

[Jan Komárek](#)

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National constitutional courts in Europe: *A rejoinder*

Jan Komárek*

First draft

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I am grateful to Marco Dani and Sabine Mair with Elias Deutscher for their thoughtful and engaging reactions to my article ‘National constitutional courts in the European constitutional democracy’.¹ It is a great privilege to make other scholars think and write about my ideas – and their critique has certainly helped me to nuance some of my initial thoughts about European constitutional democracy.

Dani raises three points, essentially: first, that my article provides too an unconditional support of national constitutional courts, second, that my account mistakenly qualifies the rise of the number of cases concerning fundamental rights as a ‘fundamental rights revolution’, and finally, that my argument is too pessimistic about ordinary courts’ ability to defend the core commitments of constitutional democracy against excessive claims by supranational authority. Mair and Deutscher also put doubts on the ‘rights revolution’s’ role in undermining the place of national constitutional courts. Further, they argue that the communicative link between adjudication and political and public sphere in the EU is not ‘broken’. Finally, they disagree with me ‘that the [ECJ] is biased in favour of private autonomy and to the detriment of public autonomy’.²

My rejoinder seeks to address these points in the following steps: (1) I begin with taking a closer look at the fundamental rights adjudication in Europe. While I agree that using the term ‘rights revolution’ was probably misconceived, I continue believing that something significant has happened with the entry into force of the EU Charter in 2009. I also react, only briefly, to the argument raised by Mair and Deutscher regarding the nature of EU fundamental rights which are embedded in a structure that allows only very limited communication between the institutional (legal and political) sphere on the one hand, and the public sphere on the other. (2) I then address the most fundamental point raised by Mari and Deutscher concerning the usefulness of the private-public autonomy distinction. I correct their mischaracterisation of my understanding of the distinction but at the same time admit that their challenge led me articulate what I am really after: the boundary between the market (or the economic sphere) and politics (and public sphere). (3) Thirdly, I address Marco Dani’s objection against my too optimistic a view of constitutional courts. I believe that the objection is much wider and concerns our view of the role of supranational legality in post-war

* Associate Professor in EU law, European Institute and Department of Law, London School of Economics and Political Science. J.Komarek@lse.ac.uk.

¹ Marco Dani, ‘Coping with the displacement of national constitutional courts: A comment to Jan Komárek’ ____, and Sabine Mair and Elias Deutscher, ‘A response to Jan Komárek’s National Constitutional Courts in the European Constitutional Democracy’, reacting to Jan Komárek, ‘National constitutional courts in the European constitutional democracy’ (2014) 12 *International Journal of Constitutional Law* 525.

² Mair/Deutscher, n 1, [2].

constitutional settlement. Similarly to Dani I am rather sceptical of its compatibility with the core commitments of constitutional democracy, but at the same time remain ambivalent when it comes to its indispensability for the health of constitutional democracy in Europe. (4) Finally, I suggest what the solution to the constitutional courts' current predicament can be: the greater emphasis on the distinction between ordinary and constitutional legality and greater institutional responsibility of ordinary courts in maintaining it.

1 Shall we fear the 'rights-revolution' in Europe?

I will start with the point regarding fundamental rights, raised by both replies to my article. I fully share Dani's criticism that the '[t]alk of revolution, ..., is exaggerated and, probably, deceiving'.³ I did not want to suggest by that expression a deep structural 're-foundation' of the EU legal order or a significant reorientation of its legal discourse. I used the term 'revolution' only in order to highlight the rise of preliminary references concerning fundamental rights by national *ordinary* courts. In my view this *numerically* significant phenomenon explains why the ECJ's 'doctrine of displacement' of national constitutional courts started to bite only relatively recently. It is the consequences of such references for the structure of the national constitutional democracy that I am concerned with most and to which I give *normative* importance.⁴

That, in essence, would be my reply to Mair and Deutscher too: of course I know that the doctrines, which I have labelled as 'displacing' constitutional courts from national and European politics, were established a long time ago.⁵ But I would insist that they started to bite national constitutional courts only relatively recently – as evidenced by the growing academic interest in the topic and the very cases that concern constitutional courts' relationship to ordinary courts – all emerging only recently. One needs to distinguish between existing doctrines in EU law, which are indeed, 'not new at all',⁶ and their actual effect on the domestic constitutional structures that gives rise to concerns, which I tried to identify in my article. This effect is due to the developments in European integration that came much later after the rulings mentioned by Mair and Deutscher.

