

National Constitutional Courts and the EU

The Evolution of the Conseil
Constitutionnel and the
Bundesverfassungsgericht

Camille White



55 Tufton Street, London SW1P 3QL
T: 020 7799 6677
E: info@civitas.org.uk

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Introduction

Over the last year, France and Germany, two of the founding members of the European Union, have had their constitutional courts make their first references to the Court of Justice of the European Union (hereafter ECJ) after over sixty years. Since its inception, the ECJ has developed a doctrine of supremacy centred on three interrelated claims: firstly, that the ECJ has the power to definitively answer all questions of European law¹; secondly, that the ECJ is entitled to determine what issues are questions of European law²; and thirdly, that European law has supremacy over all conflicting national laws³. From the perspective of the ECJ, this doctrine is necessary to ensure the uniform application of European law. If its supremacy were not respected, then the effectiveness of the law and the Court would be greatly undermined because there would be no means of preventing inconsistent laws and applications of laws across member states.

A key element of European law supremacy is the preliminary references mechanism. The preliminary references mechanism, as laid out in the Treaty on the Functioning of the European Union (TFEU), allows for courts to refer questions regarding the interpretation of European treaties and the validity or interpretation of acts by European authorities to the ECJ. The reference is preliminary in that following decision by the ECJ the case is returned to the national court, though in practice the judgement of the ECJ will decide the outcome of the case. While the TFEU merely allows that ordinary courts may refer questions to the ECJ, the Treaty makes it mandatory for *final* or *supreme* courts to do so.

How much national courts accept ECJ's claim to supremacy, however, varies dramatically. From the national courts' perspectives, unconditionally accepting European law can pose serious constitutional issues. This judicial tug-of-war has been evident in attitudes to preliminary references. In this study, we will look in detail at how the attitudes of the French and German courts to European supremacy have evolved over time, and in particular at what factors have brought the Conseil constitutionnel and the Bundesverfassungsgericht to make their first references to the ECJ.

France

Introduction

Due to the structure of the French legal system, it is impossible to give one unified picture of French courts' attitudes to the EU. Rather, any discussion must consider each of the three major courts in turn: the Conseil constitutionnel, the Conseil d'État, and the Cour de cassation. Before doing this, however, I will give a brief overview of the courts' jurisdictions and the evolution of the supremacy doctrine in France since joining the EU⁴.

Jurisdictions

The primary function of the Conseil constitutionnel is to ensure that legislation conforms with the Constitution. The Conseil was initially granted only abstract review power, whereby it had the power to review legislation referred to it by certain actors (these were increased in 1974) prior to its promulgation. Since 2009 the Conseil has also had concrete review powers thanks to the July 2008 constitutional revision establishing the *question prioritaire de constitutionnalité* (QPC) procedure: under the new article 61-1, litigants may argue that a statutory provision infringes the rights and freedoms guaranteed by the Constitution. The matter is then referred to the relevant supreme court, either the Conseil d'État or the Cour de cassation, which determines whether the case should be taken to the Conseil. If the Conseil finds that the legislative provision is in breach of the Constitution, it is repealed.

The Conseil d'État is the supreme court of the administrative branch of the justice system. It also plays an advisory role for the executive.

The Cour de cassation is the supreme court of the judicial branch of the system, acting as the court of final appeal for civil and criminal matters.

Overview

The legal doctrines of the French courts regarding European law have, perhaps inevitably, evolved dramatically since the early days of the European Union, starting from a position of extreme negativity and gradually warming to the EU.

The 1960s were marked by disagreement between the French courts and the ECJ over the obligation of national courts to enforce the supremacy of European law

over national law, mitigated by tacit acceptance of the ECJ's doctrine of direct effect (*Van Gend en Loos*⁵). The Conseil constitutionnel was declared by the Conseil d'État to be the only body capable of enforcing European law supremacy in France in *Semoules*⁶. This set a precedent against referring cases to the ECJ⁷.

In the first half of the 1970s, the Conseil constitutionnel held that enforcing international law supremacy was not within its constitutional mandate, despite the concurrent expansion of its powers in other areas. The Cour de cassation took the opportunity left it by the two Conseils to claim authority to enforce European law over national law, using European law supremacy to set aside a French regulation in *Ramel* 1970 and later completely accepting the ECJ's doctrine of European law supremacy in *Jacques Vabre* 1970. It did so on the basis that the Conseil constitutionnel's refusal to review the compatibility of French and European law meant that enforcing the supremacy of European law was not constitutional review, and was thus within the Cour's remit. The French parliament attempted to sanction the Cour de cassation for this through the Aurillac Amendment, but the amendment failed to pass through the senate and thus to gain legal force. Ultimately, by failing to pass the amendment, the parliament signalled to the lower courts that they would not be hindered in following the precedent set by the Cour de cassation⁸. Thus significant divisions had emerged between the three courts' approaches to European law by the mid-1970s.

