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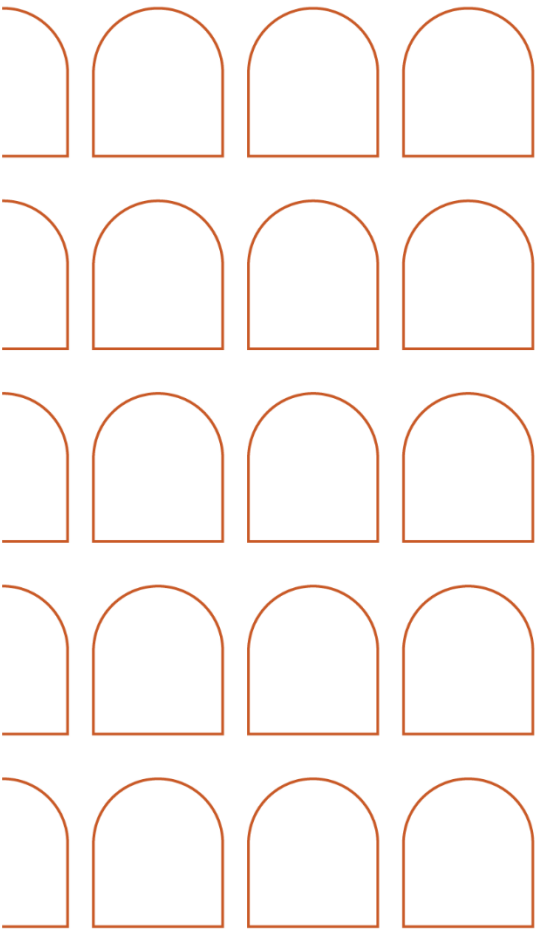

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A Dane, a German, and a Pole walk into a court: National courts as critics of the European Court of Justice

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Abstract

National courts can disagree with the judgments of the Court of Justice, objecting to outcomes or/and legal justification. This chapter conceptualizes this disagreement as methodological critique, which can take three forms. The first form is a simple methodological critique, primarily directed at the techniques/canons of interpretation. An illustrative case is the Danish Supreme Court's decision in the Ajos case. The second form is the meta-methodological critique, primarily directed at the Court's institutional responsibility for keeping the powers of political institutions in (democratic) check. The clearest illustration is the PSPP judgment of the Federal German Constitutional Court. The third is the inverted methodological critique, primarily directed at the national court's validation of the Court of Justice's – objectionable – methodology. The Polish Constitutional Tribunal's decisions K 3/21 and U 2/20 about the criteria of judicial independence are the most illustrative examples.

The contribution of the chapter is two-fold. On the legal conceptual level, it establishes the critique of the European Court of Justice by the national courts as an independent object of inquiry, separate from the doctrine of judicial cooperation or dialogue. On the theoretical level, it highlights 'uncommon' constitutional traditions as an important factor in explaining national perceptions about the intrusiveness of the Court of Justice's methodology, causing friction in the interpretation and the application of European Union law.

Forthcoming in *The Court and its Critics*, Takis Tridimas and Anthony Arnull (eds), OUP.

Keywords

judicial cooperation, national courts, methodological critique, European Court of Justice, typology of critique

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1. Introduction

National courts can disagree with the rulings of the European Court of Justice (the Court), objecting to the Court's teleology, pro-integrationist ideology, or outcomes. Scholars have typically engaged with disagreement within the established normative framework of judicial cooperation, formally anchored in Article 267 TFEU (the preliminary reference procedure). The framework shaped important and relevant doctrinal and theoretical debates, as explained below. Through this lens, disagreement appeared as an unwelcome, if not a frightening anomaly, signalling the limits of integration through case law, conditional validity of European Union law, and the erosion of the Court's institutional legitimacy. It put the idea(l) of European integration at risk.[1]

The chapter adds to the debates about judicial cooperation, however, by examining disagreement as an independent category. The argument unfolds in three steps. The first step briefly revisits the assumptions, which permeate the scholarly commentary and doctrinal analysis of judicial cooperation. It revisits the validity of the premise typically featuring in this analysis, namely that judicial cooperation is indispensable for European integration.[2]

The second step conceptualizes disagreement as critique, arguing its occurance in three analytically distinct forms. The first form can be characterized as methodological critique, where the disagreement about the meaning of a provision of European Union law originates in the disagreement about a correct/acceptable method of interpretation. While this form has a long and rich history in the literature, the judgment of the Danish Supreme Court in the Ajos/ Dansk Industri case might be its most recent and illustrative example.

The second form can be described as meta-methodological critique, where methodological critique is coupled with the question of appropriate standards of judicial review (i.e. meta considerations related to the specific techniques of interpretation), safeguarding the democratic political process and policing the limits of European Union's competence. This form of critique has led to a more complex understanding of the European legal order as a pluralist legal order animated by irresolvable constitutional conflict.[3] It is best illustrated by the PSPP judgment of the Federal German Constitutional Court.

The third form is the institutional critique or inverted methodological critique. As the Polish Constitutional Tribunal's decision in case K 3/21 illustrates, the disagreement with the Court's creation of standards (of judicial independence) is elevated into a legal theoretical discussion about the conflict of norms and their application by the national courts in the national legal order. The critique of the Court's interpretation/reasoning/methodology is directed to the validity of a legal act adopted by a national court implementing the Court's ruling, questioning its constitutionality and compatibility with European Union law.

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[1] See Chapters of this volume reviewing the relevant literature.

[2] To clarify, empirical literature adopted the same premise: if judicial cooperation is indispensable for integration, the empirical analysis of the terms of cooperation is empirically and doctrinally relevant and intellectually weighty even if the theoretical constructs are being proven wrong without suggesting an alternative framing or mechanism.

[3] Most recently Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022). For earlier work see Mattias Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' [1999] Common Market Law Review 351.

The final step reflects on the forms of critique through the lens of the Court's practice of expansive interpretation, proportionality review, and its implications for the autonomy of the Member States; all potentially raising controversy, resistance, or both. This analysis highlights the national methodological bias as a trigger of critique but also as the primary means of the national courts to communicate the critique in legal (juridical) terms. This is consequential: It suggests that the studies focusing on judicial resistance, judicial dialogue, and constitutional conflict, might have underestimated an important aspect of the functioning of the European legal order – the stubborn and particularistic legal traditions, methodological inertia, and attachment to the outdated constructs pertaining to the Court's law-making style. It also emphasizes a methodological opportunity for future studies of judicial disagreement and cooperation.

2. Judicial cooperation and European integration in legal scholarship

Disagreement of the national courts with the European Court of Justice upsets legal practice less than legal scholarship and doctrine. It has not curbed the inflow of preliminary references, triggered waves of non-implementation, or kickstarted comprehensive institutional reform.[4] The Court has remained politically relevant (even if generating negative press), overwhelmingly busy, and heavily involved in all major institutional reforms.[5] Most national governments have remained passive and most national courts continued cooperating by sending preliminary questions.

Scholarly concern is merited because judicial cooperation has been inextricably linked to European integration in theory and doctrine. While the link continues to hold considerable explanatory sway, this chapter suggests that the assumption should be relaxed because it potentially stifles the exploration of different layers, manifold forms, causes, and implications of critique (a normative point: European Union scholars should agree to disagree more). These might lead to a more nuanced appreciation of the actual risks that judicial disagreement poses to the project of European integration, and its doctrinal exposition.

