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Castillo Ortiz, P. (2014) 'Playing the Judicial Card' Litigation Strategies During the Process of Ratification of the Lisbon Treaty. European Law Journal, 20 (5). pp. 630-648. ISSN 1351-5993

https://doi.org/10.1111/eulj.12073

I. Introduction

Cases before constitutional jurisdictions are possibly one of the situations in which law and politics most clearly converge. Constitutional courts are political actors as much as legal ones,[1] their members are selected by other political actors,[2] and the questions upon which they have to adjudicate are mainly political. Cases before constitutional jurisdictions provide an opportunity to analyse how political goals are sought in a battlefield governed by legal rules. tThis gives rise to imaginative strategies of litigation in which claimants must learn how to mobilise the law for their own purposes and in which also courts have to give a constitutionally sophisticated and reasonable response while at the same time being prudent regarding the political questions at stake.

The process of ratification of the Lisbon Treaty is an excellent example of this. Before the treaty was ratified, in a context of important political pressures, twelve petitions for its review were presented before constitutional jurisdictions across Europe.[3] Analyses of these cases have been either entirely legal or entirely political. Legal studies have undertaken comparative[4] or individual[5] analyses in which the cases were commented on

[1] As assumed by literature in the field of Judicial Politics. See M. Shapiro and A. Stone Sweet, *On Law Politics and Judicialization* (Oxford University Press, 2002).

[2] M. Volcansek, 'Appointing judges the European way (Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges),' (2007) 9 *Fordham Urban Law Journal* 363, 367.

[3] French CC, Case 2007-560 DC *Treaty of Lisbon*, decision of 20 Dec. 2007; Austrian CC, Case SV 2/08-3 et al. *Treaty of Lisbon I*, order of 30 Sept. 2008; Slovenian CC, Case Ul-49/08 *Treaty of Lisbon*, judgment of 17 Oct. 2008; Czech CC, Case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 Nov. 2008; Austrian CC, Case SV 1/10-9 *Treaty of Lisbon II*, order of 11 Mar. 2009; Belgian CC, Case 58/2009 *Treaty of Lisbon I*, judgment of 19 Mar. 2009; Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 Apr. 2009; German BVerfG, Case 2 BvE 2/08 et al. *Treaty of Lisbon*, judgment of 30 Jun. 2009; Belgian CC, Case 125/2009 *Treaty of Lisbon II*, judgment of 16 Jul. 2009; Belgian CC, Case 156/2009 *Treaty of Lisbon III*, judgment of 13 Oct. 2009; Czech CC, Case Pl ÚS 29/09 *Treaty of Lisbon II*, judgment of 3 Nov. 2009; Polish CT, Case K 32/09 *Treaty of Lisbon*, judgment of 24 Nov. 2010. Some other rulings on the Lisbon Treaty were issued, but since in these cases the very claims were presented when the process of ratification had already concluded they fall outside the scope of this article: Hungarian CC, Case 143/2010 (VII. 14.) *Treaty of Lisbon*, judgment of 12 Jul. 2010; Austrian CC, Case SV 1/10-9 *Treaty of Lisbon III*, order of 12 Jun. 2010.

[4] M. Wendel, 'Lisbon Before the Courts: Comparative Perspectives,' (2011) 7 *European Constitutional Law Review* 96; K. Kruma, *Constitutional Courts and the Lisbon Treaty. The future based on mutual trust*, (Centre for European Policy Studies, 2010) online at http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=117517 (12.06.2012).

[5] See *inter alia* G. Beck, 'The Lisbon Judgement of the German Constitutional Court, the Primacy of EU law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor,' (2011) 17 *European Law Journal* 470; R. Bieber, 'An Association of Sovereign States' Comments on the German Constitutional Court's Decision on the Lisbon Treaty,' (2009) 5 *European*

from a doctrinal perspective, focusing mainly on the relationship between the rulings and the legal system as well as on the legal implications of the cases. Meanwhile, the few political works on these rulings[6] have only tried to understand the courts' decisions on the merits as a result of political variables, to the almost total exclusion of legal considerations. This article therefore aims to construct an intermediate approach, capable of combining law and politics in the study of litigation strategies. Our main assumption is that the legal and the political coexisted in the strategies that litigants used to oppose the treaty before the courts, and in the responses that the courts gave to the litigants. Our intention is to describe such strategies without making a normative assessment of the legitimacy of the underlying claims of each of the actors, thus remaining neutral observers. As we will show, the behaviour of the actors was an exhibition of mastery in the art of arguing legally with political intentions. The political strategies of litigation and the courts' reactions can only be understood by analysing the legal argumentations of both the claimants and the courts.

This article is structured as follows. After this brief introduction (I), we will focus on the strategies used by the claimants to block the ratification of the treaty before the courts (II). We will show that they made clever use of legal rules of standing before the court in order to judicialise the process of ratification (II.A), of 'integration clauses' in national constitutions in order to question the validity of the treaty or its instruments of ratification (II.B), of constitutional provisions in order to underline the democratic deficits of the treaty at stake (II.C) and of the judicial conflicts underlying the European judicial dialogue (II.D). Subsequently, we will analyse the courts' counter-arguments and show that behind their legal argumentation lay a clear pro-treaty stance (III); to do

Constitutional Law Review 391; P. Bříza, 'The Czech Republic. The Constitutional Court on the Lisbon Treaty. Decision of 26 November 2008,' (2009) 5 *European Constitutional Law Review* 143; E. Eriksen, and J.E. Fossum, 'Bringing European Democracy Back In – Or How to Read the German Constitutional Court's Lisbon Treaty Ruling,' (2011) 17 *European Law Journal* 153; D. Grimm, 'Defending Sovereign Statehood Against Transforming the European Union. Comments on the German Constitutional Court's Decision on the Lisbon Treaty,' (2009) 5 *European Constitutional Law Review* 353; A. Grosser, 'The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg": An Outsider's Perspective,' (2009) 10 *German Law Journal* 1263; P. Kiiver, 'The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU,' (2010) 16 *European Law Journal* 578; I. Slosarcik, 'The Treaty of Lisbon & the Czech Constitutional Court: Act II,' (2009) *CEPS Policy Brief 197/27*.

[6] C. Closa and P. Castillo, 'National Courts and Ratification of European Union Treaties,' in T. Evas, C. Lord and U. Liebert (eds), *Multilayered Representation in the European Union. Parliaments, Courts and the Public Sphere*, (Nomos, 2012), at 129; C. Closa, 'National Higher Courts and the Ratification of EU Treaties', (2013) 36 *West European Politics* 97.

so, we will analyse how their decisions on the merits cautiously avoided threats to ratification (III.A), how they favoured a pro-treaty interpretation of European clauses (III.B), how they tried to placate the fears of the claimants regarding the treaty's threat to democratic elements of the *polis* (III.C), and how they redirected concerns regarding the compatibility between the treaty and their constitutions towards the question of their *Kompetenz-Kompetenz* (III.D). Finally, we will offer some brief conclusions (IV).

