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CONSTITUTIONAL ADJUDICATION IN EUROPE BETWEEN UNITY AND PLURALISM

SPECIAL ISSUE

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GUEST EDITORIAL

CONSTITUTIONAL ADJUDICATION IN EUROPE BETWEEN UNITY AND PLURALISM

*Pietro Faraguna, Cristina Fasone, Giovanni Piccirilli**

1. Where Do We Stand? The Constitutionalization of the EU and the Europeanization of Constitutional Adjudication

This special issue is one of the outcomes of the IACL Roundtable on “Constitutional Adjudication: Traditions and Horizon” organized at LUISS Guido Carli, Rome, on 5-6 May 2017 and of the related workshop of young scholars selected through a call for papers. From these events it came out clearly that the Europeanization of constitutional adjudication is not only a matter of pure academic speculation. The concreteness of this transformation emerges in particular from the final special section of this special issue, where we have interviewed four judges of the Constitutional Court of Italy, guest speakers at the IACL Roundtable, about the impact of European law on their legal education, their academic career and – above all – their role as constitutional judges. Their answers emphasize different experiences and approaches to law, but are characterized by some recurrent golden thread: the importance of their transnational legal education, an ever growing sensitiveness to the impact of supranational law on the legal system, an openness towards the use of legal reasoning based on comparative law.

However, the Europeanization of constitutional adjudication emerges from the pure observation of the case law of the Court these judges are member of. The Taricco saga, that has very recently witnessed a decisive development with the decision of the Constitutional Court no. 115/2018, is only the top of the iceberg: in their interviews, all judges make clear how the impact of European law plays a crucial role in the Court. “In a context that is

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constitutionally interconnected it is no longer possible to play any game alone”, says Marta Cartabia. As Daria de Pretis explains, the interconnection may emerge in different manners. Common judges tend to refer to the case law of the European Court of Human Rights when they raise questions of constitutionality. The Constitutional Court itself abandoned its reluctance to submit references for preliminary ruling to the Court of Justice of the European Union. Finally, comparison with foreign case law is increasingly common in the legal reasoning of the Constitutional Court of Italy. This trend is even more telling, if we note, as Giuliano Amato suggests, that “constitutional courts may be considered the less Europeanized national institutions, especially if compared to governments, ordinary judges, independent authorities and now even parliaments”. And on the other hand, as Silvana Sciarra suggests, “constitutional courts must be independent – but not totally detached – from the perseverance of other institutions in bringing forward reforms”.

What are the consequences of such an empirically found high level of Europeanization of the “most national institution” in terms of constitutionalization of the European Union and facing the tension between unity and pluralism? It is responsibility of the legal scholarship to try to systematize and conceptualize empirical evidences, as the Europeanization of constitutional adjudication may be considered an empirical evidence.

The boundaries for the elaboration of this scholarly challenge are set by two introductory essays by Raffaele Bifulco and Nicola Lupo. In the first one, Bifulco tackles the questions of the Europeanization of constitutional adjudication by providing a critical assessment of the theories of constitutional pluralism in the European Union. Bifulco considers that these theories must be put in context. Their explanatory validity and normative underpinning could stand when the problem of sovereignty did not represent a challenge to the process of European integration. By contrast, in the light of the multiple crises that the European Union has suffered in the last few years and of the intergovernmental relations’ hegemony, the answer seems to come from the strengthening of the democratic principle in the Union rather than from the ordering of States and EU relationships through the paradigm of constitutional pluralism.

In the second introductory essay, Lupu invites to consider new perspectives in the mutual accommodation between the positions of the many actors that made up the composite system of constitutional review of legislation in Europe. In particular, Lupu claims that instead of framing the problem in terms of “who should speak last”, we should ask “who should speak first”. While the role of domestic legislatures in this framework cannot be neglected, their inertia and unconstitutional acts should be addressed by constitutional judges, as “tenants” of the first word in the interplay amongst national and European courts. Indeed, constitutional courts are in the best position to frame constitutionally sensitive questions through the preliminary reference mechanism to the Court of Justice in order to let the composite European Constitution work properly and to allow national constitutional identities to be effectively taken duly into account by the Court in Luxembourg.

2. A Composite System of Constitutional Adjudication in Europe as a Way Forward

In the light of the framework given by the two introductory essays, the contributions collected in this special issue analyze the process of constitutionalization of the European Union¹, in constant tension between unity and pluralism², through the prism of constitutional adjudication, intended as the function pursued by courts (both supreme and constitutional) of adjudicating fundamental rights and enforcing the separation of powers³.

¹ There are different views as for the desirability of such a constitutionalisation. The development of a European Constitutional Law has been praised by many scholars, such as R. Schütze, *European Constitutional Law* (2012); others, instead have emphasised the limits of the process, for example explaining the EU legitimacy deficit with its overconstitutionalization, such as D. Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21(4) Eur. L. J. 460 (2015). Finally, there are also scholars who contest the constitutional nature of the EU as such, like P. L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010).

² See D. Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 Comm. Mkt. L.R. 17 (1993).

³ M. Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2(2) ICON 633 (2004); J. Ferejohn and P. Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 Tex. L.R. 1671 (2004).

The questions the special issue tries to answer are the following: given the intertwinement between the domestic and the supranational “constitutions”, is there a composite system of constitutional adjudication⁴? What is the role of national and supranational courts in this system in balancing unity and pluralism when adjudicating on rights and on the interinstitutional balance? In particular, was there any specific lesson taught by the Euro-crisis in this regard?

The way in which we tackle these questions is sketching a new theoretical proposal of the emerging of a composite system of constitutional adjudication in the European Union. The essays of the special issue openly approach the question of the existence of a “system”. In the classic narrative constitutional adjudication is a necessary consequence of constitutionalism⁵. Our idea is flipping the coin: we do not assume constitutional adjudication as a necessary consequence of constitutionalism, but we assume constitutionalism as a necessary precondition of constitutional adjudication. In other words: constitutionalism may exist without constitutional adjudication, but constitutional adjudication may not exist without constitutionalism⁶.

The scholarly attention in the field of public law mostly focused on the constitutional nature of the European Union (EU), either by investigating the processes of creation and transformation of the statehood or by delving into the parallelism with the constitutional structure of Member States. The structural relationship between the European and domestic legal orders played a prominent role in guiding the debate, with several iconic methodological approaches being proposed to develop a constitutional theory of the European integration. The mutual interaction between domestic and European legal orders has been

⁴ Drawing on the idea of “Composite European Constitution” devised by L.F.M. Besselink, *A Composite European Constitution* (2007).

⁵ See the traditional narrative by H. Kelsen, *Wesen und Entwicklung der Staatsgerichtbarkeit*, in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (1929), vol 5, 78 ff. and as reported in L. Vinx, *Hans Kelsen’s Pure Theory of Law* (2007).

⁶ As proved also by the constitutional crisis taking place in some countries in Europe, for example in Poland, through the disempowerment of Constitutional Courts: see M. Granat, *Constitutional judiciary in crisis: The case of Poland*, in Z. Szente and F. Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (2018).

seen as ‘contrapunctual’⁷, or based on a necessary constitutional tolerance⁸, or as a space of ‘constitutional interdependence’⁹. The layered structure and co-existence of national and supranational levels has been read as the premise for a multi-level constitutionalism¹⁰ or the creation of a ‘union of constitutions’¹¹ or, in an even more integrated manner, as the source of a composite European constitution¹², in which neither the supranational nor the national constitutional level can fully operate alone without the necessary completion of the other. Within this stream of scholarship, constitutional pluralism exercised a growing influence on the debate¹³. However, constitutional pluralism explores the source of constitutional authority, investigating and normatively enhancing heterarchical overlaps of state constitutional authorities and European constitutional authority as ultimately self-standing sources of authority.

The special issue aims at investigating the functional exercise of constitutional adjudication within the European Union, exploring whether the fundamental rights review and the enforcement of the separation of powers are exercised in a composite manner between the EU and the Member States. This functional approach puts constitutional adjudication in front, aiming at investigating the centrality of the judicial driver in the making of European legal integration through a new prism. When the term pluralism is used in this context, it is not referred to in the sense of the “constitutional pluralism” theoretical account, but

⁷ M. P. Maduro, *Contrapunctual law: Europe's constitutional pluralism in action*, in N. Walker (ed.), *Sovereignty in transitions* (2006), 501.

⁸ J.H.H. Weiler, *In defence of the status quo: Europe's constitutional sonderweg*, in Id. and M. Wind (eds.), *European Constitutionalism beyond the State* (2003), 7-23. and Id., *On the power of the Word: Europe's constitutional iconography – Prologue*, 3(2&3) *ICON* 173 (2005) 184-190.

⁹ M. Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, 16(6) *GLJ – Special Issue on “The preliminary references by Constitutional Courts to the CJEU”* 1791 (2015).

¹⁰ I. Pernice, *Multilevel Constitutionalism in the European Union*, 5 *Eur. L. R.* 511 (2002).

¹¹ A. Manzella, *La ripartizione di competenze tra Unione europea e Stati membri*, 3 *Quad. Cost.* 531 (2000) and, more recently, Id., *L'unitarietà costituzionale dell'ordinamento europeo*, 3 *Quad. Cost.* 659 (2012).

¹² L.F.M. Besselink, *A Composite European Constitution*, cit. at 3.

¹³ See, lately, G. Davies and M. Abvelj (eds.), *Research Handbook on Legal Pluralism and EU Law* (2018).

rather to point out descriptively to a situation in which the understanding of Courts of a certain issue, their arguments and reasoning diverge among Member States as well as between a domestic court and the ECJ, in an attempt to find a problematic balance between uniformity and differentiation.

In fact, it is well established that ordinary judges of the Member States, much less so Constitutional and Supreme Courts, benefited from a steady process of empowerment through their direct dialogue with the Court of Justice (ECJ)¹⁴. The judicial dialogue then acquired a prominent role in the literature, as the principal indicator of the increasing level of legal integration. Further studies explored the impact on constitutional courts¹⁵ whose centrality in the domestic legal systems was eroded by this emerging network between ordinary and European judges¹⁶. As the right to the ultimate say of national constitutional courts was threatened by this process, they either directly challenged the authority of the Court of Justice (e.g. Czech Constitutional Court, Danish Supreme Court, Hungarian Constitutional Court) or tried to recover some role by joining the circuit of the judicial dialogue by means of preliminary references (Austrian, Belgian, French, Italian, Lithuanian, Polish, Slovenian, Spanish and, to a certain extent, German constitutional courts).

Less attention has been devoted to the emergence of a proper system of constitutional adjudication, which connects the national and the supranational level. This special issue aims at contributing to fill this gap in the legal scholarship. The pivotal question on the constitutional nature of the EU will not be addressed through the lenses of either the existence of a true Constituent Power, or the long-debated democratic/technocratic nature of European authority, but from the functional perspective of constitutional adjudication as a device that aims to combine unity and pluralism in a “compound” system. From the theoretical framework of the ‘composite European constitution’, the special issue tries to answer the fundamental question of whether there is a system of composite

¹⁴ A. Stone Sweet and T. Brunell, *Constructing a Supranational Constitution*, in A. Stone Sweet (ed.), *The Judicial Construction of Europe* (2004) 45, at p. 81 ff.

¹⁵ According to the meaning given by V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (2009).

¹⁶ J. Komarék, *The Place of Constitutional Courts in the EU*, 9 *EuConst.* 3 (2013), at 420.

constitutional adjudication in Europe. In other words, the constitutional problem of the EU will be tackled from a different and, hopefully, fruitful point of view: starting from the effects and, specifically, the functionality of a system able to adjudicate fundamental rights and freedoms to individuals and to protect separation of powers, it aims at giving robust evidences of the actual existence of a constitutional adjudication system, thus revealing a constitutional profile of the European legal area.

3. The Structure of the Special Issue

To do this, the special issue firstly explores the relationships between national constitutional judges and supranational courts, both the ECJ and the European Court of Human Rights, as grounds of cooperation, competition and sometimes of conflict. In the first section of the special issue, Paris deals with this issue from the perspective of EU Member States' constitutional courts' case law on the limits to the primacy of EU law. Through a comparative analysis the author shows that important similarities can be detected in this jurisprudence. Moreover, if constitutional review of EU law is performed by constitutional courts in a cooperative manner vis-à-vis the ECJ and within certain boundaries as for the disapplication of EU law, it can even foster the creation of a European legal space where the protection of fundamental rights and of the rule of law across the Member States and in the EU is enhanced while national peculiarities are preserved.

Alessia Cozzi's essay deals with a hypothesis of silent coordination of the fora of constitutional adjudication. Cozzi investigates decisions of national supreme and constitutional courts that implicitly follow a previous European Court on Human Rights (ECtHR) judgment without explicitly referring to it. Her article aims at understanding in which cases this implicit coordination is performed and why national courts are reluctant to make this approach explicit, hiding a successful coordination and turning a battleground into a meeting ground without emphasizing this transformation. Finally, the third essay of the first section deals with the interesting case study of the Belgian Constitutional Court, placed in a comparative perspective. It raises a problem of general and systematic interest for the identification of a system of constitutional adjudication in the EU and the exploration of its

procedures and challenges. This case study is extremely promising, as little research has examined whether constitutional courts employ the same strategies applied domestically, when violations of European and international law occur through legislative omissions. Omissions may be an insidious battleground for national and supranational courts, and Verstraelen's article demonstrates a versatile approach of Member States' constitutional courts in order to accommodate the potential fragmentation of national judges' responses with the need to ensure unity and uniformity of EU law.

The second section of the special issue is devoted to test the model of the composite European constitutional adjudication under pressure. The Euro-crisis offered an ideal stress test. Whereas legal analysis on the constitutional dimensions of Euro-crisis abounded, some specific aspects of this picture were overlooked also in those jurisdictions where the Euro-crisis had a remarkable impact. A first underestimated aspect concerns the role played by lower courts, often contradicting supreme and European courts. Pavlidou's article addresses this vastly overlooked aspect, by examining how domestic lowest courts in Greece safeguarded social rights by resorting to alternative constitutional sources and by indirectly enforcing constitutional provisions in order to constitutionalize social rights. Her essay juxtaposes this practice to the opposite interpretation of austerity measures by the European and Supreme Greek courts. In light of this, she analyzes the implications of this contradictory judicial review both in terms of the scope of social rights and conceptions of unity and diversity within the multiple levels of adjudication. Another vastly overlooked aspect in the Euro-crisis scholarship is the absence of preliminary references to the ECJ for the 'harmonization' of social rights adjudication stemming from the same supranational instruments. Constitutional courts were eager to solve cases by invoking solely their own constitutional interpretation and standards. Pierdominici's article tries to fill this gap in the scholarship, questioning constitutional courts' reluctant approaches toward preliminary references aimed at guaranteeing (European) standards of protection of social rights. Fasone's essay is devoted to look at the impact of constitutional adjudication on Euro-crisis measures on the role of legislatures, in this critical conjunction, to ascertain whether common challenges to

representative democracy have led to unitary or plural (and divergent) judicial responses to the issues of Parliaments' displacement in Euro-crisis procedures. In particular, the article investigates in this framework how constitutional courts have resorted to the argument of the national constitutional identity showing that, due to several circumstances, the protection of parliamentary powers and, ultimately, of the principle of representative democracy has been of little concern for most constitutional courts in such a critical juncture.

After having tested current trends of constitutional adjudication on the battleground of Euro-crisis measures, the third section of the special issue explores possible procedures and remedies to settle emerging conflicts. In this section, Andrea Edenharter claims that in the long run, a legal reconciliation within the EU can only be achieved if national courts enjoy at least some discretion in cases in which EU law allows for the application of national fundamental rights, because otherwise, national constitutional courts might challenge the ECJ's role as Supreme Court of the EU and thus damage the project of reconciliation as such. Edenharter's essay deals with the core problem of the possible existence of a system of constitutional adjudication in the area of fundamental rights review. In this respect, her article analyses two possible legal tools that may facilitate the function of such a system of constitutional adjudication. On the one hand, the margin of appreciation doctrine developed by the ECHR should be adopted by the ECJ. On the other hand, the principle of discretion can also be applied in favor of the ECJ, with national constitutional courts reducing the intensity of scrutiny towards the ECJ in accordance with the German Federal Constitutional Court's position in *Honeywell*.

Zaccaroni's paper deals with the need of reconciliation of Member States' constitutional identities and EU law from a different perspective. His article holds this reconciliation as a necessary assumption to make a system of constitutional adjudication workable in the EU. The essay emphasizes the contribution of some recent decisions of the EU for the identification of the concept of EU constitutional identity. Zaccaroni's aim is to assess how to reconcile the theoretical position of the ECJ with the one of the national constitutional courts, and in particular, the possibility to reconcile the pluralism of national

constitutional identities with the (desired) unity of the EU constitutional identity. His essay investigates two possible solutions: *a*) a clear theorization of an evolutionary interpretation of the principle of conferred powers; *b*) a real judicial cooperation between EU and national constitutional judges. In the latter perspective, Zaccaroni claims that constitutional courts should openly recognize the existence of an EU constitutional identity. Additionally, his essay claims that a system of constitutional adjudication would benefit from a mechanism of “reverse” preliminary ruling (from the ECJ to national constitutional courts), when identity-related conflicts are at stake. Finally, the last article of the section investigates the legal and practical obstacles to the full affirmation of the ECJ as a constitutional adjudication forum. Starting with the fact that the ECJ is increasingly emerging and self-identifying as a constitutional Court, Carlo Tovo argues that the revision of the ECJ’s rules of procedure, along with the reform of the General Court, may play a major role in strengthening the constitutional adjudication of the Court’s activity. Tovo explores the new centrality of the preliminary ruling proceedings in the revised rules of procedure of the Court of Justice, in connection with the actual and future delimitation of jurisdiction between the ECJ and the General Court. Then, his article focuses on the procedural arrangements introduced by the revised ECJ Rules of procedures and other sources, aimed at balancing the need to ensure the coherence and uniformity of EU law and to strengthen the ‘constitutional authority’ of the Court.

Before the special section on “The View from the Bench”, Gábor Halmai presents some conclusive remarks, providing a critical account of the use of the notion of constitutional identity by Member States’ Supreme and Constitutional courts. This is a key element to grasp the tension between unity and pluralism in the composite system of constitutional adjudication. Halmai argues that while a genuine reference to national identity claims is legitimate insofar as a fundamental national constitutional commitment is at stake, the abuse or misuse of constitutional identity by Constitutional courts “is nothing but constitutional parochialism” that can undermine the whole European constitutional construction and subvert the basic principle of sincere cooperation.

INTRODUCTORY ESSAYS

EUROPE AND CONSTITUTIONAL PLURALISM: PROSPECTS AND LIMITATIONS

*Raffaele Bifulco**

Abstract

As far as the EU is concerned, the funding idea is that constitutional pluralism theories take the same role as Calhoun and von Seydel's ideas with respect to federal theory. They were developed at a time when coexistence seemed possible, just as in the early days of every federal union, when the sovereignty problem does not seem insuperable. The economic crisis has brought out an increasingly hegemonic reality of intergovernmental relations. This is why the only way to avoid such drift is strengthening the democratic principle.

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1. Discussion topics

Theories on constitutional pluralism in the European Union (EU) developed somehow similarly to the foundational elaborations on federalism. It is a classic theme, part of the theory of law and constitutional law. In fact, without the possibility of forming a system, the study of law risks being identified with the analysis of single legal provisions, with poor results as far as the

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function of law is concerned. At the same time, when law becomes a system and is studied as such, an issue of unity arises, which has at least two fundamental dimensions.

In the first dimension, unity implies the idea of closure, autonomy and independence with respect to other legal systems; in the second dimension, unity also implies the relationship of this closed legal system with others characterised by a similar or very similar structure, both inside and outside the legal system. This second unity dimension is useful to identify and define the system taken into consideration, to the same extent as suggested by the first dimension. To sum up, the unity of the legal system is an indispensable requirement to complete the identity of the system. Identity is formed above all through comparison with others, with a multiplicity of entities.

Traditionally, the European legal theory has dealt mainly with the closing-opening relationship of the legal system as for phenomena occurring within the single legal system. Hence, the great studies tradition that can be synthetically defined as legal pluralism: starting from von Gierke's studies, the legal theory will become, with different approaches and purposes, increasingly focused on the opportunity of a plurality of systems within the general system. This generally coincides with the State system (a representation of this plurality of approaches can be found in contributions by Ehrlich, Hauriou, Romano, Laski). In the framework of a strongly state-based tradition, which delegated the discipline of relations between national systems to international law, the great theoretical challenge focused on the possible conception of the legal system as a closed entity, at the same time possibly containing other legal systems¹.

The overwhelming European Union phenomenon has nevertheless imposed, in an increasingly intense way, the need to reconsider the problematic relationship between unity and pluralism, not only from an internal point of view, but also and above all from an external one. The theories that, until a defined moment in the twentieth century had responded to the practical needs for relations between states, are in crisis because of the peculiar traits of the community (and following, union)

¹ In this light, the first chapter of E. Ehrlich's *Grundlegung der Soziologie des Rechts* (1913) is a fundamental point of reference.

phenomenon. One single authoritative example will suffice. In a series of lectures on the legal system published in 1960, a scholar such as Norberto Bobbio organizes the relationships between systems in terms of interference, identifying three types: interferences related to the temporal sphere, to the spatial sphere and to the material sphere (when he speaks about “material” Bobbio postulates that the legal systems regulate the same subjects). According to Bobbio interferences arise because, out of three areas, the systems have two in common. Depending on the type of interference, mechanisms of reception (temporal interferences), delay (spatial interferences), *reductio ad unum*, subordination, coordination, separation (material interferences) come into play².

The Union phenomenon specificity lies in a hypothesis not explicitly considered by Bobbio, that is to say, in the expansion of the interference to all three areas. Interestingly, in this case, the Italian law philosopher believes that talking about interference and therefore relations between different systems is not appropriate because of the process of (potential) identification between systems, which excludes mutual autonomy. In this context, the theoretical problem of the relationship between pluralism and unity of the system takes on new forms and strength, since the idea of simultaneous temporal, spatial and material system interferences, compatible with the maintenance of the autonomy of interfering systems, was traditionally excluded from the legal cultures of the States that are currently part of the EU³.

The complexity of the Union phenomenon arises specifically from the simultaneous reconsideration of these three elements, from the need to (re)think them as a coexisting entity. Obviously, this starting point implies an underlying epistemological relativistic assumption, namely that every concept of exclusivity of

² N. Bobbio, *Teoria dell'ordinamento giuridico* (1960), at 202.

³ One of the most precise critiques to constitutional pluralism comes from J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 Eur. L.J. 4 (2008), at 414-6 and Id., *Another Look at Constitutional Pluralism in the European Union*, 22 Eur. L.J. 3 (2016), at 369-70, who, however, starts from an excessive dichotomic contrast (in my opinion) between pluralism and closure. In other words, legal pluralism in itself, if the Author is properly understood, would always come into conflict with every legal system's structural principles, such as order, security, certainty of the law.

the system is, currently, out of history and out of date⁴. The development of the history of legal culture seems to reverse its course: the unity of the system, with all its dogmatic additions, is no longer pursued, replaced by a plural coexistence of systems interfering with each other from multiple points of view. The prospect of conflict between systems thus becomes endemic.

In recent years, the relationship between pluralism and unity has taken on further forms and dimensions linked to the intensification of phenomena variously attributable to the so-called globalization. The pluralism that has always characterized the international system has, in fact, seen the rise of new entities: international organizations, regional international systems, supranational systems but also, and even more problematically, private entities acting in peculiar social spheres, such as telecommunications, international trade, sport regulations. These system entities, on the one hand, are clearly not attributable to a state-based experience and, moreover, unrelated to international law categories, which rely, for better or for worse, on statehood. Not surprisingly, scholars are trying to reorganise the fragmentary and currently precarious so-called global law by using state law categories, as shown by the debate on the constitutionalization of international law⁵.

Considering the context, I would like to try to provide a concise picture of the fundamental elements that characterize constitutional pluralism theories, aimed at explaining the relations between the EU and the member states through constitutional law categories, or rather through a reformulation of these categories. These theories have also developed because of the famous *Maastricht-Urteil* with which the German Federal Constitutional Court placed a heavy mortgage on relations between the EU and the member states⁶; however, their theoretical perspective has proven to be long-term.

⁴ N. Walker, *The Idea of Constitutional Pluralism*, 65 *The Modern L.R.* 3 (2002), at 338.

⁵ On this point, please refer to R. Bifulco, *La c.d. costituzionalizzazione del diritto internazionale: un esame del dibattito*, 91 *Riv. int. fil. dir.* 2 (2014), at 239 ff.

⁶ This link is emphasized by J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, cit., in part. at 412.

Their interest features at least two aspects. Firstly, these theories, strongly rooted in a European pluralistic culture⁷, offer a very interesting escape route to the well-known discussion on the true nature of the EU, namely whether it is a federal state, a confederation or a peculiar entity. The second reason concerns the ability of these theories to describe the actual state of the art of the EU and its fragile balance⁸.

I will afterwards try to describe the main features of constitutional pluralism theories (2), and then show the opportunity (or as someone would say, the need) to go beyond the precarious balance which currently characterises theories of constitutional pluralism. This theoretical effort, which obviously presupposes highly significant social and institutional changes, is necessary in order to avoid an unconscious shift towards forms of relationship between systems that are no longer sustained by a logic of balance, but rather of hegemony (3). This will be followed by a few short conclusions (4).

2. Theories of constitutional pluralism: pluralism beyond the state

Theories of constitutional pluralism use the same conceptual root upon which pluralistic democracies have developed. However, the system level at which these theories work is different: if the concept of pluralism arises within the state framework, theories of constitutional pluralism are mainly aimed at inter-

⁷ M. Poiras Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in J.L. Dunoff, J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, (2009), at 371, which highlights how constitutional pluralism follows the same path as constitutionalism.

⁸ For a review and reconstruction of the debate on constitutional pluralism see L. Pierdominici, *The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?*, 9 *Perspectives on federalism* 2 (2017), at 119 ff., which highlights its descriptive and regulatory aspirations (part 127); please also cf. M. Avbelj, *Supremacy or Primacy of EU Law – (Why) Does it Matter?*, 17 *Eur. L.J.* 6 (2011), at 760-3, who observes how the pluralistic model (defined as ‘Heterarchical Model’ and opposed to models defined as ‘Hierarchical’ and ‘Conditionally Hierarchical’) is the most suitable to face the challenges of a European integration.

legislative relations, in particular in the context of the EU⁹. Constitutional pluralism thus arises from an evident need to rationalize these relationships¹⁰.

In this regard, a preliminary question arises: is it possible to “export” the pluralism category outside the state dimension? From a theoretical point of view, an affirmative answer is easily provided by the well-known theory of the plurality of legal systems; as known, this hypothesis originated with the purpose of denying the state nature of the rule of law, as well as the state monopoly in the creation and application of law¹¹. More generally, this function of opposition to the monopolization of law by the state belongs to all pluralistic theories. What is certain is that, when juridical theory welcomed a pluralistic thrust and began to elaborate it in a juridical system, it also paved the way for an extension of the pluralistic category beyond the state dimension. The fact that the relationship between the EU and the member states can be observed from a plurality point of view as for legal systems is a more than plausible research hypothesis¹².

As for constitutional pluralism, while the fundamental principle of every pluralistic theory remains, namely the heterogeneity of the social reference structure, the subjects taken into consideration are not individuals, groups, intermediate entities; on the contrary, they are the states themselves, their legal systems in relation to the EU legal system. The peculiarity of the constitutional pluralism prospect is the non-hierarchical interpretation of this relationship, therefore the main characteristic of the pluralistic theory in its inter-legislative version is, to use an expression by Neil Walker, the incommensurability of the claims originating at different system levels¹³. The same goes, although in

⁹ Please refer to M. Poiares Maduro, *Courts and Pluralism*, cit., at 356, who places the EU in the framework of a pluralism, which he describes as “internal”.

¹⁰ M. S. Giannini, *Le relazioni tra gli elementi degli ordinamenti giuridici*, Riv. trim. dir. Pubbl., 4 (1990), at 1002.

¹¹ S. Romano, *L'ordinamento giuridico* [1918] (1945), II ed.; specifically M. S. Giannini, *Gli elementi degli ordinamenti giuridici*, in *Studi in onore di E. Crosa*, II, (1960), at 962

¹² See M.S. Giannini, *Gli elementi degli ordinamenti giuridici*, cit, at 966.

¹³ Specifically, N. Walker, *The Idea of Constitutional Pluralism*, 65 *The Modern L. R.* 3 (2002), at 338, writes: “the very representation of distinct constitutional sites - EU and member states - as distinct constitutional sites implies an

a perspective focused on the relationships between the Courts of the respective systems, for the assumption according to which their respective interpretative power is always and in any case definitive¹⁴.

The considered systems - the member states and the EU - are therefore placed on a level playing field according to an internationalist perspective, characterised by the absence of a set of rules - such as international law - aimed at regulating the relations between the different parts. From this point of view, the examined theories mark a strong discontinuity both with theses framing the Union phenomenon in the context of international law and with theses following traditional constitutionalism, namely considering states as the only subjects with constitutional authority. In a perspective devoid of any vertical logic of inter-legislative relations, these theories expressly state that the European system has developed beyond the traditional boundaries of international law and acquired a constitutional dimension, comparable to that of the States¹⁵.

This vision brings together two theoretical moments that have marked the history of European legal culture, as well as constitutional. The first, which has already been mentioned, is undoubtedly constituted by the pluralistic current, in particular because of the way it was developed by French and Italian

incommensurability of the knowledge and authority (or sovereignty) claims emanating from these sites”.

¹⁴ Or ‘finalised’, according to N. MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 Eur. L.R. 3 (1995), at 264, as a comment to the German constitutional Court judgement on the Maastricht Treaty.

¹⁵ On this, please refer to I. Pernice, who, while considering the globalisation and supranationality phenomena, distances himself from the necessary link between State and constitution (I. Pernice, *De la constitution composée de l'Europe*, 36 RTD eur. 4 (2000), at 625; Id., *Does Europe Need a Constitution? Achievements and Challenges After Lisbon*, in A. Arnulf, C. Barnard, M. Dougan, E. Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, (2011), at 96) to adopt a contractual and functional view of constitution. The outcome of this theoretical path is the recognition of the EU as a system with a constitution, partly originated from the Treaties and partly from national constitutions (*Does Europe Need a Constitution?*, quot., 89); more recently N. Walker, *The Idea of Constitutional Pluralism*, cit-, at 337.

institutionalism; this new way of evaluating law is the foundation of an idea: law does not necessarily come from a single source¹⁶.

The second moment is provided by the Hartian elaboration of the 'point of view'. By seizing the potential of Herbert Hart's intuition, Neil MacCormick uses the relativizing *point of view* perspective to distance himself from Hans Kelsen's monistic vision and lay the foundations for a configuration of relations between the EU and the member states based on overlap, interaction and the absence of hierarchy¹⁷. Thus, the theoretical foundations of constitutional pluralism are laid. Pluralism takes shape specifically from a consideration of the heterogeneity of the system levels, united by prospects of value, but at the same time open to conflict hypotheses.

The characterisation of these theories in a pluralistic perspective therefore leads to the exclusion of any hierarchical logic in the configuration of relations between the EU and the member states. The same principle of prevalence of EU law is questioned when the right to the final say is an open issue, entrusted to a dialogue between the Courts based on a forceful relationship rather than on legal principles¹⁸. The European juridical experience - both as for the coexistence of a plurality of constitutional entities and the *Verfassungsverbund* version (as well known, this is the original concept from which Pernice's multilevel constitutionalism theory develops) - is described as pluralistic and cooperative, far from federal models that would imply hierarchical systems of logic¹⁹.

This position can be explained partly by a unilateral concept of federal experiences (as I will try to outline in the final part of this paper), partly by the analysis method substantially followed by these theories. This method, in order to rigorously describe the complex European reality, avoids verifying the correspondence of the formulated theory to established prescriptive models. In other words, the distance from federal models is clearly explained by the

¹⁶ Therefore, N. MacCormick, *Beyond the Sovereign State*, in 56 *The Modern L.R.* 1 (1993), at 18, writes about "systems of systems of rules".

¹⁷ N. MacCormick, *Beyond the Sovereign State*, cit., at 8.

¹⁸ This is one of the constitutional pluralism profiles mostly criticised by J. Baquero Cruz, *Another Look at Constitutional Pluralism in the European Union*, cit., at 371-2.

¹⁹ I. Pernice, *Multilevel constitutionalism in the European Union*, 27 *Eur. L.R.* (2002), at 511 ff.

intent to describe the European reality (which, at the moment, does not have the features of a federal state) and not to prescribe possible objectives²⁰. At the same time, if on one hand a mere description of the situation allows these theories to criticize the most consolidated explanatory models of reality (think of the distance from EU internationalist theories, from state constitutional theories, etc.), on the other hand it risks depriving them of the prescription features which undoubtedly characterize all legal theories.

Aware of such risks, the mentioned theories highlight the evolutionary character of the European experience, so as not to exclude the possibility of sudden innovations, even far from the logic of constitutional pluralism²¹.

If this is the scenario in which constitutional pluralism moves, clearly, as for a possible conflict of systems, a unique, permanent structural or procedural solution is not provided. I would indicate this as a further feature of constitutional pluralism theories. On this point, even though they are different, the positions of the authors go in the same direction. The conflict is regarded by some as an exceptional hypothesis²² or an issue to be entrusted to political decisions²³ or even as a hypothesis to be solved according to the principles of the rule of law²⁴.

²⁰ In this sense, cf. I. Pernice, *De la constitution composée de l'Europe*, cit., at 642, for whom multilevel constitutionalism tries to explain the existing constitutional system, not subvert it through the imposition of actions by the constitutional power. On the merely descriptive nature of Pernice's position, cf. relevant criticisms by G. della Cananea, *Is European Constitutionalism Really 'Multilevel'?*, 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2 (2010), at 300-1.

²¹ In particular, cf. I. Pernice, who, while building his *multilevel constitutionalism*, composed by two complementary but different constitutional systems, states in several occasions that it is not a static constitution, rather a constitutional process (*De la constitution composée de l'Europe*, cit., at 647; *Multilevel constitutionalism in the European Union*, cit., 707; *German Constitution and 'Multilevel Constitutionalism'*, in E. Riedel (ed.), *German Reports on Public Law* (1998), at 42).