On the theoretical plane, the narrative of integration through law presented law as an effective and symbolic integrative force alternative to power politics.[6] However, without national courts making use of the preliminary reference mechanism (Article 267 TFEU), the narrative and the force of law would have remained an illusion.[7] Similarly, judicial cooperation legitimized the idea (theory) of the European legal order as a supranational (*sui generis*) legal order along with its fundamental principles fashioned by the Court in close alliance with the European

[4] When the German Federal Constitutional Court voices ultra vires critique, the Polish, Hungarian, or Romanian courts rarely follow suit. Hence, one could argue that the President of the German Federal Supreme Court and the media might have adopted an overly alarmist view powered by the same assumption as the doctrine. See Peter Meier-Beck, Ultra vires? at https://www.d-kart.de/en/blog/2020/05/11/ultra-vires/; for the reaction of the media see https://www.ft.com/content/45ae02ab-56d0-486e-bea5-53ba667198dc and https://www.politico.com/news/2020/05/05/german-court-lays-down-eu-law-238787 ('Critics of the German court's move worry that by refusing to accept the CJEU's position, it effectively undermined the court's legitimacy, opening the door for other countries to ignore rulings when they disagree with them').

[5] Urška Šadl and others, 'Law and Orders: The Orders of the European Court of Justice as a Window in the Judicial Process and Institutional Transformations' (2022) 1 European Law Open 549.

[66] See a reflection on the narrative in Loïc Azoulai, '"Integration through Law" and Us' (2016) 14 International Journal of Constitutional Law 449.

[7] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American journal of international law 1; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41. For recent

Commission and the national courts.[8] Continuous acceptance and validation of the Court's rulings (primacy and direct effect) by the national courts became indispensable for conveying effectiveness and legitimacy to the European construct and the process of integration.[9] The framework has also contributed to intellectually stimulating debates, furthering a novel understanding of the European legal order as primarily (while controversially[10]) a pluralist order without the final arbiter of constitutionality,[11] and a legal system where the central position of power has remained unoccupied.[12]

Doctrinally, judicial cooperation has been assumed as indispensable for the proper functioning of the preliminary rulings procedure, hence the protection of individual rights, effectiveness, uniform application, and legitimacy ('the successful relationship between the ECJ [the Court] and the national courts is the key that unlocks the integration door'[13]).[14] It also enabled critical doctrinal reflection on less abstract topics, such as the practice of useful answers, reformulation of preliminary references, the legal quality of argumentation, the Court's methodology, the implications of procedural delays and institutional reform (the Court's reluctance to share the responsibility for the common legal order with national courts or the General Court). The framework, in which national judges wearing a European hat through loyal cooperation with the Court secured the European rule of law, could support new judicial constructs, such as mutual trust,[15] and justify specific case outcomes (the legal impossibility of the European Union to accede to the European Human Rights Convention system). Moreover, it could be used to directly engage with the organization of justice in the Member States establishing the link between the European values (the rule of law) and the national rules governing the operation of national courts.

Faithful and loyal cooperation of national courts through the preliminary reference procedure legitimized the Court's case-law. Logically, the argument of individual protection gains unprecedented justificatory force in a construct where individuals can claim their European rights directly through courts as the auxiliary agents in the enforcement of a common legal order. The Court could justify the construction of legal principles and the occasional expansion of European competence without the fear of non-implementation and non-compliance – a circumstance troubling international courts of the era. The apparent acceptance of primacy by most national courts has underpinned the Court's political power. An open feud between Europe's judges would potentially expose the fragile European construct, forcing a re-thinking of the bread and games approach, a re-legitimization of common policies, and re-construction

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[8] Robert Lecourt, 'L'Europe Des Juges'.

[9] Burley and Mattli (n 7).

[10] George Letsas, 'Harmonic Law: The Case Against Pluralism' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2013).

[11] Mattias Kumm, 'On the Past and Future of European Constitutional Scholarship' (2009) 7 International journal of constitutional law 401; Kumm (n 3); Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317.

[12] Hans-W Micklitz, *The Politics of Judicial Co-Operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press 2005).

[13] Takis Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 404.

[14] Rosas defines genuine dialogue as a relationship of reciprocity and an exchange of views and experiences. Lenaerts contends that the preliminary ruling mechanism is essential for ensuring protection of the rights that EU law confers on individuals, and indeed for upholding the rule of law within the EU. Allan Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 Eur. J. Legal Stud. 121; Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law 3.

[15] Koen Lenaerts, 'La Vie Après l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust' [2017] Common Market Law Review 805.

of a supranational legal system. (Alternatively, and perhaps more realistically, it would just kick the law-making ball from the judicial and bureaucratic to the political field).

For all the above reasons, disagreement and rejection of the Court's answers looks like a dangerous beginning of the end, a dismantling of the European legal order, the end of uniform and practically effective European Union law, and the end of European integration. But if the link between integration and cooperation is relaxed, as this chapter suggests, the tools of argumentation mobilized, it becomes possible to focus on the arguments of the courts, locating the disagreement on the level of judicial application of the law – the level of legal interpretation and forms of (deductive, inductive, analogical) reasoning, in short, judicial method.

Concretely, the study of disagreement as methodological critique calls for a narrow focus. The chapter zooms in on the national court's legal arguments about the Court's techniques of interpretation, its standards of review, and conception of legal norms, which diverge from the Court's understanding/interpretation/validity of a provision of European Union law in the context of Article 267 TFEU. However, it also calls for an expanded focus, juxtaposing critique of overly lax standards of review and expansive (dynamic) interpretation with the Court's use of the criticized principles of proportionality, and intrusive intervention into State autonomy (sovereignty). Those appear directly relevant when assessing the origin of the triggers of critique.[16]

The following section offers a platform for thinking about the relationship between European courts complementary to Article 267 TFEU and the normative framework of judicial cooperation. It lays out a typology and concretizes three forms of critique, using three judgments delivered by three peak national courts as emblematic examples of judicial resistance, capturing their main characteristics.

3. Three forms of methodological critique

The following subsections outline the simple methodological critique, the meta-methodological critique, and the inverted methodological critique, using the decisions of the Danish Supreme Court, the German Federal Constitutional Court (the FCC) and the Polish Constitutional Tribunal (PCT) as the main point of reference and the starting point for reflection.[17]

The forms of critique rest on two assumptions. First, that judicial disagreement can be analytically separated from the framework of cooperation and the preliminary reference system (Article 267 TFEU). National courts criticize the Court through their judgments in legal terms, reasoning with rules, doctrines (primacy), principles (proportionality, conferral) and standards (judicial control), and using the established methods of interpretation (literal, systemic, purposive). Second, critique is at least partly an expression of an implicit conception (theory) of law that judges hold given their education and professional socialization into a particular national legal culture (structural factors).[18]

The presented forms reflect the priors of national judges that are directly visible through the judgments (case law), appear relevant to the ongoing debates, and can easily be situated and

[16] See an illustrative analysis by Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' [2011] Common Market Law Review 395.

[17] For instance, judgments like Case C-399/09 Landtová v Česká správa socialního zabezpečení, from June 2011 would be relevant to the typology. In Landtová the conflict emerged between the national courts, the Czech Supreme Administrative Court and the Czech Constitutional Court.

[18] An interesting debate of values underlying the canons of interpretation in Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005).

discussed against a vast body of academic literature. Most importantly, these forms highlight that identical institutional or constitutional conflict can take on very diverse legal (technical) forms.

The list is not exhaustive. Alternative typologies could apply other relevant criteria such as the scope of critique (rejecting one strand of the case law or the entire legal order), its intensity (surface level versus deep critique), implications, institutional hierarchy (the critique of lower, higher, or constitutional courts), geographical origin, legal tradition (civil or common law), and other legally meaningful criteria.