II. The moves by the claimants: the litigation strategies of the opponents of ratification

Claimants were usually opponents of ratification. As such, they saw the courts as a tool they could use in their political battle. Our aim in this section is simply to describe and better understand the strategies they followed in order to achieve their goal of blocking or at least slowing down ratification of the treaty. In order to do so, litigants used the courts and law in a variety of ways. To begin with, they used rules of standing before the court to judicialise the process of ratification by asking constitutional courts to intervene and assess the constitutionality of the Lisbon Treaty; in so doing, they brought one more actor – the court – into the scene. However, the judicial arena is governed by its own rules. Aware of this, litigants deployed a variety of tactics wherein they sought to achieve their political goals through legal means. Firstly, they tried to activate 'integration clauses' in national constitutions for anti-ratification purposes; this apparent paradox demonstrates that they were ready to translate their discourse into the language that courts understand: the legal one. Secondly, they alleged that the Lisbon Treaty violated important democratic principles, probably aware that their judicial battle was only part of a larger political conflict. Thirdly, they tried to exploit the tensions between the Court of Justice and national constitutional jurisdictions – the so-called 'judicial dialogue' – to their benefit. Of course, all these strategies were not mutually exclusive; rather the claimants combined them in a variety of ways.

A. Judicialising the process of ratification

The first strategy used by the opponents of ratification was judicialisation of the process. Judicialisation has been described as the expansion of the province of justices at the expense of politicians.[7] This definition points to a rather interesting phenomenon: in participating in political affairs courts introduce legal and judicial dynamics into the political arena, but at the same time the object of their review brings courts into a scenario governed by political logics. This convergence between 'things legal' and 'things political' is the result of the actors' decision to activate judiciaries for political purposes.

The claimants that judicialised the process of ratification were in general opponents of the Lisbon Treaty; in playing 'the judicial card' the opponents of ratification may have been tempted to try to obtain in the judicial arena what they could not get in the political one. By adopting this course, in the worst case scenario, they might make visible to public opinion a series of criticisms against the treaty and at the same time they might gain time by delaying ratification. In the best case scenario, they might obtain a declaration of unconstitutionality by the court, which might eventually block ratification.

Out of twelve complaints, one was presented by a head of state, three were presented by members of parliament (MPs), and the rest were presented by citizens. In the last instance, opponents of ratification used the procedure of constitutional complaint and alleged violations of their constitutional rights by the treaty. However, this is not to say that constitutional complaints were always initiated by ordinary anonymous citizens. For instance, in the famous *Lissabon-Urteil* ruling the German court was also activated through a constitutional complaint[8] even though political actors were among the petitioners.[9] When MPs presented complaints – the two Czech cases and the Polish one – they did it with the collaboration of their head of state. In the first Czech case the upper chamber as a whole filed the petition at the instigation of its European Union (EU) Committee, while the second petition was filed by a group of senators close to

[7] T. Vallinder, 'The Judicialization of Politics – A World-wide Phenomenon: Introduction,' (1994) 15 *International Political Science Review* 91.
[8] M. Wendel (n 4 *supra*), at 108.
[9] A. Dyèvre, 'The German Federal Constitutional Court and European Judicial Politics,' (2011) 34 *West European Politics* 346, 354.

President Vaclav Klaus.[10] Similarly in Poland, the petition was filed by a group of right-wing deputies and senators[11] close to President Kaczynski.

Only one exception exists to this general landscape of judicialisation brought about by opponents of ratification: the French case. In this case, it was the head of state President Nicolas Sarkozy who asked the Constitutional Council to review the constitutionality of the Lisbon Treaty. The paradox is that President Sarkozy was not interested in blocking the ratification of the treaty: on the contrary, he was solemnly committed to its successful ratification. However, Sarkozy had not been the first French President to ask the Council to review the constitutionality of a European treaty; indeed, this had happened for every major EU treaty from Maastricht onwards.[12] While Ziller explains the French paradox as a strategic move to avoid a more aggressive petition by opponents of the treaty, because sixty deputies or senators can also bring a case before the Council,[13] we would point to the force of the tradition. Since the opinion of the Council had been sought by French executives for the Maastricht, Amsterdam and Constitutional treaties, avoiding such a petition for the Lisbon Treaty would have been deemed as an illegitimate break with political precedents. In other words, Sarkozy was bound by a largely consolidated political custom.

B. Mobilising European clauses against ratification

After the process of ratification had been judicialised, the second strategy used by opponents of the treaty was the mobilisation of 'integration clauses' for anti-ratification purposes. 'European' or 'integration' clauses exist in most Member States' constitutions, although their content varies greatly across countries. In principle, European clauses have been interpreted as providing the constitutional grounding for each state's membership of the EU.[14] However, paradoxically, litigants in many cases tried to activate European clauses against the Lisbon Treaty. This happened because

[10] C. Closa and P. Castillo (n 6 *supra*).
[11] M. Wendel (n 4 *supra*), at 107.
[12] C. Closa and P. Castillo (n 6 *supra*).
[13] J. Ziller, 'The Law and Politics of the Ratification of the Lisbon Treaty,' in S. Griller and J. Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a constitutional treaty?* (Springer, 2008), at 323.
[14] J.E. Fossum, and A. Menéndez, *The Constitution's Gift* (Rowman & Littlefield Publishers, 2011); R.M. Donnarumma, 'Intégration européenne et sauvegarde de l'identité nationale dans la jurisprudence de la Cour de justice et des Cours constitutionnelles,' (2010) 84 *Revue Française de Droit Constitutionnel* 719.

European clauses, in addition to legitimating the accession and membership of the country to the EU, usually establish formal or substantive requirements for both the ratification of new European treaties and the exercise of powers by the EU. Opponents of ratification smartly detected this 'reverse side of the coin' with regard to the European clauses and tried to exploit it in their favour.

The petitions mainly contained two kinds of allegation in this regard: they claimed either that powers beyond the scope permitted under the integration clause had been transferred to the EU or that the ratification in the country had not observed the procedural mandates of such a clause. With regard to the former, a good example is the Polish case in which claimants alleged that Article 90(1) of the Polish constitution – which allows for the transfer of certain powers to supranational institutions – was violated because such a transfer of powers in the case of the Lisbon Treaty was tantamount to conferring competences on other Member States that would then be able to impose their will on the Polish state.[15] By the same token, in the Lisbon cases before the Czech Constitutional Court, the integration clause in Article 10a was cited to oppose the treaty. Article 10a states that 'certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution,' with the claimants considering that a conflict with such a provision could derive from the fact that the transferred powers were 'not fully determinable in advance.'[16] In Germany, Article 23 of the Basic Law was also used for anti-ratification purposes. As is widely known, this provision is an offspring of the *Solange* saga[17] and refers to German membership of a 'European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by the Basic Law.' According to the claimants in the *Lissabon-Urteil* ruling, the capacity of the German legislature to democratically shape social policy was restricted by the commitment of the EU to engage in a competition-oriented open market economy, and thus the Lisbon Treaty was

