial hierarchy. But one court's meat is the other's poison. From the standpoint of highest court judges, European integration entails not a gain but a loss of authority over the lower echelons of the judiciary.⁵¹ This does not mean that highest court judges will lose on all fronts, however. For some, the pill of diminished hierarchical control comes with a sweetener. Indeed, following the ECJ *Simmmenthal* jurisprudence, every domestic court has the duty and, therefore, the power to set aside national legislation when found incompatible with EU law. The Theory of Judicial Empowerment predicts that judges who were otherwise denied the power to review legislative acts will be keener to embrace integration. To them, EU law supremacy is a way of acquiring a prerogative they did not possess under national law.⁵²

⁵⁰ Alter, *supra* n. 6.

⁵¹ Alter, *supra* n. 6, p. 49.

⁵² Weiler, *supra* n. 5.

Combining the Court Competition with the Empowerment Theory, we can derive two hypotheses regarding the response of highest courts to supremacy and direct effect. First, *ceteris paribus* we should expect constitutional courts – with ‘constitutional court’ defined in the Kelsenian sense of a judicial body with specialised jurisdiction over constitutional matters – to evince the most resistance to legal integration.⁵³ When created, these courts were granted the exclusive right to review legislative acts. So, they have no interest in acquiring a power they already have. In fact, the effect of the *Simmenthal* doctrine is to take away what used to be their monopoly. Adding this to the loss of authority over lower courts, constitutional courts clearly emerge as net losers of integration, which should make them particularly eager to set limits on the ECJ’s expansionary tendencies:

Hypothesis 4: Constitutional courts will tend to assume more Sovereigntist positions.

In the literature, the argument is thought to apply specifically to constitutional tribunals.⁵⁴ Slightly modified, however, it can be extended to all member state highest courts – supreme as well as constitutional – holding the power to review legislative enactments on constitutional grounds under national law. Surely, when judicial review is decentralised, the *Simmenthal* doctrine does not take away any judicial monopoly. Yet the other incentives to resist integration still apply. A top court has no incentive to seek a power it already has.⁵⁵ Likewise, it has no reason to show particular enthusiasm for a set of doctrines which is likely to reduce its grip on the lower courts. Hence our fifth hypothesis:

Hypothesis 5: Highest courts that already hold the authority to invalidate legislative acts on constitutional grounds under national law will tend to defend more Sovereigntist doctrines.

Alternatively, the same hypothesis can be derived from a consideration of the specific constraints supreme courts deprived of the power to invalidate statutory legislation face when trying to articulate limits to supremacy and direct effect. To restrict the scope of EU law supremacy without simultaneously calling into question the primacy of EU acts over ordinary legislation, the path typically chosen

⁵³ Claes, *supra* n. 8, p. 261.

⁵⁴ Claes and de Witte, *supra* n. 12, p. 190; Mayer, *supra* n. 8, p. 35.

⁵⁵ What matters here is the power to invalidate statutes on *constitutional grounds*. While denied the power to strike down statutory norms on constitutional grounds, some courts (e.g., Dutch courts and French ordinary courts) may hold the power to set aside such norms when found to conflict with any international treaty (and not just EU law). Yet we do not expect that holding such power will constitute an incentive to resist legal integration.

by member state courts has been to develop doctrines of core constitutional values. Yet it is hard to do that without invoking the constitution or some kind of higher law. On the other hand, should a supreme court try to devise a similar doctrine in spite of a bar on judicial review of legislation, it would immediately trigger the criticism that it is grabbing a prerogative it had been explicitly denied.