3.1. (Simple) methodological critique

The most straightforward form of critique is the simple methodological critique, launched by the Danish Supreme Court in the Ajos decision.[19] The critique echoes Hjalte Rasmussen's diagnosis of the Court's decision-making (reasoning), as policymaking under the guise of purposive methodology (useful effect), its disrespect for the legislative will, the meaning of rules, and the division of powers, and a reservation toward judicial review.[20] The description of purposive interpretation as a methodology that liberates courts from the shackles of rules is suspect and unacceptable when used in judicial review of legislative acts.[21]

The dispute, which gave rise to the preliminary reference procedure, arose between two private parties. Mr. Rasmussen, the applicant, initiated legal proceedings against his employer (Ajos) for refusing the payment of a severance allowance equal to three months' salary under the Salaried Employees Act. Ajos invoked Paragraph 2a(3) of the same act, which excluded this payment for older employees like the applicant. Mr. Rasmussen argued that the provision was discriminatory, and contrary to the European Employment Directive. The Danish Maritime and Commercial Court hearing the case at first instance agreed.[22] The Supreme Court, seized with the appeal, addressed two questions to the Court of Justice: could the principle of non-discrimination on grounds of age preclude the application of a conflicting Danish legislation, and could it yield to the principles of legal certainty and the protection of legitimate expectations?

On the formal legal level, the preliminary reference concerned the application of the principle of non-discrimination on grounds of age, and its relationship with the principle of legal certainty and the protection of legitimate expectations. On the methodological level, it turned to the commensurability of the European legal method with the Danish legal method. The letter is

[19] Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A. Available at https://domstol.dk/media/2udgvvvb/judgment-15-2014.pdf

[20] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Brill 1986).

[21] The Danish judiciary and legal practice have been schooled in the majoritarian model with judicial review (and constitutional review) limited to highly exceptional cases of egregious breaches. Jens Elo Rytter and Marlene Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 International Journal of Constitutional Law 470. See also Henrik Zahle, Grundlovens menneskerettigheder. Sammenstødet mellem legalistiske og dynamiske retstraditioner (Morten Kjærum et al. eds.,1997).

[22] Following the Court's case law. Case C-499/08 *Ingeniørforeningen i Danmark,* ECLI:EU:C:2010:600. The latter declared that Paragraph 2a(3) of the Danish Salaried Employees Law was contrary to Directive 2000/78 (the Employment Directive).

inseparable from the conceptualization of law as a system of formal rules and courts as dutiful translators of the legislative will. One could thus argue that the conflict was cultural.[23]

The Court of Justice replied in the affirmative to the question of whether the principle of non-discrimination on grounds of age precluded the application of a conflicting Danish legislation. It suggested that the Danish court could interpret the disputed provision of Article 2a(3) of the Salaried Employees Act in line with the Employment Directive, or set it aside. By implication, the concerns of legal certainty and legitimate expectations should yield to the principle of non-discrimination.

The Danish Supreme Court ruled that 'Danish courts could not disapply Paragraph 2a(3) of the Law on salaried employees. A consistent interpretation of that article with the Directive would be *contra legem.* To the Supreme Court, the Danish law was clear. Article 2a was introduced in 1971 and the Parliament did not introduce any changes to the provision over the years – not at the event of the Accession act or the transposition of the Employment Directive. Moreover, by setting aside a clear legal provision of the Danish law and replacing it with an unwritten principle of non-discrimination of European Union law, the Supreme Court would overstep its judicial role. It would be effectively applying a non-law.

The restraint articulated in the literal and subjective purposive methods of interpretation (preparatory works) implied that the Supreme Court would not need to reverse its established case law. This follows from the procedural history of the dispute exposing the legislative limbo and the instability of the national practice leading to the Ajos case. Denmark transposed the Employment Directive in 2004 in the Anti-Discrimination Act without amending the Salaried Employees Act from 1971. The Danish Supreme Court applied Article 2a(3) of the latter until the Court's decision in 2010 in Andersen, clarifying that its own case law effectively disregarded the Employment Directive. Andersen concerned a public sector employee who could rely directly on the Employment Directive but could not extend to a private sector employee like Mr. Rasmussen who faced the barrier of the horizontal effect.[24] The situation generated considerable litigation, supported by the Unions, and challenged the Supreme Court's established case law. It even prompted a legislative amendment of the Salaried Employees Law in 2015 while the dispute was ongoing.

The Danish Court found that the principle of non-discrimination on grounds of age could not take precedence over conflicting Danish national law (as lex posterior) because it lacked legal basis. The original Danish Accession Act or its subsequent amendments did not explicitly mention a general principle of non-discrimination on grounds of age, and thus the principle could not be a source of Danish law. This conclusion followed from a painstakingly detailed reconstruction of the Danish Accession Act, and the Danish accession process starting with the preparatory works leading to its initial adoption in 1972 and continuing through its

[23] In this sense Helle Krunke and Sune Klinge, The Danish Ajos Case: The Missing Case from Maastricht and Lisbon, European Papers, Vol. 3, 2018, No 1, pp. 157-182 (comparing the case to the Italian Constitutional Court's multiple references in Taricco). Available at https://www.europeanpapers.eu/en/e-journal/danish-ajos-case-missing-case-from-maastricht-and-lisbon

[24] The Employment Directive was implemented by the Danish Parliament in 2004. The legislator considered that the Employment Directive did not affect the severance allowance rules of the Law on Salaried Employees (Article 2a), that is, the national provision in dispute in the Ajos case. The Act of Parliament no. 1417 of December 22, 2004 is available at https://www.retsinformation.dk/Forms/R0710.aspx?id=30191. The Law on Salaried Employees has since been amended several times, including the contested provision, which was amended in 2015 and now applies to all employees irrespective of age.

subsequent amendments. The Accession Act, which was the ultimate source of European Union law in the Danish legal system, placed strict limits on its applicability and effect.[25]

Most commentators correctly focused on the refusal of the Danish Supreme Court to award precedence to European Union law and in line with the established analytical framework of judicial cooperation unpacked the problem in terms of constitutional conflict and judicial authority.[26] Many commentators characterized the conflict as unbecoming to highest courts who were under the paradigm of judicial cooperation mutually responsible for the functioning of the common (European) legal order. They also saw the conflict as irresolvable under the doctrine of primacy.

These weighty debates nearly overshadowed an interesting methodological aspect of the disagreement: the refusal of the Danish Court to acknowledge a general principle of European Union law as a valid source of law. It presented the initial step in the Supreme Court's reasoning.

Considering that the canons of interpretation contain legal values,[27] the judgment in the Ajos case suggests that the Danish Supreme Court values judicial restraint and the interpretation of the Rechtsstaat in which courts implement the legislative will. The restraint implies a specific argumentative style, with the Supreme Court justifying its legal position and its own interpretive authority through the words of the Ministerial replies and legal analyses conducted by the government.

The Supreme Court draws an inevitable conclusion that. "[a] situation such as this, in which a principle at treaty level under EU law is to have direct effect (thereby creating obligations) and be allowed to take precedence over conflicting Danish law in a dispute between individuals, without the principle having any basis in a specific treaty provision, is not foreseen in the Law on accession."[28]

Recalling that the Law on accession does not allow direct application of principles developed or established on the basis of Article 6(3) TEU nor the Charter in Denmark irrespective of the Court's judgment in Mangold. In fact, although the judgment was delivered in 2005, the amendment of the Law on accession in 2008 did not mention it in the travaux préparatoires for the amending legislation. Hence, "[o]n that ground alone, the judgment cannot give rise to the Law on accession subsequently being interpreted differently than before the amendment."[29] Inevitably, "the Law on accession does not provide the legal basis to allow the unwritten principle prohibiting discrimination on grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as the provision is contrary to the prohibition."[30]

Methodologically, judicial restraint effectively gives the greatest interpretive weight to the ministerial replies to the questions of the members of the Parliament (an established practice of political control and a common means of communication between the executive and the

[25] Consequently, this meant that the Danish Supreme Court considered that the Accession Act governed the applicability of European Union law, a topic picked by most commentators (including Danish).