[15] Polish CT, Case K 32/09 *Treaty of Lisbon*, judgment of 24 Nov. 2010, point I.1.
[16] Czech CC, Case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 Nov. 2008, paragraph 4. See a similar argument in the second Lisbon case: Czech CC, Case Pl ÚS 29/09 *Treaty of Lisbon II*, judgment of 3 Nov. 2009, paragraph 26.
[17] M. Claes, 'The Europeanisation of National Constitutions in the Constitutionalisation of Europe: some Observations Against the Background of the Constitutional Experience of the EU-15,' (2007) 3 *Croatian Yearbook of European Law and Policy* 1, 21.

contrary to the principle of the social state contained in Article 23.[18] Indeed, the treaty was considered to transfer democratic decision-making beyond the extent permissible in such a provision, with the democratic principle in Article 23 thus being violated.[19]

In relation to the mandates regarding the ratification procedure, among the rules most frequently utilised by claimants in their litigation were those related to the holding of a referendum for accession or the ratification of new EU treaties. Opponents of ratification tried to force an interpretation of such rules according to which ratification in the parliamentary arena was contrary to the constitution, whereas a referendum was the constitutionally appropriate manner in which to give the state's consent to the treaty. The interpretation of European clauses as mandating referendum need to be understood in the wider frame of a general strategy of raising claims with high political legitimacy – in this case, consulting the *demos* – which will be further explored in the next subsection. Cases in the Czech Republic and Latvia provide good examples of this. In the Czech Republic, litigants tried to mobilise Article 10a, paragraph 2 of the constitution, which states that the ratification of a treaty transferring powers to an international organisation requires the consent of parliament 'unless a constitutional act provides that such ratification requires the approval obtained in a referendum.' In the briefs President Klaus submitted to the Czech Constitutional Court, he stated that such provision had to be interpreted as requiring the holding of a referendum. Although he had already presented this argument in the first Lisbon case,[20] in the second one he persisted and was particularly explicit, stating that the Lisbon Treaty 'indirectly amends the Accession Treaty'[21] and thus the requirement for a referendum contained in Act no. 515/2002 regarding the Accession Treaty applied analogically to the former. In Latvia, the European clause is found in Article 68 of the constitution, which foresees the need for a referendum for accession to the EU and in the event 'of substantial changes in the terms regarding the membership (…) if such referendum is requested by at least one-half of the members of the *Saeima.*' According to the applicants, the latter norm and its legislative history 'obliged' parliament to submit the treaty to a referendum,[22] so a

[18] German BVerfG, Case 2 BvE 2/08 et al. *Treaty of Lisbon*, judgment of 30 June 2009, paragraph 117.
[19] *ibid*, paragraph 135.
[20] Czech CC, Case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 Nov. 2008, paragraph 27.
[21] Czech CC, Case Pl ÚS 29/09 *Treaty of Lisbon II*, judgment of 3 Nov. 2009, paragraph 66.
[22] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, point IV.19.

simple parliamentary ratification involved a violation of their rights of political participation contained in Article 10 of the constitution.[23]

C. Raising politically evocative concerns: the claimants as guardians of democracy

Another strategy that opponents of ratification used in the vast majority of cases was to present allegations that had a high political legitimacy. Claimants in general alleged that there was a contradiction between the provisions of the Lisbon Treaty and aspects of national constitutions replete with deep political and normative implications. In claiming that the treaty was unconstitutional, litigants focused mainly not on prosaic and legalistic questions, but on those which could lead to vigorous debate in the public sphere and evoke more intense emotions. In particular, opponents of the treaty tried to present themselves as defenders of democracy against anti-democratic elements of the process of ratification and of the content of the treaty. This is not to judge whether they were sincerely convinced of the fairness of their claims or not, or whether they were normatively right or wrong; rather the aim is simply to highlight that the claimants constructed their litigation strategy around such allegations. Three types of claim were particularly salient given their political implications: the consideration that the treaty had to be submitted to referendum, that its ratification threatened the protection of constitutional rights in the country, and the idea that it could jeopardise the role of the national legislature. We review these separately below.

i. Consult the people! Requests for a ratification referendum

One of the most common allegations made by the claimants referred to the need to hold a referendum for ratification. Such a demand has the advantage of high democratic credentials: by requesting a referendum, claimants could present themselves as defenders of democracy and the true popular will. In the previous subsection we began to analyse this kind of petition with regard to ‘integration clauses’. However, the

[23] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, point 2.

claimants were not only seeking a referendum in relation to those clauses; when other constitutional provisions allowed for an extensive interpretation that involved the holding of a referendum for ratification, litigants also included such provisions in their petitions.

In Latvia, in addition to trying to interpret the integration clause as requiring a referendum, the applicants found further grounds for their claim that the people should be consulted, namely, Article 77 of the constitution, which foresees the need for a referendum in the case of an amendment of core constitutional elements. According to the applicants, the ratification of the Lisbon Treaty would affect Article 2 of the constitution – the principle of sovereignty – and thus an amendment of a core constitutional provision would have to be carried out before ratification could occur.[24] Claimants seem to have followed this same strategy in the first Austrian case, in which they alleged that the ratification of the treaty involved a total revision of the constitution for which a referendum was mandatory.[25] In Slovenia, the need to hold a referendum on the Lisbon Treaty was the core claim by the applicants, who questioned not only the constitutionality of the Ratification Act, but also the constitutionality of the Act of Referendum and Public Initiative.[26] Finally, in Belgium, the strategy was rather imaginative: claimants alleged a violation of Articles 10 and 11 of the constitution because parliamentary ratification had taken place in Belgium, whereas some other countries had held a referendum for ratification, which in their view involved undue discrimination against Belgian citizens. Indeed, the claimants went a step further by arguing that such discrimination was forbidden not only under national, but also under international and European law, and asked the court to make a preliminary reference to the Court of Justice.[27] This use of EU law against the Lisbon Treaty itself may be considered, ironically, as proof of the success and the normalisation of the former, which is now regularly invoked by European citizens.

ii. The alleged threat to constitutional rights

[24] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, Lisbon, point I.9.
[25] Austrian CC, Case SV 2/08-3 et al. *Treaty of Lisbon I*, order of 30 Sept. 2008, point I.1.
[26] Slovenian CC, Case Ul-49/08 *Treaty of Lisbon*, judgment of 17 Oct. 2008, paragraph 1.
[27] Belgian CC, Case 58/2009 *Treaty of Lisbon I*, judgment of 19 March 2009, points II.A.1.1 and II.A.1.2.