²² M. Poiares Maduro, *Contrapunctual Law: Europe's Constitutionale Pluralism in Action*, in N. Walker (ed.), *Sovereignty in Transition*, (2003), at 532.

²³ Same goes for N. MacCormick, *Beyond the Sovereign State*, cit., at 9, who however agrees on the hypothesis of relying on international law.

²⁴ I. Pernice, *Multilevel constitutionalism in the European Union*, cit., at 520, according to whom the conflict is referred to national and European Courts and their ability to cooperate. As for the solution of the conflict, Pernice's position seems to set itself apart compared to more "orthodox" pluralists. When asked whether the conflict can be resolved, depending on the case, sometimes

In the elaboration of the conflict we feel the distance of institutional and normative instrumentation that separates constitutional democracies from constitutional pluralism: the former, having at their disposal the circuits of democratic representation and judicial review, manage to channel conflict within well-structured procedures; the second, not benefitting from adequate strategies of proceduralisation and channelling of the conflict, relies above all on the dialogue between the Courts.

The consequence, in dogmatic terms, is that everything tends to become a question of interpretation, even deciding which institution is most suitable to decide²⁵. In a situation of tendentially overlapping systems, the conflict linked to who has the final say, expressed by different and opposing supreme jurisdictional authorities is 'normalized', i.e. considered as a possible hypothesis; however, this does not determine the nature and outcome of relations between systems. This is why in this context the *Kompetenz-Kompetenz* criterion loses value; it is no longer used as a conflict resolution strategy, and becomes, at most, a "powerful evaluation criterion of constitutional maturity"²⁶. However, this solution stems from a concept of law that could be defined as neoliberal, since it explicitly states that the law cannot provide all the answers and that conflicts between systems - such as the one

favouring the EU, sometimes the States, the A. seems to implicitly provide a negative answer, starting from the assumption that, since the superiority of EU law is based on the will of sovereign peoples, this would explain why national courts cannot question the validity and application of EU law (I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, in 36 Common Mkt L. R. 4 (1999), at 715). In this answer, a federal inclination of the Author is perceivable, favouring the prevalence of EU law (in this regard, please refer to the detailed criticism presented by G. della Cananea, *Is European Constitutionalism Really 'Multilevel'?*, cit., at 307-308, on the use of the term 'levels' by Pernice because, unlike 'layers or arenas', it would imply hierarchy.

²⁵ M. Poiares Maduro, *Courts and Pluralism*, cit., at 365.

²⁶ N. Walker, *The Idea of Constitutional Pluralism*, cit., at 350; in this sense, see I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, cit., at 710, according to whom member states lost their *Kompetenz-Kompetenz*. M. Avbelj also highlights this aspect in *Supremacy or Primacy of EU Law*, cit., at 752.

opposing the German constitutional court to the Treaty of Maastricht - must be resolved on a political and non-legal basis²⁷.

Needless to say, this legal perspective risks taking the EU far back, that is to say, to a traditional international law logic, to a balance between states ensured not by law but by concrete relations of force²⁸.

As long as it was used within state systems, the category of pluralism, given its intrinsic tendency to deny the State legal monopoly, has certainly represented a push towards fragmentation and, therefore, towards an aggravation, so to say, of the decision-making process, which, however, did not highlight the need to attribute the *Kompetenz-Kompetenz* to a specific subject. Thus, the two polarities, pluralism and unity of the system, were held together. In a new post-national scenario, the traditional features of sovereignty can no longer be defined from a theoretical point of view or according to the reality of relations between member states and the EU²⁹.

The fourth characteristic of the examined theories is thus given by a concept of sovereignty that is completely open, "undecided", not closed by the explicit rejection of sovereignty as a category capable of explaining inter-legislative relations within the European framework³⁰. Positions can diverge as for development models, but they aim at the same goal. This also according to dual federalism supporters, such as Poiares Maduro, who writes about competitive sovereignty - a prospect that, although in contradiction, seems to reconcile the opposing terms developed by the necessary closure of the legal system and the plurality of legal systems - consequently, the issue of sovereignty remains unsolved,

²⁷ N. MacCormick, *The Maastricht-Urteil*, quot., 265; in this sense, also M. Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 *Modern L.R.* 1 (2007), at 23.

²⁸ Such mention can be found in J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, cit., at 418.

²⁹ This according to MacCormick, *Beyond the Sovereign State*, cit., at 14; I. Pernice observes in more than one instance, that national states have currently lost their sovereignty as for their constitutions (*Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, cit., at 726; *German Constitution and 'Multilevel constitutionalism'*, cit., at 50.

³⁰ N. MacCormick, *Beyond the Sovereign State*, cit., at 10.

as long as legal systems are able to coexist³¹. In other studies, sovereignty becomes a precarious concept characterised by autonomy, no longer by exclusivity: regulations belonging to specific sectors or functions can become more autonomous without hindering the autonomy of the other system³².

The fifth characteristic of constitutional pluralism is closely related to an open concept of sovereignty: the substantial acceptance of the democratic deficit that characterises the EU. I write substantial acceptance because, although awareness of the problem is tangible, no solution is offered.

We move from prospects aimed at a solution of the deficit³³, to others where the solution seems to be entrusted to the law's self-referentiality³⁴, and others that finally resolve the issue while remaining aware of the democratic deficit problem. They fill the democratic gap of the European institutions through the democratic nature of national representative institutions³⁵.

With specific reference to the issue of democratic legitimacy, the solutions - or better, the lack of solutions - of constitutional pluralism, highlights many perplexities. In my opinion these theories, starting from the "indecision" of sovereignty, are not aimed at resolving the issue of a low democratic mandate since its solution - namely the actual adaptation of the Union legal system to the demands of a representative democracy (beyond the declarations of principle contained in the Treaty of Lisbon) - would require a profound transformation of the European legal system³⁶. In other words, addressing the issue of democratic legitimacy

³¹ M. Poiares Maduro, *Contrapunctual Law*, cit., at 523; the same direction was already followed by I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, cit., at 706.

³² N. Walker, *The Idea of Constitutional Pluralism*, cit., at 346-7.

³³ M. Poiares Maduro, *Contrapunctual Law*, cit., at 527.

³⁴ N. Walker, *The Idea of Constitutional Pluralism*, cit., 352: "from a broad constitutional perspective law and politics are most aptly conceived of as mutually constitutive and mutually contained, thus challenging the presumption of the credibility, still less of the necessity, of an *a priori* political community".

³⁵ I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, cit., at 725.

³⁶ Appropriately, M. Goldoni, *Constitutional Pluralism and the Question of the European Common Good*, in 18 Eur. L.R. 3 (2012), at 399-400, writes that constitutional pluralism (in the M. Poiares Maduro version) appears too "court centred". More generally, the Author notes that the limit of constitutional pluralism is to be found "in the absence of a sophisticated account of the interaction between the institutions belonging to different levels" (at 401).

implies overcoming the openness of the legal order and the indecision over sovereignty, thus democratically strengthening the European institutions and favouring the loss of political autonomy by the member states and the involved political communities. While theorizing the superfluity of a legal response with respect to the core of the conflict and the correlated need for a political solution³⁷, constitutional pluralism has become a special interpreter of this dilemma, substantially removing the issue of democracy and of the necessary complex transformations needed to overcome the democratic deficit.

The peak of the trend has been reached in an extreme form of pluralism, which defines itself as radical (radical pluralism), opposed to "pluralism under international law"³⁸. While noting the change in scenario imposed by post-national space, which would turn the traditional constitutionalism schemes into obsolete strategies, based on a hierarchical logic, radical pluralism wants to favour incremental processes, able to activate forms of cooperation and mutual tolerance³⁹. The prerequisite of this form of pluralism is, if not the explicit removal, surely the hindering, loss of value or circumvention of the main democratic issues, related to the goals of the community under analysis, to all supreme laws and fundamental values⁴⁰.

Another classic strategy to overcome the problem of the democratic deficit is trying to compensate the relationship between the European legal system and national parliaments. Some authors believe this is a solution allowing us to overcome, all of a sudden,

³⁷ This according to N. MacCormick, *The Maastricht-Urteil*, cit., 265.

³⁸ This is stated in his late papers by MacCormick, who also started, with his considerations, the debate on radical pluralism.

³⁹ N. Krisch, *Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space*, 24 *Ratio Juris* 4 (2011), at 399.

⁴⁰ This according to N. Krisch, *Who is Afraid of Radical Pluralism?*, cit., 407: "We find certain advantages in a truly, "radically" pluralist structure in which fundamental question - about the scope of the polity, ultimate supremacy norms, key values - are bracketed and worked around. Such a pluralism favours pragmatic, incremental process of mutual accommodation and potential convergence, without overarching the authority of the norms and institutions that form the regime". Krisch's position recalls C.R. Sunstein's position on partially theorized agreements, (C.R. Sunstein, *Designing Democracy* (2001)). For a critique of Krisch's radical pluralism cf. G. Martinico, *Apertura ed olismo nel diritto costituzionale postnazionale. Appunti per una critica al pluralismo di Nico Krisch*, *Diritto pubbl. comp. ed eur.* 3, at 103 ff.).

very delicate theoretical questions. It is precisely the case of those who say that Treaties have a direct popular foundation, or more precisely, a foundation in the peoples of the Union; this because primary law always finds a counterpart in ratification procedures adopted by national parliaments. Consequently, the democratic principle, which in a representative form is fully implemented in nation states, is also deeply rooted in the Union dimension⁴¹. Yet, you will easily observe that such a compensatory function has apparent limitations, namely that, at European level, the principle of representative democracy continues to be only partially implemented.

The link between the removal of the democratic issue and the determined will of constitutional pluralism to disconnect the Union phenomenon from the state phenomenon cannot be ruled out. Since the logic of democracy pushes for a public power rooted in popular sovereignty, the loss of value of the democratic issue could mark the discontinuity of constitutional pluralism compared to popular sovereignty theories⁴².

3. The hegemonic risks stemming from the impact of the single currency and the economic-financial crisis

In my opinion, all these theories are knowingly temporary, unbalanced on top of a plural coexistence as well as on an irreplaceable principle of unity. However, complex the interrelation system, in order to allow the existence of a legal system, both are necessary.

Consequently, these theories seem to reflect a very important and recent phase of relations between the EU and the member states, characterised by moments of strong pluralism and by reactions tending to closure. The phase of openness, of creative indecision in the system - and peak for constitutional pluralism theories - could last only in case coexistence was a path accepted by

⁴¹ I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, cit., at 716-7.

⁴² Please cf. the "residual" interpretation of popular sovereignty by N. MacCormick, *Questioning Sovereignty* (1999), at 129-130, according to whom the more (internal) sovereignty is widespread, the more difficult is the search for an entity that holds sovereign power, and the more necessary is to appeal to the people as the ultimate holder of sovereignty.

all the subjects taking part in constitutional pluralism⁴³. A coexistence that seem to be questioned first by the creation of the single currency, and then by the economic and financial crisis.

As for economic politics, the introduction of the Euro has resulted in the loss of a key factor, with an impact on the range of instruments available to States in order to build their own redistribution policies. By removing one of its most important economic levers, the transfer of monetary policy to Frankfurt has undoubtedly affected a key objective of pluralistic democracies, that is to say the role of the State as a regulator of social conflicts⁴⁴.

However, the economic and financial crisis, which exploded in the United States and quickly expanded to Europe, gave the *coup de grace* to a system structure that, rightly or wrongly, had resisted since 1957. This is not the proper place to list all the tools aimed at facing the biggest economic crisis since the thirties of the last century. To sum up, the EU has taken measures to financially assist member states through the transfer of economic resources; it has following profoundly revolutionized the coordination and surveillance mechanisms of national economic policies, adopting a series of deeply innovative regulatory measures; finally, it has developed programs aimed at affecting the competitiveness of national economies.

These interventions have completely transformed the balance of the relations between the EU and the member states: now the EU carries out part of the redistribution policies (even if these interventions only indirectly pursue the traditional objective of redistributive policies, namely social justice); the activation of these Union policies is subject to strict conditions controlled by EU bodies, and their compliance is entrusted to sanctioning mechanisms. The aforementioned interventions have also been inspired by an economic policy approach, which effectively excludes different national economic choices and accentuates social inequalities⁴⁵. From this point of view, the principle of budget balance, which adoption is recommended in constitution or constitutional sources, seems to go well beyond budget policy. It

⁴³ M. Poiares Maduro, *Contrapunctual Law*, cit., at 523.

⁴⁴ B. de Giovanni, *Sovranità: il labirinto europeo*, 1 *Lo Stato* 1 (2013), at 19-20.)

⁴⁵ See F.W. Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, 21 *Eur. L.J.* 3 (2015), at 391.

becomes the mark of a precise economic model within the market economy context.

This model is now radiating within member states through well-defined tools and programs. Among these, first, the “Euro Plus Pact”, which identifies measures to be adopted by each State in the context of stability programs: these are measures concerning fiscal issues, the financial sustainability of social security, health, social care, income policies and productivity policies. Programs, as you can see, that shape the features of a welfare state (the “Pact for Growth and Employment”, concerning measures in the field of public administration and justice, is also worth mentioning).

If these are currently the main EU areas of intervention - please note that they were at the heart of the social policies of the member states - the procedural aspects necessary for these measures to be effectively adopted are defined in the “Stability and Growth Pact”, built on the European Semester and on the Common Budget Calendar, which promotes a strict control of national budgetary processes by the EU institutions, firmly restricting the member states areas of choice as for economics.

The described model is definable as a radical transformation of the inter-legislative scenario on which theories of constitutional pluralism were based: the consolidation of the market economy model as developed by European and international organizations, the progressive loss of economic policy options by constitutional democracies, the erosion of the distributive role of the State. In this context, which changed in the course of a few years, thinking about competitive sovereignty is very difficult, if you do not forget how that competition is ending.

We have entered a phase where, in some cases, the member states have decided or have been forced to transfer their powers to the EU as for economic sovereignty, even if the formal framework is still characterised by openness and indecision, and the EU continues to be an entity formally devoid of sovereign powers. By continuing to reason in terms of constitutional pluralism, we risk hiding the actual reality of inter-legislative relations, increasingly characterised by the entrustment of control powers to an entity - the European Commission - endowed with low democratic mandate⁴⁶.

⁴⁶ F.W. Scharpf, *After the Crash*, cit., at 393. For a wider description, please cf. M. Everson, C. Joerges, *Reconfiguring the Politics-Law Relationship in the Integration*

This means that decisions on the contents of the Union deliberations will be taken by a small group of *élites* consisting of technocracy and political interests of the most influential States.

The budget balance issue, which led Germany to modify its constitutional framework and then impose that choice on other member states, shows that this shift has already taken place. Now it is a matter of understanding whether this arrangement will become definitive or will be susceptible to a sea change.

4. Conclusion

As I have tried to explain, indecision on sovereignty and the removal of the democratic legitimacy issue have a stringent logic, linked to the will to avoid the traumatic experience brought out by the formation of a European people. In other words, the theories of constitutional pluralism have always implied that the democratic deficit can be overcome through the creation of a public sphere, a system of parties, a European people: entities that before were not at our fingertips. The answer that these theories have provided, however, is partial because, by theorizing the superfluity of a legal solution in a conflict situation, thus paving the way for political power relations⁴⁷, they contributed to eclipse one of the fundamental functions of the legal system, namely the solution of the conflict and the reconstitution of unity.

On the other side, it should be added that, those constitutional law scholars who are most linked to a state dimension, have not been able to find solutions to the democratic deficit problem. The majority of those scholars rely on a European tradition that tends to solve the federal phenomena/processes through the confederation-federation dichotomy, formulated at the end of the nineteenth century and focused on the role of sovereignty, and have thus found shelter behind the EU as an entity of its own kind; this perhaps helps describing a complex situation but does not solve the underlying issues. Finally, the position of state-based constitutionalism, even though opposed to constitutional pluralism, has also contributed to the process of

project through Conflict-Law Constitutionalism 18 Eur. L.J.5 (2012), at 644, in part. at 663; M. Dani, *Il diritto pubblico europeo nella prospettiva dei conflitti* (2013).

⁴⁷ Cf. N. Walker, *Constitutional Pluralism Revisited*, 22 Eur. L.J. 3 (2016), at 335.

indecision and removal of problems⁴⁸. Faced with the progressive transfer of sovereign powers, accelerated due to the crisis, we urgently need to find a way out that combines the principle of pluralism, which features European public law, with the necessary unity that, as mentioned, characterizes every legal system. In my opinion, the road opened by constitutional pluralism should not be abandoned, but only perfected and made coherent⁴⁹. In particular, it seems to me that the logic of constitutional pluralism theories has been useful to introduce, in a seemingly unconscious manner, patterns of categorisation that are typical of federal processes in their start-up phase⁵⁰. As I already mentioned, this aspect is not analysed by constitutional pluralism's theorists, perhaps for fear of falling into an old discussion on the European legal tradition, discussing whether the federation is or is not state-based. The consequence is the conclusion that, if the EU is a federation or develops federal traits, it is also necessarily a State or an entity with similar features⁵¹.

On the other hand, we know that the diachronic examination of federal associative systems shows initial phases characterised by rooted contractual residuals⁵², where the issue of sovereignty is not a priority⁵³. Like all federal association processes - although it has specific traits different from the processes in the USA, Switzerland or Germany - the EU also experienced a long start-up phase, during which the issue of sovereignty remained open, and was kept on

⁴⁸ For a critique to this approach cf. R. Schütze, *European Constitutional Law* (2016), at 53-59.

⁴⁹ As for the usefulness of constitutional pluralism, described as a "powerful theoretical framework (and a starting point of further research)", M. Goldoni, *Constitutional Pluralism and the Question of the European Common Good*, cit., at 405.

⁵⁰ More insights can be found in N. Krisch, *Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space*, cit., at 388.

⁵¹ Cf. D.J. Elazar, *The New Europe: a Federal State or a Confederation of States*, in 4 Swiss Pol. Sci. R. 4 (1998), at 132-3, on how European *leaderships* tend to reason in State-based terms.

⁵² Please cf. S. Ortino, *Introduzione al diritto costituzionale federativo*, (1993), at 242-3 and O. Beaud, *Théorie de la fédération* (2007), in part at 108.

⁵³ C. Schmitt, *Verfassungslehre*, (1928), at 361 ff. for a brilliant continuation of C. Schmitt's statements from a European point of view, cf. C. Schönberger, *Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas*, 129 Archiv des öffentlichen Rechts 1 (2004), at 81 ff., in part. at 117-119.

hold⁵⁴. This is the (unconscious) link between constitutional pluralism and federal theory: the constitutional pluralism theory was useful to shape an important phase of relations between systems in the EU. The real limitation of constitutional pluralism is to be found in the idea that this phase - during which homogeneity is based on legal and economic values rather than on traditional homogeneity factors within federations (nationality, language, etc.) - was a definitive phenomenon. In some ways, constitutional pluralism was the true and refined epigone of a successful and influential line of thought: integration through law⁵⁵.

However, the substantial depletion of the sovereignty of member states caused by the economic crisis currently calls for a different and substantial homogeneity, which can only be sought through a renewed development of the democratic principle. To this end, the most appropriate route is imagining increasingly intense forms of participation of the European Parliament and member states in decision-making processes and differentiation paths, thus allowing member states to safeguard and merge their own identity against union public policies⁵⁶. This seems to be the starting point of a path leading to the coexistence of a plurality of 'demoi', impossible to achieve without a prior democratic homogeneity⁵⁷.

⁵⁴ See J. Elazar, *The New Europe*, cit., at 135, according to which Europe is a "revival of Confederation". This reconstruction is criticised by N. Walker, *Constitutional Pluralism Revisited*, cit., 346-7, according to whom, in the end, federal logic replicates schemes belonging to a State-based tradition.

⁵⁵ M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience* (1985).

⁵⁶ For a knowingly provocative explanation of viable solutions, see F.W. Scharpf, *After the Crash*, cit., at 400-4.

⁵⁷ In other words, if the idea of "co-existing multiple demoi", shared by J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 Eur. L.J. 3 (1995), at. 252, is identified as the ideal finish line. Undeniably, its achievement cannot be entrusted to excessively constructivist solutions, largely explained by the difficulty to resolve issues related to the democratic deficit.

THE ADVANTAGE OF HAVING THE “FIRST WORD” IN THE COMPOSITE EUROPEAN CONSTITUTION

*Nicola Lupo**

Abstract

The article deals with the role that courts, in particular Constitutional Courts, play in the enforcement of the composite European Constitution, in relation to other actors, ordinary judges and legislators, at national level, and the Court of Justice of the European Union, at supranational level. It is argued that more important than determining who is entitled to pronounce the “last word” in this complex setting, is to answer the question about who has the “first word”. Besides the role that domestic legislators are expected to play and that they often fail to fulfil, the article supports that Constitutional Courts are in the best position to frame constitutionally sensitive questions through the preliminary reference mechanism to the Court of Justice in order to let the composite European Constitution work properly and to allow national constitutional identities to be effectively taken duly into account by the Court in Luxembourg. With this regard, the “Taricco saga”, with a fruitful interplay between the Italian Constitutional Court and the Court of Justice, is illustrative of such a best practice.

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1. Introduction: when the first word is more important than the last one

The growing interconnection of legal orders in the European Union increasingly questioned the existence of the fundamental pillars of the modern State. According to some, this phenomenon even changed the nature of the modern State, transforming it into a new kind of State, a sort of "Communitarian State" or "Member State"¹. Regarding the judiciary, the identification of a supreme authority within a legal system has been increasingly challenged. The ultimate question has usually been framed in terms of the right to say the last word. Who has the right to the last word in case of a crucial constitutional conflict at European level?

This crucial question partly reminds of the debate between Hans Kelsen and Carl Schmitt, on who the guardian of the Constitution should be², and emerges again within the framework of new dilemmas in the European legal space: who is entitled to the last word between national and supranational judicial institutions? What is left to national and EU legislators? Where is the ultimate source of constitutional authority? This contribution tries to flip the coin and addresses a different question, which may be less attractive at a first sight, but more promising in terms of answers: who has the right to the first word? What actors are empowered with the right of shaping ultimate constitutional conflicts in the first instance? The underlying assumption is that some of the traditional schemes of the modern State can be hardly applied to the European

¹ See, converging on this idea, A. Manzella, *Lo Stato "comunitario"*, 22 Quad. cost. 2 (2003), at 273; R. Toniatti, *Forma di Stato comunitario, sovranità e principio di sovranazionalità: una difficile sintesi*, DPCE 3 (2003), at 1552; F. Palermo, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale* (2005), espec. 228 ff.; moreover, in the political science literature, see A. Sbragia, *From 'Nation-State' to 'Member-State': The Evolution of the European Community*, in P. M. Luetzeler (ed.), *Europe After Maastricht: American and European Perspectives* (1994), 69 ff., espec. 87, and C. Bickerton, *European Integration: From Nation-States to Member States* (2012), 51 ff.

² The debate has been recently reported, in English, by L. Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the limits of constitutional law* (2015).

Union in the current constitutional dialogue, while it is not clear whether there is a Court that has the last word, the one that speaks first often plays a crucial role in framing the constitutional questions that other courts and, more in general, other institutions, will be called to answer.

In order to address these issues, the contribution starts by arguing for the necessity, in a composite European Constitution, of having fundamental charters and Courts that do not assume their principles and values in an unmitigated way. Likewise, EU Treaties and national Constitutions contain some clauses aiming to connect the domestic with the supranational legal systems, European and national Courts need to be prone to dialogue, not monopolizing the constitutional scene. This is confirmed also by the so called “Taricco saga”, a recent case of inter-judicial dialogue between Italian Courts and the Court of Justice of the EU, which has also confirmed the (often overlooked) role pertaining to legislators in the composite European Constitution. After re-affirming the need of direct channels of communication between different legal orders, the conclusion aims at showing the importance of who poses the initial question, thus framing the constitutional dialogue in the European legal space.

2. The reciprocal self-restraint of the European Treaties and Member States’ Constitutions

The composite nature of the European Constitution implies, first in the fundamental documents – the European treaties and the national Constitutions – and then, above all, in the Courts asked, at European and at national level, to interpret their own provisions, the ability not to consider the principles and values of which they become carriers as absolute.

In this regard, the European treaties show considerable self-restraint. On the one hand, incorporating as “general principles” of EU law fundamental rights as guaranteed by the ECHR and as a result of common constitutional traditions (Article 6 (3) TEU, with its reference to the constitutional traditions common to the Member States); on the other, by committing to respect the national identities inherent in the “fundamental, political and constitutional structure” of each Member State (Article 4 (2) TEU, with its reference to the

national constitutional identities)³. In addition to these clauses, more general and potentially open to any possible contents, several provisions of both the TEU and the TFEU state that through the procedures they foresee, some decisions need to be adopted by each Member State, “in accordance with its own constitutional requirements”⁴. In doing so, they design a series of procedures that are regulated by both EU law and national norms and involve both EU and national institutions, and could thus be defined as “Euro-national procedures”⁵.

Similarly, and symmetrically, most Member States’ Constitutions contain the so-called ‘European clauses’. Namely, constitutional provisions that implicitly or explicitly, broadly or in a more specific way, aim at opening the domestic constitutional order to norms and principles adopted at European level⁶.

³ On these features see, among many and with different approaches, A. Celotto, T. Groppi, *Diritto UE e diritto nazionale: primauté vs. controlimiti*, in Riv. it. dir. pubbl. com. (2004), at. 1309; M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 Eur. L. J. 3 (2005), at 262; M. Cartabia, “Unità nella diversità”: il rapporto tra la Costituzione europea e le Costituzioni nazionali, in G. Morbidelli, F. Donati (eds), *Una Costituzione per l’Unione Europea* (2006), 185 f.

⁴ For instance, articles 42(2) (common Union defence policy), 48(4) (ordinary revision procedure), 48(6) (simplified revision procedure), 49 (accession agreements), 50(1) (withdrawal) and 54 (ratification of the Treaty) TEU; 25 (additions to European citizenship), 218(8) (mixed agreements), 223(1) (European Parliament’s elections), 262 (jurisdiction on intellectual property rights), 311 (system of own resources), and 357 (ratification of the Treaty) TFEU.

⁵ A similar phenomenon has been spotted and analysed in the remit of EU administrative law: see, for instance, G. Della Cananea, *I procedimenti amministrativi composti dell’Unione europea*, in F. Bignami, S. Cassese (eds), *Il procedimento amministrativo nel diritto europeo* (2004) 307 f.; G. Mastrodonato, *Procedimenti amministrativi composti nel diritto comunitario* (2008), espec. at 99 ff.; C. Eckes, J. Mendes, *The right to be heard in composite procedures: Lost in between protection*, 36 Eur. L. R. (2011), at 651; F. Brito Bastos, *Derivative Illegality in European Composite Administrative Procedures*, 55 Comm. Mkt. L. R. (2018), at 101. It still needs to be analysed under the viewpoint of constitutional law, especially when it assumes a clearer procedural nature (as a supreme law regulating the intersections among the different legal orders on which the political actors operate): see A. Manzella, *Il parlamento federatore*, 22 Quad. Cost. 1 (2002), at 35.

⁶ M. Claes, *Constitutionalizing Europe at its Source: The “European Clauses” in the National Constitutions: Evolution and Typology*, 81 Year. Eur. Law 1 (2012); M. Claes, *Le “clausole europee” nelle costituzioni nazionali*, 25 Quad. cost. 2 (2005), at 283.

The existence of clauses of ‘openness’ towards the international legal order is an original feature of the Italian and German constitutions. Both constitutions contained clauses allowing – respectively – ‘limitations’ (Article 11, in 1947) or ‘transfers’ (Article 24, in 1949) of sovereignty since the beginning, and they have been immediately used as ways for European Communities law’s entry into national legal orders. The inclusion of such clauses looks fully consistent with the lessons driven from the authoritarian experiences and from the Second World War.

The same model was then followed by other Member States, like the Netherlands (Article 62 in 1953, now Article 92), Luxembourg (Article 49 *bis*, in 1956), and Denmark (Section 20, in 1953), with the drafting of general constitutional clauses used as mechanisms for acceding to the European integration process⁷. Especially with the Treaty of Maastricht, when the constitutional nature and the political effects of the European Union were about to become more evident – after having been dissimulated for a long time⁸ – a new series of clauses specifically referring to the European Union were inserted in many Member States’ constitutions. Their main aim was to ease the adaptation of domestic legal orders to some of the provisions included in the Treaty of Maastricht, but often also to implement a series of conditions and requirements for further openings or adaptations to the European integration process⁹.

Even in Member States without a codified Constitution, a similar constitutional phenomenon takes place. Without addressing here all the steps needed for the UK to become a member of the European Communities¹⁰, it might be sufficient to quote the Miller case, in which the United Kingdom Supreme Court

⁷ M. Claes, *Constitutionalizing Europe at its Source*, cit. at 6.

⁸ This dissimulation was fully consistent with the approach followed among others by Jean Monnet, according to whom the best way to conduct the integration process was to avoid dramatic (and thus too-evident) spurts, and to proceed with the ‘politique des petits pas’.

⁹ Along the same line of reasoning, see the analytic examination of the individual clauses (updated after the Lisbon Treaty) presented in Annex III of the study commissioned by the European Parliament (PE 493.046) and conducted by L. F. M. Besselink et al., *National Constitutional Avenues for Further EU Integration* (2014), 263 ff.

¹⁰ See, for instance, using theories of constitutional pluralism, A.L. Young, *Democratic Dialogue and the Constitution* (2017), 276 f.

clarified, judging upon the constitutional consequences of the Brexit 2016 referendum, that as long as the European Communities Act 1972 “remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law”¹¹.

Such ‘European clauses’ entrenched in national constitutions enable the ‘communication’ between the EU and the domestic legal orders and support once more the idea of the existence of a composite Constitution¹². They operate with mutual reference and ensure the openness of both the EU and national legal systems, somehow acting as ‘valves’: that is, like mechanical switches that can raise or lower the amount of (normative) fluid flowing through them, making the two legal orders communicate and interact as components of a unique whole¹³.

3. The necessary self-restraint of European and national Courts and the consequences of the inter-judicial dialogue in the EU

In the same way, when you consider the legal interpreters’ viewpoint, and therefore the viewpoint of the European and national Courts, they must evidently be aware of the fact that they are not alone, and must not monopolize the scene. They are therefore required to show strong self-restraint. Moreover, to continue using the abused and discussed, although effective, metaphor of dialogue¹⁴, it is clear that if one never stops talking, or

¹¹ See par. 61 of the judgment: United Kingdom Supreme Court, *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5 (24 January 2017), available at <http://www.bailii.org/uk/cases/UKSC/2017/5.html>.

¹² L. F. M. Besselink, *A Composite European Constitution* (2007), at 15-20.

¹³ M. Avbelj, *Supremacy or Primacy of EU Law-(Why) Does it Matter?*, 17 *Eur. L.J.* 6 (2011), at 744 reconstructs the mutual relationship between national and European law as ‘heterarchical’ and thus to be reciprocally coordinated rather than considered one subordinated to the other.

¹⁴ In this special issue see the contributions by D. Paris, *Limiting the ‘Counter-Limits’*. *National Constitutional Courts and the Scope of the Primacy of EU Law*; A-O. Cozzi, *The Implicit Cooperation between the Strasbourg Court and Constitutional Courts: A Silent Unity?*; A. Edenharter, *Fundamental Rights Protection in the EU: The ECJ’s Difficult Mission to Strike a Balance Between Uniformity and Diversity*; G. Zaccaroni, *The Good, the Bad, and the Ugly: National constitutional judges and the EU*

if is convinced that he or she is the only one entitled to speak, no dialogue whatsoever can ever be established.

Inter-judicial dialogue in Europe is often depicted as a struggle among judges of different and intertwined legal orders, about which judge should have the “final word” or the “final say” on the interpretation of a certain legal provision¹⁵. This assumes that each one of the many Courts currently coexisting in Europe would aim at playing, in the European legal space, the role normally assigned, within the judiciary of each nation-state, to Supreme Courts or Courts of Cassation: that is, to solve judicial controversies on the interpretation of a certain legal provision, deciding upon appeal on the case-law previously decided by (lower) Courts, therefore stating what the law is. We could even say that every judge would love to play the role famously depicted by US Supreme Court justice Robert H. Jackson: “we are not final because we are infallible, but we are infallible only because we are final”¹⁶.

Indeed, in the inter-judicial dialogue that takes place within Europe, it is questionable whether the last word really is the most important. As no Court is going to play a role similar to the role of Supreme Courts or Courts of Cassation, the struggle for the “final word”, as appealing as this role could look like, would not make much sense. On the contrary, given the composite and constantly evolving nature of the European Constitution, with a high level of social and legal pluralism, it is likely that often there will be no proper “final” decision¹⁷.

Constitutional Identity; C. Tovo, *Constitutionalizing the European Court of Justice? The Role of Structural and Procedural Reforms*.

¹⁵ See, among many, M.R. Ferrarese, *Dal "verbo" legislativo a chi dice "l'ultima parola"*, 63 *Annuario di diritto comparato e di studi legislativi* (2011), espec. at 78 ff.

¹⁶ US Supreme Court, judgment *Brown v. Allen* (344 US 443, 1953). As it has been remarked – by S. Cassese, *Fine della solitudine delle corti costituzionali, ovvero il dilemma del porcospino*, 149 *Acc. Sc. Torino Atti Sc. Mor.* 15 (2015), available at <https://www.accademiadelle scienze.it/media/1126>, at 16 f. – justice Jackson’s sentence assumes the existence of a superior Court, considering absolutely normal that when it exists, it would revert a significant percentage of previous judges’ decisions.

¹⁷ See in particular M. Kumm, *Who is the final arbiter of constitutionality in Europe?: Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, 36 *Comm. Mkt. L. R.* 2 (1999), at 351 (arguing that

As Courts are called – similarly to the Constitutions they are required to apply – to move with a strong sense of self-restraint, it often happens that the “first word” becomes more important than the “final word”. Self-restraint, indeed, is an essential feature of good judges, in any case, especially of judges that in the past have played a crucial role in setting up the pillars of a certain legal order. In the current European Union context, a mention of some constitutional theories referred to the US Supreme Court, the so-called judicial minimalism, could be extremely useful: judges should say “no more than necessary to justify an outcome [...] leaving as much as possible undecided”¹⁸.