In the late 1970s and early 1980s, the Conseil d'État further challenged the ECJ, rejecting its jurisprudence on the principle of direct effect in *Cohn-Bendit* and later refusing to make a reference to the ECJ and to apply ECJ case law to the case before it⁹. Over the same period, the Conseil constitutionnel, having openly rejected the ECJ's doctrine on the special nature of EU treaties in 1975¹⁰ and 1976¹¹, implied that it would review the constitutionality of EU obligations in 1977¹² and 1978¹³. This latter move was consistent with the Bundesverfassungsgericht's doctrine in *Solange I* that national constitutions were superior to European law¹⁴. It is worth noting that the *Solange I* decision came four years earlier. This seems to show that despite the ECJ's doctrine of uniform application across member states, in practice European law has developed at different rates in different countries.

In the 1980s, the Conseil constitutionnel refined its earlier supremacy jurisprudence. In its role as arbitrator of elections, the Conseil constitutionnel also accepted the Cour de cassation as the enforcer of international law supremacy.

Finding its legal logic (especially the *Semoules* jurisprudence) to be undermined by the Conseil constitutionnel and the Cour de cassation, and facing pressure from the French government, the Conseil d'État dramatically changed position, reversing its opposition to enforcing the supremacy of European law¹⁵.

Prior to the Maastricht Treaty, the French judges had benefited from a flexible legal order that allowed them to avoid ruling on sensitive questions, even though the ECJ had been reiterating the supremacy of European law since the late 1970s. With the constitutional amendment to Article 88, made to allow for the adoption of the Maastricht Treaty, the supremacy of European law, and thus the obligation of the French courts to enforce it, was entrenched in French law¹⁶.

After having accepted a role in enforcing the supremacy of European law, the Conseil constitutionnel and the Conseil d'État attempted to expand their powers and influence over the development of (the relationship between) French and European law throughout the 1990s. More specifically, the Conseil d'État expanded its advisory role to comprise issues of EU policy and attempted to insure against future transfers of its authority to the judicial branch¹⁷. Meanwhile, the Conseil constitutionnel accorded itself the task of reviewing the constitutionality of new international agreements and areas of EU authority.

This latter evolution raises an interesting question: was the Conseil constitutionnel moving towards greater respect of European supremacy, or merely following a general trend towards the internationalisation of law? The ECJ has distinguished European law from international law, classing it as a new legal order of its own¹⁸. While it is outside the scope of the present discussion, it is worth asking whether the Conseil constitutionnel shared this respect for European supremacy as distinct from international law, or whether its acquiescence stemmed from a greater respect for international law more generally, including the increasing importance of treaties, for example.

Recent evolution of supremacy doctrine

We will now consider the more recent developments in each court's individual legal doctrine regarding European Union law.

Conseil constitutionnel

Since the 2000s, the Conseil constitutionnel has sought to balance the demands of the European and French legal orders. However, ‘the place of EU law [in Conseil constitutionnel doctrine] continues to be determined by the French constitution’¹⁹, as evidenced in its 2010 decision on online gambling²⁰, for example.

Since a series of judgments in 2004, the Conseil constitutionnel has held that there exists a constitutional obligation to transpose EU directives into French law according to Article 88-1. However, in 2006 the court stated that the obligation of transposition is limited: transposed legislation must not violate principles of ‘French constitutional identity’ without the consent of the constituent power²¹. This approach is similar to that adopted by the Italian Corte costituzionale, as well as the German Bundesverfassungsgericht to a lesser extent.

Following this decision, the Conseil constitutionnel has sought to ensure that legislation correctly implements the EU directive it is intended to give effect to, thus breaking completely with the precedent established in its 1975 judgment²². However, the effect of this change in doctrine was limited in two ways. Firstly, review was limited to transposing laws, such that the court would not review the compatibility of a piece of legislation with any directives it did not seek to implement, for example. Secondly, the effect was limited by the Conseil constitutionnel’s refusal, until last year, to make references to the ECJ. The Conseil constitutionnel refused to seize the ECJ until 2013 allegedly because of the one month time limit it has to deliver rulings²³ (with the exception of the *a posteriori* QPC procedure introduced in 2008, for which it has three months²⁴), very likely too short a period for referrals to the ECJ. It therefore restricted itself to declaring laws to be unconstitutional when they were obviously incompatible with the directives they sought to implement²⁵.

The Conseil constitutionnel established further restrictions on its review powers in its 2010 decision (mentioned above) regarding *a priori* control of a law on online gambling²⁶. The Conseil stated that it does not examine the compatibility of a law with France’s international and EU obligations, either *a priori* or *a posteriori*, such that the Article 88-1 reference to the Treaty of Lisbon does not entail legislation being examined in light of all European law, regardless of the constitutional obligation to transpose directives. Furthermore, it declared that the constitutional obligation to transpose directives is not a right or freedom guaranteed by the

Constitution, and so cannot be invoked in a QPC. However, it allowed that ordinary courts can still take all necessary measures to ensure the full effectiveness of European law, even with the QPC procedure: they can suspend the effects of a law that violates European law, they can make a preliminary reference when they send on a QPC, and they can give precedence to European law.