The eventual threat that the Lisbon Treaty could pose to the protection of constitutional rights was also given prominence in the complaints. The protection of constitutional rights is one of the sources of the legitimation of modern political edifices, and one of the central tasks entrusted to constitutional courts. In many of these cases, the courts were activated through constitutional complaints, and this implies that the grounds for the claims were the violation of some of the complainants' constitutional rights. However, in addition, some complainants considered not only that a direct violation of one or some of their rights existed, but that the constitutional systems designed to protect these rights were endangered as a whole. Using the discourse of rights against the ratification of the treaty seems to be a particularly incisive strategy: such discourse not only invests claimants with a high legitimacy, but also directly connects with the ethos of constitutional jurisdictions as guardians of citizens' rights.

A good example of this tactic is the German case. In this country, the complainants alleged that the binding effect of the Charter of Fundamental Rights would led to human dignity being weighed against other legal interests such as the economic fundamental freedoms, and that it would exempt the German state from its obligation to respect the fundamental rights of the Basic Law.[28] It is worth noting the decades-long evolution in the litigants' argument in Germany: in the ground-breaking *Solange* ruling the allegation was similar, but in that case the alleged threat was to the right to private property, coming from the Common Agricultural Policy. A threat to the protection of fundamental rights was also alleged in other countries. In Latvia, both the ratification by the EU of the European Convention for Human Rights and the binding force of the Charter of Rights were questioned. With regard to the former, the applicants indicated that ratification is only allowed to a state; the critiques are more interesting with regard to the Charter of Rights because the complainants considered it to be incompatible with the system of protection of constitutional rights of the Satversme – the Latvian constitution.[29] Finally, in the Czech Lisbon I case, the Senate questioned the legal status of the Charter of Rights of the EU and its compatibility with the system for the protection of rights enshrined in the Czech constitution.[30] All these allegations share one characteristic: instead of presuming that the new rights' provisions of the treaty

[28] German BVerfG, Case 2 BvE 2/08 et al. *Treaty of Lisbon*, judgment of 30 June 2009, paragraph 123.
[29] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, point III.18.8.
[30] Czech CC, Case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 Nov. 2008, paragraph 10.

would complement national systems for the protection of rights, claimants tried to argue that the latter would be now in peril. However, such an argumentation was rejected by the courts, as we show below.

iii. Defending the role of national parliaments

Lastly, claimants alleged that the ratification of the treaty could endanger the powers of the most genuine democratically elected representatives of the people, the legislative chambers. Perhaps the most salient example is that of Germany, in which the allegation about the threatened powers of the legislature is at the core of the complaint accepted by the court. In this case, the claim was admitted only to the extent that a violation of the right of the claimants under Article 38.1 of the Basic Law to a Bundestag 'elected in general, direct, free, equal and secret elections' was alleged.[31] It is worth noting that in their petition, the claimants favoured an extensive interpretation of this provision – which was to a large extent accepted by the court – and which included the right to take part in the legitimation of state authority and to influence its exercise.[32] Indeed, grounding their petition in Article 38.1, the claimants alleged *inter alia* violations of the Basic Law for the loss of German statehood,[33] the contravention of the principle of the rule of law,[34] and the infringement of the principle of separation of powers.[35] Given the core role of Article 38.1 in the complaint, it is not surprising that the ruling largely reflected upon the powers of the German legislature under the framework of the new treaty and even requested a legislative amendment to better accommodate the Bundestag and Bundesrat in such a framework.

Although this topic had a special salience in Germany, it was also present in other complaints. In Latvia, concerns about the powers of the national legislatures were framed within wider fears regarding democracy in the EU, which it was argued would become weaker after the entry into force of the treaty; in particular, 'a democratic deficit is increased with the amendment procedure for founding European treaties,

[31] German BVerfG, Case 2 BvE 2/08 et al. *Treaty of Lisbon*, judgment of 30 June 2009, paragraph 168.
[32] *ibid*, paragraph 100.
[33] *ibid*, paragraph 110.
[34] *ibid*, paragraph 115.
[35] *ibid*, paragraph 118.

which allows the bypass of national Parliaments.'[36] In Poland, the complaint was to some extent authoritative because it came from a group of Senators who expressed concerns about the role of the legislative chamber, as the Polish Constitutional Court recognised in its statement that 'The application reflects the fears of the Senators that the ratification of the Lisbon Treaty will undermine the strong position of the national legislative branch.'[37] Similarly in the first Czech case the Senate put forward the capacity of the sector Council to include further areas of criminal activity in the sphere of EU regulation without any room for national parliaments to disagree and asked 'whether this does not de facto render Article 15 par.1 of the Constitution meaningless ("the legislative power of the Czech Republic is vested in the Parliament").'[38] Finally, in Belgium the moves in defence of the national legislature acquired idiosyncratic characteristics associated with one of the most defining characteristics of the country: its federal nature. While the first claim alleged that a violation of the rights of the federal and regional parliaments derived from the fact that the treaty had been ratified without such chambers having reached an agreement on the execution of the 'Protocol on the application of the principles of subsidiarity and proportionality,'[39] the second petition went further and claimed that the Lisbon Treaty would bring about major constitutional changes in Member States so that in Belgium the share of competences between federal and regional parliaments would be altered and thus the Belgian '*démocratie multiple*' would become impossible.[40] In summary, claimants pretended to act as defenders of the organs of national representative democracy, using arguments that tried to exploit the 'democratic deficit' discourse.

D. Exploiting the tensions in the European judicial dialogue

Finally, on some occasions, claimants seem to have been aware of the tensions between national constitutional jurisdictions and the Court of Justice, which had materialised in the doctrine *Kompetenz-Kompetenz* (the competence to determine the scope of competences), and tried to exploit them for their own benefit.

[36] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, point 2.
[37] Polish CT, Case K 32/09 *Treaty of Lisbon*, judgment of 24 Nov. 2010, point III.4.1.
[38] Czech CC, Case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 Nov. 2008, paragraph 8.
[39] Belgian CC, Case 58/2009 *Treaty of Lisbon I*, judgment of 19 March 2009, point A.3.1.
[40] Belgian CC, Case 125/2009 *Treaty of Lisbon II*, judgment of 16 July 2009, point A.1.2.

