6

The Role of National Courts in Redressing Fundamental Rights Violations by the EU

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6.1 INTRODUCTION

National courts are central actors in the EU legal system. In the vast majority of cases, they are the first port of call for litigants seeking to either question the validity of an EU act or to enforce it against national authorities or private actors. In a system of remedies against EU acts themselves, they take on a filtering function. Comparatively few civil society actors – individuals, groups, or companies – have direct access to the EU courts. Such access is strongly restricted by case law of the Court of Justice of the European Union (CJEU), most importantly by the *Plaumann* doctrine the court developed in 1963:[1] only claimants that are directly and individually concerned by an EU act have standing to address their claim to the EU courts. Over the last few years, the General Court has heard an average of just over 400 annulment cases per year, while annulment cases by non-institutional actors at the Court of Justice are exceedingly rare.[2] All claimants that do not meet the *Plaumann* criteria therefore have to address a national court to achieve redress.

This chapter focuses on how national courts fill this role. In the EU's system of indirect legal review of EU acts, national courts are expected to refer controversial cases to the CJEU for a judgment on the validity of such acts. Chapters 4 and 13 in this volume concentrate on the preliminary reference procedure as a remedy to EU rights violations and the problem posed by acts that are jointly carried out by EU and national agents respectively. I will not

[1] Case C-25/62 *Plaumann v Commission* [1963] ECLI:EU:C:1963:17.

[2] Christian Adam and Others, *Taking the EU to Court. Annulment Proceedings and Multilevel Judicial Conflict* (Palgrave 2020).

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address such scenarios but rather emphasise the possible autonomous role that national courts can and do take on in addressing alleged rights violations by the EU. While the CJEU has claimed for itself the sole authority to review the validity of EU acts, the hierarchy both of judicial institutions and of legal norms in the EU is far from settled. National apex courts, in particular, have claimed for themselves the position of ultimate arbiter over legal conflicts between the EU and fundamental rights contained in national legal orders. This opens opportunities for civil society actors to seize on the ambiguities inherent in a multi-level jurisdiction with contested hierarchies. In focusing on such efforts, this chapter is less interested in doctrinal questions of how to resolve conflicts inherent in a pluralist legal order. Rather, it looks at the circumstances under which civil society litigants – individuals, groups, and companies – address a claim to a national court and where national courts have historically been open to such claims. At times, such efforts blur the line between the search for individual redress and mobilisation against an EU policy more broadly. This chapter can therefore also be read as an overview of the 'legal mobilisation' of national sources of rights against EU acts.

Evidently, this subject matter raises strong normative concerns. It is possible to regard autonomous national courts as a normatively desirable backstop to a European legal order of rights and remedies with blind spots. Much of the literature, on the other hand, treats this issue as a (largely normatively undesirable) challenge to a European legal order that has by and large accepted the primacy of EU law as the guiding principle. From this point of view, national courts asserting national fundamental rights over EU acts presents a problem. While there can be a legitimate debate between these points of view, the process of democratic backsliding and the crisis of the rule of law in some Member States constitutes a graver problem that changes the parameters of the debate. Any normatively desirable role of national courts rests on their good faith efforts to protect fundamental rights to the fullest extent against any public authority. Where this is not the case, very different standards apply. I will come back to this in the conclusion to this chapter.

The chapter proceeds as follows. First, I will take an abstract look at the conditions under which litigants can potentially mobilise rights against EU acts in national courts. This encompasses the existence of rights in the first place, access to courts, and characteristics of the litigants themselves. I will then present an overview of empirical instances where civil society actors – individuals, groups, and companies – have in fact claimed fundamental rights against EU acts in national courts. I organise this overview along four different types of rights that litigants have claimed: economic rights, such as the right to property or the freedom of occupation; social rights, such as rights to social

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security or health care; civil liberties, such as the right to life or freedom from harm; and political rights, such as the right to vote. A final section concludes.

6.2 LEGAL OPPORTUNITY STRUCTURES AND LITIGANT CHARACTERISTICS

The opportunity to address national courts with a rights claim against the EU is conditioned by what the literature has termed 'legal opportunity structures',[3] a close analogue to the somewhat older concept of a 'political opportunity structure',[4] which has been used to delineate access opportunities of civil society organisations to the political process. I will primarily discuss two elements that make up the structure of legal opportunity. First, potential litigants will need to identify a source of law that they can claim against an EU act. This essentially encompasses all sources of rights that can potentially be claimed in a national court. The second central element of legal opportunity is access to courts. This primarily comprises rules of legal standing and the availability of specific remedy procedures. While these factors tend to be fairly stable over time, other factors may be more contingent. Prime among these is the receptivity of national judges to rights claims against the EU. Such receptivity may vary from court to court or even judge to judge. Some of this is known in advance and litigants can strategically direct their claims to sympathetic venues. At other times, they may simply need to try their luck. Finally, characteristics of potential litigants themselves influence their likelihood to turn to the courts. The choice of courts as a venue for contestation necessitates an awareness of the opportunities offered by the legal system. Without such 'legal consciousness'[5], individuals with valid grievances may never consider the courts as a potential source of a remedy in the first place. Where they do, they will then have to mobilise legal expertise to properly address their claims to courts. If individuals, groups, or companies do not have this expertise themselves, they have to invest resources to acquire it. In particular, cases that litigants bring strategically against an EU policy – rather than an individual act – require planning, coordination, and fairly long time horizons that are probably beyond the capabilities of individual litigants and require the

[3] Chris Hilson, 'New social movements: the role of legal opportunity' (2002) 9 Journal of European Public Policy 238.

[4] Herbert P Kitschelt, 'Political Opportunity Structures and Political Protest: Anti- Nuclear Movements in Four Democracies' (1986) 16 British Journal of Political Science 57.

[5] Susan S Silbey, 'After legal consciousness' (2005) 1 Annual Review of Law and Social Science 323; Marc Hertogh, 'A "European" conception of legal consciousness: rediscovering Eugen Ehrlich (2004) 31 Journal of Law and Society 457.

