# Constitutional Courts and Supreme Courts: A Difficult Relationship

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**Abstract**
In countries with a specialized constitutional jurisdiction, the smooth functioning of the separation of powers between a constitutional court and the supreme courts in the administrative, criminal, civil and other jurisdictions cannot be taken for granted. The expanding reach of constitutional law and especially of the fundamental rights provisions of contemporary constitutions render close cooperation between the former and the latter both more necessary and more complex. A comparative survey shows that this central institutional relationship has evolved very differently in the four major constitutional democracies of Germany, Italy, Spain and France. While in Germany a hegemonic position of the Constitutional Court was swiftly established and has largely been accepted by the supreme courts of the other jurisdictions, in Spain the relationship between the Constitutional Court and the Supreme Court has taken a confrontational turn which has severely impaired the former's authority. These widely diverging experiences show that constitutional and statutory regulation alone is not sufficient to produce a stable and productive relationship if it is not backed up by mutual respect and understanding which can only result from a permanent dialogue between the courts.

## *1. Introduction*

Constitutional courts are not established in a legal vacuum. The determination of their jurisdiction and powers has to take into account the judicial structures which already exist in the country. As the establishment of a specialized constitutional jurisdiction by definition takes place outside the traditional structure of the judicial branch, its relations to the traditional or ordinary judiciary, and in particular the supreme court, or supreme courts respectively, which are placed at the apex of the established judicial hierarchies, have to be fixed in the constitution or the law on the constitutional court, with any remaining issues to be settled by judicial practice.

In almost all civil law countries, at least two parallel supreme courts exist, one for civil and criminal cases and one for administrative law cases[1] (e.g. in France, where the respective courts are the *Cour de Cassation* and the *Conseil d'Etat*). In some countries, an even higher number of supreme courts have been established, reflecting a high degree of specialization of the judiciary. In Germany, for example, there are not just two, but five supreme courts: in addition to the supreme courts for civil and criminal cases (Federal Court of Justice) and administrative cases (Federal Administrative Court), the Federal Finance Court, the Federal Labour Court and the Federal Social Court are operating as supreme courts in the fields of tax law, labour law, and social security law, respectively.[2]

## 2. *The delimitation of the respective functions of constitutional and ordinary courts: the point of departure*

In theory, the delimitation of functions between the constitutional court and the ordinary courts is quite clear: the resolution of constitutional cases and controversies, and the interpretation and application of the constitutional law rules this involves, fall within the competence of the constitutional court, whereas the resolution of all cases and controversies involving the interpretation and application of ordinary law belongs to the province of the ordinary courts. This also seems to have been the idea of Hans Kelsen when he introduced centralized constitutional review in the Austrian Constitution of 1920. The initial text of the Constitution of Austria of 1920 provided only for the abstract review of legislation, i.e. the review of its constitutionality outside the context of litigation, with no direct links between the constitutional control by the Constitutional Court and the application of statutory legislation by the ordinary courts.[3]

In this model, constitutional jurisdiction and ordinary jurisdiction operate each within their own distinct spheres, without the need or the possibility for direct interaction between them. The constitutional court focuses exclusively on the issue of constitutionality. If it strikes down a provision as unconstitutional, the provision may no longer be applied by the ordinary courts. Conversely, if the review before the constitutional

1 Lech Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5.1, 2007: 45.
2 *German Basic Law*, art. 95 (1).
3 Garlicki, "Constitutional Courts versus Supreme Courts": 46.

court results in a finding of constitutionality, the ordinary courts will continue to apply the respective provisions just as they had done before.

The separation of functions is particularly neat if the constitutional court is limited to a preventive control of constitutionality of legislation, i.e. of statutes that have already been adopted by the legislature, but not yet been promulgated. Preventive control of legislation was the standard procedure of constitutional review that was introduced in France by the Constitution of 1958 and remained the only form in which the constitutionality of statutes could be reviewed until the constitutional reforms of 2008.

### 3. *The growing overlap of functions between the constitutional court and the ordinary judiciary: contributing factors*

However, with the proliferation of constitutional courts around the globe at the end of the 20th century, and the process of growth and expansion of constitutional adjudication that has accompanied it, the demarcation line between the functions of constitutional courts and the prerogatives of the ordinary judiciary has become increasingly blurred, and the potential for conflict or even confrontation between the two jurisdictions has grown significantly. As a result, a genuine separation of constitutional jurisdiction and ordinary jurisdiction is no longer possible in a modern *Rechtsstaat*:[4] the separation model had to be replaced by a cooperation model, whose precise features vary from one country to the next.