As is well known, one of the most salient aspects of the European judicial dialogue has been the conflict around the possibility for national courts to review EU secondary law in order to protect core constitutional provisions. The doctrine of the Court of Justice is clear in this regard. On the one hand, according to the principle of primacy, EU secondary law enjoys precedence over national law in cases of conflict[41]; on the other hand, the Court of Justice considers that a review of the validity of a rule of EU law is within its exclusive competence.[42] However, some national constitutional jurisdictions have revolted against this interpretation of the relationship between European and national law. The German Constitutional Court, in its *Solange* I decision, considered that as long as the EU did not ensure a level of protection of fundamental rights equivalent to that of the German Basic Law, it was its duty to enforce the constitutional rights of German citizens even against European secondary law.[43] Furthermore, in its *Maastricht-Urteil* decision, the German court threatened to declare unconstitutional European secondary law adopted *ultra vires*, that is to say, enacted beyond the scope of powers transferred to the EU by Member States.[44] What has been called a 'judicial dialogue' is simply an arm-wrestle between the Court of Justice and national constitutional courts each seek to delimit the other's respective powers. As stated by Stone Sweet, national constitutional courts seem to have had 'good reasons to resist the development of a European "constitutional" order that might subsume the national order.'[45]

Claimants tried to exploit this tension for their own benefit by providing an argument against the treaty based in the courts' own interest. Although almost all petitions included points that could directly or indirectly have driven the courts to approach the question of their *Kompetenz-Kompetenz*, three were particularly explicit: the German, the Polish and the second Czech petitions. In Germany, surely aware of the previous case law of Karlsruhe, the claimants argued that the treaty would include the *de facto* 'unrestricted primacy' of European law over national law, which would deprive the

[41] Case 6/64, Flaminio Costa v. Enel [1964] ECR 585.
[42] Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199.
[43] German Federal Constitutional Court, case BVerfGE 37 *Internationale Handelsgesellschaft (Solange I)*, decision of 29 May 1974.
[44] German Federal Constitutional Court, case 2 BvR 2134 et al. *Maastricht Treaty*, decision of 12 Oct. 1993.
[45] A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004), at 22.

German court of its capacity to examine compliance with the principle of conferral and to ensure the safeguarding of Germany's constitutional identity and protection of constitutional rights.[46] In Poland, the claimants challenged the conformity of Declaration No. 17, which states the principle of primacy of EU law, to constitutional provisions in Article 8 which state that: 'The Constitution shall be the supreme law of the Republic of Poland' and in Articles 91(2) and (3) as well as in Article 195(1) which state that: 'judges of the Constitutional Tribunal (…) shall be independent and subject only to the Polish Constitution.'[47] Finally, in the Czech Lisbon II ruling, the petitioners were especially explicit and gave the Czech Constitutional Court a golden opportunity to give its 'final word' on the constitutionality of EU secondary law. During the hearings, the petitioners claimed that Article 19(1) of the treaty made the Court of Justice 'superior in interpretation of the "Treaties" to the Constitutional Court of the Czech Republic.' They argued that the 'interpretation of any supplements or amendments to the Treaty of Lisbon by the Court of Justice will have priority over interpretation of them by the constitutional court of an EU Member State.'[48] It is interesting to note how sometimes the claimants were rather explicit in presenting the situation as a power struggle between the Court of Justice and national constitutional jurisdictions.

III. The Pro-ratification courts: the responses of the constitutional jurisdictions

The response by courts to the above mentioned moves by the claimants was clear: they were not going to be the standard bearers of the opponents of ratification. The courts refrained from becoming a tool in the hands of the petitioners. For those rulings that entered into the merits of the cases, every strategy put forward by the claimants seems to have elicited a pro-ratification reaction from the national courts, even if some institutions such as the French or Belgian had a rather concise style of doing so. Firstly, opponents of the treaty sought to judicialise the process of ratification, but the courts

[46] German Constitutional Court, Lisbon, paragraph 331.
[47] Polish CT, Case K 32/09 *Treaty of Lisbon*, judgment of 24 Nov. 2010, point I.1.
[48] Czech CC, Case Pl ÚS 29/09 *Treaty of Lisbon II*, judgment of 3 Nov. 2009, paragraph 88.

never gave them what they really wanted: a declaration of unconstitutionality. Secondly, while claimants emphasised the most restrictive aspects of the 'integration clauses,' the courts favoured a pro-integration reading of them. Third, the courts addressed the politically evocative points raised by the complainants by counter-arguing that the treaty reinforced the democratic elements at stake. Fourthly, the concerns about the compatibility between the treaty and the constitution were redirected towards the statement of the famous doctrine of *Kompetenz-Kompetenz*. We review these four types of responses below.

A. One 'Crotty' was enough: facilitating ratification

In judicialising the processes of ratification claimants sought to slow them down or block them. In general, the 'Crotty' case seems to have played an important role as a precedent for the opponents of ratification. As is well known, in Crotty v. An Taoiseach,[49] an opponent of the ratification of the Single European Act brought the treaty before the Irish Supreme Court for a review of its constitutionality. Mr Raymond Crotty's strategy was partially successful when, after a three against two vote of the plenary of the court, the treaty was found unconstitutional. Under such circumstances, in order to proceed with ratification, a constitutional amendment, involving a referendum, had to be carried out.[50] Although the reform of the constitution was passed by the Irish people and hence the Single European Act could finally be ratified, the ruling was a partial victory for the claimant because the case delayed ratification, forced political elites to consult the people, and gave rise to a constitutional tradition in Ireland according to which a referendum for constitutional amendment had to be held before every major European treaty ratification. The case can be seen as a successful example of the judicialisation of the processes of treaty ratification and, consequently, it is not surprising that during the process of ratification of the Lisbon Treaty other claimants tried to follow a 'Crotty strategy,' by asking the courts to review the treaty while in many cases alleging that a referendum for ratification had to take place.

[49] Irish Supreme Court, case 'Crotty v. An Taoiseach' [1987] IESC 4; [1987 IR 713] of 9 April 1987.
[50] J. O'Brennan, 'Ireland & the Lisbon Treaty: Quo Vadis?,' (2008) *CEPS Policy Brief* No.176; G. Barret, 'Taking the Direct Route – The Irish Supreme Court decision in Crotty, Coughlan and McKenna (No.2),' (2009) *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper 8/2009*, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400029 (20.06.2012).

However, such a strategy was systematically curbed by courts. In all the other cases, the courts seem to have been aware of the consequences of a declaration of unconstitutionality and avoided such statements.[51] Indeed, the 'nuclear option' to declare treaties contrary to the constitution could be argued to have direct costs with regard to the status of constitutional courts as key stakeholders in European judicial politics[52]. Only the French Constitutional Council dared to declare the treaty unconstitutional. Curiously enough, the French case is the only one initiated by a pro-ratification head of state, instead of by citizens or MPs who were opponents of ratification. According to Closa the explanation for this French exception to the rule is that, unlike in other countries, in France a constitutional amendment would have been politically costless and feasible, and hence a declaration of unconstitutionality would have been harmless.[53] Indeed, Article 89 of the French constitution allows the President of the Republic to opt between seeking a constitutional amendment through a referendum or through a joint session of the legislative chambers if a threshold of two-thirds is reached. However, a complementary explanation of the French case may be offered. Before the Lisbon Treaty, the French Constitutional Council had assessed the constitutionality of the Maastricht, Amsterdam and Constitutional Treaties, and had always concluded that constitutional amendment was necessary before ratification. The Council had created the doctrine of the 'essential conditions of the exercise of national sovereignty,'[54] which was systematically used to declare the most novel aspects of the treaties to be contrary to the constitution. Consequently, Article 88 of the French constitution has undergone frequent amendments, so its evolution mirrors the very evolution of the EU and the series of treaties ratified by France. The analogical application of such a doctrine to the new provisions of the Lisbon Treaty led to the conclusion that again a constitutional amendment was necessary. In this regard, the

[51] C. Closa (n 6 *supra*).
[52] A. Dyevre, 'Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?', (2012) working paper, available at http://works.bepress.com/arthur_dyevre1/7 (16.07.2013)
[53] *ibid.*
[54] For Michelle Troper, the concept encompasses a set of competences – such as defence, monetary policies or justice – that may be transferred to supranational institutions only after constitutional amendment. See M. Troper, 'Comment la constitution de 1958 definit la suverainete nationale?,' (2008) *Dossiers thématiques du Conseil Constitutionnel*, online at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/documentation/dossiers-thematiques/2008-cinquantenaire-la-constitution-en-20-questions/la-constitution-en-20-questions-question-n-5.17354.html (25.04.2012).