The Conseil constitutionnel made its first referral to the ECJ in 2013²⁷. The case concerned the 'speciality' principle of the European Arrest Warrant (EAW) in the case of the surrender of UK national Jeremy F. to the UK. The speciality principle 'is intended to ensure that a state cannot seek the surrender of a person for an extraditable offence whilst intending to prosecute that person for a non-extraditable offence once surrendered, or extradite the surrendered person to a third state for an offence which would not have been extraditable offence from the original executing state'²⁸. In the case at hand, the accused had been delivered to the UK under a European arrest warrant for child abduction. Once in the UK, however, F. was charged with sexual abuse of a minor, a different offence to the one for which the warrant had been issued. The British authorities therefore sent a request for extension of the warrant to their French counterparts, which was appealed by F. to the Cour de cassation. The Cour de cassation referred the matter to the Conseil constitutionnel via a QPC, and the Conseil constitutionnel applied for an urgent preliminary ruling from the ECJ, thereby overcoming the issue of time limits. The ECJ approved the application for urgent response and gave its answer in the judgment of 30 May 2013, Case C-168/13 PPU *Jeremy F. v Premier Ministre*. In its final judgment on the matter, delivered on the 14th of June, the Conseil constitutionnel accepted the ECJ's interpretation of the EAW Framework Decision and stated that the implementation of the provision challenged in this particular case was at the discretion of Member States. In this case, the EAW Framework Decision did not diminish the constitutional protection of individual rights, so the considered type of decision need not be excluded from the appellate procedure. The Conseil constitutionnel was then able to rule that the challenged provision was indeed unconstitutional²⁹.

Conseil d'État

For a long time reluctant to accept the erosion of its power entailed by the growing importance of European law, the Conseil d'État has been obliged to change its position in recent years, adopting a similar approach to that of the Conseil

constitutionnel. This was particularly evident in its *Arcelor* 2007 judgment where a challenge was made to the constitutionality of an administrative act that directly transposed a European Union directive, such that to question the act would be to question the constitutionality of the directive itself. In line with the Conseil constitutionnel, the Conseil d'État acknowledged a constitutional obligation to transpose directives into French law (stemming from article 88-1 Constitution), as limited only by a core of constitutional values on a case-by-case basis. The Conseil d'État sought to establish whether there were principles in European law equivalent to the relevant French law. Given that there were, the court found that in such cases the task of interpreting the law must fall to the ECJ to ensure uniform interpretation of the principles across the EU. This recognition of the supremacy of EU law was accompanied by the Conseil d'État's *Gardedieu* decision, also in 2007, where it stated that the state must compensate citizens for the costs of national laws that violate European law. The judgment served to encourage national authorities to correctly transpose European directives and regulations within the allowed timeframe³⁰. The Conseil d'État thus followed the growing tendency in France towards judicial cooperation and dialogue with the ECJ.

In the *Rujovic* case³¹ the Conseil d'État again gave a similar judgment to the Conseil constitutionnel, just a few days after the Conseil constitutionnel ruled on the online gambling case. The *Rujovic* case also concerned the QPC mechanism, which the Conseil d'État stated did not hinder administrative courts in their duty to ensure the effectiveness of European law, as they retained the power to suspend the effects of any law contrary to European law³².

Cour de cassation

Of the three French courts, it is the Cour de cassation which has chosen to play the role of 'European court', explicitly describing itself as the 'upholder of Community law' within its jurisdiction³³. It was in this role that the Cour de cassation took the first opportunity presented to it to make a preliminary reference to the ECJ regarding the compatibility of the QPC mechanism with European law, specifically with Article 267 of the TFEU. However, the court was not just motivated by a concern for upholding European law: the introduction of the QPC procedure can also be seen as constituting a threat to the Cour de cassation's influence over lower courts and its autonomy in developing its European law jurisprudence³⁴.

The case at hand was that of Melki and Abdeli, two undocumented Algerian nationals who had been arrested within the '20 kilometre zone' along the French-Belgian border. The defence alleged that the arrest of the two men violated their rights under both European law (specifically, the Schengen Agreement) and the French Constitution. Rather than referring the question to the Conseil constitutionnel, the Cour de cassation sought an expedited ruling from the ECJ. Whatever the motivations behind the referral, it seems that the ECJ did not decide in the interests of the Cour de cassation. Rather, the ECJ followed the interpretations of the QPC mechanism espoused by both the Conseil constitutionnel in its 12th May 2012 judgment and the Conseil d'État in its 14th May 2012 judgment. The ECJ thus found the QPC procedure to be compatible with European law, but added three conditions: that the French courts remain free to seize the ECJ whenever they deem necessary, even where a QPC has been issued; that French courts retain the power to take any measure necessary to ensure the provisional protection of rights conferred by European law; that courts retain the power to disapply any national laws they find to be incompatible with European law at the end of the QPC procedure³⁵.