[26] Illustratively Daniella Elkan, Rass Holdgaard and Gustav Krohn Schaldemose, 'From Cooperation to Collision: The ECJ's Ajos Ruling and the Danish Supreme Court's Refusal to Comply' [2018] Common Market Law Review 17.

[27] MacCormick (n 18).

[28] Page 45.

[29] Page 47.

[30] Page 48

Parliament), the 'remarks' of Parliamentary committees, the Constitutional Commission convened at the latest amendment of the Danish Basic Law in 1953, and the minutes of parliamentary debates excavated from state archives. The Court's established case law (the Andersen or the Mangold case) or the Maritime Court's interpretation/application of that case law do not measure up to these authoritative sources.

To conclude, among the main characteristics of the methodological critique that can be teased out of the above analysis, are first, a belief that constitutional interpretation is not a separate (*sui generis*) mode of interpretation, which would require the broadening of the accepted interpretive canons: literal and subjective purposive interpretation, reconstructing the meaning of the words and the legislative will from the preparatory works. Courts exercising judicial review must follow the letter of the law and legislative intent.[31]

Second, the plain methodological critique adopts an orthodox doctrine of legal sources. The underlying conception of a universal legal method as a list of rules to extricate the meaning of legal sources (wording of statutes, preparatory work), remove direct conflicts between them (*lex posterior, lex superior*…), and solve legal disputes.[32]

Third, the plain methodological critique accepts unconditional legislative superiority (no institution is above or beside the Parliament). Building on the first two characteristics, this belief suggests that static methods are superior to dynamic methods (which are dangerous signals of judicial activism) because they preserve the superiority of the legislative body. The latter is the key element of democracy.[33]

3.2. Meta-methodological critique

The meta-methodological critique adds to the methodological critique the question of active institutional responsibility to uphold the principle of conferral. The national court disagrees with the Court's application of general principles (proportionality) because it lowers the standard of judicial review of legislative action, abdicating this responsibility.

Characteristically, the courts do not diverge in their conception of the judicial role. The critique does not raise the general methodological question of the acceptable canons of interpretation. In fact, both courts accept expansive interpretation and constitution-conform interpretation, including the conception of constitutional interpretation as a *sui generis* form of statutory interpretation.[34] The critique originates from a concrete disagreement: the application of

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[31] See one of the leading textbooks on Danish constitutional law co-authored by the current president of the Danish Supreme Court. Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (3rd edn, Jurist-og Økonomforbundet 2020). p. 36. The authors also stress that the 'interpretive style' of Danish courts importantly diverges from the interpretive style of international courts such as the ECrtHR that rely on 'the present day conditions' and make rights which are practical and effective. Thus, a warning to the Danish courts not to follow these interpretive tendencies but make sure that the power does not shift from the legislator to the judicial institutions. The main argument is that the difficulty to change the Danish constitutions (high bar) requires courts to stick to the initial aim of the legislation, the wording, and the preparatory works. P. 47 – 48.

[32] E.g. Mads Bryde Andersen, *Ret Og Metode* (Gjellerup 2002).

[33] This rigid definition might be related to the fact that the Danish Constitution from 1849 nor any of the following amendments (the last in 1953) introduced a provision to the effect that 'Denmark was a democratic state with a rule of law.' Instead, Article 3 of the Basic Law (Grundloven) assigns the courts the adjudicative function, the government the executive function, and the government (the King in the original wording but interpreted as the government) with the parliament the legislative function. Article 2 states that the Regeringsformen er indskrænket-monarkisk (the form of government is a limited monarchy, interpreted as constitutional monarchy).

[34] Matthias Jestaedt and others, *The German Federal Constitutional Court: The Court Without Limits* (Oxford University Press 2020).

constitutional interpretation and standards of judicial review in a concrete case leading to a concrete (and unacceptable from the democratic point of view) outcome.

While the critique appears less severe than the plain methodological critique, it is institutionally more threatening because the national court establishes its own constitutional authority to police the application of the Court's methodology. As opposed to the methodological critique, which turns inward (and is defensive), the meta-methodological critique turns outward (it is offensive). The judgment of the Second Senate of the Federal German Constitutional Court (FCC) in the so-called PSPP case is an emblematic example.[35]

The dispute is a variation on a notorious theme of quantitative easing, a monetary policy designed to kickstart economic growth ('save the Euro') after the 2007-2008 financial crisis. It was composed of three programs.

The Gauweiler case, decided in 2015, dealt with the first program, the outright monetary transactions or OMT.[36] The latter mandated the European Central Bank (ECB) to directly purchase (outright transactions) bonds issued by the members of the Eurozone asking for assistance. The FCC inquired whether the OMT decisions of the ECB were within its monetary policy mandate, proportionate, and respecting the prohibition of monetary financing (Article 123(1) TFEU). The reference questioned the compatibility of the OMT with European Union and German constitutional law. The FCC grudgingly accepted the Court's affirmative reply to the questions, justified by the broad discretion of the ECB and safeguards put in place to contain it.

The PSPP dispute concerned the second program (public sector purchase program) established in 2015 as a counter-deflation measure. An important difference from OMT was that the PSPP extended to the entire Eurozone and not only the States asking for assistance. The FCC's preliminary reference raised three issues: whether the ECB's decision was sufficiently reasoned; whether PSPP fell within its monetary policy mandate, and whether the program respected the prohibition of monetary financing.

The Court replied positively to all questions, upholding the disputed ECB's decisions:[37] the program was a suitable means to achieve the ECB's monetary policy goals, the ECB did not manifestly err in its technical and complex assessments, and the PSPP measures were necessary (temporary, not selective, based on stringent eligibility criteria). The FCC disagreed. It held that the Court's judgment was arbitrary, incomprehensible, and ultra vires. According to the FCC, the Federal Government and the German Bundestag violated the rights of the applicants under Art. 38(1) first sentence[38] in conjunction with Art. 20(1) and (2) (principle of democracy) in conjunction with Art. 79(3)[39] of the Basic Law by failing to take suitable steps challenging the decisions of the ECB.[40] The Federal Government and the German Bundestag should have, as constitutionally responsible organs ensuring adherence to the European integration agenda, challenged the ECB's decision because the ECB "neither assessed nor

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[35] Judgment of the Second Senate of 5 May 2020 (2 BvR 859/15; 2 BvR 1651/15; 2 BvR 2006/15; 2 BvR 980/16).

[36] Case C-62/14, Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400.

[37] Case C-493/17, Heinrich Weiss and Others, ECLI:EU:C:2018:1000.

[38] (1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections.

[39] Which states that the amendments to the Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

[40] Par 116

substantiated that the measures provided for in these decisions satisfy the principle of proportionality."[41]

The differing view of the Court 'does not merit a different conclusion, given that on this point, the judgment is simply not comprehensible so that, to this extent, the judgment was rendered ultra vires.[42]

The disagreement turns around the conception and the application of the proportionality test. The FCC discredited the Court's assessment of proportionality because it could not fulfil its "corrective function for the purposes of safeguarding the competences of the Member States, as provided for in Art. 5(1) second sentence and Art. 5(4) TEU,"[43] thereby rendering the principle of conferral (Article 5(1) TEU) 'meaningless.