Furthermore, constraints of a more procedural character should also be expected to influence the courts' jurisprudential positions. A feature that typically sets apart judicial institutional is that courts cannot act *sua sponte*. To make a pronouncement about a particular issue, to review a regulation, a directive, or a piece of national legislation implementing a directive, a court has to wait until a litigant shows up with the appropriate lawsuit. In principle, if no litigant raises the issue, the judges cannot say anything about it. Although there are ways to get around this limitation – e.g., by devising doctrines that encourage litigation while giving the judges ample discretion to select the case they want to hear – procedural rules can impose considerable constraints on a court's ability to control its agenda. Until a recent reform, the French Constitutional Council could not even examine constitutional questions raised by other courts. Judicial review of legislative acts and international treaties was limited to abstract, *a priori* review. Only the executive and members of parliament could seize the Council and a law could not be challenged once promulgated. As regards EU law, this meant that the Council could not rule on directives and regulations based on the EC Treaty. Nor could it review judicial interpretations of laws implementing directives. The only way for the Council to make any pronouncement at all on the relationship between national and EU law was when it was requested by the executive or legislators to rule on the compatibility of a new treaty with the constitution (under Article 54)⁵⁶ or on the occasion of reviewing, prior to promulgation, the constitutionality of laws transposing directives. The German Federal Constitutional Court, by contrast, does not know any of the procedural constraints faced by the Constitutional Council. The Karlsruhe Court can be seized by individuals, ordinary courts, and political actors. In addition, it has the power to review every piece of legislation or judicial decision. Thanks to the size and diversity of its caseload and the control it enjoys over its docket,⁵⁷ the Court can safely assume that it will not be kept out of any issue of serious concern to its members. It has been argued that courts with more generous access rules, such as the GFCC, are better positioned to influence

⁵⁶ Until a 1992 reform, Art. 54 restricted referrals to the President of the Republic, the Prime minister and the Presidents of both houses of Parliament – making it virtually impossible for the opposition to get the Council to review the constitutionality of treaties adopted by the executive and its parliamentary majority. The 1992 reform changed this by giving the power to file referrals to any group of sixty senators or deputies.

⁵⁷ K. Schlaich and S. Koriath, *Das Bundesverfassungsgericht – Stellung, Verfahren, Entscheidungen* (C.H. Beck 2007) p. 143-183.

the ECJ in its interpretation of EU law and to place limits on the scope and pace of legal integration.⁵⁸ Put in terms of agenda-setting, this yields the following hypothesis:

Hypothesis 6: The more agenda-setting control a highest court enjoys, the more Sovereignist its doctrinal response will tend to be.

Finally, it has often been suggested that courts in monist legal systems, as opposed to courts in dualist ones, will tend to be more receptive to supranational law.⁵⁹ What is exactly meant by 'monist' and 'dualist' is not always clear. Yet there seems to be a broad agreement as to which legal systems qualify as 'monist' and which as 'dualist'.⁶⁰ This argument warrants the following hypothesis:

Hypothesis 7: Highest courts in monist legal systems will tend to be more ECJ-friendly, highest courts in dualist legal systems less so.

EMPIRICAL ANALYSIS

To test these hypotheses I have undertaken to collate systematic information about the political context, institutional environment and doctrinal positions of national supreme and constitutional courts regarding the supremacy and direct effect of EU law. In its current form, the dataset covers 34 highest courts over 26 member states (Malta is missing).⁶¹

Data

Table 1 summarizes the variables analysed in the present paper. The variable of more immediate interest is, of course, Doctrine. Applying the analysis in Section 3, the doctrinal positions of domestic highest courts were coded from Martinico

⁵⁸ Alter, *supra* n. 6, p. 179; K. Alter, 'The European Union and Domestic Legal Policy: Spillover or Backlash?', in J. Goldstein et al. (eds.), *Legalization and World Politics* (MIT Press 2001) p. 105 at p. 118-119.

⁵⁹ Slaughter et al., *supra* n. 13.

⁶⁰ C. Carrubba and L. Murrain, 'Legal Integration and Use of Preliminary Ruling Process in the European Union', 59 *International Organization* (2005) p. 399-418; M. Vink et al., *Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis*, paper presented at the 11th Biennial Conference of the European Studies Association, 24 April 2009, available at: <euce.org/eusa2009/papers/vink_06B.pdf>, visited 4 Jan. 2012.