The growing impact of constitutional adjudication on the activity of the ordinary courts is due to a variety of factors, which reflect both the increasingly sophisticated nature of constitutional procedural law and the increased importance of constitutional law in ordinary litigation.

With regard to the former, a procedure for the incidental review of statutes by the Constitutional Court was introduced in Austria within a decade of the Court's existence and quickly became a standard procedure of constitutional courts wherever a specialized constitutional jurisdiction was established. Ordinary courts were given the right to refer the issue of the constitutionality of a statutory provision which they had to apply to a case before them to the Constitutional Court if they had serious doubts that the provision in question was in conformity with the constitution. Since then, different combinations of abstract and incidental review of

4 Garlicki, "Constitutional Courts versus Supreme Courts": 49.

the constitutionality of statutes have become a common feature of most specialized constitutionalized jurisdictions in Europe and elsewhere.[5] This procedure involves the constitutional court in the adjudication of individual litigation by resolving preliminary issues relating to the constitutionality of the statute to be applied to the case at hand.

Even more dramatic in terms of challenging traditional concepts on the separation of constitutional and ordinary jurisdiction has been the introduction of the constitutional complaint procedure, especially in the form which allows the constitutional court to review not only acts by the legislature and the administrative authorities for their conformity with the constitution, but also final judgments and decisions issued by the judicial authorities. In this latter form, the constitutional complaints procedure becomes a powerful tool of control of the constitutional court over the ordinary judiciary with regard to the correct interpretation and application of the constitutional fundamental rights provisions which are central to the litigation at hand. It is therefore not surprising that the constitutional complaints procedure that gives persons who have allegedly been violated in their fundamental rights by a judicial decision or order the right to appeal directly to the constitutional court has been introduced only by a small number of countries with a specialized constitutional jurisdiction (see below IV.). It is thus going beyond the procedure of incidental review of legislation where the decision to refer the constitutional question to the Constitutional Court as well as the application of the response it gets to the case is in the hands of the court before which the litigation which has given rise to the issue of constitutionality is pending.

In parallel to the diversification of the procedural tools at their disposal, constitutional courts have refined their techniques of constitutional interpretation and adjudication. In particular, they no longer limit themselves to merely stating that a statutory provision is either constitutional or unconstitutional, and to declare its invalidity or inapplicability in the latter case. Out of respect for the democratically elected legislature, they usually try to uphold the statutory law being challenged wherever possible, i.e. if there is at least one plausible interpretation of the provision in question which would not bring it into conflict with the constitution. Known in Germany as *verfassungskonforme Auslegung,* in France as *déclaration de conformité sous reserve*, this approach requires the constitutional court or council to proceed to the interpretation of the ordinary law provision to

5 Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis*, Oxford and Portland 2014: 133.

see if there is scope for interpreting it in conformity with the constitution; or, conversely, to determine which of the interpretations which would fit its wording and its purpose should nevertheless be discarded because they are in conflict with the constitution.[6] In both cases, the constitutional court interferes with a traditional prerogative of the ordinary courts, i.e. the judicial interpretation and application of statutory law. This interpretative technique is thus double-faced: while it reduces the potential for conflict in the constitutional court's relationship with the legislative branch by avoiding declarations of non-conformity or nullity, it creates previously unknown problems of overlap with the ordinary judiciary by involving the constitutional court directly in a task that has traditionally been considered the province of the judicial branch, and in particular the supreme courts: the final and binding interpretation of statutes.

Another important development is the dramatically expanded scope of constitutional law which has direct repercussions on the relevance of constitutional court jurisprudence to the resolution of individual cases and controversies by the ordinary courts. Constitutional law was initially seen as primarily regulating the structure of the state and the powers of the central state institutions. Although fundamental rights already figured in early constitutions, they were far fewer in number than today, and were often given a narrow interpretation by the courts, limiting their application to the exercise of traditional forms of state authority, with little or no relevance at all for the litigation between private parties. This has changed dramatically in recent decades. The expansion of the types and number of constitutional fundamental rights and the frequently broad interpretation given to them by the constitutional courts has meant that constitutional law, and in particular fundamental rights, have permeated all branches of the legal system, including private law. Although the speed and the depth of this transformation vary from one country to another, and is more directly felt in areas of the law with a strong public dimension like administrative and criminal law, ordinary courts today are far more likely to be confronted with issues of constitutional law, especially with the impact of fundamental rights on all sorts of different legal relationships, including legal relations among private parties, than at any time in the past. The supremacy and the direct effect of constitutional rules and principles in all aspects of the judicial settlement of disputes are no longer contested. As a result, few branches of law today remain totally unaffected by the expanding reach of constitutional law.