Mair and Deutscher further question my reading of 'the notorious duo *Åkerberg Fransson* and *Melloni*'⁷ as contributing 'significantly to the marginalisation of national constitutional courts'.⁸ They delve admirably into the ECJ's decisions that followed these two judgments in order to argue that my fear of displacement is misguided. Here I would offer a methodological point: in my article I was mainly concerned with national *ordinary* courts' (mis)use of the displacement doctrines in order to challenge the authority of their domestic courts. For them the largely inconsistent case law of the Court, some contained in mere orders rejecting preliminary references, analysed by Mair and Deutscher, does not mean much. In national

³ Dani, n 1, [10].

⁴ I have more fully addressed this question elsewhere: see 'Why National Constitutional Courts Should Not Embrace EU Fundamental Rights' in S. de Vries, U. Bernitz, S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* (Oxford and Portland, Hart 2015), 75-92 also available online as *LSE Legal Studies Working Paper* No. 23/2014.

⁵ I deal with the more 'technical aspects' of the doctrine in a related article, 'The place of constitutional courts in the EU' (2013) 9 *European Constitutional Law Review* 420-450.

⁶ Mair/Deutscher, n 1, [3].

⁷ ECJ (Grand Chamber), Judgment of 26 February 2013 in Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105 and Judgment of 26 February 2013, Case C-399/11 *Melloni*, ECLI:EU:C:2013:107.

⁸ Mair/Deutscher, n 1, [3].

ordinary courts' operation, it is the “*grands arrêts*” of the Court that matter.⁹ And until the Court announces clearly – in a grand chamber judgment – that the approach taken in *Fransson* and *Melloni* is reconsidered, the former will be taken to represent the ECJ's doctrine as it stands.¹⁰

Moreover, when Mair and Deutscher claim that ‘the Court's interpretation of [Article 53 of the EU Charter in *Melloni*] does not deviate from its approach to national standards of protection in its pre-Charter case law’,¹¹ they point to what is exactly problematic about the Court. As many people have observed, the Court most of the time opts for the most expansionary (‘pro-integrationist’) interpretation of EU law.¹² While some people believed that Article 53 of the EU Charter ‘threaten[ed] the supremacy of [EU] law’,¹³ in actuality the Court used it to confirm the absolute nature of the principle – later confirmed in its Opinion on the Accession of the EU to the ECHR.¹⁴ To rely on the same rationale as the Court did thirty years ago in *Hauer*¹⁵ (seemingly praised by Mair and Deutscher) does not suggest sensitivity to the changed political and constitutional context of European integration, but rather a blind adherence to interpretive principles originating in times when EU law did not matter (much) in domestic politics and did not provoke so much opposition as it does today.

At the same time, however, I would not dismiss the revolutionary potential of what Dani calls ‘rights-recalibration’, whereby the ‘Union undertakes fundamental rights protection ... to humanize its institutional framework by recalibrating its regulatory projects in the light of this new legal and political culture’.¹⁶ My concern is that this recalibration will not lead to the constitutionalisation of the EU,¹⁷ but to the submission of fundamental rights to the logic of the supranational project. This is exemplified by the ECJ's Opinion on the Accession of the EU to the ECHR.¹⁸ The Court firstly emphasises that ‘[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that *the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU*’.¹⁹ The Court then explains what these objectives are: ‘The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition

⁹ On the notion of *grands arrêts* see Antoine Vauchez, ‘EU law classics in the making - methodological notes on *Grands arrêts* at the European Court of Justice’ in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge, CUP 2017).