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involvement of organised interests. Sections 6.2.1–6.2.3 will cover these aspects in more detail. Section 6.2.1 looks at the sources of law that litigants could rely on in national courts to challenge EU acts. Section 6.2.2 looks at access to courts. Section 6.2.3 in turn focuses on the characteristics that litigants will need to have in order to effectively claim rights against EU acts.

6.2.1 *The Availability of Rights to Challenge EU Acts*

The catalogue of rights that litigants could potentially claim against a violation by the EU is certainly not small. Citizens, groups, and companies can draw on national, EU, or international sources of rights. At the EU level, the primary source has been the Charter of Fundamental Rights since its entry into force in 2009 and, beyond the EU, the European Convention on Human Rights, the European Social Charter, and various international human rights treaties. In addition, individuals, groups, and companies could rely on rights derived from national law. Which of these sources would national courts be likely to enforce against an EU act? Of course, following the CJEU's understanding of the hierarchy of European legal norms, national courts should not have the power to review EU acts at all. This understanding is contested. However, there seems to be little evidence that national courts are open to claims against EU acts that rest on international, European, or higher EU legal norms. In this regard, national courts appear to follow the *Foto-Frost* doctrine that the CJEU established in 1987.[6] Following this doctrine, while national courts have some leeway to independently interpret EU law as a standard of review for *national* conduct,[7] the CJEU requires all national courts, including lower courts, to refer questions about the validity of EU law to the CJEU for a preliminary ruling, even where the CJEU's answer may be obvious. Chapter 4 in this volume deals with the opportunity for national courts to refer questions about the validity of an EU rule or act to the CJEU so I will not pursue this here.

The legal basis on which national courts have shown a willingness to review EU acts is national fundamental rights. Here, we move into the contested area of the hierarchy of legal norms in Europe. The CJEU takes the view that EU law has primacy over national law,[8] even national constitutional law.[9] National courts have not always reacted enthusiastically

[6] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452.

[7] Under the CJEU's doctrines of *acte clair* and *acte eclaire*, national courts of last instance can apply EU law themselves where EU law is sufficiently clear (*acte clair*) or where a substantively similar question has already been answered by the CJEU (*acte eclaire*).

[8] Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.

[9] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114.

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to this doctrine. National apex courts, and constitutional courts in particular, have frequently reserved the final word for themselves.[10] The catalogue of rights that potential litigants could rely on to challenge EU acts therefore depends on which rights are protected by national law. Comparative constitutional scholarship has highlighted substantial variation in the catalogue of rights contained in national constitutional documents or bills of rights. Some of this is related to age: older constitutions primarily encompass 'first generation rights' – mainly civil and political rights – whereas newer, post-WWII constitutions often additionally contain 'second generation rights' of a socio-economic nature.[11] Whilst all EU Member State constitutional documents guarantee first generation rights such as freedom of expression, freedom of assembly, property rights, and the right to vote, only some contain second generation rights such as a right to housing, health-care, or work. A wider catalogue allows for greater creativity on the part of litigants challenging EU acts. In addition, national apex courts have developed new rights and procedures for national citizens especially in light of possible intrusions by the EU. Most prominent among these is '*ultra vires* control' – a legal review of whether the EU has overstepped its delegated competences, first developed by the German constitutional court in its ruling on the Treaty of Maastricht.[12] More recently, this court has additionally identified national 'constitutional identity' as a red line to the intrusion of EU law.[13] Litigants have since relied on these concepts to contest EU acts and other European apex courts have incorporated them into their own catalogues.[14] The development and acceptance of these doctrines, however, does not seem to follow a discernible logic and appears largely contingent on the idiosyncrasies of the national courts in question. Potential litigants in different Member States are thus faced not only with different catalogues of rights but also a varying responsiveness of national judiciaries to claiming these rights against EU acts. This structures the opportunities for judicial remedies against EU fundamental rights violations and offers potential explanations for cross-national patterns in rights claims.

[10] Anne Marie Slaughter, Alec Stone Sweet, and Joseph Weiler (eds), *The European Court and National Courts Doctrine & Jurisprudence: Legal Change in its Social Context* (Hart 1998).

[11] Dennis M. Davis, 'Socio-Economic Rights' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

[12] Bundesverfassungsgericht [Germany] BVerfGE 89, 155 *Maastricht*.

[13] Bundesverfassungsgericht [Germany] BVerfGE 123, 267 *Lissabon*; Federico Fabbrini and András Sajó, 'The dangers of constitutional identity' (2019) 25 European Law Journal 457.

[14] Wojciech Sadurski, *'Solange, Chapter 3': Constitutional Courts in Central Europe* (EUI LAW Working Paper 40/2006).

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6.2.2 *Access to Courts*

Where potential litigants have identified both a source of rights that they can claim against an EU act and a national court that may be open to accepting such a claim, they need to have standing in this court to pursue it. First, this requires that the EU act in question has a national component. This is usually the case – directives need to be transposed into national law, and even directly effective EU law gains life on the ground through the action of national bureaucracies. Nonetheless, national legal systems differ widely in the type of access they grant individuals, groups, and companies to their judicial system.

In ordinary courts, standing is generally not a problem if the plaintiff can demonstrate personal and immediate harm. Greater variance exists when it comes to public interests. The Scandinavian, German, and Austrian legal systems have traditionally been very restrictive towards public interest litigation, whereas countries such as the United Kingdom, Ireland, France, Spain, and Portugal have been more open.[15] However, ordinary courts are not generally in the habit of accepting rights claims against EU acts. Rather, this tends to be the remit of apex courts, and constitutional courts in particular. These courts have special jurisdiction in fundamental rights issues and special review powers. National variation in the exact combination of access and review powers is again large.[16] Crucial for the present purposes is access for civil society actors (citizens, groups, and companies). Some constitutional courts can only be accessed by political actors (office-holders, political parties, Members of Parliament) or review cases referred by ordinary courts. Other constitutional courts allow for citizen access but limit the degree of judicial review. Constitutional complaint procedures allow for the widest degree of citizen access.[17] Such procedures are available in Germany, Austria, and Spain and were adopted in some Central and Eastern European countries after democratic transition.