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6 de Visser, *Constitutional Review in Europe*: 292.

## 4. Conflict and cooperation in practice: a comparative survey

As the overlap of the functions of constitutional courts and supreme courts has grown, the potential of conflict between them has also increased substantially. Thus, a *modus vivendi* has to be found which does not undermine the authority of either the constitutional court or the ordinary judiciary and contributes to the overarching objective which motivated the creation of specialized constitutional courts in the first place, i.e. the strengthening of the normative effectiveness of the constitution. The difficulties which this has raised, and the strategies which have been developed by the courts as well as the legislatures in dealing with this delicate problem, can be illustrated by a brief comparative survey.

### 4.1. Germany

In Germany, things came to a head shortly after the Constitutional Court's establishment in 1951, when the new court started to use its powers to impose its expansive concept of the fundamental rights guarantees of the Basic Law as developed in early landmark cases like *Elfes*[7] and *Lüth*[8] on the ordinary courts through the constitutional complaint procedure. The Basic Law itself contains no indication with regard to the delimitation of the functions and powers of the Constitutional Court and the other federal supreme courts listed in Article 95 (1). The Act on the Federal Constitutional Court, however, reflects the need for dialogue between the Constitutional Court and the supreme courts of the ordinary judiciary by prescribing, in § 2 (3) of the Act, that three of the eight members of each of the two Senates shall be elected from among the judges of the supreme federal courts. As a general rule, only judges who have served at least three years on one of the supreme federal courts shall be elected. The Constitutional Court is thus familiar with the jurisprudence of the federal supreme courts through those of its members who have served on those courts before they were elected to the Constitutional Court.

This has not prevented controversies between the constitutional and the ordinary jurisdictions, however. The first conflict arose in the procedure of incidental review of constitutionality. In its initial version, the Act on the Federal Constitutional Court provided that the incidental review of

7 Elfes Case. *Bundesverfassungsgerichtsentscheidung* 6.32 (1957).
8 Lüth Case. *Bundesverfassungsgerichtsentscheidung* 7.198 (1958).

legislation could take place only by an interposition of the supreme court of the jurisdiction concerned, not by direct referral from the court before which the litigation that had given rise to the constitutional question was pending. What was more, the competent supreme court had the right to submit its own opinion on the constitutional question referred by the lower court: in the practice of the *Bundesgerichtshof*, the supreme court in all civil and criminal matters, these opinions soon took the form of fully reasoned judgments on the issue of constitutionality published in the official collection of its decisions, sometimes even before the Constitutional Court had had the opportunity to adopt its decision on the matter. The Federal Constitutional Court felt that this practice undermined its authority as the supreme constitutional jurisdiction and in 1955 declared that the supreme courts would in the future be barred from submitting their own views on the questions of constitutionality raised in the incidental review procedure. This move gravely upset the supreme courts, which in response addressed a letter of protest signed by their presidents to the President of the Constitutional Court.[9] The controversy had to be resolved through the intervention of the political branches which in 1956 decided to amend the Federal Constitutional Court Act, abolishing the involvement of the supreme courts in the procedure of incidental review altogether. Since then, the ordinary court before which the case that gives rise to a question of constitutionality is pending may submit the matter directly to the Constitutional Court, and the Court will rule on the admissibility, and eventually, on the substance of the matter without being prejudiced through prior intervention by the competent supreme court. Thus, a direct channel of communication between the ordinary courts and the Federal Constitutional Courts has been established which allows the lower courts to circumvent the established judicial hierarchy in constitutional matters.