All this helps to explain why, in the European inter-judicial dialogue, a crucial role is eventually assigned to the Court that speaks first, not to the one that speaks last: the authority that first submits a legal challenge inevitably takes the centre stage and may affect to a significant extent the resolution of a judicial dispute and the prevailing interpretation of the legal provisions at stake.

This also implies, a bit paradoxically according to the traditional standards, some kind of reward – in terms of visibility and reputation – to the judge who is not afraid to appear humble¹⁹ and decides in particular to ask a preliminary question to the Court of Justice of the European Union, rather than to the judge who thinks to play its role alone, without involving other judges or, more generally, other actors. To put it differently, a referring judge who does not isolate itself claiming its supreme judicial authority may have a much stronger impact in shaping the European legal

“within a pluralist framework, it does not make sense to speak of a final arbiter of constitutionality in Europe”).

¹⁸ See C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999), at 3 f.

¹⁹ On the need for a constitutional judge to adopt a humble approach, see the interview to judge Silvana Sciarra, in this special issue (also connected with the need to build consensus within a collegial body). For an overview of the different approaches that constitutional judges (and interpreters, more in general) can embody see C. R. Sunstein, *Constitutional Personae* (2015).

discourse²⁰. Within this picture, judicial humbleness might prove to be a much more effective attitude than judicial pride²¹.

As judge Giuliano Amato notes in his interview, many famous decisions by Constitutional Courts relating to European integration “were actually postponing a final word on the case”.

4. The (good) example of the Italian Constitutional Court in the “Taricco saga”

In their interviews included in this special issue, all the four judges of the Italian Constitutional Court quoted the “Taricco saga”, and more precisely order no. 24/2017 through which the Court they are members of referred a preliminary ruling to the Court of Justice²².

Indeed the “Taricco saga” offers a perfect example of how inter-judicial dialogue could work and, thanks to the self-restraint of the Italian Constitutional Court and the Court of Justice of the EU, helped to solve issues that could potentially create clashes and conflicts. As judge Amato remarked, the Taricco saga is an example of the fact that “there is no exclusive primacy in the interplay between national and European levels” and a further confirmation that “we are living in times of ‘constitutional duplicity’ and the specific task of each constitutional judge is to contribute to the dialogue among legal culture and legal charters”. It is thus useful to look a bit more into this case, to show the reasons why the

²⁰ For a comparative picture of the different paths followed by the Constitutional Courts of EU Member States and the difficulties they have met see *The Preliminary Reference to the Court of Justice of The European Union by Constitutional Courts*, edited by M. Dicosola, C. Fasone, and I. Spigno, special issue of 16 Ger. L. J. 6 (2015).

²¹ On the many reasons that justify the reluctance of the Constitutional Courts to use the preliminary reference procedure and to “engage in a formal dialogue” with the European Court of Justice see M. Claes, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, 16 Ger. L. J. 6 (2015), at 1331 (noting that some explanations have been found in legal arguments, others in behavioural factors).

²² Italian Constitutional Court, Order no. 24/2017 of 23 November 2016, published in the Italian Official Journal, G.U of 1 February 2017. For a multi-disciplinary debate on it see A. Bernardi and C. Cupelli (eds.), *Il caso Taricco e il dialogo tra le Corti. L’ordinanza 24/2017 della Corte costituzionale* (2017).

approach of the Italian Constitutional Court could be considered a good example.

The Constitutional Court, in its order no. 24/2017, rightly avoided following the tempting path of affirming *a priori* and in absolute terms a yet fundamental constitutional principle, the principle of legality in criminal matters, as a "counter-limit" to assert with respect to EU law.²³ Instead, the Court preferred to ask the Court of Justice for a reassessment, especially in the light of a more careful consideration of the characteristics of the Italian constitutional system, of its own ruling on the "Taricco case". It thus demonstrated a will to face a difficult issue through a preliminary reference to the Luxembourg Court, a channel which the same Court had (a little too late) used, in the case of incidental proceedings, with order no. 207/2013²⁴.

Similarly, in the M.A.S. judgement, the Court of Justice has carefully avoided abiding by the uncompromising and self-centered reading of the European Union's legal order proposed by Advocate General Bot²⁵. In fact, in his conclusions, the Advocate General essentially denied the possibility of the Constitutional Court identifying the rights that make up the Italian constitutional identity pursuant to art. 4, par. 2, TEU and claimed that this task was instead a responsibility of the Court of Justice. Clearly, the acceptance of this interpretive approach on art. 4, par. 2, TEU would have meant disregarding the interpretation of this provision as a "valve clause", by which the European Union legal order limits itself in favour of the legal order of the Member States, in as much as constitutional identity profiles are at stake. It would even have turned it into a sort of an "aggressive clause", through which the Court of Justice could identify from above the elements making up the constitutional identity of each Member State, at least with

²³See, among many, M. Luciani, *Il brusco risveglio. i controlimiti e la fine mancata della storia costituzionale*, 2 Riv. AIC, www.rivistaaic.it, and C. Cupelli, *Il caso Taricco e il controlimite della riserva di legge in materia penale*, in A. Bernardi (ed.), *I controlimiti. Primato delle norme europee e difesa delle norme costituzionali* (2017) 331.

²⁴ Cf. G. Repetto, *Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, 16 Ger. L. J. 6 (2015), at 1449.

²⁵ See Court of Justice of the European Union (Grand Chamber), case C-42/17, M.A.S., 5 December 2017, and the Conclusion of the Advocate General Bot delivered on 18 July 2017.

regard to the identity elements that the Union is obliged to respect and therefore able to limit the primacy of the Union law²⁶.

On the contrary, the Court of Justice, with a very reasonable motivation managed to circumvent the main obstacles, the most difficult of which was certainly that of the "counter-limits" raised with the third question posed by the Constitutional Court and has partially re-evaluated its previously provided interpretation. In particular, as rightly noted²⁷, the Court of Justice has dropped the conflict on constitutional identity as an element that differentiates one order from another (the "constitutional identity as difference") and has instead recovered the shared dimension of the European constitutional heritage, insisting on the principle of determination of criminal cases, and, anyway, focussing on European standards, rather than on the typical characteristics of the Italian legal order.

5. There are legislators, too

Another general indication that can be drawn from the “Taricco saga”, being coherent with the minimalist doctrine, consists in providing the umpteenth confirmation of an element that should be granted, but is not: that is, that the protection of fundamental rights does not belong exclusively to judges, be they national or European, but also requires an essential contribution from the legislator. The definition and shaping of the main features of the composite European constitution are not a task only for Courts.

The fact that, historically, the role played by the Court of Justice and by some Constitutional Courts has been absolutely

²⁶Critically, on the conclusions of the Advocate General, see L. Daniele, *Il seguito del caso Taricco: l'Avvocato generale Bot non apre al dialogo tra Corti*, 2 European Papers 3 (2017), at 987, www.europeanpapers.eu, espec. 999 f. On the different interpretations of Art. 4, par. 2, TEU, see, among many, B. Guastaferrro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, 31 Year. Eur. L. 1 (2012), at 263; F. Xavier-Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (2013); E. Cloots, *National Identity in EU Law* (2015); G. Di Federico, *L'identità costituzionale degli stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE* (2017); J. Sterck, *Sameness and selfhood: The efficiency of constitutional identities in EU law*, (early view) Eur. L. J. (2018).

²⁷P. Faraguna, *Constitutional Identity in the EU. A Shield or a Sword?*, 18 Ger. L. J. 7 (2017), at 1617.

crucial does not mean that this judicial activism should be a permanent characteristic of the EU legal order. It is true, therefore, that the construction of the EU constitutional system has traditionally been a matter for Courts, in particular for the Court of Justice of the EU (CJEU) and the national Courts entitled to carry out constitutional review²⁸. However, this does not mean that the main current constitutional issues have to be solved only through inter-judicial dialogue. On the contrary, the more the European integration process moves forward, addressing to care further public aims and dealing with fundamental rights, the higher the necessity of a dialogue between the Courts and the many legislators acting in the European legal space²⁹, in order to solve the inevitably increasing number of constitutional conflicts³⁰, including those regarding constitutional identities³¹.

The idea –affirmed above all in the United States, but which has had considerable success also in the Italian scholarship – according to which the protection of fundamental rights is an almost exclusive responsibility of judges is currently showing all its

²⁸ C. Fasone, N. Lupo, *Constitutional Review and the Powers of National Parliaments in EU Affairs. Erosion or Protection?*, in D. Jancic (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis. Resilience or Resignation?* (2017) 59 ff. On the European Court of Justice as “the most effective supranational judicial body in the history of the world” see A. Stone Sweet, *The Judicial Construction of Europe* (2004), at 1, and, more recently, S. Saurugger, F. Terpan, *The Court of Justice of the European Union and the Politics of Law* (2017), espec. 19 ff. On the role played by Constitutional Courts, especially the German and the Italian ones, see M. Kumm, *The Jurisprudence of Constitutional Conflict*, cit. at 3, at 263 and 293-298, J. Komarek, *The Place of Constitutional Courts in the EU*, 9 *EuConst* 3 (2013), at 420, M. Dani, *National Constitutional Courts in supranational litigation. A contextual analysis*, 23 *Eur. L.J.* 3-4 (2017), at 189.

²⁹ M. Dawson, *Constitutional Dialogue between Courts and Legislatures in the European Union: Prospects and Limits*, 19 *Eur. Pub. L.* 2 (2013), at 369, and M. Dawson, *The Political Face of Judicial Activism: Europe’s Law-Politics Imbalance*, in M. Dawson, B. De Witte & E. Muir (eds.), *Judicial Activism at the European Court of Justice* (2013), at 11.

³⁰ G. Martinico, *The Tangled Complexity of the EU Constitutional Process. The Frustrating Knot of Europe* (2013) 117 ff.; M. Dani, *Il diritto pubblico europeo nella prospettiva dei conflitti* (2013) 101 ff.; N. Scicluna, *European Union Constitutionalism in Crisis* (2014) 120 ff.

³¹ See P. Faraguna, *Taking Constitutional Identities away from the Courts*, 41 *Brook. J. Int’l L.* 2, (2016), at 492.

downsides and limitations.³² These are particularly evident when referred to ordinary judges, therefore deprived – in Italy as in most EU Member States, which adopt centralized systems of constitutional justice³³ – of the possibility of labelling with *erga omnes* effects a law as invalid. However, they also emerged in the presence of constitutional judges. In fact, it often happened that their intervention was not and could not be sufficient to ensure an adequate protection of the infringed fundamental rights.

It is therefore essential, both from a theoretical and above all from a practical point of view, that the legislator does not dismiss his role as a subject called to protect and implement fundamental rights. Moreover, to do this, as a rule, "in the first instance", leaving then to the judges, constitutional or not, the task of evaluating in a second phase whether and to what extent the protection guaranteed by the legislator proves to be adequate and in line with the provisions contained – depending on the specific cases in Court – in the ECHR, in the Charter of Fundamental Rights or in the Italian Constitution. Of course, if the legislator, as has at times unfortunately happened in the Italian case, on the most sensitive issues, does not provide any kind of protection, in particular as for "new" fundamental rights, then it is inevitable that the space for the judiciary, in all its articulations, expands considerably. If anything, due to the direct intervention of the judge on matters and rights not previously ruled by the legislator, there is an overexposure of the judge called to settle issues with strong political and ethical implications.

The “Taricco saga”, after all, originated from, to say the least, an unwise and unconscious action by the Italian legislator, as a result of a law designed “*ad personam*” as for its effects, in order to affect some ongoing trials against members of the centre-right majority supporting the Berlusconi government, yet capable of quite profound alterations of the general statute of limitations. In fact, law no. 251/2005 (also known as “*ex Cirielli*”), modified the

³² See the critiques on Dworkin’s theory by R. Bellamy, *Ronald Dworkin, Taking Rights Seriously*, in J.T. Levy (ed.), *The Oxford Handbook of Classics in Contemporary Political Theory* (2018) forthcoming (available online ahead of print) and J. Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L. J.* 6, (2006), at 1346.

³³ For a comparative picture see M. De Visser, *Constitutional Review in Europe. A Comparative Analysis* (2014).

rules on the statute of limitations in a reductive sense, replacing art. 157 of the Criminal Code (also with the purpose, as said, to affect certain trials in progress, including the IMI-SIR proceeding, which saw among the defendants Cesare Previti, at the time member of Parliament).

One of the innovative elements of the M.A.S. ruling with respect to the first Taricco judgment by the Court of Justice³⁴ consists precisely in a clarification of how the obligations under art. 325 TFEU refer primarily to the legislator, even before the national judge: "It is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU, in the light of the considerations set out by the Court in paragraph 58 of the Taricco judgement" (M.A.S., paragraph 41). In this light, moreover, the Court of Justice can better justify the reference to "a significant number of cases of serious VAT fraud", which, as the Constitutional Court correctly pointed out, involves a discretionary assessment which can hardly be requested to the individual judge, but which is completely admissible when, instead, it is addressed to the legislator.

6. The need for direct channels of communication

More generally, in the "Taricco saga", the choice of the Constitutional Court was the right one, and fully understandable only on the basis of the aforementioned order no. 270/2013, with the purpose of overcoming what had long been considered a taboo, and to activate a direct confrontation with the Court of Justice, through the preliminary reference procedure.

In this procedure, *the way* the reference is made to the Court of Justice is fundamental, and also to a certain extent, *the subject* who poses it. There is much discussion –even too much – on the "right to the last word", but often, in the dialogue between judges, the most important thing is having the first word (because it is due, or because the right is autonomously taken), so as to correctly define the interpretation of the legal provision and ask a question that

³⁴ See Court of Justice of the European Union (Grand Chamber), case C-42/17, M.A.S., 5 December 2017. On it see, for a first case-note, M. Bassini, O. Pollicino, *Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome*, Verfassungsblog, <https://verfassungsblog.de/>, 5 December 2017.

leads to a certain range of solutions rather than others. Moreover, as known and as already noted, in a pluralistic and multi-level order, no judge paradoxically takes the real last word, while the judge who speaks first has the opportunity to outline legal questions, to frame them and, often, to suggest an answer, in its own legal order or sometimes even outside of it.

In this key, specifically and always with reference to the “Taricco saga”, it is worth remembering that the question originally raised (by the Court of Cuneo) was not properly focused on the core question at stake: it referred, in fact, to the interpretation of articles 101, 107 and 119 TFEU, as well as art. 158 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. Therefore, the Court of Justice, in its first decision, reformulated one of the four questions submitted by referring it, based on the grounds of the order, to the more general compatibility of EU law, thus with art. 325 TFEU (paragraphs 35 to 37 of the Taricco judgment). The way the first preliminary reference was framed did not ease the task of the Court of Justice in delivering its first judgment in the “Taricco saga”, in particular for what concerns a careful appraisal of the actual implications of that judgment in the Italian legal order.

In this context, it seems to me more than understandable that – not by chance, a few days after the M.A.S. ruling by the Court of Justice – the Constitutional Court has inserted in the motivation of the judgment n. 269 of 2017, a very significant *obiter dictum* (containing references both to the ruling by the Court of Justice and the Constitutional Court’s order no. 24/2017, from which the former originated), clearly aimed at ensuring its greater involvement, compared to the past, in the interpretation and implementation of the Charter of Fundamental Rights of the European Union³⁵.

³⁵ See the (many) case notes on judgment no. 269/2017, starting from A. Ruggeri, *Svolta della Consulta sulle questioni di diritto eurolunitario assiologicamente pregnanti, attratte nell’orbita del sindacato accentrato di costituzionalità, pur se riguardanti norme dell’Unione self-executing* (a margine di Corte cost. n. 269 del 2017), 3 Riv. dir. comp. (2017), A. Guazzarotti, *La sentenza n. 269 del 2017: un “atto interruttivo dell’usucapione” delle attribuzioni della Corte costituzionale*, 38 Quad. cost. 1 (2018), at 194, D. Tega, *La sentenza n. 269 del 2017: il concorso di rimedi giurisdizionali costituzionali ed europei*, *ivi*, 197, G. Scaccia, *L’inversione della “doppia pregiudiziale” nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, Forum QC, www.forumcostituzionale.it, 25 January 2018. From the

So far, in this regard, the most significant role in the evaluation of the Charter of Fundamental Rights of the European Union has been played – in the Italian legal order – by ordinary judges. Moreover, the Constitutional Court somehow excluded itself from the inter-judicial dialogue in Europe, refusing to go through the phase of the preliminary reference to the Court of Justice³⁶. Rather, in that phase, the Constitutional Court has invited ordinary judges to use the tool of the preliminary reference and, in those same years, has also freed itself by declaring inadmissible a series of delicate cases concerning the protection of fundamental rights. Now, strengthened by the encouraging outcome of the “Taricco saga”, the Constitutional Court seems willing to participate again in the game and play its legitimate role in a system with a centralized constitutional review of legislation. It goes without saying that this role will have to be carried out in practice, not only in theory, in a balanced and effective way, as it happened in the “Taricco saga”; otherwise it risks being placed again at the margins of the fundamental rights guarantee circuit in Europe. Indeed, if the Constitutional Court asks the right questions to the Court of Justice and proposes its interpretations of the Italian constitutional identity, the principles and values of the 1948 Constitution will be likely to find an entry path and protection, in a non-absolutistic way, in the composite Constitution of the European Union.

7. Conclusion. The importance of asking questions: from Dworkin’s “father example” to Cartabia’s “mother example”

Finally, in order to underline, once more, the importance of the Court that takes the floor first, asking questions in the right way, it could make sense to conclude this contribution by proposing a parallel between a well-known example used by Ronald Dworkin and a similar one, on the relationship among Courts in Europe, more recently put forward by Marta Cartabia.

Constitutional Court’s perspective, see A. Barbera, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, 38 Quad. cost. 38 (2018), at 149. Mainly from the perspective of ordinary judges see E. Scoditti, *Giudice costituzionale e giudice comune di fronte alla carta dei diritti fondamentali dell’Unione europea dopo la sentenza costituzionale n. 269 del 2017*, 143 Foro it. 2 (2018), at 406.

³⁶ See G. Repetto, *Pouring New Wine into New Bottles?*, cit. at 24, at 1449 ff.

Ronald Dworkin, to explain how Constitutions should be interpreted and, more specifically, the difference between (necessarily general) concepts, very frequently employed by the Constitutions, and (specific) conceptions, adopted by Courts in deciding concrete cases, put forward the so called “father example”³⁷. He described the Constitution as a father, addressing concepts to his children, and refers to the concept (and conceptions) of fairness.

“Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind, or could quickly bring to mind, examples of the conduct I mean to discourage, but I would not accept that my ‘meaning’ was limited to these examples, for two reasons. First, I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind”³⁸.

From this example, as it is well-known, Dworkin derives a criticism towards those who, in the debate on the US Constitution, argue that constitutional interpretation should consist in giving legal provisions exclusively the meanings that were already devised by their drafters³⁹. On the contrary, he maintains that the important judgments issued by the Warren Supreme Court in the Sixties and in the Seventies have adopted a correct method of constitutional interpretation, or, even better, have done exactly what Constitutional Courts should do: that is, interpreting concepts in a way that offers the “best understanding of concepts embodied

³⁷ An in-depth analysis of this “father example” is offered by S. A. Barber, J. E. Fleming, *Constitutional Interpretation: The Basic Questions* (2007), 26 ff.

³⁸ R. Dworkin [1978], *Taking Rights Seriously* (new edition 1997), 134 ff. (italics in the original).

³⁹ Polemically, Dworkin uses the arguments employed by the then US President Nixon when it argued that the good judges would “enforce the law as it is, and not ‘twist or bend’ it to suit their personal convictions, as Nixon accused the Warren Court of doing” (see R. Dworkin, *Taking Rights Seriously*, cit. at 38, 131 ff.).

in the words” of the Constitution (so called philosophic approach to Constitutional interpretation).

A similar role could be played, regarding inter-judicial dialogue in the composite European Constitution, by what we might call the “mother example”, which was quoted by Marta Cartabia in a lecture held at LUISS University some years ago⁴⁰. The aim – fully consistent with what has been argued in this contribution – is to demonstrate that sometimes the “first word” matters, in such a pluralistic legal space, even more than the “last word”.

The metaphor runs as follow. The preliminary reference made by a Constitutional Court to the Court of Justice of the European Union could be imagined like a child asking a question to her or his mother – of course, it could be her or his father too, but in this way the parallel with Dworkin’s father example would be less evident⁴¹ –for instance in order to go out for the evening, or for a week-end with her or his friends. It is clear that if the question was well formulated and strongly motivated it would have more chances to receive a timely and positive answer.

In the past decades, as already remarked, most national Constitutional Courts in Europe never raised a preliminary reference⁴². In some way, they were reluctant even to ask, either for

⁴⁰ The occasion was the opening lecture on “Courts and Rights in Europe: the construction of a legal system with multiple judicial controls” during the second week of the second edition of the LUISS School of Government’s Summer Program on Parliamentary Democracy in Europe, 15 July 2013. In other circumstances judge Cartabia has dealt with the topic in written essays, but she has never used the “mother example”. Nor, indeed, did she make any explicit spoken parallel with Dworkin’s “father example”.

⁴¹ It should be added that the metaphor must obviously be taken as such, without pushing it too far. There is almost no need to recall that most Constitutional Courts are often “older” than the Court of Justice and in any case sufficiently grown-up to take in full their own responsibility. Consequently, they do not need any kind of permission by a “superior” authority. Nevertheless, as Constitutional Courts are normally judges of last resort (“against whose decisions there is no judicial remedy under national law”), they are obliged to bring before the Court of Justice questions concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, according to Article 267 TFEU.

⁴² See M. Dicosola, C. Fasone & I. Spigno, *Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*, in 16 Ger. L. J. 6 (2015), at 1318 (remarking that the trend changed in the last decade and the

the fear of receiving a negative answer or, more plausibly, merely because in asking the question they would have recognised a kind of superior or at least an equal authority on constitutional matters to the Court of Justice. However, clearly, it is not by avoiding asking the question that the authority of the Court of Justice is put in doubt. On the contrary, there will be other judges (of the same Member State or of other Member States) who will ask the question differently, generally without a similar motivation and without the sensibility that only a Constitutional Court can have in submitting a certain question (bringing, together with it, the constitutional culture, values and identity of which the Constitutional Court should be the first interpreter).

If you want to go back to the metaphor, it is as if the question to the mother was asked not by her child but by someone else, on her or his behalf, of course using different words. None of them could clearly have the same sensibility and effectiveness that the child can have with her/his parent in asking the same question directly. Obviously, the chances of the mother fully understanding the question and giving a positive answer decrease significantly, if the question is not correctly or convincingly framed.

Constitutional Courts of Austria, Belgium, France, Germany, Italy, Lithuania, Spain, Slovenia and Poland have issued preliminary references to the Court of Justice).

I. NATIONAL AND SUPRANATIONAL COURTS AS BATTLEGROUND AND MEETING GROUND OF CONSTITUTIONAL ADJUDICATION

LIMITING THE 'COUNTER-LIMITS'.
NATIONAL CONSTITUTIONAL COURTS
AND THE SCOPE OF THE PRIMACY OF EU LAW

*Davide Paris**

Abstract

This paper examines in a comparative perspective the jurisprudence of several EU Member States' constitutional courts concerning the limits of the primacy of EU law. It aims to demonstrate that significant similarities can be found in this body of case law and, drawing from these similarities, it proposes some guidelines for a cooperative and loyal exercise of constitutional review of EU law. If duly circumscribed, constitutional courts' power to declare an act of the EU inapplicable within the concerned Member State does not jeopardize the primacy and the uniform application of EU law. Instead, it enhances the guarantees of fundamental rights and the rule of law in the EU, contributing to the creation of a European legal space where common values are cherished while national peculiarities are respected.

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1. Introduction

Throughout its more than sixty-year history, the Court of Justice has always adamantly defended the principle that “the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure”¹. However, it is well known that the constitutional courts of some Member States never accepted such an absolute understanding of the primacy of EU law. Instead, they developed doctrines that enable them to deny the application of a provision of EU law within the concerned Member State, if the EU law provision in question contradicts the most fundamental principles of national constitutional law, notably fundamental rights.

For a long time, this was the case of the Italian and the German constitutional courts only. In 1973, the *Corte costituzionale* was the first to warn that the institutions of the (then) European Community do not have the power to violate either the fundamental principles of the Italian legal order or the inalienable human rights, and it affirmed its own power to judge and redress such a hypothetical violation². One year later, the *Bundesverfassungsgericht* delivered its most well-known *Solange I* judgment, which spelled out the prevalence of the Basic Law’s fundamental rights over Community law³. In the following

¹ So the fundamental judgment of the Court of Justice, 17 December 1970, C-11/70, *Internationale Handelsgesellschaft*, para. 3.

² Corte costituzionale, judgment of 27 December 1973, 183/1973 (*Frontini*).

³ BVerfG, order of the Second Senate of 29 May 1974 - BvL 52/71.

decades, the dispute over the limits of the primacy of EU law was essentially confined to a confrontation between these two constitutional courts and the Court of Justice⁴.

In the last fifteen years, however, the number of constitutional courts that have established limits to the primacy of EU law over domestic constitutional law has increased dramatically. Some constitutional courts have dealt with this question in seminal judgments delivered in abstract proceedings concerning the constitutionality of international Treaties related to the integration process. The Spanish constitutional court did so in its declaration on the Treaty establishing a Constitution for Europe⁵, as did the Polish constitutional court in its judgment on the Accession Treaty⁶, and, more recently, the Belgian constitutional court in its decision on the Treaty on the Stability Pact⁷. By contrast, other courts, such as the French, the Czech and the Hungarian constitutional courts, have developed their doctrines on the limits of the primacy of EU law in 'ordinary' cases, in which EU law was involved.⁸

Interestingly enough, one frequently finds references to the corresponding jurisprudence of other constitutional courts in these decisions. While citations of foreign judgments are generally rare in the case law of constitutional courts, in this specific field, they represent the rule rather than the exception. It might not come as a surprise that the constitutional courts of Central and Eastern

⁴ This paper focuses on constitutional courts in the traditional, Kelsenian, meaning only, *i.e.* on those peculiar institutions detached from other courts – from which they differ in their composition and jurisdiction – that are entrusted with the task of upholding the constitution and with the exclusive power to nullify statutes passed by Parliament that conflict with the constitution. That is why decisions like those of the Supreme Court of Ireland of 9 April 1987, *Crotty*, and of the supreme court of Denmark of 6 April 1998 on the Maastricht Treaty are not considered here. However, some of the normative claims made in this paper may also apply, *mutatis mutandis*, to those Member States that do not have a separate constitutional court.

⁵ Tribunal Constitucional, declaration of 13 December 2004, n. 1.

⁶ Trybunał Konstytucyjny, judgment of 11 May 2005, K 18/04 (*Accession Treaty*).

⁷ Cour constitutionnelle, judgment of 28 April 2016, 62/2016.

⁸ See, respectively: Conseil constitutionnel, decision of 10 June 2004, 2004-496 DC (*Economie numerique*), and decision of 27 July 2006, 2006-540 DC (*Droit d'auteur*); Ústavní soud, judgment of 8 March 2006, 50/04 (*Sugar quotas III*); and Magyarország Alkotmánybírósága, decision of 30 November 2016, 22/2016 (*Refugee relocation policy*).

Europe refer to the *Bundesverfassungsgericht's* case law, for the influence of the German constitutional court on its younger colleagues is well known⁹. But it is certainly more surprising to see the *Bundesverfassungsgericht* – which is habitually quoted by other courts rather than quoting them – refer to the case law of several other constitutional courts of EU Member States, as it did in its 2015 judgment on the constitutional identity review¹⁰:

The fact that the identity review conducted by the BVerfG is compatible with EU law is corroborated by the fact that [...] the constitutional law of many other Member States of the EU also contains provisions to protect the constitutional identity and to limit the transfer of sovereign powers to the EU [...]. The vast majority of Constitutional Courts and Supreme Courts of the other Member States [...] share the BVerfG's view that the precedence (of application) of EU law does not apply unrestrictedly, but that it is restricted by national (constitutional) law.

One may view this unusually frequent cross-citation as an exercise of mutual legitimacy, which corresponds to what von Bogdandy, Grabenwarter and Huber term “the legitimizing function of the horizontal *Verfassungsgerichtsverbund*”¹¹. When it comes to resisting the Court of Justice's standing jurisprudence, which reserves for itself alone the power of judging the validity of EU law, constitutional courts feel the need to stress that they are not isolating themselves from the process of European integration but rather exercising a role that belongs to all constitutional courts ‘institutionally’. By emphasizing that most constitutional courts

⁹ See, for instance, the references to the *Solange II* and *Maastricht* judgments of the German constitutional court in Ústavní soud, judgment of 26 November 2008, 19/08 (*Lisbon I*), paras. 116 et seq.; and the reference to the *Honeywell* decision of the German constitutional court in Trybunał Konstytucyjny, judgement of 16 November 2011, SK 45/09 (*Supronowicz*), para. 2.6.

¹⁰ BVerfG, order of the second senate of 15 December 2015 - 2 BvR 2735/14 (*Identitätskontrolle*), para. 47. Constitutional courts' judgments are quoted in the English translations available on the websites of the respective courts.

¹¹ See A. von Bogdandy, C. Grabenwarter & P.M. Huber, *Verfassungsgerichtsbarkeit im europäischen Rechtsraum*, in A. von Bogdandy, C. Grabenwarter & P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum. Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen* (2016), 9.

share the same vision and exercise the same power, they aim to show that they are not erecting a stumbling block for European integration but instead are ensuring that this process of integration develops in full compliance with the fundamental constitutional values of the Member States. In their view, it is the duty of the constitutional courts to secure this compliance.

Indeed, opposing constitutional limits to the primacy of EU law is an extremely delicate, albeit sometimes necessary, move at the crossroad between jeopardizing the European integration and fostering constitutional pluralism. On the one hand, since *Internationale Handelsgesellschaft*, the Court of Justice has always insisted that allowing rules of national constitutional law to override EU law is tantamount to calling into question “the legal basis of the Community itself”¹². No responsible constitutional court would take such a step thoughtlessly. On the other hand, constitutional courts may offer a valuable contribution by opposing constitutional values to an absolute reading of the principle of the primacy of EU law, thus ensuring that the EU authorities do not overlook the constitutional values of the Member States and counterbalancing the power of the Court of Justice with judicial dialogue.

Fostering constitutional pluralism in the EU without jeopardizing the integration process is anything but easy. However, this paper suggests that a comparative analysis of the relevant case law of several constitutional courts allows us to single out certain criteria, on which several constitutional courts agree, that help make the constitutional courts’ challenges to the primacy of EU law acceptable as a legitimate expression of constitutional pluralism. The present study first stresses the wide discretion that constitutional courts enjoy in the exercise of this power (para. 2); then it highlights several points of convergence in the jurisprudence of different constitutional courts (paras. 3 to 6). On the basis of this analysis, this paper argues that the power to impose limits on the primacy of EU law – if exercised according to strict criteria, like those deduced from such a comparative analysis – does not weaken but rather strengthens the authority of EU law by fostering its pluralistic and dialogue-oriented nature (para. 7). Ultimately, this study seeks to ‘limit the counter-limits’ by defining the procedural

¹² Court of Justice, judgment *Internationale Handelsgesellschaft*, cit. at 1, para. 3.

and substantial preconditions of a 'sustainable' judicial dissent in European multi-level constitutionalism.

2. Discretion through vagueness: Counter-limits, *ultra vires*, and constitutional identity

While each constitutional court has defined differently the conditions for denying application to EU law provisions in cases where they clash with constitutional principles, all of them share the same theoretical premise: The transfer of powers to the EU is limited, because domestic constitutions do not allow the Member State to surrender its sovereignty to the EU but only to confer on it some of the Member State's own power¹³. Starting from this common premise, constitutional courts have developed different doctrines, which can be grouped into three (partly overlapping) models.

The *counter-limits* doctrine, as advanced crucially by the Italian constitutional court, represents a first model. In its judgment 183/1973, the *Corte costituzionale* made clear that the Italian Constitution, and notably its Art. 11, enables the transfer to the EU only of those powers necessary for pursuing peace and justice among the Nations. But no constitutional provision allows the EU to violate either the fundamental constitutional principles or the inalienable human rights. Therefore, just as EU law limits the sovereignty of the State, so the fundamental principles of the constitutional order 'counter-limit' the power of the EU¹⁴.

A partly different reasoning backs the *ultra vires* doctrine, whose paternity must be attributed to the *Bundesverfassungsgericht*¹⁵. Since the Member States, as the "Masters

¹³ See, in particular: Corte costituzionale, judgment *Frontini*, cit. at 2; BVerfG, judgment of the second senate of 30 June 2009 - 2 BvE 2/08 (*Lissabon*), paras. 226 et seq.; Tribunal Constitucional, DTC 1/2004, cit. at 5, para. II.2; Trybunał Konstytucyjny, judgment *Accession Treaty*, cit. at 6, paras. 7-8, and judgment of 24 November 2010, K 32/09 (*Lisbon Treaty*), para. 2.1; Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 97.

¹⁴ The term "*controlimiti*" was coined by the Italian constitutional law scholar Paolo Barile, in *Ancora su diritto comunitario e diritto interno*, in *Studi per il XX anniversario dell'Assemblea costituente*, vol. VI (1969) 45.

¹⁵ The *ultra vires* review was first announced in BVerfG, judgment of the second senate of 12 October 1993 - 2 BvR 2134, 2159/92 (*Maastricht*), para. 106.

of the Treaties”¹⁶, empower the EU to exercise supranational powers, it follows that the EU cannot act beyond the powers granted it by the Treaties. Similar in premise to the *counter-limits* doctrine, the *ultra vires* doctrine views the exercise of powers by the EU institutions from a different perspective. While the *counter-limits* doctrine prevents the EU from ‘invading’ the core of the constitutional order, the *ultra vires* doctrine applies when the EU institutions “transgress the boundaries of their competences”¹⁷.

In recent years, the concept of constitutional identity has imposed itself as a third model of review. In a sense, it represents the intersection between the previous two. On the one hand, what belongs to the constitutional identity of a Member State cannot be transferred to the EU. As a consequence, an act of the EU institution that violates the constitutional identity of a Member State cannot but be *ultra vires*¹⁸. On the other hand, a Member State’s constitutional identity certainly encompasses the most fundamental principles of the domestic constitutions, notably the protection of human rights¹⁹. Therefore, constitutional identity both marks the borders of the powers that can be transferred to (and exercised by) the EU and serves as a *counter-limit* against the potential violation of a Member State’s constitutional hard core.