6.2.3 *Litigant Characteristics*

Even systems with very open legal opportunity structures need litigants to use these opportunities. Some of the factors that encourage citizens, groups, and companies to do so are idiosyncratic (like group resources or normative

[15] Michel Prieur, *Complaints and appeals in the area of environment in the member states of the European Union* (Study for the Commission of the European Community, DGXI 1998).

[16] John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe' (2004) 82 Texas Law Review 1671.

[17] Gerhard Dannemann, 'Constitutional Complaints: The European Perspective' (1994) 43 The International and Comparative Law Quarterly 142.

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dispositions towards courts as venues for political contestation), while others are more widely shared. Legal culture, while hard to quantify, plays a role in shared discourses about the role of law and its uses in society – how prevalent rights claims are in political discourse.[18] Potential litigants need to conceive of their grievance as a rights issue. The prominent role of the constitution in US political discourse, for example, increases the consciousness that rights exist and can be activated.[19] Next to venerated constitutions, legal systems with a prominent and respected apex court will probably create a greater shared sense of legal opportunity than systems without such courts. Where citizens conceive of their grievances as rights issues, they also need to believe that there can be judicial solutions. In places like Germany, where the constitutional court has a prominent place within the political system, a rights claim may seem like an obvious choice to potential litigants, whereas in places characterised by more judicial deference to political decisions, such as the Scandinavian countries,[20] this might be much less so. This kind of legal consciousness can also be triggered by focusing events, like prominent legal cases with unexpected outcomes – see the recent wave of climate litigation after a series of much discussed if largely symbolic legal victories by individuals and civil society organisations focused on the fight against climate change.[21]

Finally, given legal opportunity and legal consciousness, individuals, groups, and companies need to meet the resource demands of litigation. Even in legal systems with generous access to constitutional review and low cost barriers, the chances of a successful legal challenge will be all the greater the better the legal quality of the complaint. With regard to alleged rights violations by the EU, this requires particular expertise in EU law. The rise of multinational law firms specialising in EU law has made this expertise available to all with the means to hire such counsel, but historically 'Euro-lawyers' were far and between.[22] Potential litigants with lesser means have to rely on a different form of 'support structure'[23] – pro bono lawyers and legal clinics or

[18] David Nelken, 'Using The Concept of Legal Culture' (2004) 29 Australian Journal of Legal Philosophy 1.

[19] Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Yale University Press 1974).

[20] Marlene Wind, 'The Nordics, the EU and the Reluctance towards Supranational Judicial Review' (2010) 48 Journal of Common Market Studies 1039.

[21] Joana Setzer and Lisa C Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10 WIREs Climate Change e580.

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

[23] Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998).

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organised interests with either in-house expertise or the means to purchase it elsewhere. Broadly speaking, a more active, organised civil society is more likely to produce such a structure. More specifically, this support structure is likely larger where EU law is part of regular legal curricula, which produces a greater pool of knowledgeable legal activists.

The factors listed above are not randomly distributed. Rather, they cluster in some legal systems and are absent in others. The prominence of Germany in the discourse on the relationship between national and EU law, for example, is no coincidence. Several factors combine to provide fertile ground for the legal contestation of EU acts. A large and comprehensively educated legal profession combines with comparatively generous material resources, an organised civil society, prominence of the constitution and a strong constitutional court in political discourse, the receptivity of this court to rights-based arguments against the EU, and comparatively low barriers of access to constitutional review (while litigants need to demonstrate individual concern, the constitutional court has been open to receiving 'mass constitutional complaints' – bundles of individual complaints that can number in the hundreds of thousands).[24]

It is difficult to gauge which of these factors is individually most predictive of rights-based litigation against EU acts. Where a system of constitutional adjudication is missing (such as in the Netherlands), litigants will need to seek remedies through administrative courts on a narrower basis of available procedures and sources of law. An organised civil society with a strong support structure for rights claims, however, may partially compensate for this disadvantage. Member States on the EU's southern and eastern periphery may have comparatively favourable legal opportunity structures, but litigants may not find the same support structure or receptive national judges. Research has started to address such factors, but much remains to be learned.[25]

6.3 RIGHTS-BASED LITIGATION AGAINST EU ACTS IN PRACTICE: AN EMPIRICAL OVERVIEW

Section 6.3.1–6.3.4 use these theoretical concepts as a heuristic frame to review what we know about litigation against EU acts in national courts.

[24] Stefan Thierse, 'Mobilisierung des Rechts: Organisierte Interessen und Verfassungsbeschwerden vor dem Bundesverfassungsgericht' (2020) 61 Politische Vierteljahresschrift 553.

[25] Andreas Hofmann and Daniel Naurin, 'Explaining interest group litigation in Europe: Evidence from the comparative interest group survey' (2021) 34 Governance 1235; Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51 Comparative Political Studies 380.

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This overview is necessarily impressionistic – a systematic review of all such attempts would require a much larger research programme – but it should cover the most prominent instances. There are several conceivable ways of structuring such an overview: chronologically, by Member State, by type of litigant or type of EU act, etc. This chapter will use the type of rights that have historically been claimed against EU acts as a structuring element.[26] Section 6.3.1 deals with economic rights that have been claimed against EU trade regulation – rights to property, occupational freedom, and the right to conduct a business. Important early waymarks, such as the German constitutional court's *Solange I* ruling,[27] fall into this category. It was also historically the first set of rights to be mobilised against the EU and its predecessors – unsurprisingly, since the economy was the major focus of European regulation in the first decades of its existence. Section 6.3.2 focuses on social rights as a corrective to market forces. Such rights were mobilised primarily in the context of the EU's response to the European sovereign debt crisis, and against austerity policies in particular. Section 6.3.3 looks at civil liberties, such as the right to life and freedom from harm. Section 6.3.4 looks at political rights. That section will cover the transformation of the right to free and fair elections into a 'right to democracy' as envisaged by the German constitutional court.