This still leaves the initiation of the referral procedure as well as the application of the ruling on the constitutionality issue handed down by the Federal Constitutional Court in the hands of the referring court. However, the Federal Constitutional Court has the means to impose its opinions on recalcitrant courts at any time through the constitutional complaint procedure. In Germany, constitutional complaints may be lodged against any act of public authority which allegedly violates one or several of the fundamental rights protected by the Basic Law, including judicial decisions. The

9 Hans Joachim Faller, "Bundesverfassungsgericht und Bundesgerichtshof," *Archiv des öffentlichen Rechts* 111.2, 1990:189–191.

only restriction here is that all available remedies against the act must have been exhausted, which in the case of a constitutional complaint against a judgment means that all possibilities to have the judgment overturned by way of appeal to a superior court, in the last instance to the respective federal supreme court, must have been exhausted before the matter can be brought before the Constitutional Court. The constitutional complaint has to be lodged by the aggrieved individual. A lower court which has obtained a preliminary ruling by the Federal Constitutional Court on the issue of the constitutionality of a statutory provision which is central to the outcome of the case before it can therefore expect that its decision of the case will be appealed if it diverges from the Constitutional Court's opinion and that compliance will be enforced through the constitutional complaint procedure. This form of enforcement is all the more effective as the Constitutional Court in the constitutional complaint procedure is not limited to a declaratory judgment. If it comes to the conclusion that the challenged judicial decision rests upon an unconstitutional interpretation or application of the law, § 95 (2) of the Federal Act on the Constitutional Court authorizes the Court to quash the decision and to remand the matter to a different court of the competent jurisdiction for a fresh decision. The constitutional complaints procedure in this way enables the Constitutional Court to impose its views on constitutional matters on the ordinary courts and turns it effectively into the court of final appeal on all matters concerning fundamental rights, modifying to this extent the traditional judicial hierarchy.

This has given rise to a discussion, in the Court's own case law as well as in constitutional law doctrine, how the Constitutional Court can be prevented from usurping the functions of the supreme courts by inflationary use of its statutory powers to overturn decisions made by the ordinary judiciary. Academic writers have submitted a number of proposals that aim to distinguish the specific issues of constitutional law from those matters that concern primarily the interpretation and application of ordinary law, the traditional prerogative of the ordinary courts.[10] However, none of the formulas suggested has managed to establish a clear-cut delimitation of the respective prerogatives of the Federal Constitutional Court and the supreme courts. The task of fixing the limits of constitutional review is thus effectively left to the discretion of the Court itself which seems to determine them on a case-by-case basis rather than by application of some

10 On this discussion see Christian Starck, "Verfassungsgerichtsbarkeit und Fachgerichte", *Juristenzeitung* 51.21, 1996: 1034.

abstract formula. While the Court keeps emphasizing that it must not act as a *Superrevisionsinstanz*, it has occasionally ventured even into a second-guessing of the establishment of facts by the (lower) ordinary courts if this seemed indispensable for the determination of the constitutional issue at hand, e.g. in cases concerning the scope of the freedom of speech. On the whole, however, only a small number of challenges to supreme court judgments through the constitutional complaint procedure have been successful, demonstrating that the Constitutional Court, anxious to respect the authority and special expertise of the federal supreme courts, uses its cassation powers cautiously.[11]

### *4.2. Italy*

Unlike the German Constitutional Court, the Italian Constitutional Court does not have the power to review, and even less to overturn, judgments issued by the ordinary courts on constitutional grounds. Italian law does not provide for a constitutional complaint procedure, neither against judgments nor against any other act of public authority. Instead, the *Corte costituzionale* communicates and interacts with the ordinary courts, and in particular with the *Corte di Cassazione*, (solely) through the procedure of incidental review: the courts of general jurisdiction may refer questions concerning the constitutionality of those statutory provisions that form the basis for the respective court's resolution of a pending case to the Constitutional Court. The Constitutional Court examines the matter and rules on the constitutionality of the referred provision(s), its ruling becoming part of the law of the case.

At first glance, this seems like the very model of a horizontal separation of functions, each jurisdiction being supreme within its sphere of competence - the Constitutional Court with regard to constitutionality issues, the courts of general jurisdiction with respect to all matters related to the interpretation and application of ordinary legislation. However, matters have not rested there but have been complicated by the Constitutional Court's refusal to limit itself to a simple positive or negative ruling on the issue of constitutionality. The *Corte costituzionale* has been among the first constitutional courts to use interpretative techniques to avoid rulings of unconstitutionality. This means basically that the Court will declare a statutory provision unconstitutional only if no plausible interpretation