Despite the differences in the language and in the framing, these doctrines not only share the common premise of the limited transfer of powers to the EU but also converge on two points.

Firstly, most constitutional courts agree in restricting the supremacy of constitutional law over EU law to some parts of the Constitution only. As a rule, constitutional courts do not claim that all constitutional provisions prevail over EU law. They accept the primacy of EU law over the provisions of the Constitution, but they introduce an exception to this rule by stating that EU law cannot override some fundamental constitutional principles²⁰. This means that it is not the entire Constitution but only its hardest core that

¹⁶ BVerfG, judgment *Lissabon*, cit. at 13, para. 231.

¹⁷ BVerfG, judgment *Lissabon*, cit. at 13, para. 240.

¹⁸ So BVerfG, order of the second senate of 14 January 2014 - 2 BvR 2728/13 (*Gauweiler-OMT*), para. 27.

¹⁹ See BVerfG, order *Identitätskontrolle*, cit. at 10, para. 49.

²⁰ See, in particular, BVerfG, order *Identitätskontrolle*, cit. at 10, paras. 37: “As a rule, the precedence of application of European Union Law also applies with regard to national constitutional law”.

serves as a yardstick for reviewing EU law provisions²¹. A distinction is then introduced within the constitutional provisions: Some of them can be derogated by EU law while others cannot.

To identify this hard core of the Constitution, constitutional courts employ different wordings. For example, the Spanish constitutional court refers to “the values, principles or fundamental rights of our Constitution”²². The *Conseil constitutionnel* first alluded to an “express contrary provision of the French Constitution”; then it moved to “a rule or principle inherent to the constitutional identity of France”²³. The Italian constitutional court speaks of “the supreme principles of the Italian constitutional order and inalienable rights”, while the Belgian constitutional court prefers a convoluted expression, partly following the wording of Art. 4, par. 2 TEU: “the national identity inherent in the fundamental political and constitutional structures, or the fundamental values of the protection that the Constitution affords to legal persons”²⁴. In its most recent jurisprudence, the *Bundesverfassungsgericht* points out that “the scope of precedence of application of European Union Law is mainly limited by the Basic Law’s constitutional identity that, according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, is beyond the reach of both constitutional amendment and European integration”²⁵. In the Czech constitutional court’s view, the limit to the primacy of EU law is set by “the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the

²¹ Poland represents an exception, since the Trybunał Konstytucyjny maintains the prevalence of the Constitution over EU law without further distinctions. See, in particular, judgment *Supronowicz*, cit. at 9, para. 2.2: “The Constitution retains its superiority and primacy over all legal acts which are in force in the Polish constitutional order, including the acts of EU law”. However, in the same judgment, the constitutional court seems to soften its position. See, in particular, para. 2.9, where it states that the protection of fundamental rights must be ensured at the EU level “to a comparable extent as in the Polish Constitution” and stresses that “the requirement of appropriate protection of human rights pertains to their general standard, and does not imply the necessity to guarantee identical protection of each of the rights analyzed separately”.

²² DTC 1/2004, cit. at 5, para. 3.

²³ See the decisions *Economie numerique* and *Droit d’auteur* respectively, cit. at 8.

²⁴ *Cour constitutionnelle*, judgment 62/2016, cit. at 7.

²⁵ BVerfG, order *Identitätskontrolle*, cit. at 10, para. 41.

Constitution of the Czech Republic, seen as inviolable (Art. 9 par. 2 of the Constitution)”²⁶.

This variety of formulations should not be overestimated. What really matters – and that is the second point of convergence – is that all these notions are vague enough to allow constitutional courts the greatest possible discretion in defining what can resist EU law and what cannot. Since a constitutional provision that expresses a supreme principle of the constitutional order or that belongs to the constitutional identity is not formally distinct, the constitutional court can itself decide whether a certain constitutional rule belongs to the constitution’s hard core and therefore trumps conflicting EU law or whether it does not and so cedes to conflicting EU law.

Hence, constitutional courts enjoy the widest discretion in deciding whether or not to use the self-attributed power to deny application to a provision of EU law that conflicts with the hard core of the constitution. The following paragraphs will pinpoint some criteria to guide the exercise of this power, drawing from the relevant case law of several constitutional courts.

3. The monopoly of constitutional courts

Some constitutional courts have stressed that the power to review EU law in the light of the fundamental principles of the constitution is reserved to the constitutional court. The Italian constitutional court claimed as much in its preliminary reference to the Court of Justice in the case *Taricco*, where it stated that the constitution vests the task of assessing whether a certain provision of EU law is compatible with the constitution’s supreme principles exclusively in the constitutional court itself²⁷. But it is the *Bundesverfassungsgericht*, in particular in its Lisbon judgment, that offers the best explanation for this monopoly:

The ultra vires review as well as the identity review may result in [...] Union law being declared inapplicable in Germany. To preserve the viability of the legal order of

²⁶ Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 216.

²⁷ Corte costituzionale, order of 26 January 2017, 24/2017 (*Taricco*), para. 6. Previously, see order 28 December 2006, n. 454; judgment of 13 July 2007, n. 284; and judgment of 22 October 2014, n. 238.

the Community, [...] an application of constitutional law that is open to European law requires that the ultra vires review as well as the finding of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone²⁸.

The German constitutional court shows its awareness that the power to deny application to EU law is too delicate and too dangerous for the survival of the EU legal order to be left in the hands of all courts. If all courts are allowed to disregard EU law on the basis of vague notions like constitutional identity or the supreme constitutional principles, then judicial dialogue becomes impossible, and this power is more likely to turn into a serious threat to the EU legal order. By contrast, if a specific court is entrusted with the task of voicing the dissent to Luxembourg, then it becomes possible to manage the conflict in a cooperative dialogue between the Court of Justice and the constitutional court affected. To be sustainable, judicial dissent should be channeled to a single court.

4. Handle with care: the necessary self-restraint

A second point of convergence consists in the statement that the cases of irreconcilable clashes between EU and constitutional law are likely to be extremely rare.

In its older case law, the Italian constitutional court described the scenario of the Community violating the supreme principles of the Italian constitutional order and the inalienable rights as “aberrant” and “unlikely”²⁹. Later, in 1989, it qualified its view slightly by defining the same scenario as “utterly unlikely but not impossible”³⁰. The Spanish constitutional court considers it

²⁸ BVerfG, judgment of the second senate of 30 June 2009 - 2 BvE 2/08, para. 241 (*Lissabon*). See further BVerfG, order of the second senate of 6 July 2010 - 2 BvR 2661/06 (*Honeywell*), paras. 66 and 68; and order *Identitätskontrolle*, cit. at 10, para. 43.

²⁹ See, respectively, Corte costituzionale, judgment *Frontini*, cit. at 2, para. 9; and judgment of 8 June 1984, n. 170 (*Granital*), para. 7.

³⁰ Corte costituzionale, judgment of 21 April 1989, n. 232 (*Fragd*), para. 3.1. This judgment marks an important development of the counter-limits doctrine by the Italian constitutional court. While previously this was understood as an extreme reaction against a potential authoritarian involution of the EU as a whole, *Fragd*

“difficult to conceive” that EU law develops in a way that is irreconcilable with the Spanish constitution³¹. The Czech constitutional court called the potential clashes between EU law and the Czech constitutional order “exceptional” and “highly unlikely”³², and, in its *Lisbon I* judgment, stated that the *ultra vires* review based on the German blueprint “is more in the nature of a potential warning, but need not ever be used in practice”³³. However, this did not prevent the same court from declaring a decision of the Court of Justice as *ultra vires* for the first time ever just three years later³⁴. The Polish constitutional court stresses the similarities of the values on which both the Polish constitution and the EU Treaties rest, concluding that “there is a considerable likelihood that the assessment of the Court of Justice will be analogical to the assessment of the Constitutional Tribunal”, so that conflicts between EU and constitutional law should be extremely rare³⁵. Similarly, the *Bundesverfassungsgericht* relies on the effectiveness of fundamental rights’ protection at the EU level to consider a breach of the German constitutional identity by the EU institutions “exceptional”:

Violations of the principles of Art. 1 *Grundgesetz* [...] will only occur rarely – for the reason alone that Art. 6 TEU, the Charter of Fundamental Rights and the case law of the Court of Justice of the European Union generally

reshapes this doctrine as a more flexible review of specific EU acts allegedly violating the supreme principles of the Italian constitutional order and inalienable rights. This makes the use of the counter-limits significantly less unlikely. See M. Cartabia, *Principi inviolabili e integrazione europea* (1995) 109 et seq.

³¹ DTC 1/2004, cit. at 5, para. 4.

³² Ústavní soud, judgment of 3 May 2006, 66/04 (*European Arrest Warrant*), para. 53.

³³ Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 139.

³⁴ Ústavní soud, judgment of 31 January 2012, 5/12 (*Slovak Pensions XVII*). However, Czech commentators point out that this decision is an isolated and improper episode that is deeply rooted in peculiar national circumstances – a “collateral damage in the judicial war” opposing the constitutional and the supreme administrative court – rather than an indicator of the crisis of authority of the Court of Justice. See: J. Komárek, *Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, 9 *EuConst* 2 (2012), 323; similarly, R. Zbíral, *A legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires*, 49 *Comm. Mkt. L.R.* 4 (2012), 1487.

³⁵ Judgment *Supronowicz*, cit. at 9, para. 2.6.

ensure an effective protection of fundamental rights vis-à-vis acts of institutions, bodies and agencies of the European Union³⁶.

In the constitutional courts' view, however, the exceptionality of the conflicts between EU and constitutional law is not just a statement of fact but also a normative claim. Such conflicts are not only deemed rare: They also have to be rare, because they jeopardize the very survival of the EU as an autonomous legal order. As a consequence, constitutional courts accept that the power of declaring an EU act inapplicable within the national legal order must be exercised with self-restraint, as an *ultima ratio*.

The *Honeywell* judgment of the *Bundesverfassungsgericht* spelled this out most clearly. These powers must be exercised "with restraint and in a manner open to European law", because

if each Member State claimed to be able to decide through their own courts on the validity of legal acts of the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk³⁷.

The *Supronowicz* judgment of the Polish constitutional court echoed this assessment:

Allowing the possibility of examining the conformity of the acts of EU secondary legislation to the Constitution, what should be emphasised is the need to maintain due caution and restraint in that respect.³⁸ [...] The ruling declaring the non-conformity of EU law to the Constitution should have the character of *ultima ratio*, and ought to appear only when all other ways of

³⁶ Order *Identitätskontrolle*, cit. at 10, para. 46. Previously, see order *Honeywell*, cit. at 28, para. 57.

³⁷ Order *Honeywell*, cit. at 28, para. 57. In the same judgment, the *Bundesverfassungsgericht* specified that "the act of the authority of the European Union must be manifestly in violation of competences and [...] highly significant in the structure of competences between the Member States and the Union [...]" (para. 61).

³⁸ Judgment *Supronowicz*, cit. at 9, para. 2.5.

resolving a conflict between Polish norms and the norms of the EU legal order have failed³⁹.

It is essential that constitutional courts practice self-restraint in using the power to declare an EU act inapplicable, so as not to let this power become a serious threat to the primacy of EU law. In German scholarship, the European multi-level system of fundamental rights protection is frequently described as a triangle with vertices in Luxembourg, Strasbourg and Karlsruhe⁴⁰. But it cannot be overlooked that in one of these three vertices, there is not just one single court, but as many courts as there are EU Member States. A bold recourse to this power by a single court not only creates a problem itself but also undermines the whole system, because it indirectly authorizes other courts to take the same step. After all, all Member States participate in the EU on an equal footing⁴¹, and there is no reason why the primacy of EU law should be stricter *vis-à-vis* certain Member States and more relaxed towards others. Just as one court exercising constitutional review of EU law increases the legitimacy of the same claim by other courts, so one court's excessive use of this power can support a similar use by other courts, in a kind of domino effect that is deleterious for the autonomy of the EU legal order⁴².

5. The Court of Justice must speak first

From the duty to exercise the constitutional review of EU law with self-restraint flows the procedural duty to first give the Court of Justice the opportunity to redress the alleged violation through a preliminary reference according to Art. 267 TFEU. Some constitutional courts have explicitly stated this obligation.

³⁹ *Ibidem*, para. 2.7. Similarly, see also Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 216.

⁴⁰ G. Hirsch, *Schutz der Grundrechte im 'Bermuda-Dreieck' zwischen Karlsruhe, Straßburg und Luxemburg*, in J. Schwarze (ed.), *Europäische Verfassung und Grundrechtecharta* (2006), 7.

⁴¹ See Art. 4, para. 2 TEU: "The Union shall respect the equality of Member States before the Treaties [...]"

⁴² See A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 *Comm. Mkt. L.R.* 5 (2011), 1451: "Domestic courts must be aware of, and take into account, the Union-wide consequences of their jurisprudence".

The Spanish constitutional court did so in its declaration on the Treaty establishing a Constitution for Europe. Here, it maintained that the constitutional court could only step in when a conflict between EU and constitutional law arises “without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein”⁴³. The practice of the constitutional court clarified this rather ambiguous statement. In the famous *Melloni* case, confronted with a potential clash between the European arrest warrant and the right to a fair trial enshrined in the Spanish constitution, the constitutional court raised a preliminary reference to the Court of Justice and finally followed the Court of Justice’s decision by overruling its previous case law⁴⁴.

In *Honeywell*, the *Bundesverfassungsgericht* most clearly theorized the obligation not to declare an act of EU law inapplicable without first giving the Court of Justice the opportunity to speak:

Prior to the acceptance of an ultra vires act on the part of the European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU. As long as the Court of Justice did not have an opportunity to rule on the questions of Union law which have arisen, the Federal Constitutional Court may not find any inapplicability of Union law for Germany⁴⁵.

Later in *Identitätskontrolle*, the *Bundesverfassungsgericht* clarified that this obligation applies to the identity review as well.⁴⁶

Following *Honeywell*, the Polish constitutional court accepted the same procedural obligation, stressing the

⁴³ DTC 1/2004, cit. at 5, para. 4.

⁴⁴ Tribunal Constitucional, judgment of 28 September 2009, n. 99 (*Melloni*).

⁴⁵ Order *Honeywell*, cit. at 28, para. 60. Already in its *Lissabon* judgement, cit. at 13, para. 240, the *Bundesverfassungsgericht* already stated, less clearly, that the *ultra vires* review is to perform only “if legal protection cannot be obtained at the Union level.

⁴⁶ Order *Identitätskontrolle*, cit. at 10, para. 46.

“subsidiarity” of the constitutional tribunal’s jurisdiction to examine the conformity of EU law to the constitution:

Before adjudicating on the non-conformity of an act of EU secondary legislation to the Constitution, one should make sure as to the content of the norms of EU secondary legislation which are subject to review. This may be achieved by referring questions to the Court of Justice for a preliminary ruling, pursuant to Article 267 of the TFEU, as to the interpretation or validity of provisions that raise doubts⁴⁷.

The Italian constitutional court has not theorized such an obligation, but its practice clearly goes in this direction⁴⁸. In *Taricco*, the Court of Justice had already expressed its view. However, instead of directly declaring the obligations arising from that judgment inapplicable, the Italian constitutional court decided to raise a preliminary reference, a sort of appeal to the *Taricco* judgment, which ultimately led the Court of Justice to overrule its previous decision, as ‘suggested’ by its Italian counterpart⁴⁹.

The obligation to refer a matter to the Court of Justice ultimately rests on the assumption that there is a common ground for dialogue between the national and the EU level: This leads to a fourth and final point of convergence.

6. The common ground of fundamental values, and constitutional identity as the intersection point between the constitutional and the EU legal orders

Many constitutional courts have stressed the identity of the values that underpin both the domestic constitutions and the EU Treaties, so that it is hardly conceivable that a breach of a Member

⁴⁷ Judgment *Supronowicz*, cit. at 9, para. 2.6.

⁴⁸ As for Belgium, see P. Gérard & W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse*, in 13 *EuConst* 1 (2017), 197. Commenting on judgment 62/2016, cit. at 7, the two authors stress that “it is very unlikely that [the *Cour constitutionnelle*] would decide upon an ultra vires act or an infringement of Belgian national identity without engaging in prior preliminary dialogue with the Luxembourg Court”, although such an obligation is not spelled out in judgment 62/2016.

⁴⁹ See Court of Justice, Grand Chamber, judgment of 5 December 2017, C-42/17, *M.A.S. and M.B.*

State's most fundamental constitutional principles does not simultaneously violate the fundamental values enshrined in the Treaties as well.

The Spanish constitutional court's declaration on the Treaty establishing a Constitution for Europe made this point most clearly:

The competences whose exercise is transferred to the European Union could not, without a breakdown of the Treaty itself, act as a foundation for the production of Community regulations whose content was contrary to the values, principles or fundamental rights of our Constitution⁵⁰.

Art. 4, para. 2 TEU is particularly relevant from this perspective, because as a result of this provision, the concept of constitutional identity enjoys protection not only under domestic constitutional law but also under EU law. If the "national identities, inherent in their fundamental structures, political and constitutional", which the EU is bound to respect under Art. 4, para. 2 TEU, are tantamount to the "constitutional identities" that constitutional courts aim to protect, it follows that a breach of a Member State's constitutional identity by the EU is at the same time a breach of Art. 4, para. 2 of the Treaty.

In that sense, Art. 4, para. 2 TEU can be seen as a provision that provides legitimacy to the self-attributed power of constitutional courts to review EU law and potentially deny its application⁵¹. Some constitutional courts have openly embraced this perspective. In particular, the Spanish constitutional court established a direct link between the limits to the primacy of EU law previously set by constitutional courts on the one hand and the protection of national identities enshrined in the Treaty on the other hand:

The limits referred to by the reservations of constitutional courts now appear proclaimed unmistakably by the Treaty under examination, which

⁵⁰ DTC 1/2004, cit. at 5, para. 3. Similarly see Trybunał Konstytucyjny, judgment *Lisbon Treaty*, cit. at 13, para. 2.2; Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 209.

⁵¹ A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, cit. at 42, 1419.

has adapted its provisions to the requirements of the constitutions of the Member States⁵².

Similarly, the Polish constitutional court considers the notion of national identity “an equivalent of the concept of constitutional identity in the primary EU law”⁵³. In this way, the power to review EU law in the light of the most fundamental constitutional principles ceases to be an act of rebellion against the Court of Justice and instead becomes an obligation flowing from the Treaty.

Yet the identity of the two concepts, while giving legitimacy to the notion of “constitutional identity” under EU law, also entails a risk for constitutional courts. Indeed, if the Treaty itself protects the Member States’ constitutional identity, then there is no need any more for the same protection by constitutional courts: Through Art. 4, para. 2 TEU, the Court of Justice has the opportunity to take upon itself alone the power to protect constitutional identity. Since constitutional identities are protected by the Treaty, one could argue that it is the Court of Justice, and no longer the constitutional courts, which must act as the guardian of constitutional identity⁵⁴.

This concern about a potential shift of the protection of constitutional identity from the national constitutional courts to the Court of Justice presumably explains the sophisticated doctrine that the Italian constitutional court proposed in its preliminary reference in the case *Taricco*. In this view, while Art. 4, para. 2 TEU protects the Member States’ constitutional identities, the Court of Justice, which is already entrusted with the task of guaranteeing the uniform interpretation of EU law, cannot be expected to assess in detail whether EU law is compatible with each Member State’s constitutional identity:

⁵² DTC 1/2004, cit. at 5, para. 3.

⁵³ Trybunał Konstytucyjny, judgment *Lisbon Treaty*, cit. at 13, para. 2.1.

⁵⁴ See M. Claes, *National Identity: Trump Card or Up for Negotiations?*, in A. Saiz Arnaiz & C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (2013), 109 et seq., who argues that “Article 4(2) does not represent a confirmation of the *controlimiti* case law of the national constitutional courts”, because “it is for the EU and its CJEU to decide whether the claim of the Member State based on the national constitution should be sanctioned as a matter of EU law” (122). In the author’s view, however, the operationalization of Art. 4, para. 2 TEU, requires the Court of Justice to engage in negotiations with national actors, including national courts (123 and 134 et seq.).

It is therefore reasonable to expect that, in cases in which such an assessment is not immediately apparent, the European court will establish the meaning of EU law, whilst leaving to the national authorities the ultimate assessment concerning compliance with the supreme principles of the national order⁵⁵.

Needless to say, in the Italian legal order, this assessment belongs exclusively to the constitutional court. Thus, in the view of the *Corte costituzionale*, the Treaty obligation to protect the constitutional identity of the Member States does not fall on the Court of Justice but is implicitly delegated to the national authorities, notably to the national constitutional courts. This rather creative doctrine makes it possible to enjoy the legitimacy bestowed on the identity review by Art. 4, para. 2 TEU, while keeping this review in the hands of the constitutional courts.

A similar concern probably underpins the sharp distinction that the *Bundesverfassungsgericht* made in its preliminary reference in the *OMT* case between the constitutional identity enshrined in the Treaty and the one enshrined in the German constitution:

The identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 sec. 2 sentence 1 TEU by the Court of Justice of the European Union. Art. 4 sec. 2 sentence 1 TEU obliges the institutions of the European Union to respect national identities. This is based on a concept of national identity which does not correspond to the concept of constitutional identity within the meaning of Art. 79 sec. 3 GG, but reaches far beyond [...]⁵⁶.

Keeping the two notions – and thus the two reviews – strictly separate ensures that the identity review performed by the constitutional court and the corresponding review by the Court of Justice remain independent. No matter whether the Court of Justice finds that EU law does not violate the constitutional identity of Germany: The *Bundesverfassungsgericht* can nevertheless reach the opposite result and declare a provision of EU law inapplicable in Germany, for the two forms of review are distinct and independent

⁵⁵ Order *Taricco*, cit. at 27, para. 6.

⁵⁶ BVerfG, order *Gauweiler-OMT*, cit. at 18, para. 29.

of one another. However, in its final decision on the *OMT*, after the judgment of the Court of Justice, the German constitutional court softened its position and seemed to consider coincident the two notions coincident. Indeed, it stated that the identity review performed by the German constitutional court “does not violate the principle of sincere cooperation within the meaning of Art. 4, sec. 3 TEU. On the contrary, Art. 4 sec. 2 sentence 1 TEU essentially provides for identity review [...]”.⁵⁷

Be that as it may, the overlapping between EU and constitutional values is indisputable. This allows constitutional courts to present their refusal to comply with EU law not as a rebellion but as an act of true fidelity to EU law, allegedly betrayed by the Court of Justice, which did not respect the Member States’ constitutional identity. The Italian constitutional court made extensive use of this possibility in its preliminary reference in *Taricco*, in which it tried – and finally succeeded – to convince the Court of Justice that its understanding of EU law is more faithful to EU law than the Court of Justice’s own perception.

7. Limiting the counter-limits: Towards a cooperative and loyal exercise of the constitutional review of EU law?

The analysis in this paper has demonstrated several points of convergence in the jurisprudence of the constitutional courts of a significant number of Member States. From these similarities, one can derive a set of recommendations for a cooperative exercise of constitutional review of EU law. If this power is reserved to the constitutional court only, if it is exercised with the utmost self-restraint as an *ultima ratio*, if it is not utilized without having first addressed the Court of Justice through a preliminary reference, and if it is grounded on the alleged violation of the values enshrined in the TEU and the Charter of fundamental rights of the EU, then it is highly unlikely that it will seriously jeopardize the primacy and the uniform application of EU law. Instead of posing a threat to the autonomy of the EU legal order, it is likely to prove that a legal space where common values are cherished while national peculiarities are respected can be better built in cooperation

⁵⁷ BVerfG, judgment of the second senate of 21 June 2016 - 2 BvR 2728/13 (*Gauweiler-OMT*), para. 140.

between the national constitutional courts and the Court of Justice, rather than by the latter alone.

Yet all this assumes that constitutional courts actually share a set of common values and are genuinely willing to cooperate in a common endeavour with the Court of Justice. Lacking this precondition, the power of freeing a Member State from the obligation to comply with selected provisions of EU law opens a most disturbing alternative scenario. The judgment of the Hungarian constitutional court of December 2016⁵⁸, in which, after praising judicial dialogue and the inviolability of human rights, the court reached the absurd conclusion that human dignity prevents Hungary from cooperating with the other EU Member States in fulfilling the right to asylum of migrants, clearly shows how dark the dark side of judicial pluralism can be.

But constitutional courts' potential abuses and distortions of a certain power should not lead to the absolute rejection of that power. A clearly delimited power to review compliance of the acts of the EU institutions with the most fundamental principles of domestic constitutional law – as this paper advocates – can be beneficial to the overall protection of fundamental rights and the rule of law in the EU and can help to secure the pluralistic nature of the EU legal order by counterbalancing the power of the Court of Justice. It would be unwise to renounce this balance in order to prevent potential abuses by courts unwilling to cooperate in a dialogue based on common values. The judgment of the Hungarian constitutional court mentioned previously does not seem to be an isolated extreme of a particular constitutional court. Rather, it is Hungary's last attempt to opt out of the EU response to the migrant crisis and to avoid the resulting duties. This poses a problem of general compliance with EU law – and ultimately with the fundamental values of the EU –, which should be addressed as such. Put differently, if a Member State generally rejects compliance with EU law and departs from the values on which the EU rests, its constitutional court, if lacking independence from the ruling majority, will likely have to use its powers to back the government's challenges to the EU. But this is not a good reason to prevent the constitutional courts of the Member States that are loyal to the values of Art. 2 TEU from exercising a power that, if duly

⁵⁸ Decision *Refugee relocation policy*, cit. at 8.

circumscribed, enhances the guarantees of fundamental rights and the rule of law in the EU⁵⁹.

⁵⁹ In this respect, commenting on this decision, G. Halmai concludes: "If the EU will still be unable to protect its joint values towards member states, such as Hungary (and lately also Poland), which do not want to comply with them, the case of Hungary (and Poland) will have a negative impact on countries with genuine and legitimate national constitutional identity claims, and on constitutional pluralism in the EU" (*The Hungarian Constitutional Court and Constitutional Identity*, in *Verfassungsblog*, 10 January 2017, available at <https://goo.gl/2RMExo>, accessed May 8, 2018).

THE IMPLICIT COOPERATION BETWEEN THE STRASBOURG COURT AND CONSTITUTIONAL COURTS: A SILENT UNITY?

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Abstract

The paper discusses the how Italian Constitutional Court (ItCC) considers the case law of the European Court on Human Rights (ECtHR) by focusing specifically on the parameters for constitutional adjudication. The analysis shows that in some cases, the ItCC considers the ECtHR precedents through Art. 117, par. 1, It. Const.—i.e. the obligation of the Italian legislation to respect international treaties—while in other cases, the ItCC prioritises constitutional rights, thus directly adopting an interpretation that is consistent with the ECHR. In this way, a silent cooperation between courts is executed. Next, this paper attempts to compare the French Constitutional Council’s behaviour with Italy’s approach to the ECHR. The analysis concludes that the ItCC’s choice of parameter seems flexible and unpredictable. More specifically, the Italian approach lacks a well-established and coherent logical priority towards substantive constitutional violations instead of conventional violations. In times of fragility of the ECHR machinery, the application of the sole substantive constitutional parameter can be explained by constitutional patriotism, which pursues autonomy and diversity. However, this might also result in the increased legitimacy of the ECHR system, rooting it directly in the living Constitution.

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1. Introduction

This study addresses the supranational dimension of fundamental rights from the perspective of constitutional adjudication. Specifically, it considers decisions of the Italian Constitutional Court (ItCC) that follow a previous judgement by the European Court on Human Rights (ECtHR). The focus is on the parameters and legal reasoning of constitutional adjudication, to explore how the ECtHR case law is taken into consideration. The objective is to understand if the ItCC's behaviour can be viewed as a means of unity or plurality towards the protection of human rights.

In 2007, the ItCC identified Art. 117, par. 1, of the Italian Constitution as the 'ECHR article' and, more generally, as a provision that opens the Italian legal system to international human rights treaties¹. Thus, the European Convention on Human Rights (ECHR) has an 'intermediate' status (*norma interposta*) between the law and the Constitution, in that a law violating the Convention is indirectly incompatible with Art. 117, par. 1, It. Const. and must

¹ Article 117, paragraph 1, It. Const.: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from European Union law and *international obligations*'. Article 117 was reformed by Italian Constitutional Law no. 3 of 2001, introducing a specific reference to international obligations. Indeed, a principle of openness of the Italian Republic to the international legal order was already provided by Articles 10 and 11 It. Const., but no reference was made to international human rights treaties and the ECHR itself.

be quashed². Thus, Art. 117, par. 1, It. Const. is the key that gives the ECHR and ECtHR case law access to the national legal order³.

A lawyer studying the ItCC case law can probably search for Art. 117 It. Const. in a database to extract all ItCC judgements concerning the ECHR. However, the list of results would be incomplete. Many ItCC judgements recall the ECtHR case law without referring to Art. 117 It. Const. and directly incorporate the ECtHR reasoning in the substantive constitutional parameter, i.e. constitutional rights.

This study focuses on those cases in which the outcome is similar to the one ruled by the ECtHR but lacking a strict and formal reference to Art. 117, par. 1, It. Const. We will call them the ‘silent cases’. We aim at understanding why the ItCC sometimes prioritises the substantive constitutional parameter instead of the ‘ECHR article’ and if this approach is useful in ensuring cooperation between the ItCC and the ECtHR.

The paper is organised as follows. Section 2 defines the term ‘silence’ in the context of this study. Sections 3 and 4 survey different models of the ItCC legal reasoning concerning the

² The ECHR was signed by the Republic of Italy on 4 November 1950 and ratified on 26 October 1955; Italian Law no. 848 of 4 August 1955 incorporated the ECHR in Italian legal order with the force of ordinary law. In 1973, Italy recognised the competence of ECHR organs to receive individual applications. As of 1 July 2017, a total of 5,351 applications against Italy were pending before the ECtHR. In 2016, the ECtHR dealt with 2,730 applications concerning Italy, of which 2,695 were declared inadmissible or struck out. The ECtHR delivered 15 judgements, ten of which found at least one violation of the ECHR. For the country fiche on Italy, see http://www.echr.coe.int/Documents/CP_Italy_ENG.pdf.

This study does not consider the role of ECHR before the ‘twin’ judgements of 2007. See G. Martinico, O. Pollicino, *Report on Italy*, in G. Martinico, O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective* (2010), 271-299, 282-283; D. Tega, *The Constitutional Background of the 2007 Revolution. The Jurisprudence of the Constitutional Court*, in G. Repetto (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (2013), 25-36, 26-27.

³ For the Italian constitutional review of legislation model, see V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini (eds.), *Italian Constitutional Justice in Global Justice* (2015), especially Chapter II. An English summary of more recent ItCC judgements is available at <http://www.cortecostituzionale.it/actionJudgment.do>. For an overview of the 2016 ItCC case law, see P. Faraguna, M. Massa, D. Tega, M. Cartabia, *Developments in Italian Constitutional Law*, in R. Albert, D. Landau, P. Faraguna, S. Drugda (eds.), *2016 Global Review of Constitutional Law*, I-CONNECT-Clough Center (2017), 108-113.

implementation of the ECHR after 2007. Section 5 presents Italian silent cases. Section 6 attempts to compare the coordination undertaken by the ItCC and other forms of silent coordination executed by the French Constitutional Council. Sections 7 and 8 examine whether the Italian silent cases are a symptom of a unitary or disruptive approach in human rights adjudication. Indeed, the priority given to the substantive constitutional parameter may be a sign of patriotism—reaffirming the superiority of constitutional norms—or a sign of silent cooperation between courts. We argue that the ItCC's behaviour might strengthen, instead of weakening, the ECHR system, rooting its legitimacy directly in the Constitution.

2. Silence: the choice of parameter for constitutional adjudication

In the context of constitutional adjudication, the term 'silence' has been used with different connotations. Silence has been used to refer to the informal cooperation between courts effected through meetings, official visits and joint seminars. This form of cooperation might be meaningful to increase familiarity and share knowledge; however, its weight and influence on judicial activity cannot be easily measured. In a more formal perspective, which can be measured, we use the term 'silence' in the context of judicial decision-making, focusing on the argumentative tools through which the courts refer to each other.

In this variation, the concept of 'silent judgement' has already been used to describe a form of judicial cooperation. Daniel Sarmiento, for example, used the concept to portray how the ECJ and national courts communicate through a preliminary reference in the case of conflict on constitutional issues. Sarmiento identified three forms of silence: complete silence, wherein the ECJ renders no solution to the question posed by the national court; partial silence – a form of judicial minimalism, when the ECJ decides *in abstracto* on specific points of law, leaving the concrete answer to the referring court; and unheard replies, that is, when national courts

have a discretion to set aside decisions of superior national courts that quash referring orders⁴.

The background of our analysis partly differs from that of Sarmiento. Firstly, here, silence refers to a specific part of the legal reasoning, i.e. the choice of the parameter for constitutional adjudication, and not to all argumentative tools developed by the courts. Second, the relationship between the ECtHR and ItCC differs from that between the ECJ and national courts. The ECtHR and national courts are yet to be connected by any form of preliminary reference⁵. In addition, Sarmiento adopts the framework of constitutional pluralism theory, in which both the ECJ and national courts claim final authority on issues of constitutional relevance such as fundamental rights and institutional autonomy and competences⁶. However, the ECHR

⁴ D. Sarmiento, *The Silent Lamb and the Deaf Wolves. Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law*, in M. Avbelj, J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012), 285-317. The premise is that the preliminary reference is a flexible instrument, under which the ECJ grants wide discretion when facing interpretative queries. In addition, national Courts are more or less free to determine ways in which the ECJ answer can be used in the case at hand. In the Author's view, the case law's approach on issues of constitutional principle placed much importance in 'the way in which the answer is framed, the intensity of its normative content, the deference it grants to the referring Court, the need to uniformity and coherence ... These factors are all balanced through a subtle and complex use of both language and silence, in a manner that would fit appropriately in a theory of judicial minimalism'. Some legal tools allow the ECJ to discard queries of national Courts when the condition required by Article 267 TFUE are not met, such as queries that go beyond the boundaries of European Union (EU) law; fictitious or hypothetical; not motivated or posed by authorities which do not fall under the Treaties' definition of 'jurisdiction'.