French Constitutional Council seems to have been bound by its very doctrine and the precedents of other treaties.

However, when the complainants were opponents of ratification, the courts always avoided satisfying their pretensions and never declared the Lisbon Treaty to be unconstitutional. In some cases, petitions were rejected on formal grounds, so the courts did not even enter into the merits of the cases. Indeed, the Austrian Constitutional Court did this twice; in its Lisbon I ruling of 30 September 2008 it stated that under Article 140 of the Austrian constitution a treaty still unpublished in the Federal Law Gazette could not be an object of the review of the court, while in its Lisbon II ruling of 11 March 2009 it stated that the petitioners had not sufficiently established any direct and personal violation of rights. In Slovenia, the situation was similar to that of the second Austrian case; Article 25 of the Slovenian constitution states that: 'Everyone shall be guaranteed the right to appeal or to any other legal remedy against the decisions of courts and other state authorities, local community authorities and bearers of public authority by which his rights, duties or legal interests are determined'. However, the Slovenian court considered that the requirement of the final part of the Article, the existence of a direct link with the claimants' rights, duties or legal interests had not been sufficiently proven. Finally, in Belgium, after twice reviewing the constitutionality of the Lisbon Treaty, the Belgian Constitutional Court dismissed on formal grounds the third suit against the treaty. The grounds for such a decision lay in Article 3(2) of the statute of the court – *loi spéciale du 6 janvier 1989* – which states that the claims based on Article 134 of the constitution for the annulment of laws have to be presented within sixty days of their publication, a requirement which the claimants did not fulfil. In these four cases, rejection of the petition on formal grounds prevented the court from entering into the merits of the case, and thus the possibility of an uncomfortable declaration of unconstitutionality was avoided, although this meant that the courts lost the chance to enter into the wider European judicial dialogue that had been created around the assessment of the treaty.

Lastly, it is important to note that, in the majority of cases, the outcome of the proceedings was in fact a declaration of constitutionality. In declaring the Lisbon Treaty constitutional, the courts emphasised that there existed a general constitutional openness to integration and, at the same time, they concluded that the substantive allegations of

the claimants did not sufficiently justify a declaration that the treaty was unconstitutional. We look at this aspect next.

B. Emphasising openness to integration: European clauses as interpreted by national courts

The role of the European clauses for ratification was controversial. In relation to the Lisbon Treaty, claimants emphasised their most restrictive aspects and forced an interpretation that would enable their integration into an anti-ratification strategy. However, the courts took an opposite view, favouring a reading of European clauses that saw them as serving to open up internal legal systems to supranational integration.

In its Lisbon ruling, Karlsruhe opted for a pro-integration interpretation of the interplay between the preamble of the constitution and Article 23, and recognised that: 'The German Constitution is directed towards opening the sovereign state order to peaceful cooperation of the nations and towards European integration'[55]. Here, the Federal Constitutional Court was indeed following the doctrine which considers Article 23 to be 'a constitutional commitment to European integration.'[56] In France, integration provisions are mentioned among the 'reference rules' of the assessment, particularly the Preamble of the Constitution of 1946 and Article 88-1 of the current French constitution, which the Council interpreted as allowing 'France to participate in the creation and development of a permanent European organization.'[57] Similarly, the Czech Constitutional Court found that Article 10a, paragraph 1 of the constitution provided the legal grounding for the transfer of powers to international organisations, even though the court limited the scope of such a transfer by stating that 'only certain powers'[58] could be transferred. Overall, as Ruffer states, 'the [Czech] Court again subscribed to the principle of a Euro-conforming interpretation of the Czech constitutional law.'[59] Other courts were less wordy in their references to European

[55] German BVerfG, Case 2 BvE 2/08 et al. *Treaty of Lisbon*, judgment of 30 June 2009, paragraph 219.
[56] D. Chalmers, 'A Few Thoughts on the Lisbon Judgement,' in A. Fischer-Lescano, C. Georges and A. Wonka (eds) *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives* (ZERP Diskussionpapier 1/2010, 2010), online at http://www.mpifg.de/people/mh/paper/ZERP%20Discussion%20Paper%201.2010.pdf (01.04.2012), 5.
[57] French CC, Case 2007-560 DC *Treaty of Lisbon*, decision of 20 Dec. 2007, paragraph 8.
[58] Czech Constitutional Court, decision (*Lisbon I*), paragraph 97.
[59] E. Ruffer, 'The quest of the Lisbon Treaty in the Czech Republic and some of the changes it introduces in EU primary law,' (2010) 1 *Czech Yearbook of International Law* 33.

clauses. In Poland, to give one last example, the Constitutional Court recognised that consent to the Lisbon Treaty had been granted by a statute enacted in accordance with the requirements specified in Article 90 of the constitution.[60] It is surprising, though, that the two courts that most emphasised openness to European integration of their national constitution, the German and Czech, were at the same time the most insistent on the notion that the transfer of powers to the EU should not be unlimited and that the *Kompetenz-Kompetenz* should remain with national institutions (see subsection III.D). Thus European clauses, even if interpreted in a pro-integration manner, were not seen as equivalent to a *carte blanche* for European authorities.

In addition to asserting the constitutional commitment to the EU incorporated in integration clauses, the courts rejected the argument that certain provisions in such clauses could be used to declare Lisbon unconstitutional. Although the Polish Constitutional Court recognised that Article 90 of the constitution was not tantamount to allowing the possibility to confer all competences of a given organ of the state or in a given field,[61] it considered that the transfer of competences as fulfilled by a statute complied with the requirements of such a provision[62]. In addition, the Polish Constitutional Court stated on a number of occasions that a referendum for the transfer of new powers included in Article 90 was not mandatory, but rather should be seen as providing for an alternative to parliamentary ratification of the treaty.[63] This interpretation seems to be shared by some scholars.[64] The Latvian Constitutional Court also contested the idea that Article 68(4) of the constitution obliged parliament to submit the ratification of the treaty to a referendum and, following different hermeneutical methods, considered that submitting the treaty to a referendum was only a right – not a duty – of MPs, which they should exercise taking into account considerations of political utility.[65] Finally, the Czech Constitutional Court did the same with regards to the claims in relation to Article 10a of the constitution, concluding that a referendum for ratification 'was not obligatory.'[66] The courts thus rejected the

[60] Polish CT, Case K 32/09 *Treaty of Lisbon*, judgment of 24 Nov. 2010, point III.1.1.2.
[61] *ibid*, point III.2.1.
[62] *ibid*, point III.2.2.
[63] *ibid*, point III.2.1.
[64] F. Hoffmeister, 'Constitutional Implications of EU Membership: a View from the Commission,' (2007) 3 *Croatian Yearbook of European Law and Policy* 59, 71.
[65] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, point IV.19.
[66] Czech CC, Case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 Nov. 2008, paragraph 212.

restrictive interpretations of European clauses that the claimants had proposed and instead underlined their most pro-ratification aspects.