⁶¹ The unit of analysis is the high court, not the country. As the same country may have several high courts (e.g., one supreme court for administrative matters, one for civil and criminal ones as well as a constitutional court), it may appear several times in the dataset. A high court is defined as a court whose decisions cannot be appealed to any other judicial body.

and Pollicino⁶² and Hoffmeister⁶³ using the following scheme. When described as Eurocentric, the position of the court was coded 0. If the court only asserted Constitutional Competence-Competence (the minimum Natiocentric position), its position was coded 1. If asserting core constitutional limits to EU law supremacy, it was coded 2. If asserting that EU law is not supreme over clear constitutional language, it was assigned the value 3. If claiming that EU law is not supreme over constitutional law regardless of the constitution's textual clarity, it was given the value 4. Finally, the value 5 was assigned to courts said to claim Judicial *Kompetenz-Kompetenz*.

Table 1. Summary of variables and descriptive statistics

Variable	N	Mean	Standard deviation	Min	Max	Source
Doctrine	34	2.06	1.48	0	5	Martinico and Pollicino (2010), Hoffmeister (2007)
Constitutional Court	34	0.46	0.51	0	1	Cour de Justice des Communautés européennes (2008)
Power of Judicial Review	34	0.62	0.49	0	1	Cour de Justice des Communautés européennes (2009)
Access Rules Index	34	0.52	0.22	0.13	0.94	Cour de Justice des Communautés européennes (2008)
Support for European Integration	34	43.33	16.25	5.5	70.67	Euro-barometer Survey
Monism	21	0.57	0.51	0	1	Vink et al. (2009)

I also envisaged the case of a court refusing any delegation of legislative competence to EU institutions (the most Sovereigntist position). Arguably, this was the position held by the French *Conseil d'Etat* until its *Nicolo* judgment in 1989.⁶⁴ However, no judicial doctrine met that description in the empirical data. This would appear to confirm Hypothesis 2, namely that there is an upper bound to the national courts' doctrinal resistance to integration. As shown in the Table, the courts' doctrinal positions range from 0 (the Belgian and Romanian Courts of Cassation) to 5 (the GFCC and the Danish Supreme Court). The variable's mean is 2.06,

⁶² Martinico and Pollicino, *supra* n. 13.

⁶³ F. Hoffmeister, 'Constitutional Implications from EU Membership: A View from the Commission', 3 *Croatian Yearbook of European Law and Policy* (2007), p. 59-97.

⁶⁴ *Conseil d'Etat*, ruling of 20 Oct. 1989, [1990] 1 *CMLR* 173.

while its standard deviation is 1.48. This means that the overwhelming majority of courts defend a Natiocentric conception of the relationship between EU law and national law, thus corroborating Hypothesis 1.

Constitutional Court and Power of Judicial Review are both dichotomous variables compiled from CJCE (2008).⁶⁵ While drawing on the same source, the Access Rules Index is a continuous variable constructed from several indicators: the existence of *a priori* abstract review, of *a posteriori* abstract review, the possibility of concrete review, and the extent to which private litigants have standing to bring cases to the court.⁶⁶ Support for European Integration is the average value of net support for EU membership in the Eurobarometer survey for the period 2004-2009.⁶⁷ Finally, the dichotomous variable Monist is borrowed from Vink et al.⁶⁸

Main results

Three courts – the Romanian Constitutional Court and the two Swedish supreme courts – appeared to be outliers in bi- and multivariate analyses. After checking the coding and the data source, it was found that the value for the variable Doctrine was probably exaggerated for the three observations. In Martinico and Pollicino,⁶⁹ it is reported that the Swedish administrative and civil supreme courts, similar to the Danish Supreme Court, have claimed the power to declare EU acts invalid. Yet this statement is not accompanied by any reference to a judicial opinion.

⁶⁵ CJCE, *Les Juridictions des Etats membres de l'Union européenne* (Office des publications officielles de l'Union européenne 2009).