⁵ Protocol No. 16 of the ECHR allows the highest courts and tribunals of a state party to request for the ECtHR's advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the convention or protocols thereto. The protocol was opened for signature on 2 October 2013. Its entry into force is scheduled on August 1, 2018.

⁶ Constitutional pluralism is a descriptive and normative legal theory designed to resolve claims of authority on issues of constitutional relevance. The main descriptive results of the theory in the judicial context are reviewed by D. Sarmiento, *cit.* at 4, 289, as follows. Legal orders in the European Union operate under shifting *grundnorms*, depending on the scope of application of each one. Despite the separation among legal systems, the criteria for the resolution of constitutional conflicts must be found in mutually enhancing normative texts. Litigations find authoritative resolutions that are based on constructive

system does not claim any final authority; rather, it is based on subsidiarity, complementarity and minimum standards. Thus, the claim of final authority does not seem to be a valid descriptive or normative background to explain the relationship between the ECtHR and national Constitutional Courts⁷.

Nevertheless, Sarmiento's conclusions could be useful in our scenario to understand the *rationale* of judicial cooperation. According to Sarmiento, the outcome of an ECJ silent judgement from a preliminary reference is 'complicity': laconic judgements and *in abstracto* or incomplete answers can protect national judicial autonomy and, eventually, the ECJ authority too. An incomplete and minimal way of reasoning gives all relevant actors a voice, enhancing collaboration and mutual trust: all courts can participate

communication over specific issues and not the competence of one judicial actor at play. The outcome is not a consequence of the primacy of national constitutions but a system of mutually dependent legal orders that maximise cooperation and allow courts to change the *grundnorm* when conflicts become unsolvable. Further, see N. MacCormick, *Beyond the Sovereign State*, 56 *The Modern Law Review* (1993), 1-18; M. Poiares Maduro, *Contrapunctual law: Europe's Constitutional Pluralism in Action*, in N. Walker (ed.), *Sovereignty in transition* (2003), 501-538; Id, *Three Claims of Constitutional Pluralism*, in M. Avbelj, J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012), 67-84; and Id, *In Search of a Meaning and not in search of Meaning: Judicial Review and the Constitution in times of Pluralism*, *Wisconsin Law Review* 2 (2013), 541-563, especially 545-549, 556.

⁷ Dealing with EU law, recently in judgement no. 269 of 14 December 2017, the ItCC seemed to reconsider the 'Granital' doctrine. Since the Granital judgement no. 170/1984, the ItCC has stated that every judge must apply the EU law with direct effect and not apply the national law in conflict. In no. 269/2017, the ItCC affirmed that when a violation of the EU Charter of fundamental rights is claimed, the judge must refer an order to the Court. The consequences of the judgement are not completely clear because the new doctrine was affirmed in an *obiter dictum*. Nevertheless, if the new doctrine is confirmed by the ItCC and followed by ordinary courts, the review of legislation under the grounds of fundamental rights will fall entirely within the centralised jurisdiction of the ItCC as an arbiter of human rights' violations. In fact, considering the mutual influences of both systems, the ItCC would better manage the interpretation of both ECHR and EU rights compared with constitutional rights. Nevertheless, differences remain, the ECHR system aiming at fixing a minimum protection standard under the subsidiarity principle, and the EU Charter being part of an order based on primacy and relevant only within the scope of EU law. Moreover, it is well-established in ItCC case law that ECHR norms must respect all constitutional provisions, while the EU law and the Charter may disregard constitutional norms, finding their limits in the constitutional supreme principles (the so-called 'counter-limits').

in a dialogue, safeguarding their jurisdictional role and their mission as a supreme interpreter of the respective *grundnorm*⁸. In the latter sections of this study, we discuss the *rationale* underpinning the ItCC's silent cooperation with the ECtHR.

3. ItCC case law after 2007: general trends

The Italian Constitutional Law no. 3 of 2001 introduced a specific reference to international obligations in Art. 117, par. 1, It. Const. After six years, in two landmark judgements, no. 348 and 349/2007, or the so-called ItCC 'twin' judgements, the ItCC relied on Art. 117, par. 1, to assign a new supra-legislative *status* to the ECHR. In decision no. 348/2007, the ItCC recognised the ECtHR's prominent role as an interpreter of the Convention; however, it had already affirmed that the ECtHR's precedents were not strictly binding for constitutional adjudication, given the needs for a 'fair balance' between respect for international obligations and the protection of constitutional rights and interests⁹. The principles displayed in the twin judgements, in some way, have been reshaped by the following constitutional jurisprudence¹⁰, and the ItCC began using interpretative tools to justify the margin of discretion while implementing the ECHR¹¹.

⁸ Sarmiento, cit. at 4, considers silent judgements a useful device to develop cooperation, but cautions that in a Europe of 27 states (at the time), they can allow judicial chaos, threaten coherence, and ignore the systemic consequences of decisions. Moreover, national courts could interpret silence to set aside EU law and reaffirm their national identities, giving place to 'an unashamed maladministration of EU law' in a manner that is far from mutual understanding and awareness. To avoid this risk, Sarmiento suggests revisiting the CILFIT criteria to balance the judicial national claim of authority and correct application of EU law.

⁹ See point 4.7.

¹⁰ Dealing with the parameters for judicial review of legislation, since decision no. 311/2009, the ItCC admitted that several rights guaranteed under the ECHR—i.e. the right to life under Article 2 ECHR and prohibition of torture under Article 3 ECHR—embody international customary law so that they can be directly applied by judges under Article 10, par. 1, It. Const.

¹¹ The ItCC's former Judge F. Gallo (*Rapporti fra Corte costituzionale e Corte EDU*, Bruxelles, 24 May 2012, at http://www.cortecostituzionale.it/documenti/relazioni_internazionali/RI_BRUXELLES_2012_GALLO.pdf, accessed May 8, 2018) enumerates four main differences between the ItCC and ECtHR methods, reasoning and judgements: relevance of

In decision no. 317/2009, the ItCC clarified the criterion of ‘the greatest expansion of fundamental rights’, that is, a comparison between the conventional and constitutional protection of fundamental rights must be conducted to obtain the greatest expansion of guarantees. The concept of the greatest expansion includes the requirement to weigh individual rights with other constitutional interests that may be affected by the expansion of individual protection. Thus, the impact of individual ECHR rules on Italian law must result in an increase in protection *for the entire system of fundamental rights*¹². Consequently, first, the criterion of the greatest expansion of fundamental rights does not call upon the formal rank of norms (i.e. constitutional norms and supra-legislative norms as the ECHR), but the material degree of protection. Second, the ItCC itself strikes a fair balance between the rights and general interests in question¹³.

In the following case law, the ItCC has presented various arguments to declare where a fair balance lies between rights and other constitutional interests. On the one hand, the ItCC occasionally refers to the ECtHR margin of appreciation doctrine, according to which national authorities enjoy a certain level of discretion in fulfilling their obligations under the ECHR. In fact,

concrete case; effects of decisions; use of comparative methods; and structure of decisions, including concurring and dissenting opinions. These differences render the ‘judicial transplant’ of the ECtHR case law to the ItCC case law far from mechanical given the need for coordination. The ItCC managed this coordination using different techniques: centralisation of the control of conventionality and recognition of the exclusive competence of the ECtHR while interpreting the Convention, thus maintaining a margin to balance conventional and constitutional rights for the ItCC itself. See O. Pollicino, *The European Court of Human Rights and the Italian Constitutional Court: No ‘Groovy Kind of Love’*, in K. Siegler (ed.), *The UK and of European Court of Human Rights - A Strained Relationship?* (2015). Bocconi Legal Studies Research Paper no. 2668688 (at <https://ssrn.com/abstract=2668688>) surveyed three techniques applied by ItCC to increase its margin of discretion: the compliance with ECtHR case law ‘essence (or the substance)’, instead of the full judgements, quoting ItCC no. 317/2009; the distinguishing technique, quoting ItCC no. 236/2011; and the use of the margin of appreciation doctrine as a rhetorical tool to justify a self-made balance. In the text, we reference the same techniques in a partially different order.

¹² Judgement no. 317/2009, point 7.

¹³ As A. Ruggeri, *Appunti per uno studio delle più salienti vicende della giustizia costituzionale in Italia*, *Nomos* 1 (2017), 1-15, 5, pointed out, the criterion is always of benefit to the Constitution and not to the ECHR norms.

since its early decisions, the ECtHR has stated that the Convention should leave the task of securing the rights and liberties it enshrines to each contracting state. Therefore, the ItCC uses the margin of discretion that the ECHR system, in principle, allows to shape its own fair balance between rights and general interest¹⁴.

On the other hand, the ItCC resolves potential conflicts between constitutional and conventional norms using the distinguishing technique¹⁵. The same strategy is applied by the Supreme Court of Cassation. The ItCC often asks ordinary courts to distinguish their cases from the relevant precedents of Strasbourg. Legal scholars recognise that the technique of distinguishing is admissible because ECtHR has jurisdiction over the case facts. This technique also increases the dialogue between ECtHR and Italian courts, thus questioning if and in which circumstances a situation could entail a violation of the Convention. However, a superficial application of the technique could jeopardise the respect for Strasbourg precedents, threatening the principles of legal certainty, equal treatment and respect for legitimate expectations¹⁶.

Moreover, the ItCC has reshaped the binding force of ECtHR precedents. In a more recent and highly controversial judgement, no. 49/2015, the ItCC ruled a question inadmissible because the principles laid down by the ECtHR in a single judgement against Italy were not sufficiently clear, well-established and deeply rooted in the ECtHR case law to become mandatory in Italian courts. In this way, the ItCC seems to leave behind strict obedience regarding

¹⁴See, for example, ItCC no. 1/2011 of 5 January 2011, for retrospective laws.

¹⁵For example, ItCC no. 236/2011 concerning the principle of *nulla poena sine lege*. The decision has been intended as a reply to ECtHR, Grand Chamber, 17 September 2009, *Scoppola v. Italy* (no. 2), application no. 10249/03. The ItCC stated that the Strasbourg precedent 'although aimed at establishing a general principle [...], remains nonetheless linked to the concreteness of the case in which it was ruled: the fact that the European Court is called to assess upon a material case and, most of all, the specificity of the single case issued, are factors to be carefully weighed and taken into account by the Constitutional Court, when applying the principles ascertained by the Strasbourg Court at the domestic level, in order to review the constitutionality of one norm allegedly at odds with that principles'.

¹⁶A. Guazzarotti, *Strasbourg Jurisprudence as an Input for 'Cultural Evolution' in Italian Judicial Practise*, in G. Repetto (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, cit. at 2, 55-68, 63.

the ECtHR interpretation and makes a selection of relevant precedents itself¹⁷.

As a result of the reshaping by the ItCC, today, the ECHR *status* in Italian legal order can be summarised as follows: (a) the ECHR has a supra-legislative rank (b) all judges must implement conventional rights following the ECtHR case law; moreover, all judges must interpret domestic law, as much as possible, in conformity with the ECtHR living interpretation; when a consistent interpretation is not possible, courts must make a referral to the ItCC to evaluate the consistency in the internal norm with the ECHR (c) the judicial review of legislation on the ground on conventionality falls within the exclusive competence of the ItCC and (d) the ItCC recognises a prominent role in ECtHR interpretation, but eventually, the ItCC must strike a fair balance between all rights and general interests at stake.

4. Survey on the application of Art. 117, par. 1, It. Const.

In the above paragraph, we described some general trends in the ItCC case law dealing with ECHR. The ItCC case law can be categorised using different methods. We opted for a classification based on a formal criterion: the parameters to rule the question of unconstitutionality, and particularly, the application of Art. 117, par. 1, It. Const. As mentioned before, since the twin judgements of 2007, Art. 117, par. 1, It. Const. has assumed significance in the ECHR incorporation into the Italian legal order as an intermediate norm between law and the Constitution. *The assumption is that*

¹⁷ ItCC judgement no. 49/2015 of 16 March 2015, concerning the ECtHR *Varvara v. Italy* case of 29 October 2013, on the imposition of a confiscation order despite the termination of criminal proceedings following an unlawful land development in breach of Article 7 ECHR and Article 1, Prot. 1. The case was strongly criticised by legal scholars because the ItCC differentiated between ECtHR judgements on the basis of procedural and substantive criteria (e.g. simple Chamber or Grand Chamber decision, 'novelty' of the principle applied by the ECtHR, and the existence of concurring or dissenting opinions), while ex Article 46 ECHR all judgements are binding for the respondent state. In fact, judgement no. 49/2015 seems to be isolated. In subsequent decisions, the ItCC analysed the coherence of the ECtHR case law to identify the exact meaning of the conventional norm (*chose interprétée*) and not undermine the binding force of judgements against Italy (*chose jugée*); see, for example, no. 184/2015, no. 36/2016 and no. 200/2016.

*adjudication on the ground of Art. 117, par. 1, It. Const. might highlight an alleged violation of the ECHR*¹⁸. However, an in-depth analysis of the legal reasoning demonstrates that the sole reference to Art. 117, par. 1, It. Const. is not meaningful to test compliance with the ECtHR case law. Therefore, we expanded the analysis to other referral orders in which a violation of Art. 117, par. 1, It. Const. is claimed, but the provision is not applied by the ItCC. The analysis resulted in three categories:

a. Concordant cases: cases in which Art. 117, par. 1, It. Const. is applied alone or together with another substantive constitutional parameter to provide an interpretation of constitutional rights *in line with* the ECtHR case law.

b. Discordant cases: cases in which Art. 117, par. 1, It. Const. is also applied; however, it is used to underline the constitutional subordination of the ECHR to the Constitution and the need for a new balance between conventional rights and other constitutional interests.

c. Silent cases: cases in which Art. 117, par. 1, It. Const. remains silent, the unconventionality being held on the sole grounds of substantive constitutional norms, for example Art. 2 or Art. 3 It. Const.

The first and second sets of cases share an explicit application of Art. 117, par. 1, It. Const., while the third set comprises cases in which Art. 117, par. 1, It. Const. is not formally considered, which are the so-called ‘silent cases’. Cases in the first category have the feature of harmony in common between constitutional and conventional norms; that is, the ItCC and ECtHR rulings are consistent. The consistency occasionally involves a broad application of ECHR principles to circumstances that the ECtHR is yet to consider. Thus, we call them ‘concordant cases’¹⁹.

¹⁸ It must be clarified that the selection of parameters for constitutional adjudication depends on the referral order. The ItCC may enlarge the parameter, but the grounds on which the issue of constitutionality arises are identified by the referring judge. See note 3.

¹⁹ See, for example, the numerous ItCC judgements quashing Italian legislation on criminal proceedings which did not provide for a public hearing under Article 6, par. 1, ECHR (right to a fair trial): ItCC no. 93/2010 of 12 March 2010; no. 135/2014 of 21 May 2014; no. 97/2015 of 5 June 2016; no. 109/2015 of 16 June 2015, all following ECtHR, *Bocellari and Rizza v. Italy*, 13 November 2007, no. 399/02; *Perre and others v. Italy*, 8 July 2008, no. 1905/05; *Leone v. Italy*, 2 February

By contrast, cases in the second category include a deviation from the ECtHR statements²⁰. In those cases, Art. 117, par. 1, It. Const. is used to *mark the subordination of the ECHR norms to the Constitution*. Thus, they are called 'discordant cases'. From a generic viewpoint, discordant cases are fewer than concordant ones. Furthermore, in both sets of cases the ItCC performs a strong analysis of ECtHR precedents, explaining their arguments and outcomes. The next paragraph explores the third category, silent cases.

First, for a comprehensive view, it is useful to focus on a well-known 'discordant case' in which the control of conventionality has been autonomously ruled under Art. 117, par. 1, It. Const. We use the so-called '*Maggio case*', ItCC judgement no. 264/2012, which followed ECtHR, *Maggio and others v. Italy* judgement of 31 May 2011²¹. A law of authentic interpretation had reset the calculation system for the pensions of Italian workers employed in Switzerland, which caused their pensions to be lower than that estimated before. Under Art. 1 Prot. 1 ECHR, the ECtHR stated that the control of public expenses and determination of

2010, no. 30506/07; *Bongiorno and others v. Italy*, 2 February 2010, no. 4514/07; *Paleari v. Italy*, 26 July 2011, no. 55772/08; *Capitani and Campanella v. Italy*, 17 May 2011, no. 24920/07; *Pozzi v. Italy*, 26 July 2011, no. 55743/08, on public hearing in proceedings concerning the application of preventive measures; and *Lorenzetti v. Italy*, on public hearing with the Court of Appeal for unfair detention. Impressively, the ItCC used the same words as those of the ECtHR to describe the *rationale* underpinning public hearings and considered the identical requirements, that is, the degree of technicality of the proceedings and the entity of rights at stake. In conclusion, in the words of ItCC, the conventional norm does not contradict the protection granted by the Constitution but is in harmony with it (literally, '*sostanziale assonanza*'). See also ItCC no. 184/2015 of 23 July 2015 on the length of proceedings; no. 196/2010 of 4 June 2010 on administrative sanctions and the prohibition of retrospective law; and no. 210/2013 of 18 July 2013 on the *lex mitior* principle consistent with the *Scoppola* case of 2009. Even in the concordant cases, an effort is made by the ItCC to shape conventional norms as more general principles shared by the Constitution and other international human rights treaties. For example, public hearing is defined as a principle rooted in all democratic systems.

²⁰ See ItCC no. 264/2012 on a retrospective law concerning the calculation of pensions and no. 49/2015, quoted above, on confiscation measures following unlawful land development.

²¹ See ItCC no. 264/2012 of 28 November 2012. However, instead of the issue of retrospective laws, ItCC no. 191/2014 of 20 May 2014 is an example of a concordant case.

pensions to secure social justice are legitimate aims and the margin of appreciation enjoyed by national authorities in implementing socioeconomic policies is broad. Nevertheless, the ECtHR held that there had been a violation of Art. 6, par. 1, ECHR because the Italian law had retrospectively set the pension level and settled, once and for all, the terms of disputes pending before the ordinary courts to which the state was party. Following the ECtHR *Maggio* judgement, the Court of Cassation made a referral order to the ItCC, challenging Italian legislation on the ground of Art. 117 par. 1, It. Const., that is, Art. 6, par. 1, ECHR, as interpreted by the ECtHR in *Maggio*. The ItCC ruled that the applicants had no legitimate expectations of a pension in line with the previous calculation system since the contested provisions were an expression of the principles of equality and solidarity prevailing within the balancing test of rights and interests at stake. The ItCC employed rhetorical tools to identify a margin of discretion in line with the ECtHR precedent, that is, the ‘great expansion of fundamental rights’ criterion and the previously mentioned margin of appreciation doctrine.

However, more deeply, the ItCC explicitly differentiated its role from that of the ECtHR. It stated that the protection of fundamental rights must be systemic, not fragmented: ‘the ECHR norm, while entering into the legal order through the first paragraph of Art. 117 Const. as an intermediate norm, is subject to a fair balance settled with the interpretative tools ordinarily used by this Court’²². In another part of the judgement, the ItCC affirmed that while the ECtHR is charged with the protection of single rights in a fragmented manner, it is for the ItCC to consider rights and

²² ItCC, no. 264/2012: ‘At the end, if, as the Court said (judgements no. 236, no. 113 and no. 1 of 2011, no. 93 of 2010, no. 311 and no. 239 of 2009, no. 39 of 2008, no. 349 and 348 of 2007), the Constitutional Court cannot substitute its own interpretation of a ECHR norm to the one given by the ECtHR applying that norm to the single case, crossing the boundaries of its competences in violation of a binding obligation taken by the Italian State through the signature and ratification, without reservation, of the Convention, anyway the Court must consider if and how the application of the Convention by the ECtHR enters into the Italian constitutional legal order. The ECHR norm, while entering into the legal order through the first paragraph of Article 117 Const. as an intermediate norm, is subject to a fair balance settled with the interpretative tools ordinarily used by this Court... This setting is not aimed at affirming the primacy of national order, but at integrating the protection of rights’ (point 4.2.).

general interests as a whole in a systemic and not isolated perspective. In this way, the ItCC justified a balance that differed from the one struck by the ECtHR, ruling that the claim of unconstitutionality was unfounded. At same time, the ItCC aimed at preventing a clear clash with the ECtHR, affirming that 'This setting [the fair balance between ECtHR rights and other constitutional general interests] is not aimed at affirming the primacy of national order, but at integrating the protection of rights'. Despite these prudent words, a conflict erupted. Following ItCC judgement no. 264/2012, the ECtHR ruled on similar Italian cases, holding again a violation of Art. 6, par. 1, ECHR and, for the first time, a violation of Art. 1 Prot. 1 ECHR given the level of reduction in pensions to less than two-third²³.

5. Silent cases

For the purpose of this study, the ItCC decisions have been considered examples of silent cases when the cases adjudicated at supranational and national level are similar and the 'similarity' between cases concerns their underlying facts; the referral order to the ItCC quotes the ECtHR case law; and the ItCC adjudicates the case in accordance with the ECtHR, although avoiding any reference to Art. 117, par. 1, It. Const.

²³ See ECtHR, *Stefanetti and others v. Italy*, 15 April 2014, no. 21838/10 and other 7, for a declaration of a violation of both Article 6, par. 1, and Article 1 Prot. 1; *Biraghi and others v. Italy*, 24 June 2014, no. 3429/09 and other 21, and *Cataldo and others v. Italy*, 24 June 2014, no. 54425/08 and other 5, for a claim on the violation of the sole Article 6, par. 1. In the *Biraghi* and *Cataldo* judgements, each applicant was awarded a sum of €6.000–47.500, depending on the circumstances of the case, and a non-pecuniary damage of €10.000. The ECtHR stated that 'Contrary to the case-law of the Italian Constitutional Court, there existed no compelling general interest reasons justifying a retrospective application of the Law no. 296/2006, which was not an authentic interpretation of the original law and was therefore unforeseeable' (§65 *Stefanetti* judgement). In *Stefanetti*, the ECtHR considered that the question of compensation for pecuniary damage was not ready for a decision. In the following judgement of 1 June 2017, Italy was condemned to pay a total amount of €874.962 and €5.000 *conjointement* to applicants, plus legal interests. The panel of the Grand Chamber rejected the request of Italian Government to refer the decision. Following *Stefanetti*, ItCC no. 166 of 2017 confirmed the solution adopted in decision no. 264/2012 and ruled the question non-admissible, but recommended the intervention of the legislative.

We consider three pairs of cases. The first couple deals with knowledge of personal information, the second with the transmission of surnames and the third with the use of embryos for scientific research. The three pairs partially differ from each other. They have all been decided on the grounds of substantive constitutional parameters. However, in the ‘one’s origin case’ and ‘the surname case’, the referring judge claimed a violation of *both* substantive constitutional rights *and* the ECHR – the latter through Art. 117, par. 1. Thus, the ItCC was able to choose the parameter between the ones identified by the referring judge. In contrast, in ‘the embryos case’, the referral order did not account for the ECHR. The referring tribunal set the issue on the sole ground of substantive constitutional rights. The ItCC freely chose to broaden the parameter to the ECtHR case law²⁴. The third couple could signify deeper cooperation between courts, given that the ECHR was not even invoked by the referral order.

In detail, the first couple addressed the confidentiality of information concerning a child’s origins. We discuss the ECtHR judgement *Godelli v. Italy* of 25 September 2012²⁵ and ItCC judgement no. 278 of 18 November 2013. Italian law guaranteed the right to keep a child’s origin a secret when the mother asked for anonymity at the time of birth; the mother had the absolute right to have her wish respected. In the *Godelli* case, an Italian woman, who was abandoned at birth by her mother, made attempts to source the details of her origin but her request was denied. Under the ECtHR case law, Art. 8 ECHR protects the right to identity and personal development, which involves establishing the truth about one’s origins. The *Godelli* case called into question the mother’s interest in preserving her anonymity, the child’s interest in learning about her origins, and the general interest of preventing illegal abortions and giving birth in appropriate medical conditions. Relying on a precedent related to France, more specifically, the *Odièvre* case, the ECtHR held that the Italian system failed to strike a fair balance between the competing interests because total and definitive preference was given to the sole wish of the birth mother. In contrast with the French law, the Italian law did not provide a

²⁴ This is clearly stated by the ItCC, affirming that the conventional parameters had not been involved in the pending judgement; see ItCC no. 84/2016 of 22 March 2016, point 10.

²⁵ ECtHR, *Godelli c. Italy*, 25 September 2012, no. 33783/09.

mechanism to disclose the mother's identity with her consent. Therefore, the ECtHR held that there had been a violation of Art. 8 ECHR.

Following the *Godelli* case, an Italian ordinary court made a referral order to the ItCC in a similar case concerning the desire of an adopted woman to know her mother's identity. The referring judge challenged the unconstitutionality of the Italian law on the grounds of certain constitutional norms: Art. 2 It. Const., in which the right to personal identity is incorporated; Art. 3 It. Const. on the principle of equality; Art. 32 It. Const. on the right to health because the denial of parental identity would prevent the applicant from possible screenings for genetic diseases; and Art. 117, par. 1, It. Const. The ItCC overruled its precedent no. 425 of 2005 (in the Court's words, a 'fully analogous case' in which the question of unconstitutionality was judged as clearly unfounded) and quashed the Italian legislation. It is surprising that ItCC judgement no. 278 of 2013 broadly refers to the ECtHR case *Godelli*, but the declaration of unconstitutionality has been made on the sole grounds of Artt. 2 and 3 It. Const.²⁶.

The second pair of cases concerns equality between spouses regarding the transmission of surname to their children: ECtHR judgement of 7 July 2014, *Fazzo and Cusan v. Italy*, and ItCC judgement no. 286 of 21 December 2016. The Italian legal order mandated a rule by which legitimate children were given their father's surname at birth. Despite an agreement between the spouses, the mother was unable to give her family name to the baby. The father's surname rule was implicit from a number of articles in the Italian Civil Code considered together. All domestic remedies were exhausted and the married couple applied to ECtHR, alleging a violation of Art. 8 ECHR, alone or taken together with Art. 14 ECHR on the prohibition of discrimination and Art. 5 Prot. 7 ECHR concerning equality between spouses. In line with its previous case law, the ECtHR held that the decision to name a child according to the transmission of the father's surname entailed discrimination on the ground of parents' sex because the father's

²⁶ The wish for coordination with the ECtHR and, at the same time, autonomous evaluation and assessment of the constitutional rights in question in the *Godelli* case is discussed in the 'University of Macerata - Alberico Gentili Lessons' by ItCC Judge G. Amato, *Corte costituzionale e Corti europee. Fra diversità nazionali e visione commune* (2015), 61-89.

name rule allowed for no exceptions, irrespective of the spouses' alternative joint wish²⁷. It followed that there had been a violation of the principle of non-discrimination under Art. 14 taken together with the right to respect private and family life under Art. 8 ECHR.

Subsequent to the ECtHR judgement, *Fazzo and Cusan*, the ItCC ruled on a referral order in a similar case. The referral order was an antecedent to the *Fazzo and Cusan* judgement and relied on Italian Constitution's norms: Art. 2 It. Const. protecting personal identity; Art. 3 and Art. 29, par. 2, It. Const. on equality and equal dignity of the spouses between them and in relation to their children; and Art. 117, par. 1, It. Const. mentioning the consistent ECtHR case law previous to the *Fazzo and Cusan* case. The ItCC fixed the flaw in the national legal system and as a result, child can be entered in the register of births with both the father's and the mother's surnames. The outcome is broadly similar to that of the ECtHR²⁸; however, the judgement was formally based on national constitutional substantive norms, and particularly, the right to the child's personal identity and principle of equality. While the violation of Art. 117, par. 1, It. Const. was not considered, a clear reference to the *Fazzo and Cusan* statements was made to define the scope of the constitutional right to personal identity.

The third pair of cases deals with embryo donation for scientific research stemming from *in vitro* fertilisation. For the first time, in the *Parrillo case*, the ECtHR was asked to rule on the question whether Art. 8 ECHR could encompass the right to donate embryos placed in cryopreservation for scientific research. In a long and complex decision of 27 August 2015²⁹, the ECtHR Grand Chamber held that Art. 8 was applicable because the exercise of a conscious choice on the fate of embryos concerns an intimate aspect of personal life and is related to the right to self-determination. Nevertheless, the ECtHR held, by sixteen votes to one, that there had been no violation of the provision as there was no European consensus on the subject, with some states permitting human

²⁷ See ECtHR, *Burghartz v. Switzerland*, 22 February 1994, no. 16213/90; *Ünal Tekeli v. Turkey*, 16 November 2004, no. 29865/96; and *Losonci Rose and Rose v. Switzerland*, 9 November 2010, no. 664/06.

²⁸ The ECtHR sanctioned the inability of parents to have their child enter the register of births under the mother's surname. The ItCC, on the other hand, stated that the child should have been registered *also* with the mother's surname.

²⁹ ECtHR, GC, *Parrillo v. Italy*, 7 August 2015, no. 46470/11.

embryonic cell lines, others expressly prohibiting it and some others permitting research only under strict conditions. In addition, the donation of embryos raised delicate moral and ethical questions. For these reasons, the Italian law on assisted reproduction did not overstep the wide margin of appreciation enjoyed by national authorities in the matter. In the meanwhile, the ItCC was referred with an order concerning an analogous case. The aim of cooperation is evident considering that the referral order challenged the Italian law on the grounds of the sole substantive constitutional parameters and did not refer to Art. 117, par. 1, It. Const.³⁰. However, the ItCC adjourned the case and postponed the date of the public hearing in anticipation for the ECtHR judgement. Even if Art. 117, par. 1, It. Const. was not mentioned, the ItCC broadly relied on the ECtHR *Parrillo* case to argue that a general consensus on the issue did not exist. Finally, the ItCC held the question inadmissible because it is for the legislative to strike a fair balance between the fundamental values in question.

In conclusion, in the selected pairs of cases the ECHR rights and their interpretation were considered to define the substance of constitutional rights, under which the national law is interpreted and if ever quashed. However, they are not separately managed to sanction that law under Art. 117, par. 1, It. Const.

As mentioned at the beginning of the paragraph, a further categorisation can be made. In the first two cases, following *Godelli* and *Fazzo and Cusan*, the ItCC could choose between different parameters: the substantive constitutional norms and procedural norm of Art. 117, par. 1; in the last case, concerning *Parrillo*, the referring judge did not mention Art. 117, par. 1. This means that in the first two cases, the ItCC gave logical priority to substantive constitutional norms, while in the third case, the reference to ECtHR case law was made *ex officio*.

In the final part of the study, we will discuss the *rationale* underlying such legal reasoning.

³⁰ ItCC no. 84/2016 of 22 March 2016. The order claimed for unconstitutionality on the grounds of Artt. 2, 3, 9, 13, 31, 32, 33, par. 1, It. Const.

6. Comparative perspective: silent cases in the French experience

To better understand ItCC trends, a comparative perspective could be useful. This perspective is examined in limited terms, with only some preliminary remarks, while the issue needs a more comprehensive study.

The French and Italian models of judicial review of legislation entail significant variations in the ECHR implementation. First, France is a monistic system, while Italy is a dualistic one. In detail, following Art. 55 Fr. Const., international treaties have a formal supra-legislative rank in the hierarchy of norms³¹. However, as Keller and Stone have demonstrated, there is no causal linkage between *ex ante* monism and dualism and the reception of ECHR. The way the ECHR is incorporated is an outcome of the reception process which in turn, will impact reception *ex post*³². Thus, a comparison between monistic and dualistic systems can be performed.

Second, even if in both countries, constitutional adjudication is centralised under a Constitutional Tribunal, the control of conventionality is managed differently. Since the well-known decision of 1975, *IVG*, the French Constitutional Council (FrCC) has stated that international treaties are not part of the *bloc de constitutionnalité* and the conventionality control falls entirely and exclusively within the jurisdiction of common courts³³. The reasons

³¹ Article 55 Fr. Const.: ‘Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party’. France signed the ECHR on 4 November 1950, but ratified it only on 3 May 1974; the right to individual petition was recognised only on 2 October 1981.

³² H. Keller, A. Stone Sweet (eds.), *A Europe of Rights: The Impact of ECHR on National Legal Systems* (2009), 685-686. The point accepted that some states, including Italy, found it difficult to precisely confer a supra-legislative rank on the ECHR because of their dualistic natures, although there is a great deal of variation even in this small group. Dualistic countries tend to incorporate through a statute, whereas monist states do so through judicial decisions. A monistic constitutional structure could provide the judiciary with more leeway in the reception process. In dualistic countries, where a powerful Constitutional or Supreme Court defends national human rights, the authors observed reticence among judges to base their rulings on the ECHR as an independent source of rights.

³³ FrCC no. 74/54 DC of 15 January 1975, *Loi relative à l'interruption volontaire de la grossesse*.

that have led to this statement vary. On the one hand, under the French *a priori* model of judicial review of legislation, the non-conformity of the law with the Constitution has a permanent character and the violation of the Constitution prevents the law's entry into force. By contrast, the FrCC held that a law inconsistent with an international treaty should not be applied in the case; however, it does not need to be quashed or disappear from the legal system. Therefore, if there are changes in the execution conditions for the Treaty, the law can produce the effects again. Thus, while the control of conventionality is relative and temporary, that of constitutionality is absolute and definitive. On the other hand, under Art. 55 Fr. Const., the binding force of treaties is subject to their application by the other parties. Therefore, the FrCC considered the application of international norms to be contingent on reciprocity, while the application of constitutional norms is not. This argument has been critically discussed by scholars for a long time given that the condition of reciprocity does not fit international human rights treaties. By contrast, human rights treaties are sources of a general and objective obligation to protect the human rights of all people within the jurisdiction of the member state, irrespective of the human rights standards ensured by other states. To this effect, many scholars have advocated the overruling of the *IVG* principles and centralisation of the control of conventionality because laws adopted in violation of an international treaty are contrary to Art. 55 Fr. Const.³⁴.

Although there are differences between the French and Italian control of conventionality, silent cases also exist in the FrCC case law. Indeed, before the entry into force of the *a posteriori* judicial review of legislation in 2008, or the so-called '*question prioritaire de constitutionnalité/QPC reform*', the FrCC found a way to implicitly verify the conventionality of laws, that is, review the legislation under the ECHR and ECtHR case law *without mentioning them*.