C. Placating democratic concerns: an optimistic reading of the Lisbon Treaty

Together with anti-ratification interpretations of European clauses, claimants used another strategy: alleging that the treaty infringed constitutional principles with deep political ramifications. The courts seem to have been pleased to address these concerns. In general, courts' rulings were verbose with plenty of normative reflections on constitutional and political principles. However, unlike the claimants, their discourse was rather conciliatory with respect to the Lisbon Treaty. Only the German Federal Constitutional Court opted for a more critical discourse, although even in this case the treaty was found to be compatible with the German constitution and its core principles.

i. Referendums are not necessary

As we have shown, referendums were sought by the claimants many times, probably following the example of the 'Crotty' ruling, but the constitutional courts systematically rejected the petitions to carry out a referendum on the ratification of the treaty. As we have also seen, the courts dismissed the petitions for a referendum that were based on European clauses, and they did the same when petitions were grounded on other constitutional provisions.

In Belgium, the applicants alleged that undue discrimination against Belgian citizens derived from the fact that, unlike in some other Member States, a referendum for ratification had not taken place in the country. This allegation was dismissed by the Belgian court, which considered the procedure of ratification to be legitimately governed by the constitutional order of each Member State.[67] In Latvia, the Constitutional Court carried out a thorough review of the treaty in order to assess

[67] Belgian CC, Case 58/2009 *Treaty of Lisbon I*, judgment of 19 Mar. 2009, point B.4.

whether it infringed Article 2 of the constitution and if a referendum for amendment should therefore be held, After the review of a large list of substantive aspects of the treaty – to which the court devoted the whole of section III of the ruling – it concluded that the principle of sovereignty of the people had not been infringed by the ratification of the treaty and hence a referendum according to Article 77 was not necessary.[68] Finally, in some cases – such as the Austrian and Slovenian – the courts rejected the claims on procedural grounds and hence did not even have to give a substantive answer to the question. In summary, with a 'responsible' attitude, the courts rejected the interpretations of the claimants that a referendum was constitutionally required. Thus, the general pattern points to the courts preferring to avoid plebiscites.

ii. Constitutional rights are safe

Alleged violations of constitutional rights were also dismissed. In this sense, as we outlined earlier, the alleged violations of applicants' rights on which the constitutional complaints were based were always dismissed by the courts: only the ruling by the French Constitutional Council resulted in a declaration of unconstitutionality; however, the case was not a constitutional complaint but rather related to a procedure to control of the treaty *in abstracto*. Hence in this case the grounds for the declaration of unconstitutionality were unrelated to the systems for the protection of fundamental rights.

More interestingly, with regards to the alleged generic threats to the national systems for the protection of rights, the courts tried to emphasise compatibility between the national and European systems. Curiously enough, the usually prolix German court dismissed summarily the alleged threat to constitutional rights posed by the Charter of Rights on the grounds that the applicant had not sufficiently substantiated a violation of his fundamental rights in relation to such an allegation.[69] Moreover, with its usual laconic phrasing, the French Constitutional Council reviewed the question and concluded that the Charter of Rights did not require constitutional amendment prior to

[68] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, point III.18.10.
[69] German BVerfG, Case 2 BvE 2/08 et al. *Treaty of Lisbon*, judgment of 30 June 2009, paragraph 190.

ratification,[70] although it considered that if the Union joined the European Convention for Human Rights, authorisation by the French parliament would be necessary.[71] Other courts provided more elaborate answers on the question. In the Czech Lisbon I case, the court considered that, in contrast to the suggestion by the Senate, the Charter of Rights did not illegitimately expand the powers of the EU. However, in addition, it underlined that under EU law the Charter had to be interpreted in harmony with the constitutional traditions common in the Member States, thereby minimising the risk of conflict.[72] The same approach was taken by the Latvian Constitutional Court, which insisted that the standards of rights of the European Convention and of the Charter of Rights were compatible with those in national constitutions because they were based on the same values and principles.[73] The courts therefore argued against the pessimistic views of the claimants, taking instead an optimistic view in which the Lisbon Treaty not only did not contradict the national system for the protection of constitutional rights, but indeed complemented it. The courts subverted the critical discourse of the opponents of ratification and made the prestige of constitutional rights play in favour of the treaty: not only was the Lisbon Treaty not a threat to constitutional rights, it was a new guarantor of those rights.

iii. The Lisbon Treaty does not threaten national parliaments

Threats to the role of national parliaments were alleged in a number of cases. In this regard, there are certain differences between the approach of the majority of the courts and that of the German court. In general, the courts emphasised the increase in the role of national parliaments.[74] In France, the Constitutional Council devotes five paragraphs to listing the new powers of the French legislature, after having recognised that the Lisbon Treaty 'increases the participation of national parliaments in the activities of the European Union.'[75] The Polish Constitutional Court also highlighted the extension in the powers of the Polish legislature deriving from the Protocol on the role of national

[70] French CC, Case 2007-560 DC *Treaty of Lisbon*, decision of 20 Dec. 2007, paragraph 12.
[71] *ibid*, at para. 13.
[72] I. Slosarcik (n 5 *supra*), at 2.
[73] K. Kruma (n 4 *supra*), at 44.
[74] K. Kruma (n 4 *supra*), at 46.
[75] French CC, Case 2007-560 DC *Treaty of Lisbon*, decision of 20 Dec. 2007, paragraph 28.

parliaments in the EU.[76] In Latvia, although it was not as categorical as some of its counterparts, the Constitutional Court also enumerated some of the new powers attributed to national legislatures by the treaty, for instance in the application of the principles of subsidiarity and proportionality[77] and in the framework of the simplified revision procedures.[78] Also, the Czech Constitutional Court enlisted the new powers granted to national parliaments by the treaty to reach the conclusion that 'the Treaty of Lisbon reserves an important role to the domestic parliaments.'[79] Finally, in Belgium, the court dismissed concerns regarding the loss of powers of regional parliaments in its two rulings using the same argument in each case: the lack of prior agreement between the federal and regional parliaments did not affect the validity of the act of ratification of the treaty[80]. Unlike other institutions and following its own general style, the Belgian court did not devote much reasoning to the question, despite it being a politically sensitive topic. In general, again, the courts opted for a positive reading of the Lisbon Treaty and argued that it did not pose a threat to the role of national parliaments. On the contrary, the courts argued that it would reinforce the position of the legislatures – with all the implications of such an interpretation leaning towards a consequent increase in democratic legitimacy.