⁶⁶ Normalized to lie between 0 and 1, the index is constructed as follows: Access Rules Index = $\frac{1}{2}((prAR+posAR+CR+Istatutory+Isecondary):8) + \frac{1}{2}(Ijudicial)$. Where *prAR* stands for *ex ante* abstract review (indicator ranging from 0 to 2); *posAR* for *a posteriori* abstract review (ranging from 0 to 2); *CR* for concrete review (0 to 2); *Istatutory* indicates whether private litigants have standing to challenge statutory legislation (dichotomous); *Isecondary* indicates whether private litigants have standing to challenge secondary legislation (dichotomous); and *Ijudicial*, which counts for 50% in the composition of the index, stands for the right of individuals to challenge judicial decisions (dichotomous too). The weight given to the *Ijudicial* indicator is intended to reflect its impact on positive judicial agenda control. Because there are potentially many more private litigants than judicial bodies and elected officials (the institutions otherwise allowed to bring cases), the possibility to hear challenges from private litigants against the decisions of other courts makes it much more likely that the court under consideration will find a case allowing it to say something about the legal integration process.

⁶⁷ As is customary in the empirical literature, I rely on the following Euro-barometer question: *Generally speaking, do you think that (your country's) membership in the European Community (Common Market) is 1) A good thing; 2) A bad thing; 3) Neither good nor bad.*

⁶⁸ Vink et al., *supra* n. 59. A limitation of this measure is that Vink et al. do not provide an explicit coding scheme, relying instead on their own intuition (and that of the lawyer in their team, Monica Claes) to classify countries as 'monist' or 'not monist'.

⁶⁹ Martinico and Pollicino, *supra* n. 13, p. 434.

Likewise, the report on Romania attributes to the Romanian Constitutional Court a markedly Sovereigntist position, noting that the Court showed little deference to the ECJ in ruling on the constitutionality of a statute implementing an EU directive.⁷⁰ In the ruling in question, however, the Court made no explicit statement concerning the application of EU law in Romania. Comparing these country reports with other doctrinal sources,⁷¹ no evidence was found that this was indeed the position of the said courts. Hence I elected to drop the three observations.⁷²

Table 2. Correlation matrix

	<i>Doctrine</i>	<i>Constitutional Court</i>	<i>Power of judicial review</i>	<i>Access Rules Index</i>	<i>Support for European integration</i>	<i>Monism (N=19)</i>
Doctrine	1.00					
Constitutional Court	0.20	1.00				
Power of Judicial Review	0.42	0.58	1.00			
Access Rules Index	0.16	-0.34	-0.14	1.00		
Support for European Integration	-0.12	-0.19	-0.26	0.04	1.00	
Monism (N=19)	-0.23	0.05	-0.37	-0.00	0.51	1.00

Notes: All bivariate correlations between Doctrine and the other variables have the expected sign. The number of observations is $N=31$ (Romanian Constitutional Court and Swedish courts dropped), except for the correlations with Monism, where values are available only for 15 member states, as a result $N=19$.

As can be seen from the first column in Table 2, the bivariate correlations between the output variable 'Doctrine' and the five input variables – namely: Constitutional Court, Power of Judicial Review, Access Rules Index, Support for European Integration and Monism – all exhibit the sign predicted by Hypothesis 3 to 7. When a highest court happens to be a constitutional court, the value of the Doctrine variable tends to go up. So too, when the court has the power of judicial review under domestic law, as predicted by Hypothesis 5. The same goes for the Access Rules Index. Judicial doctrines tend to become more Sovereigntist as it

⁷⁰ Martinico and Pollicino, *supra* n. 13, p. 381.

⁷¹ Notably Hoffmeister, *supra* n. 64.

⁷² Doing this brings the mean of the variable Doctrine down to 1.806 and its standard deviation to 1.276. The corresponding statistics for the other variables remain largely unchanged.

risers. Support for European Integration and Monism, on the other hand, have the opposite effect. In line with respectively Hypothesis 3 and 7, public support for integration and a monist legal system are associated with more integration-friendly juridical responses.