11 Garlicki, "Constitutional Courts versus Supreme Courts": 52.

of the provision in question can be found which permits to confirm its constitutionality.[12] Rulings of unconstitutionality of the Court are thus rarely adopted in absolute terms, but only in relation to a particular interpretation of the provision at issue. These interpretative decisions can take different forms, depending on whether the Court in its decision focuses on the interpretation which would make the provision constitutional (*sentenza interpretative di rigetto*) or, conversely, on the one that would make it unconstitutional (*sentenza interpretative di accoglimento*). Particularly in the first case, the Court is likely to get into conflict with the ordinary courts if the provision under review has traditionally been interpreted in a certain way and this interpretation does not correspond to the one required by the *Corte costituzionale* in the *sentenza interpretative di rigetto*.[13]

As a matter of fact, such conflicts between the *Corte costituzionale* and the highest court of the civil and criminal jurisdiction, the Court of Cassation, have occurred repeatedly, with the Court of Cassation refusing on more than one occasion to proceed to the revision of its established jurisprudence which the relevant interpretative rulings of the Constitutional Court would have required. The Act on the Constitutional Court does not provide a solution for these cases. The universally binding effect of its rulings which the Act mandates attaches only to a ruling invalidating a *statute* as unconstitutional, not to a ruling which declares one or several *interpretations* of the statute unconstitutional. The Italian courts were thus left to find a *modus vivendi* among themselves. In general, they have been successful in doing so. On the one hand, the ordinary courts have acknowledged the growing reputation and authority of the Constitutional Court and become more willing to take its interpretative rulings into account when developing their jurisprudence on the interpretation of the provisions concerned. The *Corte costituzionale*, for its part, has refined its interpretative methods to give greater weight to the jurisprudence developed by the ordinary courts, notably by having recourse to the "living law" concept, which means that the Constitutional Court does not review contested legal provisions in the abstract, but with regard to the way they have been applied in the case-law of the superior courts.

While this conciliatory approach from both sides has helped to minimize conflicts, their cooperation remains fragile and subject to sudden

12 See *Corte costituzionale Decision No. 356/1996* in which the Court held that submissions by ordinary courts in the incidental review procedure are admissible only if the referring court has exhausted all possibilities to find an interpretation in conformity with the constitution, and found none.

13 de Visser, *Constitutional Review in Europe*: 381.

outbursts of conflict, as happened in the late 1990s in the controversy concerning the correct reading of the provision of the Code of Penal Procedure governing the calculation of the maximum term of preliminary detention.[14] In such conflicts the *Corte costituzionale* cannot expect to retain the upper hand, as it is dependent on the ordinary courts for both the referral of constitutional questions in the incidental review procedure and the implementation of the interpretative ruling handed down in that procedure in the ultimate judicial resolution of the case. Unlike the German Constitutional Court, the *Corte* lacks the means to impose it views directly on the courts of general jurisdiction via a constitutional complaints procedure which would allow it to review the final judgments adopted by the other jurisdictions and, where necessary, to overturn them.

### *4.3. Spain*

The Italian case seems to suggest that an express regulation of the powers of the constitutional jurisdiction in relation to the ordinary judiciary is a central and indispensable element in any constitutional and legal framework designed to allow the constitutional court to discharge its task as the ultimate guardian of the constitution effectively. Nevertheless, the Spanish case demonstrates that such a regulation in itself is not sufficient to prevent major conflicts between the constitutional court and the ordinary judiciary. In most aspects that are of interest here, the regulation of the powers of the Spanish Constitutional Court is similar to the one analyzed in the German case. Among its competences is the incidental review procedure in which the courts and judges of general jurisdiction may – and in certain circumstances must – submit the question of constitutionality of a provision or rule having the force of law to the Constitutional Court. The Spanish Constitutional Court is also competent to decide in the *amparo* procedure on petitions lodged with the aim of preserving or restoring the rights and freedoms protected by the Constitution against acts of public authority allegedly infringing those rights, including decisions by the ordinary judiciary. If the Court arrives at the conclusion that the petition is well-founded, it can annul the decision or judgment which violates the rights and freedoms in question.[15] More generally, the Organic Law of the Judicial Power obliges all courts and tribunals to apply the statutes and

14 Garlicki, "Constitutional Courts versus Supreme Courts": 56.
15 *Act on the Constitutional Court*, art. 55.

regulations in accordance with the rules and principles of the Constitution as the latter have been interpreted by the Constitutional Court, regardless of the procedure in which this interpretation has been issued. Thus, it should be clear that the Constitutional Court enjoys supremacy in all matters concerning the interpretation of the constitution, which shall also guide the courts in the interpretation and application of the ordinary law.[16]