The only case in which a court appreciated that there could be a partial threat to the powers of the national legislature was that of Germany. Karlsruhe stands above the rest as the most mistrustful of the courts we have discussed herein. The court admitted the claim on the grounds that the rights of the complainant under Article 38.1 of the constitution could be violated by the treaty on the understanding that such provision included the right to a democratically elected parliament. Although the court finally considered that the Lisbon Treaty did not infringe Article 38 of the Basic Law, it found that the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters did do so, in so far as the rights of the legislative chambers had not been sufficiently developed. According to Lock, introducing a hurdle at the

[76] Polish CT, Case K 32/09 *Treaty of Lisbon*, judgment of 24 Nov. 2010, point III.2.3
[77] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, point III.18.3.
[78] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009, point III.18.6.
[79] Czech CC, Case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 Nov. 2008, paragraph 174.
[80] Belgian CC, Case 58/2009 *Treaty of Lisbon I*, judgment of 19 March 2009, point B.12; Belgian Constitutional Court, Lisbon II, part B.4.

national level to prevent the erosion of national competences was the alternative to declaring that the treaty was unconstitutional.[81]

D. The ultimate guarantee of the constitutional order: constitutional jurisdictions as *ultima ratio*

As stated by Closa, 'an attractive alternative to demanding constitutional reform is the use of legal reasoning to identify clear limits and conditions that may not be breached in the future.'[82] National courts seem to have redirected certain concerns of the claimants such as respect for national sovereignty or the constitutional identity towards the doctrine of *Kompetenz-Kompetenz*: although the treaty could be ratified, the courts would act in the future as ultimate guarantors of the core elements of the constitution. Thus the doctrine was at the same time a response to the petitions and a tool used by courtsto empower themselves vis-à-vis the European Court. The general idea was that the primacy of EU law was not unlimited, and that constitutional jurisdictions would act as an ultimate safeguard of core constitutional provisions. This could be considered a partial victory of claimants, who had contributed with their petitions to the shaping of the relationship between EU law and national constitutional law.

The German court was rather clear in stating that the Lisbon Treaty did not confer primacy over the constitutional identity of the Member States, which in the case of a conflict of laws was protected in Germany by the identity review pursuant to Article 23.1 in conjunction with Article 79.3 of the Basic Law[83]. The importance given to the concept of 'constitutional identity' has probably been one of the most salient features of the wave of judicial cases on the Lisbon Treaty. In addition, Karlsruhe stressed that in its Maastricht ruling it had already stated that it would review whether the legal instruments of the European institutions remained within the limits of the sovereign powers conferred on them.[84] By the same token, and with an explicit reference to its German counterpart, the Czech court stated that it remained the supreme protector of the

[81]T. Lock, 'Why the European Union is Not a State. Some Critical Remarks. Comments on the German Constitutional Court's Decision on the Lisbon Treaty,' (2009) 5 *European Constitutional Law Review* 407.
[82] C. Closa (n 6 *supra*), at 112.
[83] German BVerfG, Case 2 BvE 2/08 et al. *Treaty of Lisbon*, judgment of 30 June 2009, paragraph 332.
[84] *ibid*, paragraph 339.

Czech constitution, even 'against possible excesses by European Union bodies'[85]. However, curiously enough, when in the second complaint the Czech court was explicitly asked about this question, it preferred to water down its approach and to restate that possible conflicts between European and constitutional law could also be solved by means of a constitutional amendment.[86] Finally, slightly less boldly, the Polish[87] and Latvian[88] rulings also approached the question, although they stated that they would consider whether to make an exception to the primacy of European law only where real – and not hypothetical – conflicts between European law and their constitutions arose. It is worth noting that in none of these cases in which *Kompetenz-Kompetenz* was stated was the treaty found to be unconstitutional. On the contrary, the only ruling that resulted in a declaration of unconstitutionality, that of the French Council, did not contain a statement of *Kompetenz-Kompetenz*.

IV. Conclusions

Opponents of ratification showed that they had understood that in order to contest the treaty before a court they had to respect the rules that govern the judicial arena, and so they played their political game the judicial way. In so doing, they developed a multitude of strategies in order to persuade the courts with legal arguments that the treaty, or its act of ratification, should be declared contrary to the constitution. However, the courts seem to have been aware of the political consequences that a declaration of unconstitutionality could have for the ratification of the treaty, and every move by the claimants was met by a judicial counter-strategy. At the end of the day, the claimants seem to have felt a certain sense of frustration, which became visible in the petition in the Lisbon II case in the Czech Republic:

> The petitioners cannot rid themselves of the impression that the Constitutional Court, in reviewing the conformity of the Treaty of Lisbon with the constitutional order, was always heretofore, in the case of any doubts, more on the side of the Lisbon Treaty than on the side of the

[85] Czech CC, Case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 Nov. 2008, paragraph 216.
[86] Czech CC, Case Pl ÚS 29/09 *Treaty of Lisbon II*, judgment of 3 Nov. 2009, paragraph 172.
[87] Polish CT, Case K 32/09 *Treaty of Lisbon*, judgment of 24 Nov. 2010, point III.2.6.
[88] Latvian CC, Case 2008-35-01 *Treaty of Lisbon*, judgment of 7 Apr. 2009, point III.18.8.

> constitutional order. The Constitutional Court has a considerable degree of discretion in interpretation, and unfortunately the Constitutional Court's efforts to proceed intentionally so that the Treaty of Lisbon could be declared not to contravene the constitutional order cannot be denied.[89]

The discourse by the claimants and of the courts highlight the different facets of the cases. The claimants judicialised the process of ratification with arguments that the Lisbon Treaty exceeded the potential for the transfer of powers foreseen by the national integration clauses and that the democratic credentials of the treaty were dubious: the people had not been consulted about the ratification of a treaty that could endanger the protection of constitutional rights and the role of legislative assemblies in the country. For the courts, however, the ratification of the treaty was simply the expression of a constitutional commitment to integration; indeed, for constitutional jurisdictions the ratification reinforced the standards for the protection of rights and expanded the powers of the national parliaments. Only two institutions dared to diverge slightly from this general pattern: the French Constitutional Council with its harmless declaration of unconstitutionality and the German Federal Constitutional Court with its challenging declaration of constitutionality.[90]

[89] Czech CC, Case Pl ÚS 29/09 *Treaty of Lisbon II*, judgment of 3 Nov. 2009, paragraph 32.
[90] There is, though, a precedent of the idiosyncratic and paradoxical outcomes of these two courts: the process of ratification of the Maastricht Treaty. See J. Baquero, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement,' (2008) 14 *European Law Journal* 389.