6.3.1 *Economic Rights: Challenges to EU Trade Regimes*

A story of national remedies against EU rights violations is necessarily also a story of EU violations of fundamental rights. The potential nature of such violations is closely tied to what the EU does. For the first four decades,[28] this has largely been the construction of a customs union and a common market for goods, labour, services, and capital. It follows that the first rights-based challenges against EU acts related to such efforts to build a common market, and in particular against rules that regulated and constrained market activity in ways not previously experienced under national rules. These challenges therefore had a market-liberal bent, and they were brought by companies and entrepreneurs. The first prominent example in this vein was litigation initiated by Internationale Handelsgesellschaft, a German import/export company. In the late 1960s, this company was in the business of exporting cereals to countries outside the EU (then the European Economic Community).

[26] I stress the idea of a structuring element – most typologies suffer from overlap and fuzzy boundaries.

[27] Bundesverfassungsgericht [Germany] BVerfGE 37, 271 *Solange I*.

[28] I use the term 'EU' in a broad sense to include its predecessors starting with the European Coal and Steel Community (ECSC).

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In accordance with EU rules on the cereal market, companies wishing to do so needed to apply for export licences. In order to secure such licences, companies needed to pay a deposit to the national authority tasked with disbursing such licences. Internationale Handelsgesellschaft followed this procedure in order to export 20,000 tons of maize meal. The business paid the deposit but ended up unable to export the full 20,000 tons. The responsible German authority then declared part of the deposit (of about 17,000 Deutsche Mark) to be forfeited.[29]

What remedies would be available to Internationale Handelsgesellschaft in this situation? According to the *Plaumann* doctrine, which the CJEU developed in 1963, Internationale Handelsgesellschaft would not have standing to challenge the validity of the EU policy on export licences before the CJEU because they were not directly and individually concerned by the rule itself. They were directly and individually concerned by the forfeiture, but this decision was taken by a German authority. Internationale Handelsgesellschaft appealed this decision to an administrative court in Frankfurt. Since the German authority had merely followed the stipulations of the EU rules on cereal markets, Internationale Handelsgesellschaft could only argue that the EU rule breached a higher norm. In the event, they argued that the EU rule infringed on their economic rights guaranteed by the German constitution, in particular the right to conduct a business and the principle of proportionality that governs restrictions to this right. The administrative court referred the question of the validity of the EU rules on deposits and forfeiture to the CJEU, pointing out that such a rule likely ran counter to German constitutional law. The CJEU used this case to develop notions of EU fundamental rights but ultimately confirmed the validity of the EU norm and insisted on its supremacy over German constitutional law.[30] Back in Frankfurt, the administrative court then referred the case to the German constitutional court for its say on the constitutionality of deposits and forfeitures (ordinary courts in Germany cannot rule on constitutionality). The German constitutional court famously went on to admonish the solution found by the CJEU and to assert the German constitution as the higher standard against which it would measure EU law 'as long as' (*solange*, in German) the EU had no fundamental rights catalogue of its own that would be a worthy equivalent of the rights accorded by the German constitution.[31]

[29] Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979* (Cambridge University Press 2012) 160.

[30] *Internationale Handelsgesellschaft mbH* (n 9).

[31] Bundesverfassungsgericht [Germany] BVerfGE 37, 271 *Solange I* (n 27); Bill Davies, 'Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ's

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This ruling significantly expanded the opportunity structure for constitutional rights claims against EU rules in Germany, but very few claims seem to have materialised. Perhaps this is a product of the somewhat restrictive procedure the German constitutional court had devised for such scenarios: a litigant would bring a claim to a lower German court, which would then have to refer the issue to the CJEU for a first ruling on validity. If the CJEU were to uphold the validity, the lower court could then refer the question to the German constitutional court for a final review. Internationale Handelsgesellschaft had lost its deposit in 1969, the German constitutional court issued its final decision five years later, and it went against Internationale Handelsgesellschaft in substance. While the *Solange* principle may have sounded favourable, it was probably of limited practical use as a remedy against contested administrative decisions in day-to-day business operations. Very few cases therefore followed this model.

One such case concerned a German authority's refusal to grant a property owner permission to plant vines, following EU rules aiming to cut excess capacities on the wine market. The property owner (Liselotte Hauer) objected to this decision claiming an infringement of her constitutional right to occupational freedom, in addition to her property rights (to the prospective vineyard). The administrative court of Neustadt an der Weinstraße followed the procedure mandated by the German constitutional court: it referred the question to the CJEU,[32] which upheld the validity of the EU rule.[33] Restrictive publication practices of the German constitutional court make it impossible to ascertain whether Mrs Hauer subsequently lodged a constitutional complaint. In any case, court records contain no such reference.

Another case led the German constitutional court to reverse its *Solange* doctrine. The plaintiff this time, Wünsche Handelsgesellschaft, was a company active in the import of agricultural products from third countries. At issue was a decision by a German authority to deny this company a licence to import preserved mushrooms from Taiwan, based on a Commission regulation protecting the European market in mushrooms. Wünsche first appealed the decision of the German authority to the Frankfurt administrative court on factual grounds. The first instance court confirmed the validity of the

Human Rights Jurisprudence' in Bill Davies and Fernanda Nicola (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 163.

[32] Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECLI:EU:C:1979:290.

[33] Gunnar Folke Schuppert, 'Public Law: Towards a Post-National Model' in Kenneth Dyson and Klaus Goetz (eds), *Germany, Europe, and the Politics of Constraint* (Oxford Academic, Oxford University Press 2003) 122.

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Commission regulation without submitting questions to the CJEU and rejected Wünsche's claim. Wünsche appealed this ruling to the German federal administrative court, who in turn referred the question to the CJEU. The EU court confirmed the validity of the Commission regulation.[34] Unhappy with this outcome, Wünsche claimed that the CJEU had ignored important arguments and therefore deprived Wünsche of its right to a fair trial. In consequence, it asked the federal administrative court to either re-refer the issue to the CJEU or to refer the fundamental rights claims to the German constitutional court. When the federal administrative court refused both options and dismissed its appeal, Wünsche lodged a constitutional complaint with the German constitutional court, claiming this time that the federal administrative court had infringed its constitutional right to a fair trial. The German constitutional court accepted the case for decision but dismissed it on the merits.[35] In doing so, it reverted from the *Solange* doctrine and stated that it no longer reserved the right to review EU rules on the basis of the German constitution, as long as the EU upheld effective fundamental rights protection. This closed the opportunity for rights claims against EU rules in German courts for a number of years.