¹⁰ This is an argument based on my experience of how the ECJ's case law operates in national courts – which I admit is not corroborated (at least not to my knowledge) by a sound empirical scholarly research.

¹¹ Mair/Deutscher, n 1, [6].

¹² See e.g. Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford and Portland, Hart 2012), Chapter 10, Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge, CUP 2012).

¹³ See Jonas Bering Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’ (2001) 38 *Common Market Law Review* 1171.

¹⁴ ECJ (Full Court), Opinion of 18 December 2014, 2/13, ECLI:EU:C:2014:2454.

¹⁵ Mair/Deutscher, n 1, [9], reference is to ECJ, Judgment of 13 December 1979 in Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

¹⁶ Dani, n 1, [11].

¹⁷ And nowhere in my article I suggest this, since I reject reducing constitutionalism to a mere rights-protection.

¹⁸ N 14.

¹⁹ *Ibid*, paragraph 170, emphasis added.

policy'.²⁰ I would suggest that free trade is (thus far) certainly not the central objective of any national constitutions, since life is about many more things than free market and trade.²¹

Finally, as I argue elsewhere, EU fundamental rights are not embedded in a political system that provides for open contestation over the objectives to be pursued by its institutions, but is instead tied in a straitjacket formally amendable by the Member States, but in reality isolated from any meaningful political contestation.²² And that is the true reason for worry, in my view: unless the EU becomes itself a constitutional democracy, its fundamental rights will serve not an emancipatory ideal of the latter, but the neoliberal goal of submitting national democratic process to the demands of unfettered globalism and marketization.²³

The few examples of the EU legislator's engagement with the ECJ's rulings, offered by Mair and Deutscher, cannot change this bleak view.²⁴ They represent most of the time modest modifications rather than radical overturns, which are simply almost impossible to adopt in the so diverse Union. The quote from Mair and Deutscher speaks in my view against their argument. They refer to a recent analysis of 22 legislative proposals, which identified 'alongside 13 codifications, 5 modifications, 3 non-adoptions and 1 override of the Court's case law by the EU legislator'.²⁵ I read these numbers as showing that while it may be possible for the EU legislator to negotiate the (a very limited) extent to which national social policy must give way to the requirements of the free movement law,²⁶ the fact remains that the market reins. Attempts to exempt certain domains from the reach of legal integration remain most of the time futile.²⁷

2 Fundamental boundaries: the market and politics

This relates to the perhaps most fundamental critique raised by Mair and Deutscher against my article. It focuses on the conceptual framework of my article - the idea of European Constitutional Democracy, based on the balance - or better put, the process of negotiation - between private and public autonomy.²⁸ I am said to argue that the ECJ's 'bias in favour of private autonomy, to the detriment of public autonomy, can best be balanced by national constitutional courts, due to their traditional public autonomy focus'.²⁹ They add, without attributing this view to me:

Traditionally, individuals' private autonomy is protected on the basis of fundamental rights, as such rights protect citizens against abusive governmental power. By contrast,

²⁰ Ibid, paragraph 172.

²¹ See however Daniel Cohen, *Homo Economicus: The (Lost) Prophet of Modern Times* (Cambridge: Polity 2014).

²² See n 4. On the constitutional significance of the static nature of the EU objectives see Floris de Witte and Mark Dawson, 'From balance to conflict: a new constitution for the EU' (2016) 22 *European Law Journal* 204-224.

²³ See Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books 2015).

²⁴ Mair/Deutscher, n 1, Section 2, drawing mostly on Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (OUP 2015).

²⁵ Mair/Deutscher, n 1, 9.

²⁶ And this still to a very limited extent.

²⁷ See e.g. Loïc Azoulay, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *European Journal of Legal Studies* 192-219.

²⁸ Mair/Deutscher, n 1, Section 3.