Subsequent discussion of the case has focused on limiting the ability of the Cour de cassation from again using its position as the supreme justice court to act as a 'stopper' of QPCs, suggesting that the ultimate outcome of its controversial act will be to diminish its institutional standing³⁶.

Germany

Introduction

Unlike in France, EU supremacy jurisprudence in Germany has been relatively uniform, largely thanks to its more vertical court structure, discussed in more detail in the next section. For this reason, our analysis will concentrate on the German Federal Constitutional Court, Bundesverfassungsgericht (hereafter BVerfG), which lies at the apex of the court system.

Jurisdiction

The BVerfG is the highest court on all constitutional matters and all German courts fall under its constitutional authority. However, the BVerfG's main responsibility is to review legislation and state actions for their compatibility with German constitutional law, the *Grundgesetz*, or Basic Law. With the exception of cases involving constitutional or international law, the BVerfG does not serve as a regular appellate court. Of interest to the discussion at hand are the four ways in which the BVerfG may become entangled in EU legal debates according to the constitution³⁷. First, the BVerfG has concrete review powers: national courts may refer cases or constitutional questions to the BVerfG, which must then issue a decision. However, the impact of this channel has been limited by the ability of the court to exclude certain issues from discussion and so avoid addressing politically sensitive questions. Second, the BVerfG can hear individual constitutional complaints; however, the BVerfG again has some discretion here because it can choose to postpone cases in order to let matters evolve, for example through the introduction of new legislation. This also applies to concrete judicial review. Third, the BVerfG can be seized by state governments to resolve disputes between the state and federal tiers. Fourth, the BVerfG has the power of abstract review over legislation referred to it by the Federal or state governments, or by one-third of the Bundestag. The great degree of flexibility inherent in these processes has allowed the BVerfG judges to choose when to intervene in the debate surrounding European Union law and effectively to pick their fights with the ECJ³⁸.

Overview

In the period immediately post-accession, judicial debate raged over the constitutionality of the EEC Treaty in Germany. This came to a head when a tax

court in Rhineland-Palatinate suggested that the EC might violate the separation of powers entrenched in the German Basic Law. The question was referred to the BVerfG, which, after giving a first response that avoided politically sensitive questions³⁹, eventually found that Germany's membership of the European Union was compatible with the Basic Law by virtue of Article 24, which states that the German government may 'transfer sovereign powers to intergovernmental institutions' through legislation⁴⁰. This is coupled with the Article 25 provision that international law is an 'integral part of federal law' and that general rules of public international law take precedence over national laws, directly creating rights and duties for inhabitants of Germany. The constitutional groundwork in Germany makes an interesting contrast with the more restrained wording of Article 88 of the French Constitution, particular prior to the 2008 changes. The BVerfG also established that directly applicable European regulations were binding in Germany and that German courts were not competent to assess the validity of European regulations⁴¹. However, the implied view of European law as somehow 'special' would later be challenged as the concerns raised by the Rhineland-Palatinate court resurfaced.

During the 'turnover tax struggle' of 1965 to 1971 the BVerfG established that national courts had an obligation stemming from Article 24 to give European law supremacy over subsequent national law. Furthermore, it stated that national courts ought also to hold the government accountable to its EU legal obligations. It should be noted that this decision came after a series of confrontations between the lower courts, who evidenced a willingness to refer broad legal issues to the ECJ to circumvent national courts, and the Federal Tax Court, which was motivated to recant its previous support of both the constitutionality of the EU and transfer of sovereignty to it because of significant challenges to its tax jurisprudence and encroachments into its jurisdiction. Throughout this 'struggle' the BVerfG chose to keep from intervening, perhaps because the debate did not directly concern its own jurisdiction⁴².

Leaving the lower courts aside, there seemed, therefore, to be a great deal of congruence between the BVerfG's jurisprudence and the ECJ regarding not only the ECJ's doctrine of direct effect (*Van Gend en Loos* 1963) but also that of European law supremacy (*Costa v ENEL* 1964).

However, since the 1970s and right up into the 2010s, the BVerfG has 'expressed deep misgivings about the compatibility of the EU treaties with Germany's Basic Law', taking issue with the relative weakness of EU human rights protections, the European Parliament's lack of democratic legitimacy, and its ability to circumvent national constitutional courts⁴³.

The BVerfG began to find limits to Article 24 transfer of sovereignty in its *Solange I* and *Solange II* decisions, 1974 and 1985 respectively. These cases came after the ECJ's assertion of European law's supremacy over national constitutions, even national fundamental rights, in its now well-known *Internationale Handelsgesellschaft* ruling⁴⁴. In their first *Solange* judgment, the BVerfG judges declared that, like all other treaties, the EC treaty's authority in Germany depended on Article 24 of the Basic Law. Contrary to the ECJ's doctrine, the BVerfG thus found that European law did not have supremacy over the German constitution, in particular the constitutionally entrenched protections of fundamental rights. In the second *Solange* judgment, the court reaffirmed this position, but allowed that European protections of fundamental rights may be applied in Germany so long as the level of protection was adequate. Unmaking its prior European law jurisprudence, the BVerfG further declared that it had the authority to review the compatibility of European law with German constitutional law, and thus the validity of European law in Germany. Hence the *Solange* decisions showed that the BVerfG retains a degree of control over European law doctrine, in this case by placing conditions on its acceptance of European supremacy.