Despite this clear-cut delimitation of functions, the Spanish Supreme Court has repeatedly refused to accept the jurisprudence of the Constitutional Court on important points, e.g. regarding the statute of limitations in criminal law. This conflict escalated in 2004 when the Supreme Court sentenced eleven judges of the Constitutional Court to pay damages because they had in its view wrongly and negligently dismissed a petition brought by the plaintiffs for a violation of their fundamental rights in the *amparo* procedure. As has been noted, such an extreme confrontation is quite unique in the history of constitutional courts in Europe.[17] The Constitutional Court could find no other way to defend itself against the transgression of the Supreme Court than the filing of a constitutional complaint by the aggrieved constitutional judges in the *amparo* procedure against the decision of the Supreme Court for violation of their constitutional right to effective judicial protection. The Constitutional Court had to wait several years until the aggrieved judges had retired from the court before it could hand down a judgment in their favor.

However, the authority of the Spanish Constitutional Court never fully recovered from this blow. In a timid response to the grave constitutional crisis triggered by these events the Spanish legislature has tried to mollify the ordinary judiciary by inserting an express provision into the Constitutional Court Act which provides that in *amparo* proceedings against judicial decisions, the Constitutional Court shall focus on the determination of whether the allegedly infringed rights and freedoms have indeed been violated by the challenged decision, and, if this is the case, to preserve and restore those rights, but "shall abstain from any other observation on the

16 *Ley Organica del Poder Judicial*, art. 5.1: "La Constitución es la norma suprema del ordenamiento jurídico, y vincula a todos los Jueces y Tribunales, quienes interpretarán y aplicarán las leyes y los reglamentos según los preceptos y principios constitucionales, conforme a la interpretación de los mismos que resulte de las resoluciones dictadas por el Tribunal Constitucional en todo tipo de procesos."

17 Juan Luis Requejo Pages, "Das spanische Verfassungsgericht", in: *Handbuch Ius Publicum Europeum* 6, edited by Armin von Bogdandy, Christoph Grabenwarter and Peter M. Huber. Heidelberg 2016: 687.

activities of the judicial bodies." Whether this rather meek reminder of the need to observe courtesy among courts is sufficient to redress the harm which has been done to the authority of the Constitutional Court by the aggression of the Supreme Court remains doubtful.

### *4.4. France*

The final example of inter-court relations which shall be discussed here is France. As mentioned above (2.), the model of constitutional review originally implemented in the 1958 Constitution corresponded most comprehensively to the ideal of a strict separation of constitutional from ordinary jurisdiction. This is already indicated by the constitutional terminology which refers to the body of constitutional review as a *conseil*, not as a tribunal or a court. But it is also evident from the powers which were initially assigned to the *Conseil constitutionnel*. These powers limited the Constitutional Council to a preventive review of the constitutionality of statutes that had to take place in the short period between the final adoption of the law by the legislature and its promulgation and entry into force. Thus, the *Conseil* had no possibility to pronounce on the constitutionality of a law once it had entered into force, and thus neither directly or indirectly on the interpretation and application of that law by the judiciary.

Matters did not rest here, however, as the same factors which pushed the dynamic development and expansion of constitutional jurisprudence in other West European countries in the 1950s and 1960s were also felt in France. In 1971, the *Conseil constitutionnel* took the bold step of affirming the legally binding character of the Preamble to the 1958 Constitution, and thus of the Declaration of the Rights of Man and of the Citizen of 1789 and the Preamble to the 1946 Constitution with its guarantees of social and economic rights to which it refers, and started to use them as yardsticks against which the constitutionality of new legislation had to be measured in the constitutional review procedure. Together with the constitutional reforms of 1974, which extended the right to initiate a preventive control of the constitutionality of legislation to 60 members of the National Assembly or 60 Senators, and thus in effect to the political opposition, this increased the practical impact of the preventive review exercised by the *Conseil* greatly. Its jurisprudence now also started to have an impact on the jurisprudence of the ordinary courts. In the 1970s and the 1980s, the *Conseil* developed comprehensive case law on fundamental rights, not limiting itself to the determination whether the legislation

under review was consistent with the constitution or not. Instead, like other constitutional courts the Council developed more refined techniques of interpretation which allowed it to uphold a statute if an interpretation in conformity with the constitution was at all possible. These rulings of "déclaration de conformité sous réserves" required the ordinary judiciary to play along to have any practical effect, since the *Conseil* had, and still has, no procedural means at its disposal to impose its views on the courts: the viability and practical impact of the Council's interpretations entirely depend on the voluntary compliance of the other jurisdictions.