Striking, however, is the small size of the correlations, except for Power of Judicial Review. This would suggest that most of the explanations for the inter-court variation advanced in the literature, though not inherently wrong, fail to capture its main causes. When we try to go beyond what is essentially a post-dictive analysis of the data to assess the extent to which we might generalize the hypotheses beyond the data, most of the hypothesised relationships prove statistically insignificant.

Shown in Table 3 are various regressions of Doctrine on the predictor variables. Model 1 estimates the effect of Constitutional Court on Doctrine.⁷³ The effect of the predictor variable on the courts' doctrinal positions turns out to be positive (.51). As with the results of the correlation matrix, this should mean that constitutional courts tend to defend more sovereigntist positions than other courts. On average and relative to the supreme courts, the position of a constitutional court should be 0.51 higher on the doctrinal scale. This result, however, is not statistically significant. Probabilistically (i.e. assuming that the dataset is a representative sample of the population of domestic high courts dealing with European integration), it could well be as high 1.43 or as low -0.43. In other words, because zero is included in the confidence intervals, we cannot exclude that there is no relationship between the two variables in the population represented by the dataset.

The models 2 to 5 repeat the same analysis, changing only the predictor variable. The only significant factor seems to be Power of Judicial Review (Model 2), which accounts for 18% of the variance in the outcome variable ($R^2 = 0.179$). When a court already holds the power of judicial review, its position is, on average, 1.11 point higher on the doctrinal scale. At least, we can say with 95% confidence that it should be between 0.21 and 2.01 higher in the population from which the sample is drawn.

Model 6 brings the predictor variables Power of Judicial Review, Access Rules and Support for Integration into a single multivariate regression. Again, only Power of Judicial appears significant by conventional cut-offs, while the adjusted coefficient of determination (adjusted $R^2 = 0.14$) implies a poor fit of the model to the data.

⁷³The model corresponds to the following equation: Doctrine = $\beta_0 + \beta_1$ [Constitutional Court] + ε . Where β_0 is the intercept, β_1 is the coefficient of the relationship (i.e., the slope of the line summarising the relationship between Doctrine and Constitutional Court) and ε the error term.

Table 3. Regression results

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Constitutional Court	.504 [-0.43,1.44]	-	-	-	-	-
Power of Judicial Review	-	1.109 [0.21,2.01]	-	-	-	1.181 [0.23,2.13]
Access Rules Index	-	-	.906 [-1.27,3.08]	-	-	1.27 [-0.76,3.3]
Support for European integration	-	-	-	-.009 [-0.04,0.02]	-	.001 [-0.03,0.03]
Monism	-	-	-	-	-.524 [-1.65,0.61]	-
N	31	31	31	31	19	31
Intercept	1.563	1.109	1.333	2.216	1.857	0.417
R ²	0.04	0.179	0.025	0.014	0.053	0.226
Adjusted R ²	0.007	0.15	-0.009	-0.02	-0.002	0.14

Doctrine is the outcome variable. OLS method is used. 95% confidence intervals are reported in brackets.