Despite this disagreement over the extent of European law supremacy, the 1980s were nonetheless largely characterised by 'a warming trend towards the ECJ'⁴⁵, with the BVerfG recognising the ECJ as the legal judge (or *gesetzlicher Richter*) of European law, thus establishing that national courts had constitutional obligations to refer questions regarding European law to the ECJ and to respect the ECJ's rulings. The BVerfG also imposed this European doctrine on lower courts, including, for example, in its reversal of the Federal Tax Court's attempts to refute the direct effect of European directives and to reject an ECJ decision.

The coming into force of the Maastricht Treaty signalled the BVerfG's return to a more confrontational approach. In its 1993 *Maastricht* decision, the BVerfG sought to establish limits on the new parliamentary powers created by the Treaty as incorporated through Article 23 of the Basic Law, including circumscribing what the

German government could agree to at the European level. It found there to be certain inviolable constitutional limits on the government's ability to transfer sovereignty to the EU. In particular, European law and ECJ interpretations must comply with the national constitution and must remain within the transfers of power delineated by the Treaty. The BVerfG also asserted that it was the final authority on the limits of European authority in Germany. Both the Maastricht Treaty and the Lisbon Treaty were ratified by the Bundestag, in 1993 and 2009 respectively, only on the condition that the national government, parliament, and courts remain the 'masters of the treaties', i.e. of their future development⁴⁶.

This period culminated in the BVerfG's 2000 *Bananas* decision where it declared that any allegation that the EU had infringed German fundamental rights standards must prove this explicitly, expressing doubt that the EU would ever do so. This may be interpreted as a sign that the BVerfG did not intend to intervene in the European law debate so long as the European law protection of German citizens remained above a certain minimum level, established in its *Solange* judgments.

Recent evolution of supremacy doctrine

In considering the BVerfG's recent decisions, I will focus specifically on the debate over the European Arrest Warrant (EAW) and on the court's first preliminary reference to the ECJ, made earlier this year, in order to facilitate comparison between the two countries in the next section.

The European Arrest Warrant (EAW)

Just as the EAW was cause for debate in France, ultimately leading the Conseil constitutionnel to make its first reference to the ECJ, so too did it cause controversy in Germany. Prior to the adoption of the Framework Decision, Article 16(2) of the Basic Law had been amended in order to allow the extradition of a citizen within the EU, subject to the condition that the fundamental principles of the rule of law be respected. However, the BVerfG found the EAW Framework Decision to be incompatible with the constitutional amendment's rule of law requirement⁴⁷. The judges maintained that because of the partial nature of the European legal system and the exemption of the then third pillar from the doctrine of direct effect, there should be case-by-case review of the EAW to ensure its application complied with the Basic Law. The BVerfG judges claimed their decision was justified in light of the principle of subsidiarity, which requires only limited

mutual recognition of other states' criminal decisions and allows for variation from the cooperative arrangement, they claimed, when a significant 'domestic connecting factor' is established in any given case⁴⁸.

The BVerfG's judgment was both a warning against future attempts to encroach on the hard core of national sovereignty⁴⁹, as well as a reaction to the 'acceleration' of integration, as made evident shortly before the BVerfG's EAW decision in the ECJ's *Pupino* judgment, which created the rule that national courts must interpret national law 'as far as possible in the light of the wording and purpose of a framework decision in order to attain the objectives it pursues'⁵⁰.

Outright Monetary Transactions (OMT)

One of the policy commitments made by the European Central Bank (ECB) in late 2012 as part of its attempt to alleviate concerns around the viability of the Eurozone was the 'Outright Monetary Transactions' (OMT) programme. Through the OMT mechanism, the ECB can make unlimited purchases of governments' sovereign debt once a Eurozone government has made a request for financial assistance. While the ECB has not yet had cause to make any OMTs, in 2013-14 the BVerfG sought to establish itself whether the ECB would be within its mandate were it to do so⁵¹.

This move by the BVerfG can be seen as a further expression of its determination to retain the power to judge whether European laws and EU actions are constitutional in Germany. Its subsequent seizure of the ECJ is, however, difficult to square with this interpretation. The decision might also have come as a surprise to some observers of the court, given its *Honeywell* ruling⁵² two years earlier. That case concerned the age discrimination directive. In its judgment, the court held that there were no structural changes to which it could object, finding that the ECJ was not overstepping its mandate in Germany. The BVerfG found that the ECJ had to be given the opportunity to interpret the relevant provisions of European law before the BVerfG itself could declare them inapplicable in Germany. The *Honeywell* judgment thus seemed to mark a new phase of cooperation in the relationship between the Constitutional Court and the European judicial system⁵³. What does the decision to send a reference to the ECJ tell us about the way in which the BVerfG's supremacy doctrine is evolving? The key lies in determining the nature of the referral made to the ECJ, i.e. establishing whether it was indeed a friendly gesture of deference, or whether it was a challenge of some sort.