The proportionality critique of the FCC proceeds from the genealogy of the principle ('developed in common law [...] and, in particular, German law (for a general overview cf. BVerfGE 3, 383 <399> […]). Facilitated by the case-law of the European Court of Human Rights [...] and the CJEU, it is now recognised in all (partial) legal orders in Europe [...]),[44] and the universality of its application across the Member States and the United Kingdom (In applying the principle of proportionality, German law distinguishes between the elements of suitability (Geeignetheit), necessity (Erforderlichkeit) and appropriateness (Angemessenheit) […] The French Conseil constitutionnel, too, assesses the proportionality of acts of public authority in these three steps [...], as do the Spanish Tribunal Constitucional [...] and the Swedish Högsta domstolen [...]. The Italian Corte Costituzionale takes a similar approach with the additional element of reasonableness, which entails a balancing of constitutional values [...] Similar approaches are reflected in the jurisdictions of Austria […], Poland [...], Hungary [...] or the United Kingdom [...]).[45]

The analysis turns to the application of proportionality review in the Court's case-law, finding that the Court often attaches different meaning to the terms 'suitable', 'appropriate' and 'necessary' than the German terminology and doctrine. For instance, the FCC remarks, the Court's test of necessity considers only the availability of alternative less onerous means for attaining the objectives, but not whether the measure is proportionate in the strict sense (the third prong of proportionality review). Moreover, its recent decisions show a tendency to merge the elements of appropriateness and necessity.[46]

In the PSPP case, and considering the ECB's decisions, the Court should have considered the economic policy effects of the PSPP, weighing them against other conflicting interests.[47] This would have cleared the bar of the strict proportionality test. In its absence, the 'specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principal meaningless' because it is impossible to distinguish whether the PSPP pursues monetary or economic policy, that is, whether it is acting within the EU's exclusive monetary

[41] Par 116

[42] Par 116

[43] Par 123

[44] Par 124

[45] Par 125

[46] Par 126

[47] Par 138

policy competence or encroaching on the retained competence of the Member States to conduct their general economic policies.[48]

From the judgment, it transpires that the FCC objects to the self-imposed restraint of the Court (diametrically the opposite from the Danish Supreme Court's attitude), resulting in a limited review of ECB's 'manifest error of assessment.' The standard of review is, according to the FCC, "by no means conducive to restricting the scope of the competences conferred upon the ECB."[49] Instead, it allows a gradual and unnoticeable expansion of the ECB's competences to determine its own authority: it largely or completely exempts ECB's action from judicial review.

In sum, "[t]his combination of the broad discretion afforded the institution in question together with the limited standard of review as to whether that institution manifestly exceeded its competences may well be in line with traditional case-law in other areas of EU law. Yet it clearly fails to give sufficient effect to the principle of conferral [...] and paves the way for a continual erosion of Member State competences."[50]

The characteristics of the meta-methodological critique, which emerge from the analysis are first, the insistence that constitutional interpretation entails institutional responsibility of a particular kind, which is common to the Member States (and thus also applicable in the national context in which the national court operates). Courts exercising judicial review must apply the established methods of constitutional interpretation and the common constitutional principles like proportionality in a way that it can "fulfil its corrective function for the purposes of safeguarding the competences of the Member States."[51]

Second, the critique operates on the premise that the Court must police the principle of conferral with 'appropriate' methodological standards. This standard of review applied by the Court fails to give effect to the function of the principle of conferral as a key determinant [in the division of competences] and to the consequences this entails, in terms of methodology, for the review as to whether that principle is observed. In other words, judicial review may not simply accept positions asserted by the ECB without closer scrutiny.[52]

Finally, the meta-methodological critique is compelling national courts to control the Court's application of common principles in concrete disputes as a means of controlling the European integration program and the division of competence (the principle of conferral), a key element of democracy. Thus, the meta-element of the critique – how to apply concrete methods to achieve constitutional goals.

3.3. Inverted methodological critique

The inverted methodological critique leverages legal theoretical constructs to justify outcomes that indirectly dispute the relevance/authority of the Court's interpretations without directly challenging the methods of interpretation. As the methodological critique, it turns inward, with the difference that it is directed primarily against fellow or competing national courts accepting inconvenient interpretations and only indirectly toward the Court's presumably ultra vires decision. Similar to the meta-methodological critique, it objects to the Court's criteria (standards) but rejects them to avoid political confrontation with the national executive and the

[48] Par 127

[49] Par 156

[50] Par 156

[51] Par 133

[52] Par 142

legislator (and not to keep them in democratic check, as the meta-methodological critique). In this sense, it inverts the methodological and the meta-methodological critique. This critique is the most difficult to conceptualize because the national court diverts and abstracts the discourse. Nonetheless, it can be analyzed as a separate form of critique because of a clear disagreement with the Court's interpretation, the refusal to follow it, and instructing all national courts to ignore/disapply it.

An example of this form of critique is the ruling of the Polish Constitutional Tribunal (PCT) in K 3/21. The judgment is among the most recent points in an ongoing struggle for judicial independence in Poland, with the Supreme Court's and a handful of ordinary or common (sądy powszechne) courts' active resistance to the erosion of democratic political institutions.

The PCT's decision followed the Prime Minister's application for constitutional review of the constitutionality of selected Articles of the TEU. The Prime Minister questioned the Union's competence in the organization of the judiciary in the Member States, and the Court's jurisdiction in such disputes. By deciding on these issues, the Court's action was ultra vires according to the Polish Prime Minister, signalling a 'new stage of integration' violating the Constitution.

The PCT upheld the Prime Minister's application in three points. First, and most generally, it ruled that 'the new stage of integration' characterized primarily by the Court's case law was contrary to the Polish Constitution, to the extent where the European Union authorities were permitted to act ultra vires, eroding Polish sovereignty, and the supremacy of the Polish constitution.

Second, it held that Article 19(1) TEU ensuring effective legal protection in the areas covered by European Union law was unconstitutional to the extent it entitled the ordinary courts to bypass the Constitution in concrete disputes, grounding their decisions in legal provisions revoked by the Sejm or provisions declared unconstitutional by the PCT.

Third, the PCT held that Article 19(1) and Article 2 TEU were unconstitutional insofar they granted domestic courts the competences to review the legality of the appointment procedures of judges, including the legality of acts of the President, and the acts of the National Council of the Judiciary recommending the appointment to the President, and finally, insofar they reviewed the appointment process, potentially disregarding individuals appointed to judicial office.

Technically or formally, the judgment confirmed the unconstitutionality of the Supreme Court's resolution BSA I-4110-1/20 (the Resolution) previously decided in U-2/20.[53] Practically or in substance, the judgment again rejected the Court's criteria of judicial independence, on which the Resolution and the ensuing action of the resisting national courts were based. The link between the three events was a preliminary reference of the Polish Supreme Court and the Court's judgment in the A.K. case.[54] The Court established the criteria for judicial independence, from which it was clear that the National Council of the Judiciary (in charge of judicial nominations), and the Disciplinary Chamber of the Supreme Court (competent i.a. to decide on the disciplinary liability of judges referring preliminary references to the Court despite

[53] The Resolution stated that a formation including a judge appointed by the National Council for the Judiciary in accordance with the new rules, was appointed unduly (criminal proceedings) or unlawfully (civil proceedings), if it could cause a breach of the standards of independence within the meaning of Article 45(1) of the Polish Constitution, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the European Convention of Human Rights.