It is a testimony to the quality of the Conseil's decisions and its growing reputation, as well as to the efforts of the French doctrine to explain and systematize its jurisprudence, that its rulings have found widespread adherence in both the civil and administrative law jurisdictions.[18] This successful practice of cooperation has paved the way for a further constitutional reform which finally freed the *Conseil* from the narrow limits of a merely preventive control of legislation by giving it the power to review the constitutionality of statutory provisions that have already entered into force in an incidental review procedure, called *question prioritaire de constitutionnalité* in French. This new procedure, which was introduced into Article 61 of the Constitution in 2008 and implemented through the necessary amendments to the Act on the *Conseil constitutionnel* in 2010, allows courts both of the general and of the administrative jurisdiction to submit questions concerning the consistency of a statutory provision they have to apply to a case before them with the constitutionally protected rights and freedoms to the *Conseil constitutionnel* for a preliminary ruling. However, unlike the incidental review procedures in the other constitutional systems discussed so far, the lower courts may not circumvent the established judicial hierarchy by presenting the constitutional issue directly to the Constitutional Council. Instead, the motion of referral has to pass compulsorily through the highest court of the respective jurisdiction, i.e. the *Cour de Cassation* in the case of civil and criminal courts, and the *Conseil d'Etat* in the case of administrative courts. The competent supreme court then takes the final decision on whether the constitutional question is referred to the Constitutional Council or not. If it declines to do so, no appeal is possible, neither by the lower court which has submitted the motion for referral, nor by the party to the pending court case which has asked for the referral in the first place. The solution implemented in France thus fully preserves the filter function of the supreme courts as well as the integrity

18 Garlicki, "Constitutional Courts versus Supreme Courts": 63.

of the respective judicial hierarchy, in line with the positive experiences with the system of voluntary cooperation between the judiciary and the *Conseil contitutionnel* made prior to the reform.

## *5. Conclusion*

The survey has shown that conflicts and tensions between constitutional courts and supreme courts are no longer isolated events or accidental in nature. Rather, they are the inevitable consequence of the rise of constitutional adjudication and the increasing impact of that adjudication on the development of the legal system as a whole, and especially on the interpretation and application of the ordinary law by the judiciary. The relationship between constitutional and ordinary jurisdiction thus constitutes a structural problem which has to be addressed effectively if the overarching goal, the strengthening and effective enforcement of the supremacy of the constitution, is to be realized.

The preceding analysis has revealed the existence of three main approaches to this problem. The first is institutional design, which means that permanent and stable institutional links between the constitutional court and the ordinary judiciary are established. An example for this approach is provided by Germany, where three members of each of the two Senates of the Federal Constitutional Court have to be selected from among the judges of the (other) federal supreme courts, thus creating a solid basis for dialogue between the constitutional and the ordinary jurisdictions within the Constitutional Court itself. The second instrument which may, and perhaps should be used, is the establishment of clear procedural rules for the interaction and cooperation between the jurisdictions in the Act on the Constitutional Court or the General Act on the Judiciary, or in both. Such provisions are useful in increasing the awareness on both sides, and particularly among the ordinary judges, that a close cooperation of the ordinary judiciary with the constitutional court is needed to give practical effect to the supremacy of the constitution in all areas of law, and that that leading role of the constitutional court on all constitutional matters has to be accepted if this important goal is to be achieved. Thirdly, a constant dialogue between the different jurisdictions is needed, which can and should take place also outside formalized avenues, e.g. through regular meetings, joint seminars, etc. This dialogue should increase mutual understanding and the awareness of the need for self-restraint where the other jurisdiction is better placed to assess the adequacy of a statutory interpretation or a certain practice of the law.

These approaches are not alternative, but cumulative. As the Spanish example shows, constitutional or statutory regulation of the relationship is not sufficient if it is not backed up by mutual respect and understanding which can only result from constant dialogue. On the other hand, the French experience seems to suggest that fruitful cooperation between a constitutional court and the supreme courts can also develop in the absence of any formal rules governing their relationship or establishing formal institutional links. However, while this model has functioned well in the French context, it may be inadequate in other constitutional systems where the judicial features of constitutional adjudication are more fully developed and the scope and need for interaction between the constitutional court and the ordinary judiciary, and for formal rules providing direction to that interaction, is accordingly greater.