In its referral, the BVerfG argues that the OMT programme is outside the mandate of the ECB because it falls under economic, rather than monetary, policy, which remains the exclusive competence of member states⁵⁴. The potential size of the OMTs excludes them from being classified as simple support of the European Union's general economic policies⁵⁵, the court claims. Perhaps most importantly, the BVerfG alleges that the OMT mechanism violates Article 123(1) of the TFEU, which it interprets as prohibiting the direct purchase of government bonds. Simply put, the BVerfG argues that the OMT programme could be an *ultra vires* act by the ECB, and one that may even threaten the constitutional identity of the Basic Law⁵⁶ by inhibiting the government's ability to exercise its financial powers⁵⁷. The BVerfG does suggest some, albeit limited, means for the OMT programme or something like it to be found compatible with the treaties.

If the BVerfG is found to be correct in its claim that the ECB is acting *ultra vires*, then the German authorities would not be bound to the ECB's programme. Given the German central bank's importance to the ECB (for example, its contributions make up almost 20% of the ECB's capital⁵⁸), the potential consequences of the ECJ's decision are significant. The ECJ's decision will also determine whether the BVerfG must make plain its opposition to the ECJ - or even reveal itself to be compliant with it.

There are three possible outcomes of the referral and the BVerfG's subsequent reaction⁵⁹. First, the ECJ may find the OMT programme to be in violation of the relevant treaties and thus declare it void. In this case, the BVerfG would accept the decision. Second, the ECJ may find the OMT programme to be valid under a restrictive interpretation. Because the BVerfG includes this possibility in its referral, it seems likely the BVerfG would again accept the decision. In both these cases, therefore, the ECJ's decision would reflect the German court's position, such that it would not be possible to determine whether the BVerfG only accepted the judgment because it aligned with its own, rather than because it was deferring to the authority of the ECJ. The third potential outcome is for the ECJ to hold that the OMT programme does not violate the treaties (and that no restrictive interpretation is necessary). In this and only this case would there be the possibility of a definite answer as to the nature of the initial referral: the BVerfG will have to decide whether to accept the ECJ's decision, or to declare the programme *ultra vires*, in breach of the treaties.

Given the ECJ's record of defending the integration project come what may, the third outcome seems to be by far the most likely. However, to reject the ECJ's decision in the third case would not only subject the BVerfG to extraordinary criticism, it would also put the German government and other national bodies into an extremely difficult situation. The Bundesbank, for example, would be forced to either breach national law or breach European law if the ECB were to request its assistance. This in itself suggests the court would be under much pressure to accept the ECJ's judgment.

However, other aspects of the referral suggest it was not a friendly act, implying that the BVerfG may yet choose to openly oppose the ECJ. The BVerfG could have, for example, chosen to dismiss the politically sensitive questions as irrelevant to the particular case. Furthermore, the arguments it presents are open to serious counter arguments, something the brevity of its referral does nothing to help. The BVerfG 'obviously wanted this referral no matter what'⁶⁰, which bodes ill for the possibility of a conciliatory outcome.

Comparison: France and Germany

In comparing the French and German doctrines as outlined above, we will consider in turn the effect of the differing legal systems in place in each country and the effect of history on the national cultures of the judiciaries. We will then discuss the constitutional courts' first references to the ECJ, looking at the implications of these on our understanding of their supremacy doctrine.

Legal systems

Three differences between the French and German legal systems are worth highlighting in the present context: the powers of the respective constitutional courts; the relationship between the higher courts; and the relationship between the lower courts and the higher courts.

First then, for much of its history the Conseil constitutionnel has had quite limited powers relative to the BVerfG. In particular, the Conseil constitutionnel lacked the BVerfG's concrete review powers until the introduction of the QPC mechanism in 2008, as discussed above. Access to the Conseil constitutionnel has also been comparatively restricted, with individuals party to trials only able to refer constitutional questions to the Conseil constitutionnel since 2010. These factors have limited the power of the Conseil constitutionnel insofar as they limited the issues brought to it.

Secondly, the Conseil constitutionnel does not head a strictly vertical hierarchy like the BVerfG. In part by virtue of its reluctance to hear such cases, the Conseil constitutionnel has not had the same control over the French judicial dialogue with the ECJ that the BVerfG has had. Rather, the Conseil constitutionnel has had to 'compete' with the Conseil d'État and the Cour de cassation to determine French doctrine on European law supremacy. In France, development of judicial doctrine has therefore been a gradual process of back-and-forth between the courts, in contrast to the comparatively rapid development in Germany given the latter's more streamlined legal system. While the clarity of the German system might be thought advantageous in terms of efficiency, the checks inherent in the French legal system might be defended on the grounds of the politically sensitive nature of European law doctrine.