²⁹ Ibid, [10].

public autonomy is traditionally linked with the idea of protecting the general interest through means of public policy.³⁰

The distinction between private and public autonomy is indeed crucial for my understanding of constitutional democracy. It encapsulates a tension, which far transcends the context of constitutional courts and adjudication in Europe. It is a tension between individuality and communality, our ‘desire to be autonomous and the desire to be a participant in a common venture’.³¹ In jurisprudence it was made famous by Duncan Kennedy, who saw it as a ‘fundamental contradiction’ of the liberal conception of law.³² The contradiction was adopted by many ‘crits’ in the United States, despite that Kennedy later ‘renounced’ it,³³ and lies at the heart of Maarti Koskenniemi’s revolutionary study of legal argument in international law.³⁴ More broadly speaking it has been articulated in various debates on justice (between ‘liberals’ and ‘communitarians’),³⁵ on freedom (where it relates to the distinction between liberal or negative freedom and different versions of political or social freedom),³⁶ or self-determination.³⁷ In post-war European constitutional law it is visible in the conception of rights, which are always balanced against each other and also some fundamental common interest, although the core of the right must always be protected.³⁸

Speaking of the role of positive theory of public law, Martin Loughlin somewhat sceptically observed that its objective ‘can only be that of developing the most effective apparatus we can that acknowledges the power of these competing claims. And since this disjuncture between freedom and belonging can be neither eliminated nor reconciled, it can only be negotiated’.³⁹ One way of analysing legitimacy is to see how this tension is negotiated in concrete institutional settings – since the tension cannot be displaced, no matter how much some proceduralists would want it so.⁴⁰ To borrow from Christoph Möllers’ study of the principle of separation of powers, where public autonomy refers to democratic self-determination and private autonomy to individual self-determination:

both forms of legitimacy are not only equally valuable, but mutually dependent and reinforcing. The justificatory capacities of individual and democratic procedures do not operate at the expense of one another. Democratic and individual legitimacy do not play in a zero sum game. The democratic process can claim legitimacy only if the rules that guarantee equal participation are observed. Inversely, the scope of individual liberties needs a democratic procedure because it potentially concerns everybody. As a result, any

³⁰ Ibid, [11].

³¹ Martin Loughlin, *Foundations of Public Law* (Oxford: OUP 2010), 11.

³² See particularly ‘The Structure of Blackstone’s Commentaries’ (1979) 28 *Buffalo Law Review* 205-382, 211-213.

³³ Peter Gabel and Duncan Kennedy, ‘Roll over Beethoven’ (1984) 36 *Stanford Law Review* 1-55, 15-16.

³⁴ *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a New Epilogue* (Cambridge: CUP 2005).

³⁵ See Stephen Mulhall and Adam Swift, *Liberals and Communitarians* 2nd Ed (Oxford: Blackwell 1996).

³⁶ See Axel Honneth, *Freedom’s Right: The Social Foundations of Democratic Life* (Cambridge: Polity 2014).

³⁷ Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: OUP 2013), especially chapter 2, ‘Self-determination as the source of separated powers’.

³⁸ See e.g. Article 52 of the EU Charter. On this structure of rights and the development of legal thought see Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: CUP 2013).

³⁹ Loughlin, n 31, 11.

⁴⁰ See e.g. Linda Mulcahy, ‘The Collective Interest in Private Dispute Resolution’ (2013) 33 *Oxford Journal of Legal Studies* 59–80, who observes at 59 that ‘that litigation models in England send out conflicting messages’. In my view it cannot be otherwise.

act of public authority must live up to both modes of legitimacy. No binding decision may refer *only* to *one* mode.⁴¹

With this broader context in mind it should be clear that I do not attribute one form of autonomy to exclusively one institution (such as private autonomy to the ECJ and public autonomy to constitutional courts); what I am concerned with is the existence of an institutional structure that allows for negotiation between private and public autonomy and the legitimation of public authority in terms of both. In this way I connect the idea of European Constitutional Democracy to the theory of constitutional pluralism.⁴² And indeed, I do not believe that the institutional structure of the EU, if taken *in opposition to* rather than *in conjunction with* domestic structures falls short of this demand. By ‘domestic structures’ I do not mean constitutional courts only, but the whole edifice of a constitutional democracy, although my argument focused on the former, since they seemed to me marginalised in the debate that focused on national parliaments.