On the one hand, the FrCC considered that a law on asylum was not contrary to the Constitution provided 'in the silence of the questioned law', the law is interpreted in compliance with an

³⁴ See D. Rousseau, *Droit du contentieux constitutionnel* (2013), 111, quoting, for a critical approach on *IVG* principles, J. Rivero, *Actualité juridique. Droit administrative* (1975), 134; F. Luchaire, *ivi*, 137.

international convention on refugees ratified by France. Such legal reasoning is called the ‘neutralisation technique’. Art. 55 Fr. Const. is not a formal component of the constitutional adjudication reasoning, but the respect for international obligations is imposed through a binding interpretation of the law³⁵. On the other hand, the FrCC interpreted the constitutional right of defence using the same words of the ECtHR but without mentioning it³⁶.

During the discussion concerning the introduction of the *a posteriori* judicial review of legislation, scholars suggested the centralisation of conventionality control together with the *ex post* control of constitutionality, although this suggestion was not implemented. Following the *QPC* reform, in 2010, the FrCC held again that the control of conventionality, as well as compliance with the EU law, falls entirely under the jurisdiction of ordinary and administrative courts³⁷. However, here as well, the scholars remark that the interpretation of constitutional rights often incorporates ECtHR interpretation³⁸.

There are two preliminary conclusions. First, in both the French and Italian experience, some form of silent cooperation is performed, irrespective of the monistic or dualistic relationship between national and international order. In both systems, the constitutional judge maintains a level of compliance with the ECHR. However, the silent cases of the FrCC differ from those concerning the Italian experience because the FrCC generally tends to not mention the ECHR, while the ItCC broadly refers to the ECHR and ECtHR case law. In the Italian experience, the reference to ECtHR has become explicit and the silence concerns the alternative of adjudication (even) on basis of Art. 117, par. 1, or the sole grounds of substantive constitutional norms.

³⁵ See FrCC no. 86/216 DC of 3 September 1986, *Revue française de droit administrative* (1987), 120, note of B. Genevois; the same technique is applied in FrCC no. 92/307 DC of 25 February 1992, *ivi*, 1992, note of B. Genevois.

³⁶ See, for example, FrCC 89/260 DC of 28 July 1989. The FrCC directly applied the ECHR in electoral disputes, in which it rules as an ordinary judge (see FrCC 21 October 1988, applying Article 3 Prot. 1 ECHR; FrCC 8 November 1988, on the holding of a public hearing under Article 6 ECHR, quoted by D. Rousseau, *cit.* at 34).

³⁷ FrCC 2010/605 DC of 12 May 2010.

³⁸ B. Mathieu, *Les décisions du Conseil Constitutionnel et de la Cour européenne des droits de l'homme: Coexistence, Autorité, Conflits, Régulation*, 32 *Nouveau Cahier du Conseil Constitutionnel* (2011), 11.

Second, the *rationale* of implicit cooperation depends on the features of each system. In France, the confirmation of the *IVG* principles is an expression of concern to maintain a well-established relationship with the national Supreme Courts, Court of Cassation and Council of State more than the desire to set a relationship with the ECtHR itself. In Italy, the justification of silent cooperation may differ. Nevertheless, in both systems constitutional law scholars have suggested an explicit reference to ECHR for similar reasons, that is, to counteract marginalisation and self-exclusion of the constitutional judge from the 'network' of European Courts to avoid the risk of external imposition of rights that do not fit local sociocultural traditions and ensure its active contribution to the 'shaping' of human rights³⁹.

7. Search for the *rationale* behind Italian silent cases

We now refer to the ItCC behaviour concerning ECHR. From our perspective, the ItCC case law concerning ECHR involves both explicit cases, in which Art. 117, par. 1, It. Const. is formally applied and silent cases, in which Art. 117, par. 1, It. Const. is not considered. Both explicit and silent cases make a clear reference to ECtHR case law. However, in silent cases, the ItCC ruled on internal laws potentially inconsistent with the ECtHR case law on the grounds of substantive constitutional norms, such as the right to personal identity or principle of equality. The outcome is similar to that ruled by the ECtHR, but it lacks a strict and formal reference to Art. 117, par. 1, It. Const. Therefore, an explicit violation on the ground of the ECHR is not autonomously mentioned. This section aims to analyse the *rationale* underpinning this manner of reasoning.

³⁹ For the period before the *QPC* reform, see G. Carcassone and B. Genevois, *Faut-il maintenir la jurisprudence issue de la décision 74-54 DC du 15 janvier 1975 ?*, Les Cahiers du Conseil constitutionnel 7 (1999), 93-100 and 101-108. As for condition after the *QPC* implementation, particularly about the potential FrCC risk of losing control on constitutional human rights adjudication, see D. Rousseau, cit. at 34, 112-113. See *Contra*, B. Mathieu, cit. at 38, 13 of the draft given that the ECtHR would become a Supreme Court in a system that is not federal. In the author's opinion, the FrCC should continue interpreting constitutional rights in compliance with the ECHR without overruling the *IVG* principles but by making clear reference to ECtHR jurisprudence.

Indeed, a silent cooperation between the ItCC and ECtHR already existed before the landmark decisions of 2007, when the ECHR did not have a formal supra-legislative rank yet. The cooperation included referring to the ECHR to confirm and reaffirm the interpretation of constitutional rights⁴⁰. This form of silent cooperation persists after 2007. However, the meaning of silence somehow changed thereafter. In fact, since 2007, the position of the ECHR in national legal order, as well as the tasks of ordinary judges and the ItCC performing the control of conventionality, has been clearly defined.

In general, it appears that the ItCC's choice of parameter is flexible and unpredictable. The case law does not follow a guiding principle that clearly explains why the ItCC applies both substantive constitutional norms and Art. 117, par. 1; the sole Art. 117; or the substantive constitutional parameter. In other words, *no well-established and coherent logical priority is given to substantive constitutional violations instead of conventional violations*.

Having said this, the 'substantive constitutional favour' can be explained in different ways. On the one hand, the focus on a substantive constitutional parameter could depend on the involved rights as an expression of rooted sociocultural traditions. Since the topic at hand is sensitive and controversial issues, such family matters or medical procreation, relying on a substantive constitutional norm instead of a conventional parameter can increase public acceptance of the outcome. The priority given to substantive constitutional rights suggests that the solution from Strasbourg was *already* set out in the Constitution, that is, the Constitution is able to independently answer social questions and these answers must be accepted because they rely on and belong to the evolution of our legal, social and cultural tradition.

⁴⁰ See M. Cartabia, *Of Bridges and Walls: The 'Italian Style' of Constitutional Adjudication*, this Review 1 (2016), 37-55, 50: 'While, at the beginning of the European adventure, the Italian Court considered its supranational and foreign counterparts as aliens, a period of informal reciprocal influence then followed, during which the Italian Constitutional Court - while avoiding all formal reference to the case law of the two European Court - was actually well aware of the case law developed in Luxembourg and Strasbourg. ... However, long before opening up to direct dialogue with the European Courts [with the two judgements of 2007], the Italian Constitutional Court maintained an implicit and silent, although influential, attention to their decisions'.

On the other hand, such behaviour could aim at preserving the supremacy of national constitutions, regardless of the issues at stake, and reaffirming the prominent role of national constitutional courts. If so, there is room to suspect 'patriotism'. In fact, priority might be given to constitutional rights as the only true source of fundamental rights. In this framework, the ItCC plays a central role, thus having the final say in constitutional human rights adjudication. If this is true, silent cases are underpinned by a claim of autonomy and could be perceived by scholars as a potential symptom of increasing irreconcilable diversities.

Moreover, if the focus is placed on predictability and legal certainty as core values of judicial adjudication, it could be argued that the explicit analysis of ECtHR jurisprudence on the grounds of Art. 117, par. 1, It. Const. would serve as clarity. This would further allow the comparison of constitutional rights as interpreted by the ItCC with conventional rights as understood by the ECtHR. By contrast, the incorporation of the ECtHR case law in substantive constitutional parameters could increase judicial discretion. In this way, slight divergences between constitutional and conventional case law could be easily hidden. These considerations suggest that the lack of reference to Art. 117, par. 1, It. Const. could break cooperation between courts.

Nevertheless, in our opinion, this conclusion does not fit the case law analysis. As seen before, the sole reference to Art. 117, par. 1, It. Const. is insufficient to evaluate the level of compliance between jurisprudence. Thus, other considerations must be taken into account.

In our silent cases, the ItCC and ECtHR case law are consistent. Despite the sole reference to substantive constitutional rights, the ItCC legal reasoning deeply analyses the ECtHR arguments and their outcome. In principle, and with certain nuances, the silent cases show a strong commitment to the ECtHR case law. In addition, from a substantive viewpoint, the reference to the sole constitutional parameter seems a way to stress that unconventionality results in unconstitutionality. Such reasoning is coherent with the ItCC general trends reported in the second section of this research. In judgement no. 317/2009, while holding that there must be a comparison between the ECHR and Constitution to obtain the greatest expansion of fundamental rights, the ItCC made the commitment to develop '*the potential inherent in*

the constitutional norms which concern the same rights'. Indeed, in the silent cases, the comparison between conventional and constitutional rights is performed *within* constitutional provisions. The ECHR, and ECtHR interpretation, does not interact with national law as a separate and autonomous parameter, which calls for an external comparison with constitutional norms, although it *internally* shapes the meaning of constitutional norms. Hence, the lack of reference to Art. 117, par. 1, It. Const. cannot be seen as a sign of 'patriotism' *per se*.

This conclusion is clear if we explore the execution of ECtHR judgements before the Committee of Ministers. Indeed, during the execution of the *Godelli* judgement, following the obligations under Art. 46 ECHR, the Italian Government referred to the ItCC judgement no. 278 of 2013 as a general measure to avoid similar violations⁴¹. It is noteworthy that even if the ItCC formally quashed the law under substantive constitutional norms, its judgement ensured compliance with the ECtHR and it was explicitly used by Italian authorities to prove compliance.

In sum, silent cases underline substantive compliance with the ECtHR case law. Returning to the Sarmiento's analysis, in our framework, silent cases are also a means of 'complicity'. However, there is a key difference. ECJ's laconic answers avoid conflicts, while in the ItCC case law on ECHR, when there is a clash between conventional and constitutional rights, there is no silence. And the ItCC speaks through Art. 117, par. 1. In fact, the 'discordant cases' clearly mention Art. 117, par. 1, It. Const. In this sense, the previously quoted *Maggio* case is significant. In principle bound by the ECtHR *Maggio* judgement, the ItCC lent itself to a balancing exercise, considering that other opposing constitutional interests prevailed in the case's circumstances. The foregoing considerations suggest the final remarks presented in the following section.

8. Conclusions

The ItCC case law following a previous ECtHR judgement shows that the choice of parameters for constitutional adjudication is flexible. The analysis of silent cases, in which an explicit reference

⁴¹ See the action report Dh-DD(2015)999, Committee of Ministers 1243 meeting, 8-10 December 2015, Communication from Italy Concerning the Case of *Godelli* against Italy.

to Art. 117, par. 1, is lacking, demonstrates that their legal reasoning and outcome are consistent with those of the ECtHR case law. The incorporation of ECHR and ECtHR case law into the constitutional rights parameter means that ECHR norms *are* constitutional *in substance*. Despite the formal sub-constitutional rank of ECHR in the hierarchy of norms, in silent cases conventional norms are managed *as* constitutional ones. Thus, this type of reasoning maximises the degree of ECHR's integration into national legal system. In other words, silence is a means to unity.

Instead, ECHR's formal rank emerges when the interpretation, that is, the fair balance, of the two courts is diverging. Therefore, *Art. 117, par. 1, It. Const. is the procedural norm to stress the subordination of ECHR to the Constitution*. Thus, the explicit reference to Art. 117, par. 1, parameter is a means to plurality. In other words, when the outcome is consistent with the ECtHR rulings, reference to Art. 117, par. 1, remains *optional*; however, when the constitutional balance and ECHR balance differ, Art. 117, par. 1, becomes necessary. If this is true, the construction of a dialogue that preserves the constitutional heritage of each state does not pass through silence but through the explicit differentiation between the constitutional parameter and conventional norms and the clear explanation of the reasons for a diverging interpretation⁴².

On the other hand, when there is consistency and the use of Art. 117, par. 1, is avoided, the question on 'substantive constitutional favour' still stands, that is, whether the silent cases can be explained differently from constitutional patriotism. The answer is hypothetical because the evidence is not supported by the strict analysis of judicial legal reasoning or case law outcomes.

First, focusing on the constitutional substantive parameters, silent cases underline a theory of constitution 'as a whole, as a system, avoiding the fragmented interpretation of a single

⁴² G. Martinico, *La giurisprudenza della disobbedienza. Il ruolo dei conflitti nel rapporto tra la Corte costituzionale e la Corte europea dei diritti dell'uomo*, in A. Bernardi (ed.), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali* (2017), 407-444, argues that what we call 'discordant cases', or judgement no. 49/2015, could be a way of 'functional disobedience' in so far as they imply a mutual recognition between courts. These cases entail a form of cooperation if the reasons of dissent are clear and well-explained, thus allowing scholars and the public opinion to control legal reasoning.

provision removed from its contextual relationship with the other principles, rules and rights enshrined in the Constitution'⁴³. This opinion reflects a general path for cooperation and coordination together with the desire to maintain and protect the Italian constitutional core values and traditions.

Second, the answer may not be as simple when adopting the legitimacy perspective. As previously mentioned, in principle, silent cases could serve a defensive approach, prioritising the national constitution even when its interpretation complies with the ECHR. However, the defensive approach may play in the opposite direction, protecting the ECHR itself.

In recent years, there have been growing opinions across different states, suggesting an exit from the ECHR system and reaffirming a constitutional supremacy. Voices have been heard in the United Kingdom, following the conservative proposal to abolish the Human Rights Act, the law incorporating the ECHR into British legal order, and restore the Parliament's sovereignty over British law. These voices have escalated to public opinions⁴⁴. In France, some civil servants and intellectuals have proposed to make the binding force of ECHR less stringent⁴⁵. Although minor opinions, these are signs of a disbanding involving not only populist parties seeking to address ordinary people with anti-

⁴³ M. Cartabia, *Of Bridges and Walls: The 'Italian Style' of Constitutional Adjudication*, cit. at 40, 52.

⁴⁴ See, for example, the campaign launched in 2011 by The Telegraph under the slogan 'End the Human Rights Farce' following cases in which foreign criminals used 'the right to a family life under Article 8 ECHR to avoid deportation'. Other cases, such as giving prisoners the right to vote, have caused emotive reactions. In 2015, a Manifesto of the Conservatives aimed at abolishing the Human Rights Act and introducing a British Bill of Rights, wishing to break the formal link between British Courts and ECtHR and make the Supreme Court the final arbiter in matters concerning human rights in the United Kingdom; the campaign remains on-going. Recently, The Telegraph affirmed that the United Kingdom's plans to 'scrap' the Human Rights Act have been shelved until after Brexit (<http://www.telegraph.co.uk/news/2017/01/26/theresa-may-preparing-abandon-plans-british-bill-rights-sources/>, accessed May 8, 2018).

⁴⁵ See the Manifesto of the so-called 'Groupe Plessis', pseudonym for a group of French high-level officers, suggesting the exit of ECHR: 'Cour européenne des droits de l'homme: pourquoi en sortir est un impératif démocratique' (<http://www.lefigaro.fr/vox/politique/2016/06/21/31001-20160621ARTFIG00149-cour-europeenne-des-droits-de-l-homme-pourquoi-en-sortir-est-un-imperatif-democratique.php>, accessed May 8, 2018).

European rhetoric but also high-level officials. In this context, silent cases may serve another objective. Focusing on the Constitution and converting an ECHR violation into a substantive constitutional one, they could be a means to prevent the perception, in public opinion, of an unreasoned importation of judicial solutions. Thus, the incorporation of ECtHR interpretation directly into the substantive constitutional parameter is a way to protect the ECHR machinery itself. In times of mistrust, it is possible that the European human rights adjudication needs, today more than in the past, to be rooted in constitutional norms and have legitimacy from a constitutional background. In sum, implicit cooperation can grant and preserve the unity of the European transnational system of human rights protection. In fact, through their own parameters, national courts aim at complying with ECtHR jurisprudence, assuring the same level of protection, while rooting the legitimacy of European integration directly into their living Constitution.

PROTECTION OF EU LAW IN CASE OF LEGISLATIVE OMISSIONS: HOW CONSTITUTIONAL COURTS REACT

*Sarah Verstraelen**

Abstract:

When a Constitutional Court declares a gap in legislation to be unconstitutional because certain categories are not included, immediately the question rises how redress can be offered to the excluded party. A mere annulment of the contested norm will often be insufficient. Therefore, Constitutional Courts developed different types of adjudication in order to eliminate a legislative lacuna, sometimes by even instructing ordinary judges to expand the contested norm's field of application.

A similar reasoning applies to legislative omissions that violate EU law. The principles of supremacy and direct effect that oblige national judges to set aside national legislation when it is contrary to EU law and the possibility of harmonious interpretation will often not suffice; a simple annulment of the contested norm does not lead to an expansion of its field of application. The principle of loyal cooperation (Article 4 (3) TEU) together with the principles of equivalence and effectiveness compel Constitutional Courts to employ the same types of adjudication they use within a national context to offer redress when EU law is violated. This research will show that the Italian and Belgian Constitutional Courts follow the practice they developed within a mere national setting, thereby often instructing ordinary courts to expand the contested norm's field of application in accordance with EU law. By contrast, the German and French Constitutional Courts do not even review national legislation to its conformity with EU law, let alone they use the developed techniques to fill a legislative gap that violates EU law. In this way, the latter deny to offer the necessary redress to the excluded party.

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1. Setting the scene

In 2008, the XIVth Congress of the Conference of European Constitutional Courts was devoted to the problems of legislative omissions in constitutional jurisprudence¹. From the national reports it became clear that all Constitutional Courts are often implicitly or explicitly confronted with cases regarding legislative omissions². In these cases a Constitutional Court will review the existence of a complete absence of legislative performance (absolute omissions) or it will review legislation that has been enacted in a partial, incomplete or defective way (relative omissions)³. Although only few Constitutional Courts were explicitly attributed the competence to review legislative omissions⁴, judicial review of relative omissions has been extensively developed in the past decades in all democratic countries when it concerns the existence of poor, deficient or inadequate regulation, thereby in most cases infringing upon the principles of equality and non-discrimination⁵. Merely annulling or declaring unconstitutional the insufficient legislative norm however, does not provide the necessary redress. Consequently, Constitutional Courts developed different types of adjudication in order to eliminate a legislative lacuna, sometimes by even instructing ordinary judges to expand the contested norm's field of application.

¹ www.confueconstco.org, accessed May 8, 2018.

² T. Birmontienė, E. Jarašiūnas, E. Spruogis, *General Report*, in E. Jarašiūnas (ed.), *Problems of legislative omission in constitutional jurisprudence* (2009), 203-204.

³ A.R. Brewer-Carias, *Constitutional Courts as positive legislators in comparative Law*, in A.R. Brewer-Carias (ed.), *Constitutional Courts as positive legislators. A comparative law study* (2011), 125-126.

⁴ See e.g. Art. 283(2) Portuguese Constitution; Section 46(2) Act CLI of 2011 on the Constitutional Court Hungary; Art. 103, § 2, Brazilian Constitution 1988.

⁵ T. Birmontienė, E. Jarašiūnas, E. Spruogis, *General Report*, cit. at 2, 204; A.R. Brewer-Carias, *Constitutional Courts as positive legislators in comparative Law*, cit. at 3, 148.

Legislative omissions may also be present within the context of the European Union. In that case and for this contribution, a legislative omission arises when the national legislator failed to provide a sufficient legal norm that implements European legislation and/or ensures the full protection of EU law. The principle of loyal cooperation between the Union and the member states obliges all authorities of the member states, including the courts, to take all appropriate measures to ensure fulfilment of the obligations arising from the Treaties and acts of the institutions of the European Union. Referring to the principles of equivalence and effectiveness, one would assume that the same types of adjudication in case of a legislative lacuna in a mere national context are evenly applied to ensure compatibility with EU law. After all, the well-known principles of supremacy and direct effect that oblige national judges to set aside national legislation when it is contrary to EU law and the possibility of harmonious interpretation will often not suffice. Reference can be made to the situation where a national norm violates EU law because a certain category of persons is excluded without reasonable justification. In this case, a simple annulment of the contested norm will not lead to the desired effect, namely an elaboration of the contested norm's field of application so that it includes all persons.

In order to test this reasoning, I examined the case law of the French, German, Italian and Belgian Constitutional Court and the types of adjudication they use when dealing with legislative omissions in a mere national context (II) and consequently in a European context (III). These countries were chosen because their attitude towards EU law ranges from very rigid to very Europe friendly, which impacts the review process. Despite the principles of effectiveness and equivalence, not all Constitutional Courts apply the same types of adjudication to ensure compatibility with EU law. The French *Conseil Constitutionnel* refrains from reviewing national legislation in accordance with EU law and the decision of the German *Bundesverfassungsgericht* in the EAW case resulted in a total non-application of the relevant Framework Decision. By contrast, the Italian *Corte Costituzionale* has ruled on several occasions on how a violation of EU law in the form of a legislative lacuna should be eliminated and the Belgian Constitutional Court regularly and very explicitly instructs judges on how to fill a legislative gap violating EU law. With this active approach, a high

degree of clarity, legal certainty and uniformity is established and the Constitutional Court lives up to the standard of loyal cooperation and its duty to take all appropriate measures to ensure fulfilment of the obligations arising from EU law (Article 4 (3) TEU) (III). Moreover, recent case law of the European Court of Human Rights demonstrated that the right to an effective remedy, as enshrined in Article 47 of the charter of Fundamental Rights of the European Union and Articles 6 and 13 of the European convention of Human Rights (ECHR), could be violated when courts do not fill a legislative gap (IV).

2. Adjudication within a national context

The Belgian Constitution, nor the Belgian Special Act on the Constitutional Court (SACC) provide an explicit basis for the Belgian Constitutional Court to review legislative omissions. What is more, Article 142 of the Belgian Constitution states that the Court may rule on violations of the constitution *by* a statute, decree or ordinance⁶. Likewise, since 2008 the French Constitution provides the possibility to bring proceedings in progress before the *Conseil constitutionnel* if it is claimed that *a legislative provision infringes* the rights and freedoms guaranteed by the Constitution⁷. The Italian Constitution equally refrains from mentioning the possibility of an infringement of the Constitution by a legislative omission; the Constitutional Court shall pass judgement on controversies on the constitutional legitimacy of laws and acts having force of law issued by the State and Regions⁸. By contrast, the German Act on the Federal Constitutional Court (BVerfGG) explicitly states that the violation of a constitutional right by an act *or omission* can be subject of a constitutional complaint brought before the Court⁹.

The fact that the possibility for some Constitutional Courts to review (relative) legislative omissions was not taken into account by the (constitutional) legislator, becomes apparent when looking

⁶ See respectively Articles 1 and 26 of the Special Act 6 January 1989 on the Constitutional Court, *Belgian Official Gazette* 7 January 1989.

⁷ Art. 61-1 French Constitution.

⁸ Art. 134 Italian Constitution.

⁹ § 92 BVerfGG.; see e.g. also Art. 283 (2) Portuguese Constitution; Section 46 (2) Act CLI of 2011 on the Constitutional Court Hungary; Art. 103, §2, Brazilian Constitution 1988.

at the possible decisions the Court may take when it finds such an unconstitutional legislative omission present. What is more, even within the German legal order where the review of legislative omissions was explicitly mentioned, the German *Bundesverfassungsgericht* developed the technique of *Unvereinbarkeitserklärung* to declare a provision unconstitutional, but not void when it encompasses a legislative omission¹⁰. After all, annulling the contested norm rarely provides the desired redress: parties wish to expand the confined field of application, rather than annulling the norm in its entirety (2.1). Consequently, Constitutional Courts resort to creative interpretations of the legal norm (2.2) and use the possibility to modulate the temporal effects of their decisions (2.3). In some cases Constitutional Courts pronounce injunctions to the legislator and sometimes they even instruct the ordinary courts on how the legislative gap should be filled (2.4). It will become clear that similar techniques are being used within the different legal orders to avoid the harsh consequences of a strict (retroactive) annulment.

2.1. Setting aside or annulling the contested norm

By annulling or declaring a legislative norm unconstitutional, a Constitutional Court prevents further application of the contested norm. However, when a Court annuls an explicitly determined exception to a rule, the Court automatically expands the field of application and offers immediate redress for the litigants. In this way e.g. the French *Conseil constitutionnel* eliminated an unconstitutional omission in legislation regarding data retention. Considering that the legislator did not include proper guarantees to ensure an equal balance between the right to respect of private life and the prevention of attacks on public order, the Council simply annulled the explicit competence for the investigators to obtain communication data¹¹. A well-known case within the Belgian legal order, is case No. 157/2004 where the Constitutional Court ruled on the federal

¹⁰ W. Heun, *The Constitution of Germany* (2011), 178.

¹¹ *Conseil constitutionnel* 21 July 2017, QPC No. 2017-646/647; see recently *Conseil constitutionnel* 24 January 2017, QPC No. 2016-608; *Conseil constitutionnel* 9 March 2017, QPC No. 2017-16-617; see also *Conseil constitutionnel* 20 January 2012, QPC No. 2011-212; *Conseil constitutionnel* 2 March 2016, QPC No. 2015-523; Italian *Corte Costituzionale* 26 May 2010, No. 187/2010.

legislation for combating discrimination¹². The law explicitly provided a limited list of protected categories on the basis of which discrimination was prohibited, but forgot to mention (among others) language and political affiliation. The annulment of the limited list by the Court immediately ensured a general prohibition of discrimination.

In the majority of its judgments regarding legislative omissions, the Belgian Constitutional Court resorts to a very specific modulation of its dicta. The Court decided in numerous cases that the contested norm violates the principles of equality and non-discrimination *to the extent that* it excludes certain persons or *to the extent that it does not provide* for a certain form of protection, benefit, etc. It must be emphasized that this line of reasoning does not provide the necessary redress because the Court only declares the legislative lacuna as such unconstitutional; the contested norm remains unaltered. In decision No. 96 of 2015 the Italian Constitutional Court ruled in a similar manner: it found the rules on medically assisted procreation unconstitutional to the extent that they did not allow fertile couples who are carriers of genetic diseases to have access to methods of medically assisted procreation¹³.

2.2. Constitution-conform interpretation

De Visser determined that the technique of constitution-conform interpretation is ubiquitous in the case law of European Constitutional Courts¹⁴. When more than one valid construction of the contested norm is possible, the presumption of constitutionality requires that judges should opt for the interpretation that guarantees conformity with the constitution¹⁵. For example, the French *Conseil constitutionnel* established a well-known tradition of *réserves d'interprétation* since the beginning of its case law in 1959¹⁶.

¹² Belgian Constitutional Court 6 October 2004, No. 157/2004.

¹³ Italian *Corte Costituzionale* 14 May 2015, No. 96/2015; see also e.g. Italian *Corte Costituzionale* 16 January 2013, No. 7/2013.

¹⁴ M. De Visser, *Constitutional Review in Europe* (2014), 291.

¹⁵ *Ibid.*, 292.

¹⁶ Within the *a priori* review procedure, reference can be made to so called *semi-réserves* or *interpretations directives* entailing guidelines to the legislator on how to eliminate the legislative omissions. *Rapport du Conseil constitutionnel de la République française*, in E. Jarašiūnas (ed.), *Problems of legislative omission in constitutional jurisprudence* (2009), 511.

Likewise, the Belgian Court of Cassation stated already in 1950 that if possible, legislation should be interpreted in conformity with the Constitution¹⁷. The Belgian Constitutional Court also regularly resorts to this technique. Although it is obliged to examine the contested legislation in the interpretation given by the referring judge, this does not prevent the Court from adding an alternative interpretation that is in conformity with the Belgian Constitution¹⁸.

We must be aware however, and this is not only the case when legislative omissions are in play, that this technique can lead to considerable activism by the Court¹⁹. For example, in decision No. 2017-632 the French *Conseil constitutionnel* declared the contested legislation to be constitutional under the interpretation of “reading in” what was missing, namely a possibility of recourse against a physician’s decision to halt or not implement treatments that it deems useless, disproportional or without any other effect than artificially sustaining life, when the patient is no longer in a condition to express his/her wishes²⁰.

2.3. Modulation of the temporal effects

Decisions of Constitutional Courts have a certain temporal effect that determines to which facts and (pending) cases the finding of unconstitutionality will be applicable. When a decision attaches legal consequences to facts that occurred prior to the judgment, this decision has an effect *ex tunc* or a retroactive effect. This is the case for decisions of the Belgian Constitutional Court and the German *Bundesverfassungsgericht*. If legal consequences are only attached to legal facts that occur after the pronouncement or publication of the decision, an effect *ex nunc* is attributed, which is the case for decisions of the French *Conseil constitutionnel*. Research

¹⁷ Belgian Court of Cassation 20 April 1950, *Arresten van het Hof van Cassatie* (1950), 517.

¹⁸ P. Popelier, *Procederen voor het Grondwettelijk Hof* (2008), 266-268; e.g. Belgian Constitutional Court 29 January 2004, No. 17/2004; Belgian Constitutional Court 6 July 2005, No. 119/2005; Belgian Constitutional Court 22 December 2011, No. 197/2011.

¹⁹ See on the difference between interpretation and correction or amendment V. Ferreres Comella, *Constitutional Courts & Democratic Values* (2009), 112 et seq.

²⁰ *Conseil constitutionnel* 2 June 2017, QPC No.2017-632; M. De Visser, *Constitutional Review in Europe*, cit. at 14, 293; see also Belgian Constitutional Court 29 January 2004, No. 17/2004; Belgian Constitutional Court 6 July 2005, No. 119/2005; Belgian Constitutional Court 22 December 2011, No. 97/2011.

has shown that the initial attribution of a certain temporal effect to decisions of the highest courts is not decisive, but the possibility to deviate from them is²¹. In particular the possibility to assign an effect *pro futuro*, thereby imposing a continued application of the unconstitutional norm for a certain period of time, proves to be of great importance²². This becomes clear when we look at the case law of the Italian *Corte Costituzionale*. Seeing that this Court does not formally have the competence to control the temporal effects of its decisions, the Court developed the practice of the so called “warning decisions”. In these decisions, the Court refrains from declaring legislative norms unconstitutional, but sends a message to the legislator to overcome a situation which might be justified only temporarily or in order to avoid a dangerous *horror vacui* subsequent to a decision of unconstitutionality²³.

As said before, in cases where legislative omissions are present, parties usually strive for an expansion of the field of application instead of an annulment or declaration of unconstitutionality of the existing, but incomplete norm. Moreover, such an annulment or declaration of unconstitutionality is often more detrimental than upholding the unconstitutional norm, because this would prevent other citizens to benefit from it²⁴. Consequently, Constitutional Courts often find recourse in the possibility to impose an effect *pro futuro*, thereby granting the legislator time to fill the unconstitutional legislative gap²⁵. After all, the decision to modulate the temporal effect of the Court’s decision does not expand the contested norm’s field of application.

²¹ S. Verstraelen, *Rechterlijk overgangsrecht* (2015), 446 et seq.

²² P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe, *The Effect of Judicial Decisions in Time: Comparative Notes*, in P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe (eds.), *The Effects of Judicial Decisions in Time* (2014), 3, 8-10.

²³ G. Martinico, *The Temporal Effects of the Italian Constitutional Court and the Mechanism of Warning Decisions*, in P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe (eds.), *The Effects of Judicial Decisions in Time* (2014), 139.

²⁴ V. Ferreres Comella, *Constitutional Courts & Democratic Values*, cit. at 19, 25.

²⁵ *Conseil constitutionnel* 21 July 2017, QPC No. 2017-646/647; see recently also *Conseil constitutionnel* 9 June 2017, QPC No. 2017-635; *Conseil constitutionnel* 27 October 2017, QPC No. 2017-670; German *Bundesverfassungsgericht* 6 December 2016, 1 BvR 2821/11 - 1 BvR 321/12 - 1 BvR 1456/12; Belgian Constitutional Court 21 December 2004, No. 202/2004.

2.4. Filling the unconstitutional gap

2.4.1. Boundaries of constitutional adjudication

In 2005 the German *Bundesverfassungsgericht* filled a legislative gap situated in Article 79, §2 of the Act on the Federal Constitutional Court (AFCC) that prohibited the execution of non-appealable decisions based on a legal provision that was declared void. The Court decided to extend this prohibition of execution to decisions based on the interpretation of a legal provision which the Court declared to be incompatible with the Basic Law²⁶. In her dissenting opinion, judge Haas rejected this analogous application and considered that with this, the Court took a political stance on what it thinks to be the ideal legal solution²⁷.

The foregoing example demonstrates the difficulty Constitutional Courts face when they wish to remedy an unconstitutional gap; they are constantly testing the boundaries between constitutional adjudication and judicial lawmaking. What is more, when a legislative omission violates the principles of equality and non-discrimination, there are two possibilities to restore the equality: either via a level down-approach, where the existing norm is removed so no one may benefit from it anymore, or via a level up-approach, where the field of application of the norm is expanded so that all parties concerned may benefit from it. Especially in cases where Constitutional Courts impose services, mostly benefits, for excluded categories of persons, this can entail grave financial consequences²⁸. Only when an hierarchical higher norm obliges the legislator to provide for a certain right, the level down-approach cannot be followed. This is the case when EU law obliges the Member States to provide for and implement certain measures. Consequently, seeing that levelling downwards is not permitted, Constitutional Courts can give full effect to EU law by expanding the field of application. We will see this later.

2.4.2. Instructions to the legislator

The instructions a Constitutional Court provides for the legislator on how the unconstitutional omission can be remedied is

²⁶ Similar to the wording of art. 79, §1 AFCC, German *Bundesverfassungsgericht* 6 December 2005, 1 BvR 1905/02, § 38.

²⁷ *Ibid.*, § 58.

²⁸ X, *Report of the Constitutional Court of the Italian Republic*, in E. Jarašiūnas (ed.), *Problems of legislative omission in constitutional jurisprudence* (2009), 564 et seq.

a perfect example of the ongoing constitutional dialogue between these two actors. Especially when the Court informs the legislator on possible constitutional legislative reforms without the obligation for the legislator to act accordingly, the Court respects the discretionary powers of the latter. However, it must be emphasized that when a Court only provides instructions to the legislator, again it fails to provide the necessary redress in that specific case and in the intermediary period leading up to the legislative reform.