Thirdly, the lower courts in France have not had the German courts' influence over doctrinal change. This is partly due to the lower administrative courts' limited ability to challenge the Conseil d'État's European jurisprudence, coupled with the lower civil and criminal courts' lack of avenue for challenging higher court jurisprudence given that the Cour de cassation and ECJ have largely concurred in their doctrine.

Thus the different legal systems of France and Germany have played an important role in creating the different sources of pressure for doctrinal change: whereas in France forces for change have been horizontal, coming from the other high courts, pressure for change in Germany has tended to be vertical, coming up the judicial hierarchy.

This also reflects the endogenous relationship of judicial incentives to legal systems. For example, because of the structure of the French legal system, the Cour de cassation was able to take a lead in developing its own European law doctrine. Due to this feature of the system and as the importance of European law grew, the Conseil constitutionnel had an incentive to bring its jurisprudence more in line with that of the Cour de cassation in order to increase its influence in this domain. Conversely, the BVerfG did not have any players similar to the Cour de cassation with which to compete, and thus did not face the same incentives to orient itself towards the European court⁶¹.

Judicial cultures

Judicial culture is a complex phenomenon, determined in part by the particular historical development of a given judicial system. One aspect of French judicial culture that is said to differ from German judicial culture is an abiding reluctance among French judges and courts to make controversial or political decisions, especially when contrasted with their German counterparts. This may arguably be traced back to the hefty sanctions against activist judges introduced in France in the late 18th Century. Evidence of this conservative judicial culture today might be thought to lie in the nature of the cases French courts have referred to the ECJ, i.e. largely technical matters (rather than more controversial or politicised questions), as well as the low litigation rates against the government (approximately one third of those found in Germany, for example⁶²). However, the explanatory power of this factor is limited to say the least: French courts have made and do make controversial judgments, as has been made evident in our overview above. Judicial

culture, or at least this aspect of it, therefore fails to explain the variance we see in French courts' willingness to make political decisions.

A more compelling claim can be made regarding the effect of German historical developments on judicial culture, specifically with regards to German fundamental rights protection. In several of the landmark cases we have discussed, such as the BVerfG's EAW decision, German courts have displayed a distrust of other countries' rights protections. The historical context for this distrust was clearly articulated by the Rhineland-Palatinate tax court involved in the initial case challenging German integration into the European Union. In its judgment, the court likened those embracing integration uncritically to the academics who embraced Nazi doctrine uncritically, expounding the dangers inherent in a collapse of the separation of powers entrenched in the constitution⁶³. Both the defence of separation of powers and overriding concern for the protection of fundamental rights can be convincingly traced to this fear of repeating the past.

Preliminary references

The subject matter of the preliminary references made by the Conseil constitutionnel and the BVerfG reveals a fundamental difference in their approach to European supremacy. Whereas the Conseil constitutionnel raised questions surrounding the authority of French courts to hear cases concerning the EAW, the BVerfG seized the ECJ in order to challenge the authority of the ECB. Underlying the courts' references are two radically different questions, ones which have long characterised the behaviours of the courts: for the Conseil constitutionnel (and the other French courts to varying degrees) the main issue has been whether national courts and judges had the authority to enforce supreme European law over national law; for the BVerfG, the main issue has been whether European law really was supreme to national law⁶⁴.

Conclusions and predictions

Broadly speaking, the French and German courts' European supremacy doctrines seem to be converging around similar positions over time⁶⁵. This is perhaps not so surprising, given how pessimistic and optimistic they were, respectively, about European integration in its initial phases. One might even argue that this trend towards the middle ground was somewhat inevitable. However, such claims are clearly ahistorical: at the time of accession, the orthodoxy was that courts' support

for the European courts, law and integration would grow as new generations of judges and lawyers, more accustomed to the European legal order, rose to pre-eminence. While the French Conseil constitutionnel and Conseil d'État have followed this model, the more contact German courts have had with the EU, the more critical they are of it. Indeed, it is those German courts that have the most experience with the European legal order that are most hostile to it⁶⁶.

Rather than conforming to simplistic predictions, the doctrines of the French and German constitutional courts have been the complex outcomes of the interaction between their legal systems (and the corresponding judicial incentives), judicial culture, differing questions surrounding the European legal order, and the changing issues raised by deepening integration. This divergence highlights the deeply political nature of the European project and, ultimately, of European law.

Our overview showed, for example, that German acceptance of European supremacy has always been dependent on certain conditions being met, chief among them the protection of fundamental rights. In this sense, the German challenge to European law supremacy has always been present. Similarly, contemporary challenges to European law are difficult to separate from political opposition to the European project. It may be the case that the countries with the most experience of the European legal order are the same countries currently questioning how advantageous their membership is to them.