[54] Joined Cases C-585/18, C-624/18 and C-625/18 A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, ECLI:EU:C:2019:982. The Commission also initiated two infringement procedures.

the presumable unconstitutionality of the practice; or on the early retirement of Supreme Court justices) were not independent judicial institutions. These organs made it possible for the Polish government to control judicial appointment processes and remedies, effectively containing judicial review.[55]

The disagreement of the PCT centers on the Court's jurisdiction to set such criteria for judicial independence and preventing the empowerment of the national courts to resist the political institutions and their constitutional court. To justify its jurisdiction and competence to review the constitutionality of European Union law with the Polish constitution the PCT relies on a legal theoretical distinction between legal provisions (text) and legal norms (interpretations of text).[56] The distinction is well-established in Polish legal theory.[57]

It proved central procedurally and substantively. Procedurally, the PCT could avoid a reference. In substance, it could rule on the constitutionality of the Treaty provisions with the Polish Constitution. The distinction is premised by the idea that legal norms, which are the result of interpretation, can be a separate object of review, and could be distinguished from the provisions (written text). Thus, the PCT could review the meaning of the norms fashioned by the Court in the process of Treaty interpretation without crossing into the review of the constitutionality of Treaty provisions.[58] The subject of the Prime Minister's request were thus legal norms reconstructed from the provisions of the Treaties as 'statements imposing the rules of behavior regardless of the verbal form in which the legislator expressed the norms in legal provisions.'[59]

The PCT's ruling is moreover issued a so-called interpretative ruling, invoking another debated but familiar distinction in Polish theory between interpretive and scope judgements. Scope rulings, as the name suggest, are judgments about the constitutionality of a legal provision within a certain scope of its application. They are the rulings in the operative part. Their aim is to authoritatively decide whether a legal provision, the understanding of which is clear (non-contestable), is constitutional within a certain scope of its application. Interpretative judgments,

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[55] The Marshall of the Sejm, the Prime Minister, the Prosecutor General and the President initiated proceeding before the PCT to halt the implementation of the Resolution. The judgment (U 2/20) resolved 1) the competence dispute between the Supreme Court and the Sejm, indicating that the former was not competent to adopt it, leading to a change in the normative state in the sphere of the system and organization of the judiciary and 2) the competence dispute between the Supreme Court and the President, indicating that the former cannot control the legality of judicial appointments, hence de facto cannot implement the Court's ruling. The PCT also issued an injunction (Kpt 1/20) halting the application of the Resolution, which it held was a reviewable legal act, conform with the Court's ruling but not with the Polish Constitution. It considered a preliminary reference unnecessary.

[56] The question discussed by commentators is whether the reasoning has 'manipulated' national and European Union law to disregard the ruling of the Court and its competence to interpret EU law. See Anna Wyrozumska, 'Odwracanie kota ogonem bez żadnego trybu, czyli o orzeczeniach Trybunału Konstytucyjnego w sprawach Kpt 1/20 i U 2/20' in Jan Barcz, Agnieszka Grzelak and Rafał Szyndlauer (eds) Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2018–2020) (Warszawa 2021) 488-528. I thank Hubert Bekisz for summarizing the arguments of the article.

[57] Concretely, the PCT relies on hte legal theoretical distinction to justify the review of a provision of European Union law as interpreted by the Court in a concrete case (that is, its specific interpretation / understanding) the lack of competence to rule on the constitutionality of individual judgments (like the Court's judgement). The PCT can thus clam that it cannot review Treaty provisions as *legal provisions* / text while effectively reviewing the Court's interpretation of Treaty provisions, however *as norms* interpreted by the Court.

[58] Par 144 – 147.

[59] Maciej Zielinski's theory of derivative interpretation, creatively developing the earlier concept of Zygmunt Ziembinski, holds that legal norms, as opposed to legal provisions constituting the editorial unit of a legal text, are derived from legal provision, being the effect of interpretation of legal provisions, and each provision, even prima facie uncontroversial on linguistic grounds, is subject to interpretation (omnia sunt interpretanda - cf. Maciej Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Wolters Kluwer 2012).

by contrast, declare that an interpretation of a provision (the legal norm) is (un)constitutional. Constitutionality/unconstitutionality is thus not attached to provisions but to norms as interpreted (the meaning of which is reconstructed) from that provision. Their function is to eliminate unconstitutional *norms* rather than removing unconstitutional provisions from the legal system.[60] The distinction has practical implications as the provision is not deleted from the statute but accompanied with an annotation that it is (un)constitutional to the extent that / understood as interpreted […] .

Based on the two national legal theoretical distinctions the PCT could argue that it did not assess or evaluate the correctness of the Court's case law. Instead, it mapped the relevant case law to establish its normative content and reflect on the 'new stage of integration.' The object of control of constitutionality was the outcome resulting from the reconstruction or creation of legal norms arising from Treaty provisions or norms whose existence was justified in its jurisprudence. Those fell squarely within its competence.

The final obstacle was the reconstruction of a single norm following a single decision of the Court with interpretive certainty. The PCT can namely control legal norms if the established meaning of a provision is widely accepted in jurisprudence. However, the situation was special. Given the considerable importance of the case and the status of the Court, the European Court of Human Rights, the Supreme Court, or the Supreme Administrative Court, the PCT claimed that it could also control a legal norm emerging as a result of a *single* jurisprudential statement. This norm has exceeded the impassable limit of concessions, which Poland accorded to the European Union as a sovereign state. They could thus not bind Polish state authorities, especially Polish courts. Their action was *ex tunc* unconstitutional.

The PCT's judgment dost not affect the validity of the provisions of European Union law in Poland (according to the dominating view in the literature), which remain binding.[61] The national court inverts the methodological critique to declare the national court's practice unconstitutional / to subdue the national courts, establishing its authority against the national constitution and the national courts.

The characteristics of the disagreement are first, the national court's resort to national legal and constitutional theory. The latter elevates the conflict from the political conflict, formalizing it into a legal technical debate. In this sense, it can be regarded as legalistic or excessively formalist. Second, the disagreement is indirect, rejecting the standards of judicial independence or other common constitutional standards by ruling on the constitutionality of legal acts that effectively embrace and apply them. Finally, the critique amounts to a structural disagreement with the stage of integration, as it can be reconstructed from the Court's case law in concrete disputes. The national court seems to build an alternative, idiosyncratic, normative framework for disagreement.

3.4. Contrasts and commonality

The three communication strategies, reasoning styles, and methodological choices of the three forms of critique, illustrated by three judgments, appear strikingly different. The rationale of critique, by contrast, is more similar: the national courts, in one way or another, reject the

[60] Monika Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne* (Ars Boni et Aequi 2006). I thank Hubert Bekisz for translating and interpreting parts of this work for me.

[61] See, for example, the contributions to *Europejski Przegląd Sądowy* 12/2021 - the issue entirely devoted to the consequences of the Constitutional Tribunal's ruling. The authors reach a consensus on the ruling not producing any legal effects due to its incompatibility with EU law. I thank Hubert Bekisz for translating and interpreting parts of this work for me.