It can be true that *on its face*, it can seem that ‘the balancing between individual fundamental rights and a genuinely European interest, lies at the very heart of the [ECJ]’s fundamental rights case law over the last four decades’.⁴³ The problem is, however, that in my view it is difficult to identify the ‘genuinely European interest’, other than rhetorically covering various deep social conflicts between the ‘centre’ and the ‘periphery’ of the Union, where ‘the “universal” of the Union most often coincides with the “particular” of the centre’.⁴⁴ The free movement of goods is therefore one of the fundamental ‘universals’ of the Union, which however serves disproportionately companies based in the ‘old’ Member States and does not allow challenging their marketing practices as price dumping (taking advantage of different price elasticity of demand in the ‘old’ and post-communist Europe. Post-communist Member States are not allowed to make up for such dumping, which leads to the loss of competitiveness of producers based there, through taking advantage of its competitive advantage – the cheap labour force – because social dumping is something to be prevented.

This is not to fully agree with Damjan Kukovec, who came with a very sobering critique of the overwhelming diatribe against the ECJ’s decisions in *Viking* and *Laval*⁴⁵ and introduced the above analysis to the EU legal discourse. Contrary to Kukovec⁴⁶ I still believe that it makes sense to think of such conflicts in terms of the ‘fundamental contradiction’ mentioned above and share ‘the conclusion of progressive lawyers that what needs to be fought is “the market” or “the goal of free competition”’.⁴⁷ Explaining why would require more space and would essentially entail replying to Kukovec, but I would like to a recent observation made by Wolfgang Streeck: ‘I do not believe we can speak meaningfully about the future of democracy, in Europe or elsewhere, without at the same time speaking about the future of capitalism. Put otherwise, we cannot do democratic theory without political economy’.⁴⁸ To

⁴¹ Möllers, n 37, 78-79.

⁴² See Jan Komárek, ‘Institutional Dimension of Constitutional Pluralism’ in M Avbelj and J Komárek (eds), *Constitutional Pluralism in Europe and Beyond* (Oxford: Hart 2012).

⁴³ Mair/Deutscher, n 1, [13].

⁴⁴ Damjan Kukovec, ‘Law and the Periphery’ (2015) 21 *European Law Journal* 406-428, 423.

⁴⁵ ECJ (Grand Chamber), Judgment of 11 December 2007 in Case C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen’s Union (“Viking”)* [2007] ECR I-10779 and Judgment of 18 December 2007 in Case C-341/05 *Laval un Partneri* [2007] I-11767.

⁴⁶ *Ibid.*, 416-419. Kukovec labels the form of analysis endorsed here as ‘conceptualism of contemporary legal thought’.

⁴⁷ *Ibid.*, 417.

⁴⁸ Wolfgang Streeck, ‘Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas’ (2014) 21 *Constellations* 213-221, 218.

me this means to analyse the notion of the market and free competition in constitutionalist terms, something that some people have started to do also in Europe,⁴⁹ and not abandoning the concepts altogether.

3 The role of supranational legality: is it compatible with constitutional democracy?

Coming to the point regarding my idealisation of constitutional courts, on a closer look Dani's critique is not so much about them. The key critique concerns the very notion of *national* constitutional democracy, and its confrontation with a new type of legality developed in the post-war era. After the *bourgeois formal legality*, which helped to liberate 19th century liberals and capitalist entrepreneurs from feudalism, and *welfare constitutional legality* that sought to address the social question raised by socialists in the aftermath of laissez-faire capitalism, *supranational legality* is established to enhance 'constitutional democracies by coping with their structural deficiencies',⁵⁰ which consist in their 'inbuilt tendency of sanctifying national communities and their particular conception of the human order' and their susceptibility 'to capture by vested interests and exclusion of outsiders'.⁵¹ More controversially, supranational legality serves what Dani calls 'advanced liberalism agenda' – 'boosting the competitiveness of national economies by countering vested interests'.⁵²

Dani's account of the EU developed throughout much of his recent work⁵³ is remarkably richer (and in my view far more accurate) characterization of the point of European integration than the one, which sees the Union only as an external *constraint* that complements internal mechanisms with supranational ones.⁵⁴ The EU is quite a powerful *enabling* force, in the sense that its government structures allow the adoption of policies that would be hardly achievable at the level of the nation state.