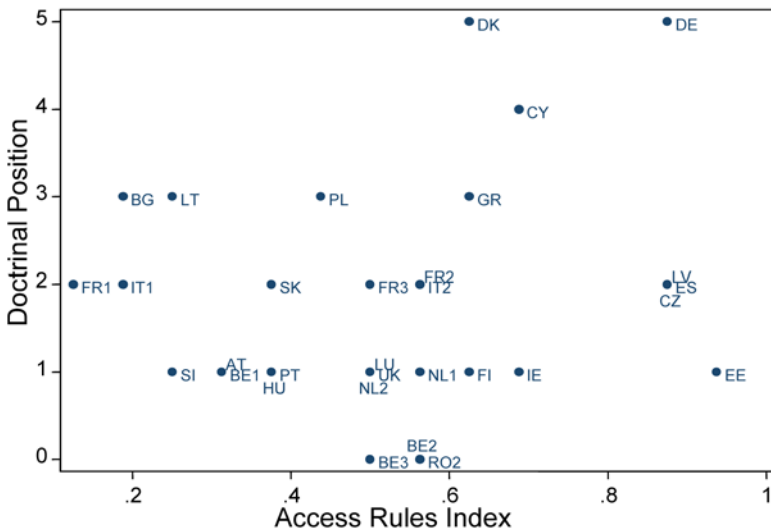


Figure 3. Doctrinal position on integration and access rules

In light of the emphasis on judicial agenda-setting in the literature, the results for the Access Rules Index arguably deserve some refining. Figure 3 plots the value of the Index against the doctrinal position of the corresponding court.

With data points scattered all over the panel, there appears to be no clear pattern of relationship between access rules and judicial doctrines on integration.⁷⁴ True, the French Constitutional Council (the 'FR1' dot in the lower-left region of the scatter plot) scores low on the Access Rules Index as well as on the doctrinal scale whereas the GFCC (the 'DE' dot in the upper-right corner) scores high on both. These are precisely the two examples put forward by Karen Alter to shore up her argument about the importance of access rules in shaping the doctrinal positions articulated by domestic judges.⁷⁵ Even so, taking a broader view of the position of highest courts across the Union, there seems to be little evidence to support it.⁷⁶

Since access rules tend to be more restrictive for constitutional courts than for supreme courts (as shown by the negative correlation between Constitutional Court and the Access Rules Index in Table 2), it could be retorted that the analysis is distorted by the presence of courts of different types. Because constitutional courts are more likely to defend sovereigntist positions than other courts and many of them have restrictive rules of standing, a simple bivariate analysis cannot determine the true relationship between access rules and judicial doctrines. In response to this objection, we can add the control variable Constitutional Court to the bivariate regression so as to eliminate the effect of court type. When we do so the Access Rules Index comes closer ($p = 0.19$ against $p = 0.4$ for the model without control variable), but still fails to reach statistical significance.

CONCLUSION

This paper offers some support for the view that institutional constraints and incentives influence the position of member states' top courts on European integration. While it constitutes the first and, to date, only study applying quantitative

⁷⁴It might be objected that this results from the construction of the Access Rules Index. An anonymous reviewer suggested an alternative formula of the form: Access Rules Index = ($prAR + posAR + CR$) * ($Istatutory + Isecondary + Ijudicial$). This construction, however, hardly gets us closer to statistical significance, with $p = 0.3$, and 95% confidence interval $[-0.05, 0.14]$. There are, of course, many possible ways to construct the Access Rules Index from this set of indicators which cannot all be tested here. The point, however, is that these indicators must be aggregated so that the resulting index makes theoretical sense. Statistical significance alone is not sufficient. We need a theoretical justification for the adopted construction. As always in empirical research, theory comes first.

⁷⁵Alter, *supra* n. 5, p. 179; Alter, *supra* n. 55, p. 118-119.

⁷⁶Note that, taken individually, none of the components of the Access Rules Index achieves statistical significance.

methods to this research question, it also comes with several limitations, which in turn point to various avenues for future research. First, and most obviously, the analysis leaves unexplained much of the observed variance in the doctrinal response of domestic courts. Presumably, much of it may result from variations in the ideological outlook of the courts' judicial personnel. But unless we find a way of measuring judicial preferences regarding European integration, we will not be able to tell with a reasonable degree of certainty. Second, the dependent variable is measured using country reports that might reflect a biased interpretation of the relevant court decisions. Instead of culling doctrinal data from scholarly works, future studies may thus elect to code the courts' position directly from the text of the decisions. Third, the present study assumes that the courts' positions exist on a pre-defined one-dimensional doctrinal scale. This dimension is, in a sense, imposed on, rather than inferred from, the data. Not only may some disagree with the underlying theoretical framework and the way it orders the doctrines. We cannot rule out that these doctrines reflect different dimensions and thus measure distinct underlying constructs. It might be possible to re-code the doctrines as distinct doctrinal indicators and then conduct a factor analysis – a statistical technique that helps determine the extent to which a set of indicators measure the same latent construct⁷⁷ – so as to arrive at a scale that looks less like a Procrustean bed. Finally, the small size and cross-sectional nature of the dataset used for the present study mean we should not be overconfident about the robustness and generalizability of its findings.⁷⁸ An ambitious research project would aim at collecting data for all courts without exception and for every year since the beginning of European integration. Students of the legal integration process would then be able to trace variations over time, not just in the choice of doctrines but also in the evolution of institutional constraints.