When various options are at the legislator's disposal to amend the unconstitutional legislation, the German *Bundesverfassungsgericht* often resorts to an *Unvereinbarkeitserklärung*, providing the legislator explicit suggestions on how the unconstitutional gap can be filled, sometimes even on the (im)possible retroactive effect this new legislation should have²⁹. In case No. 179 of 2017, the Italian Constitutional Court in its turn expressed its urgent wishes that the legislator proceeded rapidly to satisfy the principle of necessary proportionality of punishments³⁰. Since 1996, the Belgian Constitutional Court developed case law in which it declares the contested norm to be constitutional, but the mere absence of a similar provision for the excluded category to be discriminatory. Referring to the legislator's prerogatives, the Court often states that only the legislator is able to fill the legislative gap³¹. Similarly, albeit less explicitly, the Italian *Corte Costituzionale* ruled on the

²⁹ German *Bundesverfassungsgericht* 10 November 1998, 2 BvR 1057/91 - 2 BvR 1226/91 - 2 BvR 980/91; German *Bundesverfassungsgericht* 11 November 1998, 2 BvL 10/95; German *Bundesverfassungsgericht* 6 March 2002, 2 BvL 17/99; German *Bundesverfassungsgericht* 18 July 2006, 1 BvL 1/04 - 1 BvL 12/04; German *Bundesverfassungsgericht* 28 March 2006, 1 BvL 10/01; German *Bundesverfassungsgericht* 11 July 2006, 1 BvR 293/05; German *Bundesverfassungsgericht* 12 February 2014, 1 BvL 11/10; German *Bundesverfassungsgericht* 23 June 2015, 1 BvL 13/11 - 1 BvL 14/11; German *Bundesverfassungsgericht* 6 December 2016, 1 BvR 2821/11 - 1 BvR 321/12 - 1 BvR 1456/12; W. Schroeder, *Temporal Effects of Decisions of the German Federal Constitutional Court* in P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe (eds.), *The Effects of Judicial Decisions in Time* (2014), 24-25.

³⁰ *Ibid.* Italian *Corte Costituzionale* Judgment No. 179/2017, <https://www.cortecostituzionale.it/actionJudgment.do>

³¹ E.g. Belgian Constitutional Court 15 May 1996, No. 31/96; S. Verstraelen, *Constitutionele dialoog als een lens: onderzoek naar het wetgevend optreden na de vaststelling van een ongrondwettige lacune door het Grondwettelijk Hof*, *Tijdschrift voor Wetgeving* (2016), 20-21.

impossibility for homosexual couples to marry³². The Court did not declare the provisions of the Civil Code discriminatory considering that homosexual unions could not be regarded as homogeneous with marriage. The Court however, underlined that for the purposes of Article 2 of the Italian Constitution, it was for Parliament to determine, exercising its full discretion, the forms of guarantee and recognition for homosexual unions³³. Again it must be emphasized that in this way, the Court merely opens a dialogue with the legislator by inciting the latter to react, but it does not eliminate the existing legislative lacuna, nor does it oblige the legislator to fill the legislative gap. This became clear in the aftermath of the Italian legislative omission regarding homosexual unions which was brought before the European Court of Human Rights (ECtHR). The ECtHR found the failure of the Italian legislature to provide a specific legal framework for homosexual unions to be in violation of Article 8 ECHR³⁴. It even stressed that “the repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account”³⁵.

2.4.3. Instructions to judicial and administrative authorities

When the Constitutional Court provides clear instructions to the ordinary courts and administrative authorities on how the unconstitutionality needs to be remedied, the Court offers immediate redress and provides certainty and equality regarding the further application of the contested norm.

The imposed deadline for legislative reaction by the German *Bundesverfassungsgericht* is often accompanied with further details for ordinary courts on how to act. First, the German Court can instruct the ordinary courts on how they should adjudicate cases when no legislative reaction has yet taken place. In this way the

³² Italian *Corte Costituzionale* 15 April 2010, No. 138/2010.

³³ *Ibid.*

³⁴ ECtHR 21 July 2015, *Oliari a.o. v. Italy*; ECtHR 14 December 2017, *Orlandi a.o. v. Italy*.

³⁵ ECtHR 21 July 2015, *Oliari a.o. v. Italië*, § 184.

Court avoids insecurities in the transitional phase³⁶. On several occasions the Court emphasized the further application of the unconstitutional norm, which of course does not lead to the desired effect of expansion of the field of application³⁷. In a decision of 2006 regarding the possibility of transsexuals to change their first name, the Court even argued that imposing a provisional arrangement would infringe upon the competences of the legislator to decide upon the question³⁸. The Court can also instruct judges to apply another legal norm or can instruct judges to postpone their rulings until the entering into force of new legislation. The latter was the case in the recent notorious decision of the German *Bundesverfassungsgericht* on the 'dritte option'. The German Court found the absence of a third option, namely the possibility for intersex people to indicate that they are neither male, nor female, incompatible with the respect for human dignity, the right to free development of citizens personality and the principle of equality³⁹. The legislator is obliged to amend the unconstitutionality prior to 31 December 2018 and proceedings pending before the *Oberlandesgericht* will be continued after this legislative reaction.

Secondly, the German Court often provides information on how the unconstitutionality should be addressed if the legislator does not meet the imposed deadline⁴⁰. In this way, the Court already clarified what would become the new legal ground for certain tax exemptions if the legislator would not react in time⁴¹. In a 2017 case, the German Court explicitly stated that if the legislator fails to act in time, the disputed regulation will become void with retroactive effect to the date of its entering into force⁴². In the latter

³⁶ M. Gerhardt, *Report of the Constitutional Court of the Federal Republic of Germany*, in E. Jarašiūnas (ed.), *Problems of legislative omission in constitutional jurisprudence* (2009), 229.

³⁷ German *Bundesverfassungsgericht* 10 November 1998, 2 BvR 1057/91 - 2 BvR 1226/91 - 2 BvR 980/91; German *Bundesverfassungsgericht* 23 June 2015, 1 BvL 13/11 - 1 BvL 14/11.

³⁸ German *Bundesverfassungsgericht* 18 July 2006, 1 BvL 1/04 - 1 BvL 12/04.

³⁹ German *Bundesverfassungsgericht* 10 October 2017, 2 BvR 2019/16.

⁴⁰ German *Bundesverfassungsgericht* 28 March 2006, 1 BvL 10/01; German *Bundesverfassungsgericht* 11 July 2006, 1 BvR 293/05.

⁴¹ German *Bundesverfassungsgericht* 10 November 1998, 2 BvR 1057/91 - 2 BvR 1226/91 - 2 BvR 980/91; see also German *Bundesverfassungsgericht* 26 July 2016, 1 BvL 8/15.

⁴² German *Bundesverfassungsgericht* 29 March 2017, 2 BvL 6/11.

example, the similarity with the so called ‘warning decisions’ of the Italian *Corte Costituzionale* becomes apparent.

I mentioned before the practice of the Belgian and Italian Constitutional Court to annul or declare unconstitutional legislation *to the extent that it does not provide* for a certain benefit, level of protection, etc. By annulling the legislative omission, one could say that nothing changes: The Court merely annuls a rule that is not even present within the legal order. Since decision No. 111/2008, the Belgian Constitutional Court resolved this issue by explicitly granting the ordinary courts the possibility to fill the legislative gap “when the finding of unconstitutionality is put in sufficiently precise and complete terms”⁴³. Within the case law of the German Constitutional Court, instructions to the ordinary judges usually accompany the instruction for the legislator to react, thus accentuating a perception of primacy of the legislative power and the legislator’s duty to react. Instead, the Belgian Constitutional Court often only refers to the competences of ordinary courts to fill the legislative gap. What is more, within the Italian legal order, such an explicit indication for the ordinary courts is not even required. Within the case law of the Italian Constitutional Court, “substitutive” and “additive” judgments can be discerned. In the first, the Court declares a provision unconstitutional “in the part in which” a certain thing “instead” of another is provided for. In the case of additive judgments, the Court declares unconstitutional the provision “in the part in which it does not” foresee something. These decisions immediately add a fragment to the norm that was the subject of the judgment, i.e. immediately fill the legislative gap without explicit instructions towards ordinary courts⁴⁴. The Italian Constitutional Court has emphasized that an additive decision is only permitted when it leads to a logical extension which is necessary and often implicit in the interpretive potentiality of the normative context in which the contested norm was inserted. This is not the case when a plurality of solutions is present, deriving from various possible assessments and the chosen solution by the Court would be the result of a discretionary assessment⁴⁵. This line of reasoning corresponds to the formulation the Belgian

⁴³ Belgian Constitutional Court 31 July 2008, No. 111/2008.

⁴⁴ X, *Report of the Constitutional Court of the Italian Republic*, cit. at 28, 554-55.

⁴⁵ Italian *Corte Costituzionale* 109/1986, 22 April 1986, translation by M. De Visser, *Constitutional Review in Europe*, cit. at 14, 315.

Constitutional Court uses: ordinary courts can only fill the legislative gap when the finding of unconstitutionality is put in sufficiently precise and complete terms by the Court, meaning that no further discretionary assessment by the ordinary judge is required.

As mentioned before, also the French *Conseil constitutionnel* instructs the ordinary courts on how to fill a legislative gap, albeit in a less explicit way. The Council uses the technique of *reserves d'interprétation* to declare a norm constitutional, but under the condition of an extended interpretation of the defective norm, thereby "reading in" the excluded category of persons. The Council expects an active performance by the competent jurisdictions by filling the gap and providing for a timely recourse⁴⁶.

3. Adjudication within a European context

Seeing that the treaties do not provide explicit rules or mechanisms based on which EU law can be invoked by individuals and when it should be applied by national courts, the European Court of Justice (ECJ) developed crucial case law to define the tasks and competences of national judges⁴⁷. Three main types of decisions or techniques can be distinguished to ensure the full effect of EU law: setting aside national legislation, the technique of harmonious interpretation and the overarching obligation to take "all appropriate measures". The resemblance with the aforementioned types of adjudication used by Constitutional Courts to rule upon legislative omissions already becomes apparent.

First and foremost, in 1963 the ECJ formulated the principle of direct effect in the *Van Gend & Loos* case⁴⁸ meaning that an EU law provision can be directly invoked in the national legal order by individuals⁴⁹. Approximately one year later, the ECJ acknowledged in the *Costa v E.N.E.L.* case the principle of supremacy of EU law:

⁴⁶ *Conseil constitutionnel* 2 June 2017, QPC No.2017-632, §17.

⁴⁷ U. Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System* (2014), 62.

⁴⁸ CJEU C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 5 February 1963.

⁴⁹ T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges* (2011), 27.

when national law conflicts with EU law, the latter must take precedence⁵⁰. Only in this way it will be possible for EU law to be effective and to be applied in a uniform and equal manner across the whole Union⁵¹. Consequently, national provisions must be set aside when they conflict with EU law⁵².

The question then rises what this ‘setting aside’ actually means. In the *IN.CO.GE* case, the ECJ clarified that the incompatibility with a European provision does not have the effect of rendering that rule of national law non-existent⁵³. Given the absence of a European provision that describes the remedies or procedures that need to be followed, the principle of national procedural autonomy comes into play, encompassing the requirements of effectiveness and equivalence⁵⁴. The latter entails that procedural conditions that govern the actions at law intended to ensure the protection of European Union rights cannot be less favourable than those relating to similar actions of a domestic nature⁵⁵. Consequently, when we look at the national competences of a Constitutional Court, the principle of equivalence requires that when a national court has the competence to annul a national law for non-compliance with a higher norm, in our case with the Constitution, then it is under the obligation to apply the same national remedy when a national provision does not conform to EU law⁵⁶.

Besides the instrument of direct effect, national courts may give effect to EU law via the principle of harmonious

⁵⁰ *Ibid.*, 26; CJEU C-6/64, *Flaminio Costa v. E.N.E.L.*, 15 July 1964.

⁵¹ CJEU C-106/77, *Amministrazione delle finanze v Simmenthal SpA*, 9 March 1978, §14; D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (2012), 134.

⁵² CJEU C-106/77, *Amministrazione delle finanze v Simmenthal SpA*, 9 March 1978, §21; U. Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System*, cit. at 47, 64.

⁵³ CJEU C-10/97 to C-22/97, *Ministero delle Finanze v IN.CO.GE.'90*, 22 October 1998, §21.

⁵⁴ U. Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System*, cit. at 47, 82.

⁵⁵ CJEU C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, 16 December 1976, § 5; CJEU C-45/76, *Comet BV tegen Produktschap voor Siergewassen*, 16 December 1976, §13.

⁵⁶ D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, cit. at 51, 135.

interpretation⁵⁷. In the aforementioned *von Colson* case, the ECJ emphasized that “it is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, in so far as it is given discretion to do so under national law”⁵⁸. Moreover, the ECJ considers the requirement for national law to be interpreted in conformity with EU law as inherent in the system of the Treaty, because it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it⁵⁹. Seeing that this obligation applies to all national laws, irrespective of the source of EU law and even in horizontal cases, this principle of ‘indirect’ effect is of great importance to ensure a uniform application of EU law⁶⁰.

Finally, Article 4 (3) TEU states that “the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”. The possibility to set aside national legislation which is contrary to EU law, or to interpret national legislation in conformity with EU law, does not always suffice for a national court to give full effect to EU law. Via the principle of national procedural autonomy, other suitable measures are used to ensure the protection of EU law and the ECJ also incites national courts to adopt these measures, thereby surpassing the technique of harmonious interpretation. In the *Martin Martin* case for example, a Spanish Court questioned the ECJ for a preliminary ruling regarding the interpretation of Article 4 of Directive 85/577/EEC to protect the consumer in respect of

⁵⁷ T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, cit. at 49, 29; P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials* (2008), 287.

⁵⁸ CJEU C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, 10 April 1984, § 28.

⁵⁹ CJEU C-397/01 to C-403/01, *Bernhard Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, 5 Oktober 2004, §114.

⁶⁰ CJEU 157/86, *Mary Murphy and others v An Bord Telecom Eireann*, 4 February 1988; CJEU C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, 13 November 1990; P. Craig, G. De Búrca, *EU Law. Text, Cases and Material*, cit. at 57, 288-89; T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, cit. at 49, 29; U. Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System*, cit. at 47, 78-79.

contracts negotiated away from business premises⁶¹. This Article enshrines the duty for Member States to ensure that their national legislation lays down appropriate consumer protection measures in cases where consumers were not in writing notified of their right of cancellation. The Court recalls the principle of harmonious interpretation and emphasizes that the concept of “appropriate consumer protection measures” affords to the national authorities a discretion in determining consequences which should follow a failure to give notice, provided that that discretion is exercised in conformity with the Directive’s aim of safeguarding consumer protection. Declaring the contract in the dispute void, can be categorised as “appropriate” and Article 4 of the Directive does not preclude the national judge from pronouncing this measure of its own motion. The Court further points out that this finding does not rule out the possibility that other measures might also ensure that level of protection, for example by resetting the relevant time-limits relating to the cancellation of the contract⁶². Consequently, the ECJ considered these creative solutions by ordinary courts as appropriate measures in the light of Article 4 (3) TEU.

3.1. The deliberate decision to refrain

The French Constitution states that treaties and international agreements that are duly ratified or approved shall take precedence over Acts of Parliament (Article 55). The German Basic Law in its turn articulates that with a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law (Article 23, §1). The Constitutional Courts of both countries however, are reluctant to review national legislation to its conformity with European Union law.

Since 1975, the French Council adhered to a strict interpretation of the constitutional provisions regarding its functions to monitor the conformity of French national law to the

⁶¹ CJEU C-227/08, *Eva Martin Martin EDP Editores, SL*, 17 December 2009.

⁶² CJEU C-227/08, *Eva Martin Martin EDP Editores, SL*, 17 December 2009, § 32-68.

Constitution⁶³. The Council stresses the difference “between the review of statutes for the purpose of verifying their conformity with the Constitution, which is incumbent upon the *Conseil constitutionnel*, and the review of their compatibility with the international and European commitments of France, which is incumbent upon the Courts of law and Administrative courts”⁶⁴. The Council even emphasized that the ordinary judges, when asked to rule in litigation in which the argument of incompatibility with European Union law is raised, can *do all and everything necessary* to prevent the application of statutory provisions impeding the full effectiveness of the norms and standards of the European Union⁶⁵. By contrast, the Council does not appropriate itself this broad competence. Consequently, the Council articulated that an argument based on the incompatibility of a statutory provision with the international and European commitments of France cannot be deemed to constitute an argument as to unconstitutionality⁶⁶. What is more, the *Conseil Constitutionnel* maintained its perspective when deciding preliminary rulings (*Questions Prioritaires de Constitutionnalité*). The French Council emphasized similarly that “a challenge alleging the incompatibility of a legislative provision with the commitments of France under international and European law cannot be deemed to be a challenge to their constitutionality; that accordingly it is not for the Constitutional Council, when seized pursuant to Article 61-1 of the Constitution, to examine the compatibility of the contested provisions with the treaties or with European Union law; that the examination of such a challenge falls under the jurisdiction of the ordinary and administrative courts”⁶⁷.

Obviously, the *Conseil constitutionnel* adopts a very reluctant attitude in deciding on questions of supremacy of EU law over national legislation. As a result, the *Conseil constitutionnel* has not yet decided that a field of application of French law needed to be expanded to comply with EU law, which contrasts heavily with the

⁶³ M. Fartunova, *Report on France*, in G. Martinico, O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (2010), 210-211.

⁶⁴ *Conseil constitutionnel* 12 May 2010, DC No. 2010-605, § 11.

⁶⁵ *Conseil constitutionnel* 12 May 2010, DC No. 2010-605, § 14.

⁶⁶ *Ibid.*; M. Fartunova, *Report on France*, cit. at 63, 211.

⁶⁷ *Conseil constitutionnel* 3 February 2012, QPC No. 2011-217, § 3.

active approach regarding legislative lacuna the French Council uses within a mere national context, as seen before.

Considering that the Council clearly distinguishes the constitutional review from the compatibility with EU law, its first preliminary reference to the ECJ in 2013 could be seen as an important first attempt at harmonization between both types of review⁶⁸. The question concerned the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter FD EAW). More precisely, the French implementing statute explicitly excluded the right to appeal the decision to execute an EAW, thus constituting a legislative lacuna. The *Conseil constitutionnel* wished to ascertain whether Articles 27 and 28 FD EAW opposed an appeal mechanism that would suspend the execution of an EAW⁶⁹. The ECJ decided that the fact that the FD EAW did not provide for a right of appeal with suspensive effect against decisions relating to EAWs, does not prevent the Member States from providing for such a right⁷⁰. Consequently, the ECJ found the absence of an appeal mechanism not in violation with the FD, but granted Member States the possibility to organize one. The *Conseil constitutionnel* in its turn, reviewed the compatibility of this legislative lacuna with the rights and freedoms guaranteed under the Constitution and found that the absence of the right to appeal imposed an unjustified restriction on the right to obtain effective judicial relief⁷¹. The French Council declared the wording “by a ruling not subject to appeal” to be unconstitutional, thereby immediately eliminating the legislative omission. The Council further indicated that this declaration would have effect upon publication of the decision, but will be applicable to all appeals pending before the Court of Cassation on that date.

⁶⁸ *Conseil constitutionnel* 4 April 2013, QPC No. 2013-314; see *Conseil constitutionnel* 23 January 2015, QPC No. 2014-439 where the Council decided not to refer a preliminary question to the ECJ; see also J. Komárek, *The Place of Constitutional Courts in the EU*, 9 *EuConst* 3 (2013), 434.

⁶⁹ A. Torres Pérez, *A predicament for domestic courts: caught between the European Arrest Warrant and fundamental rights*, in B. de Witte, J. A. Mayoral, U. Jaremba, M. Wind, K. Podstawa (eds.), *National Courts and EU Law* (2016), 200.

⁷⁰ CJEU C-168/13, *PPU Jeremy F v. Premier ministre*, 30 May 2013, § 51.

⁷¹ *Conseil constitutionnel* 14 June 2013, QPC No. 2013-314 (English text available on <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2013/2013-314-qpc/version-en-anglais.140224.html>, accessed May 8, 2018)

Thus, the Council dealt with the legislative lacuna, not within a European context (no violation of EU law was discerned by the Council, nor the ECJ), but within a mere national context. What is more, it seems that the French Council returned to its strict division between constitutional review and review of European Union law; in decision QPC No. 2015-512, the Council ruled that it was not necessary to refer a preliminary question to the ECJ regarding the validity of Framework Decision 2008-913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, because the validity of that Framework Decision could not impact the review of conformity with the French Constitution⁷².

The absence of a possibility for judicial review for EAWs that grant extraditions also played a pivotal role in the case law of the German *Bundesverfassungsgericht*. It needs to be highlighted that the standard of review before the German *Bundesverfassungsgericht* is limited to norms of domestic constitutional law in the strict sense⁷³. Similar to his French counterpart, and despite the call for participation in Article 23, §1, Basic Law, the German Court has on various occasions distinguished between constitutional review, for which the Court and only the Court is fully competent, and review of compatibility with EU law⁷⁴. In its famous *Milkpowder* case of 9 July 1971, the *Bundesverfassungsgericht* clearly stated that the Court is not competent to decide on the question whether a national norm is compatible with directly applicable EU law, but that ordinary courts are competent to decide upon this possible conflict of norms⁷⁵. Furthermore, the Court determined that when no margin of appreciation was left to the Member States, the *Bundesverfassungsgericht* will not review the constitutionality of national legislation implementing EU law, so long as the European

⁷² *Conseil constitutionnel* 8 January 2016, QPC No. 2015-512, §4.

⁷³ P. Cede, *Reports on Austria and Germany* in G. Martinico, O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (2010), 65.

⁷⁴ D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, cit. at 51, 136.

⁷⁵ German *Bundesverfassungsgericht* 9 July 1971, 2 BvR 255/69, BVerGE 31, 145, § 97.

Union, particularly the ECJ, provides effective protection of fundamental rights⁷⁶.

Keeping the foregoing division between constitutional and European review of national legislation in mind, we will assess the decision of the *Bundesverfassungsgericht* in the German EAW-case. The latter declared the German European Arrest Warrant Act, which implemented the FD EAW in the German legal order, void⁷⁷. The German Court discerned two important reasons for this judgment, both relating to legislative omissions. First, the Court blamed the legislator for not using the latitude that the FD EAW left Member States to incorporate it in national law, leading to a violation of Article 16.2. of the German Basic Law that prevents extradition of German citizens to foreign countries⁷⁸. Secondly, and similar to the French reasoning, the Court found a gap in legal protection by excluding recourse to a court against a grant of extradition to a Member State of the European Union⁷⁹. In other words, the German *Bundesverfassungsgericht* accused the German legislator for being too pro-European, thereby neglecting his duties emanating from the German Basic Law. What is more, by declaring the German EAW act void in its entirety, the FD EAW could no longer be applied so no German citizen could be extradited to a Member State. The German Court even emphasized that because the legislator had to decide again, in normative freedom and taking into account the constitutional standards, an interpretation in conformity with the constitution or a ruling that establishes the Act's partial voidness, are excluded⁸⁰. This kind of ruling is extraordinary, especially when we look at the types of adjudication

⁷⁶ I primarily focus on the review of national legislation and its compatibility with EU law and not on the compatibility of EU law with the German Constitution; German *Bundesverfassungsgericht* 13 May 2007, 1 BvF 1/05, §§68-69; German *Bundesverfassungsgericht* 31 May 2007, 1 BvR 1316/04, §47; German *Bundesverfassungsgericht* 22 November 2007, 1 BvR 2628/04, §30; German *Bundesverfassungsgericht* 29 April 2010, 2 BvR 871/04 – 2 BvR 414/08, §28; German *Bundesverfassungsgericht* 18 May 2016, 1 BvR 895/16, §29.

⁷⁷ German *Bundesverfassungsgericht* 18 July 2005, 2 BvR 2236/04 (English text available on http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2005/07/rs20050718_2bvr223604en.html, accessed May 8, 2018)

⁷⁸ *Ibid.*, § 64 et seq.

⁷⁹ *Ibid.*, § 103 et seq.

⁸⁰ *Ibid.*, § 118 et seq.

the Court deploys on a national level. The Court could have opted for the possibility of an *Unvereinbarkeitserklärung*, which it often uses when the consequences of declaring an act void are too harsh. What is more, the Court could have imposed a deadline for the legislator to react and instruct the ordinary courts how they needed to act, possibly even obliging them to allow recourse against a grant of extradition, until such legislative reform took place. The Court had ample possibilities at its disposal, which it uses on a national level, to reconcile between the state (and legislative) sovereignty and supremacy of EU law, but chose the one option rendering the effectiveness of EU law impossible. Judge Gerhard did not agree with the ruling by the Court and explicitly stated that “the declaration of nullity of the EAW Act was not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible. [...] Both objectives of protection are achieved by interpreting and applying the European Arrest Warrant Act in conformity with the constitution with account being taken of European Union law. The same applies *mutatis mutandis* to compliance with the guarantee of legal protection”⁸¹. Furthermore, he regrets that the Constitutional Court refused to make a positive contribution to European solutions and argues that instead of emphasizing the national perspective, it should achieve a balance between the bonds of national law and that of European law⁸².

3.2. The deliberate decision to take (extreme) actions

For a long time, the Italian *Corte Costituzionale* adhered to the same division of powers as seen in the French and German constitutional case law: the guarantee of primacy of EU Law was entrusted to national ordinary judges. Thus, no question of constitutionality to the Constitutional Court was required, seeing that ordinary judges needed to apply the provisions of EU law and ‘not apply’ national rules contrasting with directly applicable EU law⁸³. In cases of direct review by the Italian Constitutional Court

⁸¹ Ibid., §§ 186-187.

⁸² Ibid., § 191.

⁸³ G. Martinico, O. Pollicino, *Report on Italy*, in G. Martinico, O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (2010), 273-274; D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, cit. at 51, 137.

however, ordinary judges do not participate and therefore cannot offer any protection of EU law. Consequently, in order to avoid a gap in the protection of rights, the Italian Court uses EU norms as “interposed norms” for review of national legislation; when the Court finds that a national norm is incompatible with EU law, it will declare the latter unconstitutional, seeing that Article 117 of the Italian Constitution clearly states that the legislative power belongs to the State and Regions in accordance with the constitution and within the limits set by European Union law and international obligations⁸⁴.

The Italian Court however, did not restrict this type of adjudication to direct proceedings. In 2010, the implementation of the FD EAW caused a stir (also) in the Italian legal system, albeit with different consequences than in the other two aforementioned countries⁸⁵. The national transposing law stated that in specific situations, the Court of Appeal could refuse to execute the arrest warrant and order that the sentence or security measure be enforced in Italy *if the person sought is an Italian national*. The ordinary courts could not remedy this strict field of application through interpretation. Referring to the case law of the ECJ concerning the interpretation of the Framework Decision, the Italian Court concluded that by using the exclusive criterion of citizenship and excluding any check as to the existence of an actual and stable link with the executing Member State, the contested provisions ultimately violated not only the wording, but also and above all, the rationale of the provision of European Union law which it should have correctly implemented. The Italian Court thus explicitly reviewed a national provision to its conformity with EU law and from the violation thereof, deduced a finding of unconstitutionality⁸⁶. What is more, the Court instructed the legislator and ordinary courts to fill the legislative gap. The Court

⁸⁴ Ibid.; see e.g. Italian *Corte Costituzionale* 13 February 2008, No. 102/2008; Italian *Corte Costituzionale* 2 April 2012, No. 86/2012.

⁸⁵ Italian *Corte Costituzionale* 21 June 2010, No. 227/2010.

⁸⁶ In decision No. 187/2016 the Italian Constitutional Court applied a similar reasoning within an incidental proceeding after a reference for a preliminary ruling to the ECJ was made, but not in a case relating to legislative omissions. Italian *Corte Costituzionale* 15 June 2016, No. 187/2016; CJEU C-22/13, C-61/13-C-63/13 and C-418/13, *Raffaella Mascolo et al. v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli*, 26 November 2014.

highlighted Parliament's prerogatives and emphasized that it is for Parliament to assess whether it is appropriate to specify the conditions governing the applicability of a refusal to surrender to non-nationals for the purposes of the enforcement of the sentence in Italy, in accordance with the relevant originating provisions of EU law, as interpreted by the ECJ. Besides demarcating the legislator's prerogatives, the Court explicitly instructed the ordinary courts to react in accordance with EU law: it is for the courts to ascertain whether the requirement of lawful and effective residence or staying is met, following an overall evaluation of the defining features of the individual's situation such as, *inter alia*, the length, nature and conditions of his presence in Italy as well as the family and economic ties that he has in our country, in accordance with the interpretation provided by ECJ⁸⁷. Consequently, the Court gave (detailed) guidelines to the ordinary courts on how to fill the legislative gap prior to the legislative response.

Within the Belgian legal order, parliament denied the Constitutional Court the competence to review national legislation against international law, considering that it was well-established case law that ordinary courts possessed this power⁸⁸. Consequently, according to Article 142 of the Belgian Constitution, the Belgian Constitutional Court is only competent to review national legislation⁸⁹ for compliance with stipulations that allocate powers between the federal State, the communities and the regions, and for compliance with fundamental rights and liberties⁹⁰. Nevertheless, and unlike its French and German colleagues, the Constitutional Court adopted two indirect ways to review national legislation against international law. The first way is an indirect review through Articles 10 and 11 of the Constitution, which encompass

⁸⁷ Italian *Corte Costituzionale* 21 June 2010, No. 227/2010, §9.

⁸⁸ Advice Council of State, *Parliamentary proceedings Senate* 1979-80, No. 435/1, 5-7; A. Alen, J. Spreutels, E. Peremans, W. Verrijdt, *Het Grondwettelijk Hof en het internationaal en Europees recht*, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2014), 620; P. Popelier, K. Lemmens, *The Constitution of Belgium* (2015), 213.

⁸⁹ This encompasses legislative acts from the federal parliament and from the parliaments of the Regions and Communities.

⁹⁰ As further elaborated in Articles 1 and 26 of the Special Act 6 January 1989 on the Constitutional Court, *Belgian Official Gazette* 7 January 1989.

the right to equal treatment and non-discrimination⁹¹. The Belgian Constitutional Court decided that the protection provided for by these two constitutional rights, also encompasses the rights and freedoms that ensue from international treaty stipulations⁹². The same reasoning is used with regards to secondary EU law⁹³. In this way, the Belgian Court referred to the “rationale” behind a Directive to deduce the intention of the European legislator and to consequently annul the contested stipulation to the extent that it did not provide for the same exception in case of family reunification with EU-citizens⁹⁴.

Secondly, in case No. 136/2004, the Belgian Constitutional Court stipulated that when a treaty obligation has a similar (*analogous*) scope as a fundamental right enshrined in the Belgian Constitution, this treaty obligation becomes inseparable from the protection offered by the constitutional stipulations⁹⁵. This line of reasoning offers the Belgian Constitutional Court the opportunity to update the content of its own constitutional catalogue of fundamental rights, but is by no means as important as the possibility for indirect review via Articles 10 and 11 of the Constitution⁹⁶.

Because of its Europe-friendly attitude, the Belgian Constitutional Court utilizes all types of adjudication exhibited in a mere national context (Cf. supra 2.1-2.4) when cases arise in which a legislative omission is found to be in violation with EU law. First, in cases Nos. 55/2011, 192/2011 and 99/2013, the annulment of the exclusion of practitioners of liberal professions from the legislation

⁹¹ Court of Cassation 27 May 1971, *Pasicrisie* 1971, I, 886; A. Alen, J. Spreutels, E. Peremans, W. Verrijdt, *Het Grondwettelijk Hof en het internationaal en Europees recht*, cit. at 88, 620-621; P. Popelier, K. Lemmens, *The Constitution of Belgium*, cit. at 88, 213-214.

⁹² Belgian Constitutional Court 23 May 1990, No. 18/90, § B.11.3; Belgian Constitutional Court 15 July 1993, No. 62/93, B.3.2.; Belgian Constitutional Court 19 May 2005, No. 92/2004, B.5. (regarding ECHR).

⁹³ See explicitly for EU Directives Belgian Constitutional Court 25 October 2000, No. 105/2000, B.51.; Belgian Constitutional Court 22 July 2003, No. 106/2003, B.42.; A. Alen, J. Spreutels, E. Peremans, W. Verrijdt, *Het Grondwettelijk Hof en het internationaal en Europees recht*, cit. at 88, 621-622.

⁹⁴ Belgian Constitutional Court 26 September 2013, No. 121/2013.

⁹⁵ Belgian Constitutional Court 22 July 2004, No. 136/2004, § B.5.3.

⁹⁶ A. Alen, J. Spreutels, E. Peremans, W. Verrijdt, *Het Grondwettelijk Hof en het internationaal en Europees recht*, cit. at 88, 623-624.

on commercial practices immediately led to the expansion of the field of application and to compliance with Directive 2005/29/EG, i.e. the Unfair Commercial Practices Directive⁹⁷.

Secondly, in cases where the Belgian Constitutional Court interprets legislation to be in violation with EU law *to the extent that* it is not applicable on certain categories of persons, the Belgian Constitutional Court will almost always modulate the annulment or declaration of unconstitutionality. After all, in those cases a simple annulment or declaration of unconstitutionality will lead to a situation that is even less desirable and to a graver extent in violation with EU law. For example, in case No. 11/2009, the Court stated that a Flemish rule regarding health care violated (now) Articles 45 and 49 TFEU because EU-citizens who worked in the Flemish linguistic region, but lived in the French or German linguistic regions, could not benefit from the health care system⁹⁸. Seeing that the annulment would lead to an even bigger exclusion of EU-citizens from this benefit, the Court annulled the norm, but maintained the effects of the provision. The Flemish legislator was attributed one year to amend the legislation accordingly⁹⁹.

Finally, instructing lower courts on how the legislative lacuna should be eliminated is a clear example of 'appropriate measures' to which Article 4 TEU refers. Within the case law of the Belgian Constitutional Court, two decisions are of great importance. In the first it became clear that the Belgian Court is willing to go as far as granting (financial) benefits on the basis of EU law to excluded categories of persons. In the second case the Court demonstrated a very active approach in indicating how the compliance with EU law should be ensured.