This new reading was tested a few years later in yet another case concerning trade in agricultural products. The import company this time was the Atlanta group, which did much of its business in the import of bananas. Its business model was affected by a reorganisation of the European market for bananas that gave preferential treatment to bananas produced in overseas territories of the Member States or African, Caribbean, and Pacific (ACP) countries that were party to EU partnership agreements. Germany had previously not had import restrictions, and the new rule set strict import quotas from third countries. Atlanta now had to apply for an import licence with the responsible German authority and the quota it was assigned was significantly lower than its imports of previous years. Atlanta challenged this decision before the Frankfurt administrative court. Like companies before it, Atlanta claimed a breach of its constitutional right to property and its occupational freedom. Its warehouses and ripening stations were running at reduced capacity, and it had to let go of workforce. The Frankfurt administrative court referred the question to the CJEU, which upheld the validity of the regulation.[36] Unhappy with this result, Atlanta requested a referral of the case to the German

[34] Case 126/81 *Wünsche Handelsgesellschaft v Federal Republic of Germany* [1982] ECLI:EU:C:1982:144.

[35] Bundesverfassungsgericht [Germany] BVerfGE 73, 339 *Solange II*.

[36] Case C-466/93 *Atlanta Fruchthandelsgesellschaft mbH and Others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECLI:EU:C:1995:370.

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constitutional court for a review of the validity of the EU regulation based on German constitutional principles. The German constitutional court rejected Atlanta's claims, reaffirming its revised *Solange* doctrine.[37]

6.3.2 *Social Rights: Challenges to EU-Induced Austerity*

Section 6.3.1 outlined how private litigants (companies and entrepreneurs) leveraged national economic rights against EU trade regulation that in some way restricted their economic activity. This section in turn deals with litigants that claim social rights – such as rights to social security, housing, or education – against EU-induced measures that limited welfare benefits and labour protections during the European sovereign debt crisis.[38] The EU's response to this crisis consisted of creative new legal instruments – 'new forms of law'[39] – that simultaneously existed outside the 'regular' legal order of the EU and had concrete and dire consequences in countries that had to make use of the EU's sovereign loan programmes. At the core of the legal challenges was the establishment of the European Stability Mechanism (ESM) and its predecessors, an embodiment of the EU's dual objective to extend fiscal solidarity and impose strict budgetary discipline. Governments of EU Member States set up the ESM as a facility to guarantee that distressed sovereign debt would be serviced and defaults prevented. In return, recipients of bailouts were required to sign Memoranda of Understanding (MoU) that outlined measures these governments committed to in order to regain creditworthiness. These were strictly focused on measures to reduce budget deficits and to deregulate labour markets. They included cuts to public pensions, welfare benefits, public sector pay and entitlements, and limits to employment protections and collective bargaining rights.[40]

Legal challenges against such measures faced two central obstacles: the unclear allocation of responsibility between the EU, the ESM, and the national level and the dearth of rights to claim against them. Both obstacles

[37] Bundesverfassungsgericht [Germany] BVerfGE 102, 147 *Bananenmarktordnung*.

[38] Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); Mark Dawson, Henrik Enderlein, and Christian Joerges (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* (Oxford University Press 2015); Thomas Beukers, Bruno de Witte, and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017).

[39] Samo Bardutzky, 'Constitutional Courts, Preliminary Rulings and the "New Form of Law": The Adjudication of the European Stability Mechanism' (2015) 16 German Law Journal 1771.

[40] Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 European Constitutional Law Review 393.

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were intertwined: while the EU Charter of Fundamental Rights offers social and economic rights, the *Plaumann* doctrine restricts access to EU courts and the applicability of the Charter to MoUs rests on the question of whether these count as EU law in the first place. National constitutions, on the other hand, vary widely in the degree to which they grant social rights.[41] Legal challenges to MoU-induced austerity measures thus varied by access to courts and the availability of rights to draw upon. In November 2010 and April 2011, a Greek public sector union brought annulment actions before the General Court against measures contained in Council decisions within the Excessive Deficit Procedure that mandated cuts to holiday bonuses, increased the retirement age, and reduced pension levels.[42] The General Court found these actions inadmissible – it did not find the Council decisions of direct concern to the union. It instead pointed out the possibility of an indirect challenge via the preliminary reference procedure. However, in preliminary reference cases brought by a Romanian police union,[43] an employee of a Romanian municipal theater,[44] and Portuguese unions for employees of the banking[45] and insurance[46] sectors against cuts to pay and entitlements, the CJEU found that the measures in question, being national measures based on an MoU, lacked a direct connection to EU law and it therefore lacked jurisdiction. These judgments in effect cut off the option of a remedy in EU courts.

This left litigants with national courts and national sources of law. In Latvia, citizens made use of their access to constitutional complaint procedures against legal statutes to claim social rights contained in the Latvian constitution (such as a right to social security and children's rights). Several citizens brought such complaints against cuts to pensions,[47] parental benefits,[48] and

[41] Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in Bruno de Witte, Claire Kilpatrick, and Thomas Beukers (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017).

[42] Case T-541/10 *ADEDY and Others v Council* [2012] ECLI:EU:T:2012:626; Case T-215/11 *ADEDY and Others v Council* [2012] ECLI:EU:T:2012:627.

[43] Case C-434/11 *Corpul Naţional al Poliţiştilor* [2011] ECLI:EU:C:2011:830; Case C-134/12 *Corpul Naţional al Poliţiştilor* [2012] ECLI:EU:C:2012:288.

[44] Case C-462/11 *Victor Cozman v Teatrul Municipal Târgovişte* [2011] ECLI:EU:C:2011:831000.

[45] Case C-128/12 *Sindicato dos Bancários do Norte and Others* [2013] ECLI:EU:C:2013:149.

[46] Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins* [2014] ECLI:EU:C:2014:2036.