'foreign' elements of the legal order, which cuts deep into their constitutional settlement, or usurps their interpretive authority and the authority to impose the correct standards of review and canons of interpretation.[62]

The crudest critique of the national courts is the methodological critique. Reflecting the scholarly critique of the Court's judicial activism, it is grounded in the legal realist tradition and judicial politics literature calibrated to the normative (legal theoretical) thinking about legal argumentation. Through this lens, repeated reliance on the useful effect and the aim of the ever-closer union, achieved by the method of purposive interpretation, can be read as signals of judicial overreach (as the Court usurping the legislative role). They potentially taint the Court's rulings as illegitimate policymaking without the necessary legal basis in the existing rules. This critique has been debated in judicial scholarly and political circles since the 1980s, without amounting to an institutional rejection of the Court's methodology and jurisdiction.[63] The critique is rooted in the conceptualization of law and courts as a system of formal rules, which require interpretation before being applied to concrete cases. The debate turns around the question which method of interpretation best protects the values of legal certainty, legitimate expectations, and the rule of law.[64] Courts are conceptualized primarily as dispute resolution institutions, finding the abstract rules crafted by the legislature.

The meta-methodological critique of national courts highlights the conception of courts as active ('dynamic') as opposed to passive guardians of democracy and the rule of law. The critique imposes a specific use of interpretive methods, concepts, and standards of review that match this institutional role, placing courts on par with the legislator. In the latter sense the meta-methodological critique contradicts the methodological critique, concerned with the overstepping of judicial powers.

One could also argue that the methodological critique bifurcates from the initial perception of the Court's judgments as unpersuasive or arbitrary, hence objectionable from the national point of view – the first turning inward (from the European system towards the national system), the latter outward (from the national system towards the European system).

Finally, the inverted methodological critique resorts to a method of norm construction (that is, a critique that is on its surface unobjectionable) to reverse the application of potentially any 'norm' of European Union law by national courts. This form of critique is legally fascinating because it twists the application of ordinary judicial tools of interpretation and the role of courts as the guardians of the legal system (and constitutionality). The critique is directed towards the national courts. Inverted methodological critique relies on abstract legal theoretical constructs, and a formal perception of the law. In the latter sense, it is close to the plain methodological critique. In the former, it is closer to the meta-methodological critique.

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[62] Whether they do so persuasively, has been subject to countless debates and contributions, which this chapter acknowledges without engaging with the reasoning of the national courts beyond the methodological aspect.

[63] See e.g. Mitchel De S.-O.-L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009); Rasmussen (n 20).

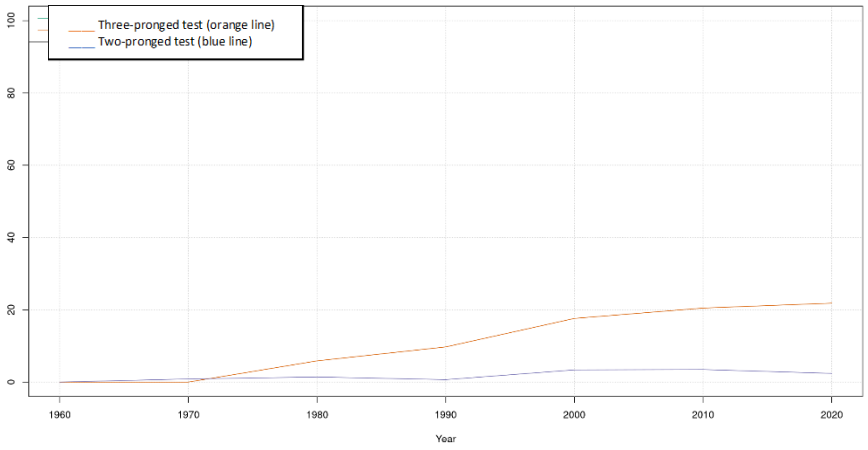
[64] For a discussion of canons of interpretation and the underlying values see Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press Oxford 1993).

4. Contextualizing the forms of critique against the Court's practice

The forms of critique have emerged in different legal contexts. The Danish case concerned a labor law dispute between private parties (an employer and an employee) about a no longer valid provision of a national statute. The German case challenged the constitutionality of the decision of the EBC and the omission of the Federal Government and the German Bundestag to discharge their duty of care with regard to European integration. It cut straightforwardly into the political realm, state sovereignty, and democratic control. The Polish dispute also raised questions of compatibility of European Union provisions with the Polish constitution at the highest political level. It was situated in a tumultuous political conflict, seeking to legally quash the democratic opposition. Regardless of the circumstances and the nature of the disputes, all forms touched upon the perennial question of state sovereignty and the limits of European integration. As if the disputes were only the triggers of broader concerns.

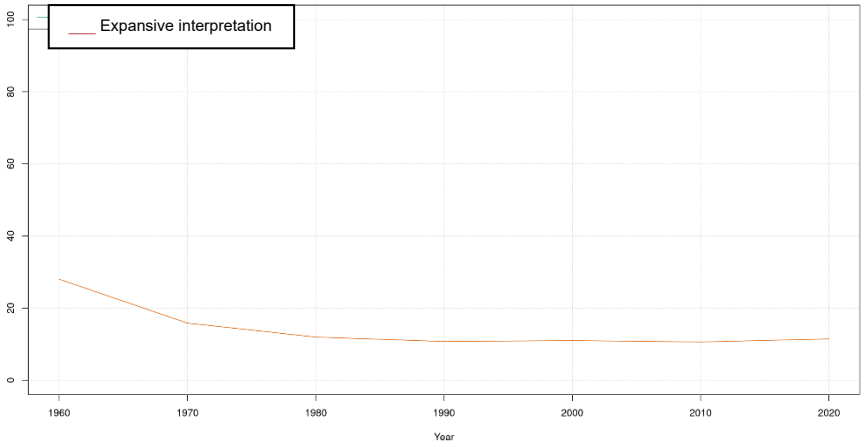
This intuition finds support in the Court's case law addressing issues of judicial review, balancing, regulatory autonomy and expansive interpretation in free movement judgments. For instance, considering the Court's use of proportionality over time in over 3300 free movement of persons, goods, and establishment cases, one can observe 1) an overall increase of balancing over time, and 2) an increased use of the three-pronged proportionality test. As Figure 1 shows, the Court has been increasingly willing to consider and apply a three-pronged proportionality test (including the balancing in the strict sense).[65] Over the past two decades, the Court has been applying a three-pronged proportionality test in 1 out of 5 judgments calling into question the validity of national or European Union's measures. By contrast, it has rarely resorted to a two-pronged proportionality test (in fewer than 5% of the judgments, with this share remaining overall stable over time).

Figure 1: Proportionality over time



[65] The data is on file with the author. The sample of consists of over 3300 judgments decided since 1954 (until 2022). It includes all judgments decided by the Court in the areas of free movement of persons, goods, and establishment. The judgments have been collected using an automated text search on CURIA and EURLEX, and screened by a research assistant to confirm that they fell into the subject area. The judgments were coded by the research assistants based on a detailed codebook and following a strict coding protocol (and cross-coded to ensure the reliability of the data).

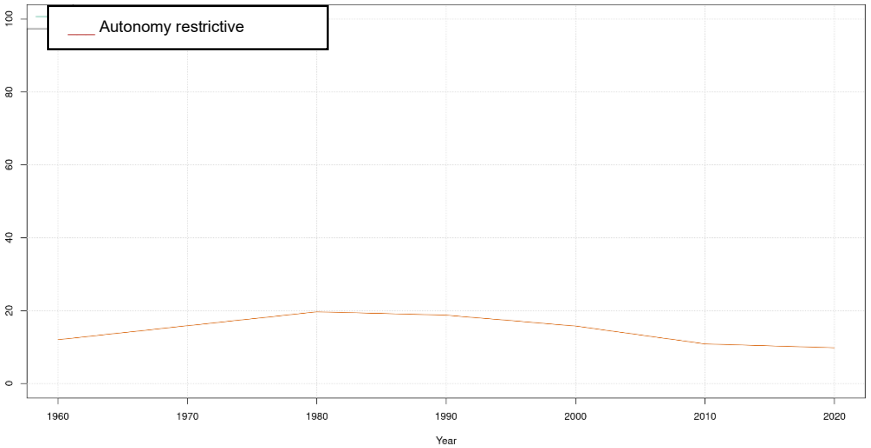
Figure 2: Expansive interpretation over time



Similarly, looking at the same sample of judgment, the Court has not been overly prone to interpreting European Union law expansively. As Figure 2 demonstrates, the Court has used purposive interpretation, which potentially expands the meaning of European Union law, in around 15% of judgments. This figure has remained constant since the mid-1990s.