Looking forward then, it remains to be seen how the BVerfG's challenge to the ECJ will be resolved. It is unclear whether the ECJ will be able to answer the preliminary reference without inciting open conflict between the courts. Whatever its outcome, the case will have serious implications in terms of the nature of subsequent judicial dialogue across the European Union. If economic conditions in Europe deteriorate further such that new measures are proposed and further powers accorded to the ECB, this could also fuel attacks from the national courts, in line with the BVerfG's reference regarding the OMT.

Notes

- ¹ Article 234 EC, Treaty of Nice (2001), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E234:EN:HTML>
- ² Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199
- ³ Case 6/64 Costa v ENEL [1964] ECR 585
- ⁴ For ease of understanding, I will use 'EU' and 'European Union' throughout. Similarly, all legislation and norms at the European level will be referred to as 'European law'.
- ⁵ *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62
- ⁶ *Semoules Case*, Conseil d'Etat, 1 March 1968, [1970] CMLR 395
- ⁷ Alter (2003), 138-140
- ⁸ Alter (2003), 145-150
- ⁹ Alter (2003), 151-152
- ¹⁰ Conseil constitutionnel (CC), Decision no. 74-54 DC of 15 January 1975 (IVG/abortion decision)
- ¹¹ CC, Decision no. 76-71 DC of 30 December 1976 (regarding elections to the European Parliament)
- ¹² CC, Decision no. 77-89 DC of 30 December 1977
- ¹³ CC, Decision no. 78-93 DC of 29 April 1978
- ¹⁴ Alter (2003), 153
- ¹⁵ Alter (2003), 158-161
- ¹⁶ Jakubyszyn (2007)
- ¹⁷ Alter (2003), 167-71
- ¹⁸ Case 6/64 Costa v ENEL [1964] ECR 585
- ¹⁹ Richards (2011), 9
- ²⁰ CC, Decision no. 2010-605 DC of 12 May 2010
- ²¹ CC, Decision no. 2006-540 DC of 27 July 2006
- ²² CC, Decision no. 74-54 DC of 15 January 1975 (IVG/abortion decision)
- ²³ Article 61 Constitution
- ²⁴ Article 61-1 Constitution
- ²⁵ For example, Decision no. 2006-543 DC of 30 November 2006
- ²⁶ Richards (2011), 8
- ²⁷ CC, Decision no. 2013-314P QPC of 04 April 2013
- ²⁸ Kustra (2013), 176
- ²⁹ Kustra (2013), 177-178
- ³⁰ Quatremer (2007)
- ³¹ CE 14 May 2010, *Rujovic*, req. no. 312305
- ³² Richards (2011), 9

- ³³ Cour de cassation (2006) Quoted in Richards (2011), 3
- ³⁴ Dyevre (2011)
- ³⁵ Joined Cases C-188/10 and C-189/10 Melki and Abdeli (judgment of 22 June 2010); Court of Justice (2011), 13
- ³⁶ Dyevre (2011), 29
- ³⁷ Alter (2003), 70
- ³⁸ Alter (2003), 71
- ³⁹ *Re Tax on Malt Barley* (case III 77/63), BVerfG decision of 5 July 1967, BVerfG 2 BvL 29/63, [1967] 2 EuR 351, [1967] 27 CMLR 302
- ⁴⁰ BVerfG decision, 1 BvR 248/63, 1 BvR 216/67 of 18 Oct 1967, [1968] 1 EuR 114, [1967] 12 A WD 477
- ⁴¹ Alter (2003), 74-80
- ⁴² Alter (2003), 80-87
- ⁴³ Brady (2014), 21
- ⁴⁴ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Weatherill (2013)
- ⁴⁵ Alter (2003), 73
- ⁴⁶ Brady (2014), 21
- ⁴⁷ 18 July 2005, 2 BvR 2236/04 “European Arrest Warrant Act case”
- ⁴⁸ Pollicino (2010), 76-77
- ⁴⁹ Pollicino (2010), 104
- ⁵⁰ Case C-105/03 *Maria Pupino*, para. 43
- ⁵¹ *The Economist* (2014)
- ⁵² *Honeywell*, 6 July 2010, 2 BvR 2661/06
- ⁵³ Thiele (2014), 242
- ⁵⁴ Treaty on the Functioning of the European Union (TFEU), Article 120
- ⁵⁵ TFEU, Article 125
- ⁵⁶ Concept first raised in the BVerfG’s *Lisbon* decision
- ⁵⁷ Thiele (2014), 245
- ⁵⁸ European Central Bank (2014)
- ⁵⁹ Thiele (2014), 247
- ⁶⁰ Thiele (2014), 264
- ⁶¹ Alter (2003), 125-126
- ⁶² Alter (2003), 174-179
- ⁶³ *Re Tax on Malt Barley* (case III 77/63), FG Rhineland-Palatinate decision of 14 Nov. 1963, [1963] EuR 10 130, [1964] 10 CMLR 130
- ⁶⁴ Alter (2003), 135
- ⁶⁵ Alter (2003), 178

⁶⁶ Alter (2003), 6

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