[47] Satversmes tiesa [Latvia] 2009-43-01 *Ilmārs Drēziņš et al. v the Parliament*; Satversmes tiesa [Latvia] 2009-76-01 *Uldis Mugurevičs v the Parliament*; Satversmes tiesa [Latvia] 2009-88-01 *Vēsma Vilka v the Parliament*; Satversmes tiesa [Latvia] 2010-21-01 *Eduards Ikvilds v the Parliament*.

[48] Satversmes tiesa [Latvia] 2009-44-01 *Raimonds Priede-Baņģieris et al. v the Parliament*.

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the salary of judges,[49] with some success in particular regarding pension cuts.[50] In Greece, civil society organisations (trade unions and professional associations) and individuals claimed their right to property (an economic right, here repurposed as a right to social entitlements) in litigation before the highest administrative court against Greek cuts to public pensions.[51] The court was not receptive to this claim but rather held that the right to property did not protect pension benefits of a specific amount and the cuts served the legitimate goal of shoring up Greek public finances.[52] Unions also challenged government measures that reduced minimum wage levels and labour protections,[53] claiming several social rights contained in the Greek constitution, such as a right to a decent living or the principle of collective autonomy.[54] Litigation in Greece did not include challenges against other cuts to welfare entitlements, such as housing or family support, a fact that observers attribute to the lack of civil society mobilisation in this field.[55] Similarly, the absence of rights-based litigation against austerity measures following bailout conditionality in Ireland has been linked to the lack of a culture of rights in economic and social issues.[56] In Portugal, despite a comparatively broad catalogue of social rights (the Portuguese constitution contains rights to social security, health care, decent housing, a safe environment, protection of the family, parenthood, and children's rights), litigation was largely brought by political actors (opposition MPs and the Portuguese president) in abstract review proceedings, to which civil society actors have no access.[57] Here, too,

[49] Satversmes tiesa [Latvia] 2009-111-01 *Dace Ābele et al. v the Parliament*.

[50] Zane Rasnača, *Constitutional Change through Eurocrisis Law: Latvia* (European University Institute 2014).

[51] Symvoulio tis Epikrateias [Greece] 668/2012.

[52] Evangelia Psychogiopoulou, 'Welfare rights in crisis in Greece: The role of fundamental rights challenges' in Claire Kilpatrick and Bruno de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (EUI Working papers LAW 05/2014).

[53] Symvoulio tis Epikrateias [Greece] 2307/2014.

[54] Matina Yannakourou, 'Challenging austerity measures affecting work rights at domestic and international level. The case of Greece' in Claire Kilpatrick and Bruno de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (EUI Working papers LAW 05/2014).

[55] Psychogiopoulou (n 52).

[56] Aoife Nolan, 'Welfare Rights in Crisis in the Eurozone: Ireland' in Claire Kilpatrick and Bruno de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (EUI Working papers LAW 05/2014).

[57] Cristina Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective* (EUI Working Papers MWP 25/ 2014); Kilpatrick (n 41); Miguel Nogueira de Brito, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis' in Claire Kilpatrick and Bruno de Witte (eds), *Social*

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commentators have highlighted the absence of a culture of rights and litigation in civil society.[58] The Portuguese constitutional court, however, did prove responsive to some of the rights challenges brought by political actors, relying in particular on the principle of equality in invalidating austerity measures that – in the view of the litigants – placed an undue burden on the public sector.[59] The Romanian constitutional court, too, invalidated measures contained in the country's MoUs for breaches of fundamental rights. These cases were, as in Portugal, largely brought by opposition MPs in abstract judicial review cases, who had relied on social rights such as a right to a decent standard of living.[60]

6.3.3 *Civil Liberties: Challenges to EU Intrusions on Personal Liberties*

The EU's historic focus on market regulation did not give rise to many occasions where EU acts would intrude on civil liberties, such as the right to life, human dignity or privacy, or the freedom of expression or assembly. Economic actors (companies, mostly) affected by concrete EU acts, such as 'dawn raids' in anti-trust enforcement, usually had recourse to judicial review before EU courts. Such acts are of direct and individual concern to those targeted, which will grant standing under the *Plaumann* doctrine.[61] With the expansion of EU competences into policy fields beyond the common market, however, personal liberties became a more pressing issue. EU acts in areas of border control, migration, and defence are evidently more likely to cause immediate personal harm than trade regulation (and, arguably, austerity) – and are hence more likely to violate civil liberties. Claimants in these areas face multiple barriers. Unclear chains of delegation and allocation of responsibility make it harder for those affected to show direct and individual concern to gain standing before EU courts. Moreover, they are generally individuals of limited means and rely on legal aid from law clinics or organised civil society. They are often unaware of the opportunities offered by the legal system, and even where they are, such opportunities are narrow.

Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges (EUI Working papers LAW 05/2014) 76.

[58] Nogueira de Brito (n 57) 77.

[59] Roberto Cisotta and Daniel Gallo, 'The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal' in Claire Kilpatrick and Bruno de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (EUI Working papers LAW 05/2014) 90.

[60] Kilpatrick (n 41).

[61] Miroslava Scholten and Alex Brenninkmeijer, *Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order* (Edward Elgar 2020).

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The involvement of Frontex, the EU's border and coast guard agency, in maritime operations in the Mediterranean is one of the most vigorously debated instances of potential rights violations by EU agents. Frontex assists national border guards in their operations, mainly in the deterrence of undocumented migration. This scenario gives rise to many occasions in which the agency has been accused of infringing the personal liberties of migrants. The nature of the agency's cooperation with national agencies, however, diffuses accountability and makes it difficult to contest individual action.[62] While affected persons and their support network (mostly NGOs and pro bono legal clinics supporting migrants)[63] have addressed rights claims to national courts, they rarely challenge Frontex directly. Of the several cases that Pijnenburg and van der Pas report being brought in Italian courts, only one specifically included the conduct of EU officials in a shipwreck that resulted in a substantial number of fatalities.[64]

A similar scenario unfolds in the context of EU foreign missions. Potential claimants here face the additional hurdle that foreign policy in the EU – like in many national settings – is largely exempt from judicial review. Stian Øby Johansen describes litigation by the relatives of nine ethnic Serbs who were killed in Kosovo between 1999 and 2000.[65] The litigants targeted the EU mission in Kosovo for its failure to investigate these crimes, claiming an infringement of their right to life and the prohibition of torture and inhuman or degrading treatment or punishment under the EU Charter of Fundamental Rights. After several unsuccessful attempts in international legal fora, including the EU General Court, the claimants turned to British courts, where their action resulted in a noteworthy judgment by the English High Court.[66] However, they ultimately failed to overcome the obstacle of finding a national (in this case, English) source of rights to claim before an English court. Following the CJEU's *Foto-Frost* doctrine, the English High Court refrained from adjudicating on the conformity of an EU act with a higher EU legal norm.[67]

[62] Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532.