Crucially, these are policies that a European nation state could not implement not only for reasons of their scale and scope, such as the Europe-wide common market or environmental protection, but also – and more importantly - *because such policies would have been opposed by the domestic electorate*. Chris Bickerton argues in this vein that 'the turn to member statehood' was part of the strategy 'to change public expectations and to demobilize those societal actors for whom national Keynesianism had become the natural policy choice'.⁵⁵ Monetarist emphasis on price stability won over the Keynesian objective of full employment and the external devaluation of currency ceased to be available to national governments, which would have sought to regain international competitiveness in this way. Moreover, in the context of European market integration, exchange rate stability became a goal in itself,

⁴⁹ See particularly Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Oxford, Portland: Hart 2016).

⁵⁰ Dani, n 1, [6].

⁵¹ Ibid, [5].

⁵² Ibid, [13].

⁵³ See particularly 'Rehabilitating Social Conflicts in European Public Law' (2012) 18 *European Law Journal* 621-643 and 'The Subjectification of the Citizen in European Public Law' in Loïc Azoulay, Ségolène Barbou des Places, and Etienne Patout (eds), *Constructing the Person in EU Law Rights, Roles, Identities* (Oxford and Portland, Hart 2016).

⁵⁴ A view presented by Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven, Yale University Press, 2011), 146-150 and adopted since by other authors writing on the EU constitution.

⁵⁵ See Christopher J Bickerton, *European Integration: From Nation-States to Member States* (Oxford, Oxford University Press, 2012), 102-108.

forcing the Member States to bind themselves to various cooperative mechanisms, which predated the establishment of the EMU in 1993.⁵⁶

Bickerton also shows how the transformation of the European nation states into the EU Member States helped to lower the expectations that people had from the state – to the point that today the state is not seen as an achievement of freedom understood as the ability to co-determine with others the conditions of one’s life but an obstacle to it. Freedom is thus reduced to negative freedom from interference – and institutions of collective self-determination (the state, but also labour unions), which are crucial to what is often called ‘social freedom’ seen with suspicion. Individuals can of course cooperate, but they do so mainly through private contracts in the market place, not through political action in the public sphere.⁵⁷

Now we may praise all this if we agreed with the kind of policies pursued by the EU Member States since the 1970s, but the question is whether European peoples actually want such policies. The only mechanism to find out is through politics that takes place in the framework of constitutional democracy and that is precisely what we lack today in the EU. It is largely constrained at the national level and virtually non-existent at the level of the EU. National politics operates in the context where ‘there is no alternative’ – at least for some countries - to the economic model prescribed by the Treaties (and mutated in the context of the Eurocrisis).⁵⁸ The EU is then busy with creating fictions of actual politics (such as the presentation of the former prime minister of Luxembourg as the leader ‘elected’ by European citizens),⁵⁹ while ‘keeping the people out (or from obstructing integration)’⁶⁰ – a familiar theme of the struggle for EU legitimacy since 1950, beautifully reconstructed by Claudia Schrag Sternberg.

The key question for both me and Marco Dani,⁶¹ I suspect, is whether the transformation of European nation states into EU Member States has been a legitimate process and whether the price the former had to pay for it was not too high. The question of whether the displacement of constitutional courts was worth it is just part of this larger and much more important question. It asks, essentially, what the legitimate form of political rule in Europe is and whether constitutional democracy can coexist with supranational integration. Dani finds promising a mix of constitutional democracy and intergovernmental-technocratic regulation, while I think that constitutional democracy needs to be extended to comprise both the Member States (qua states)⁶² and the Union.

⁵⁶ See Barry Eichengreen, *The European Economy Since 1945: Coordinated Capitalism and Beyond* (Princeton, Princeton University Press, 2007), 225-293.