For all its limitations, this study may still be better than explanations simply based on the scholar's gut feeling and observation of two or three cases. In suggesting us a certain causal nexus, our intuitions are often right. But the problem is that, while good at identifying the existence and direction of causal effect, our intuitions tend to perform much less well when it comes to apprehending their

⁷⁷ For a non-technical exposition of factor analysis, see P. Vogt, *Quantitative Research Methods for Professionals* (Pearson 2007).

⁷⁸ The dataset does not take into account recent developments in the member states, notably the ruling of the Polish Constitutional Tribunal of Dec. 2011 and the judgment of the Czech Constitutional Court of Jan. 2012, which explicitly declared the ECJ decision in the *Landtova* case *ultra vires*, see Jan Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 Jan. 2012, Pl. ÚS 5/12, Slovak Pensions XVII', 8 *European Constitutional Law Review* (2012), p. 323-337. Nor does it reflect institutional evolutions, such as the introduction of concrete review in France, that took place after 1 Jan. 2007.

size. To say that being organised as a specialised constitutional court will make a judicial body more resistant to integration is one thing. To be able to say *how much* more resistant this will make the court is another. EU scholars should be aware of this. Beyond the methodological debate, though, the findings of the present study should be of relevance not only for political scientists who, like Karen Alter, engage in empirical inquiry of the European integration process, but also for legal scholars who tend to discuss the relationship between national and supranational courts in more normative terms. Admittedly, without knowledge of how institutions work or could be made to work, normative advice or evaluation of the behaviour of judicial actors remain vulnerable to utopian impulses.

ANNEX

Court Labels

<i>Code</i>	<i>Court Full Name</i>	<i>Doctrinal Position</i>
AT	Austrian Constitutional Court	1
BE1	Belgian Constitutional Court	1
BE2	Belgian Council of State	0
BE3	Belgian Cour de Cassation	0
BG	Bulgarian Constitutional Court	3
CY	Cypriot Supreme Court	4
CZ	Czech Constitutional Court	2
DK	Danish Supreme Court	5
EE	Estonian Supreme Court	1
FI	Finnish Supreme Administrative Court	1
FR1	French Constitutional Council	2
FR2	French Council of State (Conseil d'Etat)	2
FR3	French Cour de Cassation	2
DE	German Federal Constitutional Court	5
GR	Greek Council of State	3
HU	Hungarian Constitutional Court	1
IE	Irish Supreme Court	1
IT1	Italian Constitutional Court	2
IT2	Italian Council of State	2
LV	Latvian Constitutional Court	2
LT	Lithuanian Constitutional Court	3
LU	Luxembourgian Cour de Cassation	1
NL1	Dutch Council of State	1
NL2	Dutch Supreme Court	1
PL	Polish Constitutional Court	3
PT	Portuguese Constitutional Court	1
RO1	Romanian Constitutional Court	4
RO2	Romanian Court of Cassation	0
SK	Slovakian Constitutional Court	2
SI	Slovenian Constitutional Court	1

<i>Code</i>	<i>Court Full Name</i>	<i>Doctrinal Position</i>
ES	Spanish Constitutional Tribunal	2
SE1	Swedish Administrative Supreme Court	5
SE2	Swedish Supreme Court	5
UK	UK Supreme Court	1