[63] Annick Pijnenburg and Kris van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route' (2022) 24 European Journal of Migration and Law 401.

[64] Ibid 413.

[65] Stian Øby Johansen, 'Suing the European Union in the UK: *Tomanovic et. al. v. the European Union et. al.*' (2019) 4 European Papers 345.

[66] England and Wales High Court [UK] *Tomanović et.al. v the European Union et.al.* [2019] EWHC 263 (QB).

[67] Johansen (n 65).

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6.3.4 *Political Rights: Challenges to EU Policies and EU Integration as Such*

The final group of rights reviewed here that have been claimed by litigants against EU acts are political rights, here understood as rights to political participation, and in particular the right to vote. Litigation that relied on such rights generally did not target individual EU measures but rather broad EU policies, such as the EU's financial rescue mechanisms during the Eurozone crisis or EU integration as such. Cases again almost exclusively originated in constitutional complaints before the German constitutional court, which were brought by a comparatively small group of prominent repeat litigants. Such litigation has its origins in a prominent case concerning the German ratification of the Treaty of Maastricht. A former EU Commission official and a number of members of the German parliament for the party Bündnis 90/Die Grünen claimed that the ratification of this treaty entailed a transfer of legislative competences to the EU level that essentially rendered domestic elections meaningless. This, they claimed, constituted a violation of their constitutional right to free and fair parliamentary elections.[68]

The German constitutional court accepted this claim in principle, even if it did not invalidate the ratification as such. The German judges reserved for themselves the authority to review the conformity of EU acts with the principle of conferral. In this reading, the right to vote not only entails participation in universal, free, and fair election but also that elected representatives can make meaningful choices about public policy – it entails, in a sense, a right to democracy.[69] This ability would be impaired if an excess of essential legislative competences were transferred to the EU or if EU institutions were to take decisions outside of their mandate that could tie the hands of future legislators.[70] This interpretation gave creative litigants extensive leeway in challenging EU policies. Litigants could now employ constitutional complaints against EU acts that, in their view, were not covered by EU competences circumscribed by primary EU law. Such complaints have since become a regular feature of major EU projects: the introduction of the Euro,[71] the Treaty of Lisbon,[72] EU responses to the

[68] Bundesverfassungsgericht [Germany] BVerfGE 89, 155 *Maastricht* (n 12).
[69] Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 German Law Journal 1090.
[70] Ibid 1091; Peter Hilpold, 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European 'Popular Spirit'' (2021) 23 Cambridge Yearbook of European Legal Studies 159, 166.
[71] Bundesverfassungsgericht [Germany] BVerfGE 97, 350 *Euro*.
[72] Bundesverfassungsgericht [Germany] BVerfGE 123, 267 *Lissabon*.

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Eurocrisis,[73] and the EU rescue mechanisms established in reaction to the COVID-19 pandemic.[74] Litigants not only challenged EU legislation but also acts of the Europan Central Bank (ECB) and judgments of the CJEU. So far, only the complaints against the ECB's public sector purchase programme (PSPP) have had – famously – some degree of success. The German court created deep controversy by rejecting a previous CJEU ruling and ordering the ECB to give reasons for its programme of quantitative easing that reflected potential negative socio-economic effects (such as a potential real estate bubble).[75] Compare this to a similar challenge by two Belgian activists before the Belgian constitutional court,[76] which that court rejected because the litigants could not show individual concern.[77]

Given the German constitutional court's openness to such broad challenges, organised interests have discovered the mobilising potential of filing 'mass constitutional complaints' against EU acts.[78] The group 'Europolis' around lawyer and academic Markus C. Kerber filed at least five complaints against various bailout measures.[79] 'Bündnis Bürgerwille', a group surrounding the AfD-founder Bernd Lucke, filed a constitutional complaint against the ECB's public sector purchasing programme in the name of some 1,700 applicants[80] and a complaint against the EU's pandemic recovery fund NextGenerationEU co-signed by 2,275 individuals.[81] Another group, 'Mehr Demokratie', committed to promoting direct democracy, brought together 11,718 individuals to challenge the ESM.[82] The largest single constitutional complaint to date was lodged in 2016 by 'Mehr Demokratie' in cooperation with the groups 'Campact' and 'Foodwatch', who assembled 125,000

[73] Bundesverfassungsgericht [Germany] BVerfGE 129, 124 *EFS*; Bundesverfassungsgericht [Germany] BVerfGE 132, 195 *Europäischer Stabilitätsmechanismus*; Bundesverfassungsgericht [Germany] BVerfGE 134, 366 *OMT-Beschluss*; Bundesverfassungsgericht [Germany] BVerfGE 151, 202 *Europäische Bankenunion*; Bundesverfassungsgericht [Germany] BVerfGE 154, 17 *PSPP-Programm der EZB*.

[74] Bundesverfassungsgericht [Germany] BVerfGE 157, 332 *Eigenmittelbeschluss-Ratifizierungsgesetz*.

[75] Feichtner (n 69); Hilpold (n 70).

[76] Court Constitutionelle [Belgium] 33/2012.

[77] Werner Vandenbruwaene, *Constitutional Change through Eurocrisis Law: Belgium* (European University Institute 2014).

[78] Thierse (n 24).