⁵⁷ See Axel Honneth Joseph Ganahl (transl), *Freedom’s Right: The Social Foundations of Democratic Life* (Cambridge, Polity Press, 2014).

⁵⁸ See Agustín José Menéndez, ‘Editorial: A European Union in Constitutional Mutation?’ (2014) 20 *European Law Journal* 127-141.

⁵⁹ See Sara B. Hobolt, ‘A vote for the President? The role of *Spitzenkandidaten* in the 2014 European Parliament elections’ (2014) 21 *Journal of European Public Policy* 1528-1540.

⁶⁰ Claudia Schrag Sternberg, *The Struggle for EU Legitimacy: Public Contestation 1950-2005* (Basingstoke, Palgrave Macmillan 2013), 187.

⁶¹ I feel the need to add ‘talking as constitutionalists’ – since if we were economists, or talked as the citizens of two different EU Member States, we could have different criteria and therefore different views on this question.

⁶² In this respect I do not agree with Habermas, who speaks of ‘European peoples’ instead of states and reserve the term ‘citizen’ only to the citizens of the EU – see Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge, Polity Press, 2012), 28-37.

At this point I think it is important to avoid a false dichotomy between on the one hand an idealised notion of constitutional democracy, existing at the level of the nation state,⁶³ and on the other hand the EU (and other supranational projects, such as the ECHR), presented in supposedly realistic, cold and rather unattractive terms. It may well be that the very establishment and sustained existence of national constitutional democracies in the post-war years was possible only thanks to European integration. In other words, it is plausible to say that today's Germany has constitutional democracy *now* admired by some *only* because shortly after the War it participated in European supranational structures, and similar things can be said about post-communist states that joined the EU much later.⁶⁴ Too many accounts of the legitimacy crisis of the EU take the view that there once was a fully democratic European nation state, which was somewhat lost or dismantled on its way to become the member of the EU. It is important to ask a different question: does the EU *today* make the rule *over* the people of its Member States more legitimate than their being ruled without the Union?⁶⁵ Interestingly, Bickerton believes that the latter is true through his open support of Brexit⁶⁶ – which should be taken seriously by anyone concerned with democracy in Europe.

4 Where the action lies: ordinary courts

Finally, given the constraints of space, I would like to offer a much briefer reaction to Dani's invitation to 'an appraisal of the potential inherent in the preliminary reference procedure, namely the possibility for courts (and the other actors involved) to voice arguments based on national constitutional law and, critically, to have them considered by the Court of Justice'.⁶⁷

In my view each kind of legality identified above requires its own institution: whereas this seems still uncontroversial for supranational legality promoted by supranational courts, the separation of formal legality, which in my view has its place in ordinary courts, and constitutional legality to be located in constitutional (or supreme) courts seems rather outdated. Blurring the lines between the two seems to be the hallmark of what is called the 'new constitutionalism', which has triumphed on both sides of the Atlantic after the War. The action must come from ordinary courts, which in my view should be much more constrained in challenging the separation of both kinds of legality.

This in my view will ultimately preserve not only constitutional court's place in constitutional democracies, but also the authority of ordinary courts, which in my view does not rest on democracy or public reason (now popular grounds for judicial legitimacy in the academic literature), but on formal legality. This is a point, however, requiring a much longer argument than this short reply allows.

⁶³ Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Martin Loughlin and Petra Dobner (eds), *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010), 3-22.

⁶⁴ Despite some uneasiness with such view, expressed in my 'Waiting for the Existential Revolution in Europe' (2014) 12 *International Journal of Constitutional Law* 190-212.

⁶⁵ See also 'Europe's democratic imaginary: Government by the people, for the people and of the people?' (2015) 22 *Maastricht Journal of European & Comparative Law* 784-787.

⁶⁶ See Chris Bickerton, 'Brexit is not the property of the political right. The left is disenchanted too' *The Guardian*, 22 June 2016 and also his book *The European Union: A Citizen's Guide* (London: Pelican 2016), 219-230.

⁶⁷ Dani, n 1, [19].