Finally, the share of judgments, which can be interpreted as restricting Member State regulatory autonomy, has never exceed 20%, and has been steadily decreasing since the 2010s, as Figure 3 demonstrates. No more than 12% of all judgments have such an effect. Most judgments do not significantly alter the regulatory choices of the Member States.

Figure 3: Autonomy restrictive judgments over time



The numbers raise the question whether the national courts remain fixated on an outdated image of the Court, rather than paying attention to the overall trends in the jurisprudence. The Court might not be an 'activist' institution, supporting the Union's action at all costs – and especially at the cost of Member State sovereignty.[66]

There is a caveat to the analysis based on large numbers. For the purposes of the argument in this chapter it is illustrative because it highlights how the national courts interpret and

[66] See also Jan Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020).

respond to the Court's rulings and interpretations, meaning that the latter can acquire a new meaning in the national context, depending on the image that the national courts hold of the Court. A national court in awe of the Court's method and status, will interpret the Court's rulings benevolently ('in their best light'), seeking to reconcile the demands of European Union law (constitution) with the national constitution, and vice versa. Moreover, the analysis does not draw strong conclusions or invalidate the attitude of national courts as empirically wrong or legally wrong (incorrect). The attitude, on the contrary, is constitutive of the critique, meriting scholarly engagement outside the normative framework of judicial cooperation, and a further probing into the national methodological choices and their underlying rationales.

As an example of entrenched national ideas about the core judicial duties, animating methodological critique, Børge Dahl, a former President of the Danish Supreme Court, wrote extrajudicially that the 'Danish judges work on the basis of the law and view creative judicial activism as something that puts legal certainty under pressure and which may over time encumber the trust in courts and their legitimacy.'[67] The Danish courts, and notably the Supreme Court, Dahl adds, should continue to hone the textual approach, which put Denmark as 'number one on the global list of legal certainty…. In the annual EU survey of trust in the courts of the Member States, Denmark comes out as number one.'[68] Dahl's comments reflect the mood of scholars and members of the national judiciary extolling the virtues of the restrictive – as opposed to the activist – judicial approach. Leading Danish jurists tend to distinguish between Danish/Nordic and European/international approaches to legal interpretation, referring to the latter as dynamic or creative, and insisting that the value of Nordic pragmatism should not yield to 'the others.'[69] Whether such approach is fact or fiction, is an unresolved question which more recent literature has addressed critically.[70]

5. Conclusion: The uncommon constitutional traditions

The judgments of the national courts overtly disagreeing with the Court's rulings are often interpreted as a blow to European integration and judicial cooperation, undermining the fragile construction of European Union law's primacy, uniformity, and full effect. This chapter has engaged with disagreement as methodological critique, distinguishing between three analytically separate forms: the plain, meta- and inverted methodological critique.

The examples show the weight of uncommon constitutional traditions and methodological divides between courts, especially their power to ground and justify the critique rationally, with accepted and acceptable methodological tools and argumentative techniques. In other words, it is just as difficult to criticize a three-pronged proportionality test as irrational as it is to reject the literal interpretation as doctrinally objectionable.

The Danish Supreme Court and the FCC take issue with the Court's method, proceeding from the assumed difference between the 'Danish' and the 'non-Danish' international approach to

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[67] Translation of B. Dahl, 'Hvad skal vi med Højesteret?', in M. H. Jensen, S. H. Mørup and B. Dahl (eds), *Festskrift til Jens Peter Christensen* (DJØF, 2016), at 619-34, 632.

[68] Our translation of ibid 632.

[69] Dahl's formulation in an essay to a former colleague at the Supreme Court, Jens Peter Christensen (the current president of the Danish Supreme Court), cited in Rass Holdgaard, 'Højesteret Har Sagt Fra over for EU-Domstolen' (2017) 37 Advokaten 32. ("Hvert land har sit svar på, hvor balancepunktet mellem jura og politik ligger. Det danske balancepunkt er demokratisk funderet, og det er vigtigt, at udviklingen internationalt ikke bliver så dynamisk og kreativ, at man ikke kan følge med nationalt. Som forholdene er i Danmark og de andre nordiske lande, kan vi trygt have vores egen tilgang til de spørgsmål, internationaliseringen rejser. Nordisk retspragmatisme er en fælles værdi, der er værd at stå vagt om, og vi skal ikke uden videre give efter for andres.")

[70] Essays collected by Astrid Kjeldgaard-Pedersen, *Nordic Approaches to International Law* (Brill Nijhoff 2017).

interpretation, and the underlying values. The Danish approach, according to the Danish court, upholds the 'correct' position of courts in a democratic society, where legal certainty is of primary concern to the citizens.

The German court takes issue with the Court's standard of review, on the surface proceeding from the 'common European standards' and 'constitutional traditions' but eventually grounding its disagreement in the German three-pronged proportionality test. The German approach upholds democracy by upholding the German sovereignty, holding political institutions accountable for overstepping the constitutional limits of conferral.

While the Danish court turns inward, transposing the question of non-discrimination and unwritten principles of European Union law into the question of Danish statutory law and the Danish Constitution, circling back to the Law of Accession, the German court turns outward. The FCC turns the criticism toward the implications of the principle of conferral for the European Union and the Court's competence, the German Basic Law serving as a floor not a ceiling. It questions the European arrangement and the duty of the Court to police the rule of law, and the limits of competence that European institutions derive from the Treaties. This gives the methodological critique an institutional dimension.

The critique of the Polish Constitutional Tribunal takes issue with the implications of the legal standards (of judicial independence). It originates in the national theoretical distinction between rules (text) and norms, finding that the national Supreme Court's action was unconstitutional and in breach of the European Union law. It turns inward, institutionally, against fellow national courts accepting the Court's interpretations. While it rejects the Court's criteria (standards), it does so to side with the political institutions, and avoid keeping them in democratic check.

One can safely argue that all national courts have their own established ways of dispute resolution and interpretation, which change over time depending on the composition of the court but remain national in character and orientation – after all, preliminary references are not the bread and butter of national courts.[71] Moreover, there might be overwhelming normative reasons for passing the ball from adjudication to the political process.[72]

Thus, when a Dane, a German, and a Pole walk into a courtroom to disagree with the Court of Justice they argue from their national experience using their national arsenal of judicial tools. A nuanced understanding of those tools and the forms of critique they produce is intuitively helpful in understanding judicial cooperation. It is free from strong normative assumptions, which might blur, neglect, or disregard their arguments as legally correct or incorrect under the Europe-centered paradigm of judicial cooperation and the doctrines of primacy, direct effect, loyalty, rule of law, or mutual trust. This might help to construct a theory of judicial cooperation as communitarian (collective) operation, rather than a (bilateral) conversation/dialogue/ conflict structured by Article 267 TFEU.

[71] Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022).

[72] Martijn van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union' (2019) 82 The Modern Law Review 293.