[79] Bundesverfassungsgericht [Germany] 2 BvR 1219/10; Bundesverfassungsgericht [Germany] 2 BvR 1824/12; Bundesverfassungsgericht [Germany] 2 BvR 2731/13; Bundesverfassungsgericht [Germany] 2 BvR 980/16; Bundesverfassungsgericht [Germany] 2 BvR 71/20.

[80] Bundesverfassungsgericht [Germany] 2 BvR 1651/15.

[81] Bundesverfassungsgericht [Germany] 2 BvR 547/21.

[82] Bundesverfassungsgericht [Germany] 2 BvR 1438/12.

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individuals to challenge the constitutionality of CETA, the EU's trade agreement with Canada.[83] A concurrent complaint by private activist Marianne Grimmenstein assembled another 68,000 complainants.[84] The complainants held that the CETA committee system, which has certain autonomous rule-setting powers, infringed on their right to vote.[85]

6.4 CONCLUSIONS

This chapter reviewed the role of national courts in a system of remedies against fundamental rights violations by the European Union. While the European legal hierarchy, based on the principle of primacy of EU law as envisaged by the CJEU, does not foresee an independent role for them, national courts can and do provide such remedies. However, the degree to which they do so is predicated both on opportunity structures, such as the availability of (national) rights to rely on, procedures that provide remedies, and access to courts for private litigants, as well as on more contingent factors such as the national judiciary's receptivity to fundamental rights claims against EU acts, litigant resources, and the existence of a support structure for rights claims, such as a well-qualified legal profession and organised civil society. Such conditions cluster in some regions more so than in others. The empirical overview of rights claims against EU acts has repeatedly focused on Germany and its constitutional court. Here, an active civil society meets with a broad interpretation of national fundamental rights by a well-respected and politically influential constitutional court that provides comparatively broad access in the form of constitutional complaints. In an earlier phase of EU market integration, German companies and their legal counsel claimed economic rights against EU trade regulation. Beginning with the Treaty of Maastricht, civil society actors, often a handful of repeat litigants, started claiming their right to vote, recast as a right to democracy, against virtually all major EU projects. Social rights, largely absent from the German constitution, played a significant role in litigation by individuals, trade unions, and professional associations in countries affected by bail-out conditionality during the sovereign debt crisis. 'Classic' civil liberties, on the other hand, hardly feature at all in rights claims against EU acts. Those affected by EU migration policy and external action face substantial barriers to legal remedies: they lack individual resources, access to courts, and judicial receptivity to their claims.

[83] Bundesverfassungsgericht [Germany] 2 BvR 1823/16.
[84] Bundesverfassungsgericht [Germany] 2 BvR 1444/16.
[85] Markus Krajewski, 'Vorläufig teilweise verfassungskonform: Zum CETA-Beschluss des Bundesverfassungsgerichts' (*Verfassungsblog*, 12 March 2022).

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In recent years, a different set of courts has moved to the centre of the debate about national legal challenges to EU acts. The constitutional courts of Hungary and Poland have issued several judgments challenging the primacy of EU law over national constitutions.[86] In a number of cases since 2016, the Hungarian constitutional court has invoked the concept of constitutional identity, most prominently developed by the German constitutional court in its judgment on the Treaty of Lisbon, in order to defend the Hungarian government's refusal to accept relocated migrants from other EU countries and to push back migrants at the Serbian border.[87] In 2021, the Polish constitutional court, referencing the PSPP judgment of the German constitutional court, declared EU law on effective legal protection and judicial independence, as interpreted by the CJEU, incompatible with the Polish constitution.[88] Commentators have pointed out parallels to Danish and Italian cases that invoke the protection of national constitutional identity against EU acts.[89] Nonetheless, these cases stand out from those covered in this chapter. The Hungarian and Polish cases were initiated by government entities in abstract review proceedings to defend government policies. They were brought before courts where the majority of judges had been appointed by pro-government parliamentary majorities. They were not initiated by civil society actors and are not good faith efforts to safeguard the fundamental rights of such applicants against public authorities.

I will conclude with two observations about the limits of what this chapter has offered. First, the overview presented in this chapter is impressionistic. It can be seen as the beginning of an endeavour to more systematically map and classify fundamental rights–based litigation against EU acts in national courts. Existing literature largely covers prominent cases where litigants have had some success, giving cause to doctrinal and normative debate. Unsuccessful attempts receive little (if any) attention and, given restrictive publication practices of national courts,[90] may prove difficult to identify in the

[86] Fabbrini and Sajó (n 13); Jakub Jaraczewski, 'Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal' (*Verfassungsblog*, 12 October 2021); Gábor Halmai, 'Abuse of constitutional identity: the Hungarian constitutional court on interpretation of article E) (2) of the fundamental law' (2018) 43 Review of Central and East European law 23.

[87] Gábor Halmai, 'Coping Strategies of the Hungarian Constitutional Court since 2010' (*Verfassungsblog*, 27 September 2022).

[88] Jaraczewski (n 86).

[89] Fabbrini and Sajó (n 13).

[90] For example, the German constitutional court does not publish constitutional complaints that it does not accept for decision – which amounts to 98% of all such complaints. German courts in general publish less than 1% of all judgments. Those that do get published are biased towards unusual or innovative outcomes: Hanjo Hamann, 'Der blinde Fleck der deutschen Rechtswissenschaft – Zur digitalen Verfügbarkeit instanzgerichtlicher Rechtsprechung' (2021) 76 JuristenZeitung 656.

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first place. Finally, this chapter has not addressed the question of whether national remedies are normatively desirable. The previous paragraph has highlighted the pitfalls of a commitment to legal pluralism in the EU.[91] Any positive assessment relies strongly on efforts of national judiciaries to safeguard fundamental rights against intrusions by all public authorities, not a selective preference for national over European actors. As I have pointed out, this is not a given in all EU Member States today. Nonetheless, fundamental rights challenges against EU acts in national courts are an empirical reality that deserves both greater empirical attention and more nuanced normative debate.

[91] R. Daniel Kelemen, 'The Dangers of Constitutional Pluralism' in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism an EU Law* (Edward Elgar 2018).

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