In the first case (No. 42/2012) the requirements to be eligible for guaranteed family benefits were discussed. In order to benefit from this legislation, a person should have resided for at least five years within Belgium. For certain categories of persons, an

⁹⁷ Belgian Constitutional Court 6 April 2011, No. 55/2011; Belgian Constitutional Court 15 December 2011, No. 192/2011; Belgian Constitutional Court 9 July 2013, No. 99/2013.

⁹⁸ Belgian Constitutional Court 21 January 2009, No. 11/2009, B.10.1.

⁹⁹ See also Belgian Constitutional Court 14 January 2004, No. 5/2004; Belgian Constitutional Court 15 March 2012, No. 46/2012; See similarly Belgian Constitutional Court 2 March 2011, No. 33/2011; Belgian Constitutional Court 14 June 2012, No. 76/2012.

exception to this requirement of residence was possible. To the extent that persons who were granted a subsidiary protection status still needed to meet the five-year residence requirement, the Belgian Constitutional Court found the national norm in violation of Articles 10, 11 and 191 of the Constitution, in conjunction with Article 28, paragraph 2, Directive 2004/83/EC¹⁰⁰. The Court added that the referring court, in this case the labor court in Brussels, needed to eliminate this unconstitutionality. Consequently, the labor court had the possibility to award family benefits to persons who were granted a subsidiary protection status even if they had not yet lived in Belgium for more than five years as the national law in force at that time required.

In the second case, which was an appeal for annulment, the Belgian Constitutional Court instructed the ordinary courts even more explicitly on how they should fill the legislative gap. This case related to the possibility for collective redress when an undertaking violates its contractual obligations or when it violates European legislation¹⁰¹. The Belgian legislation stipulated that a group could only be represented by one group representative, which could be a consumer association, an organization of which the main objective is in direct connection with the collective damage or an autonomous public service. Of these three possible representatives, the law required that the first two needed to be accredited by the Minister. The Court ruled that the performance as a group representative also constituted a service in the light of the EU's Services Directive (2006/123/EC). Consequently, the requirement that the respective associations and organizations needed to be accredited infringed upon Article 16 of that Directive that states that the freedom of providing services may not be restricted by obliging the provider to obtain an authorization or registration. The Court annulled the Belgian provision to *the extent that it did not allow* for entities from other EU and EEA Member States that meet the standards provided in point 4 of Recommendation 2013/396/EU, to act as group representative. The latter Recommendation relates to the common principles for injunctive and compensatory collective redress

¹⁰⁰ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004 O.J. L 304/12.

¹⁰¹ Belgian Constitutional Court 17 March 2016, No. 41/2016.

mechanisms in the Member States concerning violations of rights granted under European Union Law. Point 4 elucidates who has standing to bring a representative action; a non-profit character and a direct relationship between the main objectives of the entity and the alleged violated EU rights is required, as well as sufficient capacity in terms of financial resources, human resources and legal expertise. The Belgian Constitutional Court considers that, in anticipation of a legislative response, ordinary judges may take into account the criteria mentioned in point 4 of the Recommendation to eliminate the established violation of EU Law. What is more, the Court adds that ordinary courts may not declare an action for collective redress inadmissible when it is brought by an entity as defined in Article 4 (3) Directive 2009/22/EC. The Court however, did not previously refer to this Directive.

In this way, the Court provided a lot of instructions to the courts on how to fill this legislative gap. By doing so, the Belgian Constitutional Court used a very active approach: it does not (merely) allow an expansion of the contested norm's field of application, but replaces the contested norm with a stipulation from a European Recommendation. The approach by the Court however, may not be surprising: if it would have annulled the stipulation regarding who could be group representative, even more uncertainty would have arisen. The solution by the Court obviously constitutes an 'appropriate measure' as laid down in Article 4 (3) TEU. The Court does much more than eliminating a national norm that violates European Union law; it plays a crucial role in ensuring full application of EU Law by imposing the criteria as formulated in the Recommendation on to the ordinary courts and thereby filling the legislative gap.

It goes without saying that this type of adjudication provides the desired outcome; in both cases the legislative omission is eliminated in order to comply with EU law. However, this does not detract from the fact that for reasons of legal certainty and clarity, a legislative response is still desirable. Reference can be made to a procedure initiated by the Commission against Belgium for a failure to fulfil its obligations¹⁰². The subject of the procedure concerned the federal legislation on commercial practices and consumer protection, as was already declared to be

¹⁰² CJEU C-421/12, *Commission v Belgium*, 10 July 2014.

unconstitutional and in violation of EU law by the Belgian Constitutional Court in the aforementioned cases¹⁰³. In the first two preliminary rulings the Court declared the exclusion of practitioners of liberal professions unconstitutional, which automatically lead to the expansion of the field of application and to compliance with the Unfair Commercial Practices Directive. Advocate General Cruz Villalón decided that it is not always necessarily the case that a formal finding of unconstitutionality, as is the case in Belgian preliminary rulings, is in itself basis enough to rule out the possibility of the provision in question being applied¹⁰⁴. The ECJ reiterated that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations under rules of EU law¹⁰⁵. Moreover, the ECJ held that even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty, particularly in the field of consumer protection¹⁰⁶. Given this case law, we can confirm that when the Belgian Constitutional Court instructs lower courts on how to fill the legislative gap, it complies with Article 4 (3) TEU, but this does not detract from the responsibility of the legislator to amend the contested legislation. The case law of the German Constitutional Court within a national context can be brought to mind: The Court usually first incites the legislator, who has the primary responsibility to adopt proper legislation, to react and subsequently instructs ordinary courts on how to act in the intermediate period.

4. Principles of effectiveness and equivalence

Given the requirements of effectiveness and equivalence, as briefly mentioned before, the case law of the Italian and Belgian

¹⁰³ Belgian Constitutional Court 6 April 2011, No. 55/2011; Belgian Constitutional Court 15 December 2011, No. 192/2011; Belgian Constitutional Court 9 July 2013, No. 99/2013.

¹⁰⁴ Opinion Adv.Gen. Cruz Villalón, with CJEU C-421/12, *Commission v Belgium*, 26 November 2013, §§ 45-52.

¹⁰⁵ CJEU C-421/12, *Commission v Belgium*, 10 July 2014, § 43.

¹⁰⁶ CJEU C-421/12, *Commission v Belgium*, 10 July 2014, § 46.

Constitutional Courts may not come as a surprise. The position of the French Constitutional Council and German Constitutional Court, on the other hand, is all the more remarkable.

The principle of equivalence or non-discrimination entails that remedies available to ensure the compliance of national law, must be made available in the same way to ensure the compliance of Union law¹⁰⁷. The research has shown that this analogous reasoning is out of the question for the French Constitutional Council and the German Constitutional Court. By contrast, the Italian Constitutional Court and in particular the Belgian Constitutional Court, are far more willing to transpose the instruments they use in a mere national context, to cases where violations of EU law are present.

Besides, the willingness of the Belgian Constitutional Court cannot come as a surprise. The Court was established only in 1985, i.e. several years after the introduction of the principles of supremacy and direct effect. Therefore, the Court never operated under the impression of exclusivity of review of domestic legislation¹⁰⁸. Consequently, if the Belgian Constitutional Court finds itself competent to impose on ordinary courts the power to fill a legislative gap that violates the Constitutional requirements, the Court should apply the same remedy when the legislative gap violates EU law. The fact that this type of remedy has no textual basis in the Constitution or in any other legal act does not alter this consideration.

With this, one important remark must be made. The power for ordinary courts to take appropriate measures to fill a legislative omission that violates EU law, is not determined by or dependent on decisions of the Constitutional Court. Ordinary courts can resort to this type of redress based on the obligation to ensure full effect of EU law as enshrined in Article 4 (3) TEU. However, when a Constitutional Court explicitly grants ordinary courts the power to fill the legislative lacuna, a uniform application of EU law will be reached within the national legal order, thereby providing clarity and legal certainty for citizens and ordinary courts.

¹⁰⁷ CJEU C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, 16 December 1976, § 5; CJEU C-45/76, *Comet BV tegen Produktschap voor Siergewassen*, 16 December 1976, §13; P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials*, cit. at 57, 307.

¹⁰⁸ J. Komárek, *The Place of Constitutional Courts in the EU*, cit. at 68, 428.

The principle of effectiveness implies that a national rule cannot be applied if it makes it impossible or excessively difficult to exercise rights conferred by EU law¹⁰⁹. Consequently, a national procedural rule may not jeopardise the *effet utile* of EU Law. The application of this principle, and the relation with the requirement of equivalence, changes considerably when the principle of effective judicial protection, recognised as a fundamental principle of EU law¹¹⁰, is added. This principle is enshrined in Article 19 (1) TEU that explicitly states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. After all, the principles of equivalence and effectiveness merely require the same (procedural) treatment of cases, regardless whether EU or national law is at stake, and where necessary, shall the court set aside a restricting national procedural rule. This line of reasoning does no longer suffice and national courts will sometimes need to apply ‘additional’ national rules in accordance with EU law or invent new legal remedies when they want to assure effective legal protection¹¹¹. The case law of Constitutional Courts where violations of EU law are eliminated by granting ordinary judges the power to fill the legislative gap, is consistent with the foregoing considerations.

The importance of this right to an effective remedy is also enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and Articles 6 and 13 of the European Convention on Human Rights (ECHR). In this regard, reference needs to be made to a recent decision of the European Court of Human Rights (ECtHR). In the case *P.F. v. Belgium*, the plaintiff failed the entrance

¹⁰⁹ CJEU C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, 14 December 1995, § 17.

¹¹⁰ CJEU C-583/11, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, 3 October 2013, §98; T. Tridimas, *The General Principles of EU law* (2006), 418 et seq; L. M. Ravo, *The Role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions*, in *Sources of Law and Legal Protection* (2012), 102-106.

¹¹¹ CJEU C-583/11, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, 3 October 2013, 103-104; P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials*, cit. at 57, 313-325; T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges*, cit. at 49, 31; M. Dougan, *The vicissitudes of life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts*, in P. Craig, G. De Búrca (eds.), *The Evolution of EU law* (2011), 412-421.

exam for the judicial internship and contested that he did not have any recourse to a court to challenge this result, being an administrative act of the High Council of Justice¹¹². In 2011 already, the Belgian Constitutional Court examined Article 14 of the coordinated laws on the Council of State that provides an exhaustive list of administrative acts against which an appeal for annulment can be brought before the Council of State. The Constitutional Court determined that, seeing that candidates for other civil services had the possibility to challenge the results of their exams via an appeal for annulment, the absence of a similar judicial guarantee for candidates that did not succeed the entrance exam for the judicial internship, violated the principles of equality and non-discrimination. The Court declared the contested norm, i.e. Article 14, to be constitutional and found only the absence of such a similar recourse unconstitutional. Considering the need to secure the independence of the High Council of Justice, the Court emphasized that only the legislator could fill the unconstitutional legal gap, possibly by providing special guarantees which were not implemented in the coordinated laws on the Council of State¹¹³.

In the aftermath of this preliminary ruling, the Council of State dismissed the appeal of the plaintiff as inadmissible. After all, given the exhaustive list in Article 14 of the coordinated laws, the Council was not competent to treat the appeal¹¹⁴. Invoking Article 6 § 1 ECHR, the plaintiff complained about the absence of any recourse against a decision of the High Council of Justice regarding the result of an entrance exam for the judicial internship and the Belgian Government acknowledged the violation of Article 6 § 1 ECHR. This infringement of Article 6 ECHR could have been avoided if the Belgian Constitutional Court would have enlarged the field of application of Article 14 of the coordinated laws. In this way, the appeal before the Council of State should have been allowed.

¹¹² Decision ECtHR No. 70759/12, *P.F. v. Belgium*, 23 August 2016.

¹¹³ Belgian Constitutional Court 20 October 2011, No. 161/2011.

¹¹⁴ Council of State 8 May 2012, No. 219.268 and No. 219.267, www.raadvanstate.be, accessed May 8, 2018.

5. Concluding remarks

National Courts, including Constitutional Courts, play a pivotal role in securing a uniform application of EU Law. Consequently, it is questionable whether Constitutional Courts adhere to the spirit of the *Simmmenthal* mandate and therefore contribute to the immediate application of EU law by not reviewing the (in)compatibility between national law and EU law when constitutional questions arise¹¹⁵. Within the *Simmmenthal* case, the ECJ explicitly circumscribed the mandate of *national* courts, and therefore not exclusively *ordinary* courts, to set aside national legislation violating EU law¹¹⁶. Especially in direct proceedings, where no ordinary court can guarantee the protection of EU law, this strict division of competences can be questioned. What is more, when legislative omissions violate EU law, the principles of equivalence and effectiveness dictate that Constitutional Courts should similarly apply the techniques they use on a national level to fill an unconstitutional gap on cases where a legislative gap violates EU law. It has been shown that on a national level, Constitutional Courts often provide an effective remedy by instructing lower judges on how to fill the unconstitutional gap. Such an active performance by the Courts can definitely be considered as an appropriate measure when applied within a European context, thereby eliminating a violation of EU law. In this way, Constitutional Courts ensure a uniform application of EU law within the national legal order and provide clarity and legal certainty for citizens and ordinary courts while awaiting a legislative reaction¹¹⁷.

¹¹⁵ D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, cit. at 51, 137-138.

¹¹⁶ CJEU C-106/77, *Amm. finanze v Simmenthal SpA*, 9 March 1978, §21.

¹¹⁷ V. Ferreres Comella, *Constitutional Courts & Democratic Values*, cit. at 19, 20-26, 136-137.

II. TESTING THE BATTLEGROUND: SOCIAL RIGHTS AND INSTITUTIONAL CHALLENGES DURING THE EUROZONE CRISIS

SOCIAL RIGHTS IN THE GREEK AUSTERITY CRISIS:
REFRAMING CONSTITUTIONAL PLURALISM

*Kyriaki Pavlidou**

Abstract

This article examines social rights case-law by the highest European and Greek courts, as well as, Greek lower courts. The focus is placed on the measure of labour reserve, upon the constitutionality of which lower courts decided, at the same time that judges of the highest courts were deciding that the challenged austerity measures before them were in conformity with the Greek Constitution. Assessing the relevant cases, the article stresses that lower judges in Greece safeguarded social rights by constitutionalizing these rights. By assessing the unexplored clash in constitutional adjudication, which took place at a domestic level in Greece, the article proffers the reframing of constitutional pluralism in this context. The latter is understood as in hierarchy of social values and *heterarchy* of procedure. Constitutional pluralism is perceived in this sense as realizing and promoting social values

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and as defending equality and dignity that is grounded on solidarity. The article criticizes the concept of solidarity in this respect and defends an idea of solidarity that represents a fundamental constitutional principle of social justice on the scope of self-reliance and reciprocity rather than antagonism. Situating the individual within the austerity context, it claims that this was concretised within a *neo-utilitarian*, instrumentalist and individualistic ideological framework in favour of economic interests and purely efficiency parameters. It further inquiries into the nature of social rights and stresses that social rights pertain to personal integrity and autonomy and have an individual as much as a collective dimension. Ultimately, the article argues that reframing constitutional pluralism requires vigilance to the material conditions of constitutional adjudication horizontally at a national and supranational level, as well as, to the protection and interpretation of social values over economic interests.

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1. By way of introduction

In February 2017, the European Commission’s President Jean-Claude Juncker in a letter addressed to the Members of the European Parliament (MEPs) stressed that national measures agreed under bailout programs “fall outside the EU legal order”¹ and do not have to comply with the European Charter of Fundamental Rights. In particular, he stated the following: “The European Court of Justice has confirmed that the Memorandums of Understanding are acts of the European Stability Mechanism (ESM)

¹ See Athens News Agency, Macedonian Press Agency, *EC spox on Juncker letter: 'Full compliance' with EU Human Rights Charter is key* (2017) available at <http://int.ert.gr/ec-spox-on-juncker-letter-full-compliance-with-eu-human-rights-charter-is-key/>, accessed May 7, 2017.

which falls outside the EU legal order. Therefore, when adopting national measures previously agreed in the memorandum of understanding, Greece is not implementing EU law and as a consequence, the Charter of Fundamental Rights does not apply as such to the Greek measures.”². Even though, the deputy spokesman for the European Commission Alexander Winterstein clarified afterwards that when implementing a memorandum, compliance with the treaties and with the spirit and the letter of the charter is key, incidents and statements of that sort reflect well by now a reality in Europe. That is, there is heavy obscurity and bafflement that revolve around the sovereign debt mechanisms and the austerity measures in bailout countries. This further manifest the profound difficulties in accurately locating and reconstructing the intricate and interconnected map of legal sources, by means of either identifying the linkages between national and supranational law, or providing effective protection of human rights³.

In this respect, the legal reflexes by the legal community in defense of the affected parties and the respective interpretations of the austerity policies by national and supranational courts are of interest to the present analysis. Part two explores austerity judgments by the highest European and Greek courts, as well as, Greek lower courts. The focus is placed on the measure of labour reserve, upon the constitutionality of which lower courts decided, at the same time that judges of the highest national and supranational courts were deciding that the challenged austerity measures before them were in conformity with the Greek Constitution. The analysis further assesses how lower courts in Greece safeguarded social rights⁴ by resorting to human rights protection and by enforcing constitutional provisions in order to constitutionalize social rights. It then juxtaposes the interpretation of austerity measures by the European and Supreme Greek Courts.

² Ibid.

³ See also Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35 *Oxf Jour Leg Stud.* 2 (2015) 337, 339, 340.

⁴ In this paper, the use of the term ‘social rights’ includes essentially labour rights within the context of the examined case law and does not engage with the subset of social rights, such as, the rights to housing, social security, health care or education. It does touch upon, though, rights, such as the right to property, which could be classified under the concept of ‘economic rights’ within the broader term of socioeconomic rights.

By assessing the unexplored clash in constitutional adjudication, which took place at a domestic level, the article seeks to highlight the developments in constitutional adjudication, as well as, questions of pluralism and unity that have arisen.

Part three engages with a more theoretical valuation of the examined legal events. In particular, it argues that lower judges have set forth an understanding of constitutional pluralism that is defined on shared social values and promotes the constitutional guarantee of human dignity and equality for the protection of rights and of right holders. This claim is further established by a re-assessment of heterarchy and hierarchy in the constitutional pluralism discourse. In this respect, a reading of constitutional pluralism as in hierarchy of social values and heterarchy of procedure, is suggested. The analysis then proceeds with assessing the concept of solidarity in austerity within the discourse of constitutionalization of social rights. It briefly engages with the nature of social rights and the role and reason of the state in claims of social rights protection. The positioning and the ideological and legal concealment of the subject that shaped social rights theories and formed European social policies is further criticized. To that end, it is stressed that social rights pertain to personal integrity and autonomy and have an individual as much as a collective dimension that needs to be understood under a constitutionally reviewed procedure. It is then stressed that social rights, in the absence of a social governance model in Europe with a constitutional pedigree, were concretized within a *neo*-utilitarian and instrumentalist context in favor of the protection of the market. This further provided a fertile ground for an economic analysis of law to act as *modus operandi* and a neoliberal managerial model of economic maximization and social inequality to prevail.

Part four takes stock and encourages the revision and reframing of constitutional pluralism in austerity Europe on the basis of unity and solidarity and for the purpose of entrenching substantive equality. It highlights the active role of judges, as it was demonstrated by lower courts in Greece. It further stresses the importance of a human-rights based judicial review in the effective protection of social rights and in the re-configuration of constitutional adjudication.

The analysis aims towards a dignity and autonomy-based theory of social rights from the standpoint of the affected individual

in austerity Europe in a, what is now already called, time of *post-crisis* legitimacy. By embracing the constitutionalization of social rights it opts for a framing of constitutional pluralism, in the sense that this is understood as the constitutional safeguard of the social individual not in a top-bottom hierarchical fashion of administrative justice, but in a constitutional heterarchy. The latter is conceived as realizing and promoting social values and as defending equality and dignity and as being grounded on solidarity. By reconciling the collective and the neglected individual aspect of social rights, constitutional adjudication is understood as not being set in a *disequilibrium* between pluralism and unity, but rather as being in symmetry and being balanced by the forces of unity *within* plurality.

2. Greek austerity measures before the courts: an unexplored clash

2.1. The domestic and supranational approaches

The Greek legal system is influenced by the civil law tradition and legal positivism, while it is built around the *summa divisio* of public and private law. Greece has no centralized constitutional adjudication and it has a diffuse system of judicial review that lacks a Constitutional Court. The diffuse, incidental and in concreto character of the Greek system of constitutionality control can rather be understood as “an original version of a mixed system that combines elements of both strong-form and weak-form review”⁵. Courts at all instances are considered competent to decide upon the constitutionality of a statute, while they can also review its compatibility with fundamental human rights provisions and European law. However, the Supreme Civil and Criminal Court of Greece (Areios Pagos) and the Hellenic Council of State (Symvoulío tis Epikrateias or Supreme Administrative Court of Greece)⁶, are

⁵ A. Kaidatzis, *Greece's Third Way in Prof. Tushnet's Distinction between Strong-Form and Weak-Form Judicial Review, and What We May Learn From It*, 13 *Jus Politicum* (2014) available at <http://juspoliticum.com/article/07-greece-s-third-way-in-prof-tushnet-s-distinction-between-strong-form-and-weak-form-judicial-review-and-what-we-may-learn-from-it-956.html> last accessed December 30, 2017.

⁶ Council of State hereafter.

usually entrusted with interpreting the Constitution and with annulling statutory provisions, which are found unconstitutional.

The analysis here considers the judgement 668/2012 of the Hellenic Council of State concerning the compliance of austerity measures with the Greek Constitution, which were introduced within the domestic legal order through the implementation of the denominated Memorandum I of Understanding on Specific Economic Policy Conditionality (MoU)⁷. This decision was widely relied upon by the European Court of Human Rights⁸ in the case of Koufaki and ADEDY v. Greece⁹, which is of further interest to the present discourse.

International scholarly literature has approached the case of Greece, by heavily focusing at the above-mentioned cases. With respect to Greece, when mapping constitutional challenges that courts in sovereign debt states have faced, these decisions are considered up to this date as “key constitutional judgments”¹⁰. However, during the critical period between 2012 and 2014, when the attention was placed on the judgments of the highest Courts, there have been significant voices in constitutional adjudication at a national level relating to the so-called austerity measure of ‘labour reserve’. The highest courts’ judgements fall in the ‘passive phase’ of judicial review of the austerity measures, between 2010-2014¹¹. From 2014 onwards a more active role of highest judges is identified

⁷ Decision No 668/2012 of the Greek Council of State on the constitutionality of Law 3845/2010 according to which the 1st MoU was enacted (applic. date 26/07/2010; public. date 20/02/2012); For a detailed analysis of the labour reforms according to Law 3854/2010 see L. Kiosse, *6 May 2010 – 14 February 2012: A highway to the deregulation of labour rights legislation*, 71 Rev of Empl Law (2012).

⁸ ECtHR or Strasbourg Court hereinafter.

⁹ ECtHR I. Koufaki and ADEDY v. Greece, Nos. 57665/12 and 57657/12, (May 13, 2013), Koufaki case hereinafter; See also S. Koukoulis-Spiliotopoulos, *Austerity v. Human Rights: Measures Condemned by the European Committee of Social Rights in the light of EU law*, *Academic Network of the European Social Charter (ANESC/RASCE), Turin Conference (2014)*, 2, par. 6.

¹⁰ Cl. Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, Chapter 11 in Th. Beukers, Br.de Witte & Cl. Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law*, Cambridge University Press (2017), 286, 297.

¹¹ A. Tsiftoglou & St. Koutnatzis, *Financial Crisis and Judicial Asymmetries: The Case of Greece*, Paper presented during the 2017 ICON-S Conference (July 7, 2017), forthcoming [provided with copy by the author].

during this second phase of judicial deference¹². There have been detailed and insightful analyses of the highest courts' judgements during the first period¹³; thus, the present article does not engage with the facts of the cases or the rationale of the decisions. The examination is rather interested in the active role of lower courts during the passive first phase of constitutional adjudication. Given the peculiarity of the judicial review system in Greece, its positivistic legal tradition and the prevalence of economic rationality in European social policy, the argument here is that lower courts reframed with their judgments the idea of social rights and constitutional pluralism in the direction of solidarity and unity.

2.1.1. Lower courts and the measure of 'labour reserve'

There has been a vast production of judgments by Single-Judge Civil Courts of First Instance (Monomeles Protodikio) adjudicating upon the measure of labour reserve in the public and wider public sector, i.e. the legal status of mandatory mobility, re-assignment or suspension of employees¹⁴. The staff placed on labour reserve were state employees under private law contracts of indefinite duration¹⁵. The suppression of the contract staff posts

¹² See also A. Marketou, *Economic Emergency and the Loss of Faith in the Greek Constitution, How Does a Constitution Function when It Is Dying?* 4 Cambridge J. Int'l & Comp. L. 2 (2015), 195-196.

¹³ A. Marketou, *Greece: Constitutional Deconstruction and the Loss of National Sovereignty*, Chapter 6 in Th. Beukers, Br.de Witte & Cl. Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law*, Cambridge University Press (2017), 308-309.

¹⁴ Prior to the examined legislation, the labour reserve measure was introduced in Greek legal order with Law 3986/2011 via the Mid-term Fiscal Strategy Framework 2012-2015, paying 60% of basic salary to those assigned, which was applicable to employees in state-owned enterprises. Later, Law 4024/2011 (Greek Government Gazette A 226/ 27.10.2011) extended the scope of the application to cover employees in the public sector. This was a pre-retirement scheme. [See also A. Koukiadaki & U. ETUC (ed.), *Can the Austerity Measures be Challenged in Supranational Courts? The Cases of Greece and Portugal, ETUC Working Papers* (2014), 29]; The significant difference between legislation of 2012 (and after) and legislation of 2011, is that those placed in labour reserve during the first stage (law of 2011), they would retire on full pension at the end of the labour-reserve period. However, those placed on labour reserve in the examined time framework, i.e. 2012 onwards - which is of interest to the present article - were dismissed and lost their jobs after the end of the labour reserve period.

¹⁵ Subparagraph Z.4 of Article 1 of Act 4093/2012 (Greek Government Gazette A 222/ 12.11.2012).

was by percentage and the work force was placed in mandatory availability with completely random criteria. Staff in labour reserve was paid at 75 percent of their basic wage for as long as they were in this status, while this was set at 12 months, after which they were dismissed without compensation. Due to further legislation¹⁶ the following contracted staff was also made redundant: i. all staff positions on private-law open-ended contracts, who were serving as school guards in public schools; ii. all permanent posts of officials, who served in municipal police positions across the country; iii. all employees, who served as permanent staff at the secondary level of technical education, of 50 specialties in total, which were nominally abolished. The remuneration of the staff was 75 percent of their former salary and the duration of the labour reserve status was set at 8 months. Those, who were not transferred to other posts within this timespan, were subsequently dismissed after its expiration, while the abolition of posts was made by invoking the public interest argument.

According to the structural fiscal policies and reforms that the Greek government intended, the general government employment was planned to be reduced by at least 150,000 employees in the period 2011–15, a condition of the country's loan agreements. Almost half of the initial goal was reached, i.e. around 80,000 employees from the public and wider public sector were dismissed, and indeed the number of public servants in Greece fell by more than 12% to just under 567,000 from 647,000 between 2011 and 2015¹⁷. The Greek government expressed its commitment to "furlough enough redundant public employees into the labor reserve by end-2012 to achieve 15,000 mandatory separations (i.e. once their time in the labor reserve has been exhausted)"¹⁸ and to

¹⁶ Articles 80, 81 and 82 of Act 4172/2013 (Greek Government Gazette A 167/23.07.2013).

¹⁷ Eurofound, *Greece: Reducing the number of public servants – latest developments* (June 23, 2016) available at <https://www.eurofound.europa.eu/observatories/emcc-eurwork/articles/working-conditions-labour-market-industrial-relations/greece-reducing-the-number-of-public-servants-latest-developments>, last accessed December 19, 2017.

¹⁸ See International Monetary Fund, Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding of Greece (March 9, 2012) 7, 59, available at

augment the labour reserve scheme annually. In the course of 2012, the redundant staff of 2,000 employees were transferred to labour reserve, while there was a commitment to transfer 27,000 staff to a new mobility scheme by 2015¹⁹. By March 2014, 11,400 employees of the public sector were dismissed (instead of the 15,000 layoffs, which was the goal for the biennium 2013-2014), while prior to that 3,635 employees were let go (instead of the aim of 4,000 'mandatory removals', which constituted a commitment of Greece to qualify for granting the second loan by the creditors)²⁰.

Following the relevant legislation, the majority of staff, who was placed on labour reserve, have collectively brought individual actions in one single application against the administrative bodies that issued the mobility and suspension orders. Among the affected employees who brought an action, some initially asked for preliminary injunctions before proceeding to the main hearing of the cases, while others preferred to wait for the main trial. Accordingly, the majority of the Courts of First Instance provided immediate temporary protection in accordance to the urgency procedure and interim proceedings. The lower judges have granted the employees provisional injunctions, prohibiting in this way the application of the labour reserve measure. The judges hearing the applications for interim relief allowed the applications, as well as the actions, which were subsequently brought before the relevant courts. A minority of judges did not accept the applications for interim relief and the lawsuits afterwards, and thus the same measure of labour reserve was applied to similar staff. However, a large number of employees in the country was not placed under the status of labour reserve and has not been suspended, because the employees were protected by the judgments of lower courts. In particular, in a series of about 40 actions and applications for

<https://www.imf.org/external/np/loi/2012/grc/030912.pdf>, last accessed December 21, 2017.

¹⁹ International Monetary Fund Country Report No. 13/20 (January 2013) available at <https://www.imf.org/external/pubs/ft/scr/2013/cr1320.pdf>, last accessed December 21, 2017.

²⁰ See Editorial, Ethnos, The Timetable for 11.400 layoffs: Who is dismissed from the Public Sector in 2014 (January 17, 2014) available at www.dikaiologitika.gr/eidhseis/dhmosio/23316/11-400-apolyseis-dimosion-ypallilon-to-2014 and www.real.gr/DefaultArthro.aspx?page=arthro&id=290546&catID=108, last accessed May 09, 2018.

interim measures, which were documented covering a period of two years (2013 – 2014)²¹, in only eight of them the measures were found in conformity with the Greek Constitution²², while three of the cases were dismissed on admissibility grounds²³.

In several proceedings for interim measures²⁴ the courts ordered that the mandatory availability and labour reserve plan was in violation of the Greek Constitution, the European Social Charter²⁵ and the European Convention on Human Rights²⁶. Lower courts found in this respect that the challenged austerity measure violated a number of provisions of the Greek Constitution, i.e. the right to a decent living (article 2 par. 1), the principle of equality to public charges (article 4 par. 5), the right to property (article 17), the principle of proportionality (article 25 par. 1), and the right to work (article 22 par. 1)²⁷. In addition, it was stressed that the measure disregarded several provisions of the ESC, including the right to work and to the fair remuneration of workers that would provide them and their families with a decent standard of living (article 1 and 4 par.1). Last but not least, in some cases the judges underlined that the contested measure violated specific provisions of the

²¹ As documented in legal journals and the online Greek legal database of national scope NOMOS, available at <https://lawdb.intrasoftnet.com/>.

²² See Decisions on interim measures No 387/2013 First Instance Court of Xanthi; No 1705/2014 First Instance Court of Thessaloniki; No 5026/2014 First Instance Court of Thessaloniki; No 186/2014 First Instance Court of Ioannina; No 324/2014 First Instance Court of Kavala; see also Decisions No 729/2013 Administrative Court of Appeals of Athens; No 215/2014 District Civil Court of Patras; No 1845/2014 Administrative Court of First Instance of Thessaloniki.

²³ See Decisions No 67/2013 First Instance Court of the Aegean; No 298/2013 First Instance Court of Alexandroupolis; No 1705/2014 First Instance Court of Thessaloniki.

²⁴ See Decisions on interim measures No 37/2013 First Instance Court of Chios; No 90/2013 First Instance Court of Xanthi; No 1759/2013 First Instance Court of Athens; No 63/2013 First Instance Court of Mesologgi; No 4916/2013 First Instance Court of Thessaloniki; No 494/2013 and No 202/2014 First Instance Court of Patras; No 2700/2013 First Instance Court of Piraeus; No 13915/2013 and No 13917/2013 and No 7809/2014 First Instance Court of Athens.

²⁵ ESC hereinafter.

²⁶ ECHR hereinafter.

²⁷ See Decisions No 09/2014 First Instance Court of Xanthi; No 324/2014 First Instance Court of Kavala; No 333/2014 First Instance Court of Chios; No 46/2014 First Instance Court of Orestiada; See Decisions No 1240/2014 and No 1951/2014 First Instance Court of Athens.

ECHR²⁸, such as the right to property, as it is enshrined in article 1 of Protocol 1 to the ECHR.

In some instances, lower courts found that the austerity measure of the mandatory placement of employees in labour reserve was opposed to the protection of human dignity of the involved individuals and did not ensure their personal and professional development. Lower judges stressed that this austerity measure constituted effectively a *sui generis* dismissal procedure²⁹. They further pointed out that the legislator acted in a flattening and levelling way, violating in this way human dignity and the constitutionally protected principles of equality and of respect and protection of the value of the human being³⁰.

The judges placed in this respect particular emphasis on the concerned individuals, who were affected by the measures; they underscored that “irrespective of the effectiveness and the suitability of the measure, behind numbers specific individuals do exist, whose life is drastically overturned and, who are sacrificed for the sake of the government's economic goals and the reduction of state spending, while those [i.e. economic goals] are proclaimed as overriding public interests by putting the human being on the brink and by transforming the human being into the means to achieving the desired goal.”³¹.

In some of the actions brought before the lower courts, the issue of legality and proper incorporation of the contested measures in the Greek legal order was also raised, since it was argued that constitutional provisions on the proper procedure of the passing of

²⁸ Cl. Kilpatrick, Br. De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, EUI Department of Law Research Paper No. 2014/05, 8.

²⁹ See Decision No 117/2014 First Instance Court of Preveza. See also M. Yannakourou, *Austerity Measures Reducing Wage and Labour Costs before the Greek Courts: A case law analysis*, 11 *Irish Empl Law J.* 2 (2014), 41.

³⁰ Article 2, para.1 of the Basic Provisions of the Greek Constitution on the Form of Government reads as follows: “Respect and protection of the value of the human being constitute the primary obligations of the State.” available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>, last accessed May 26, 2017.

³¹ Excerpt taken (with author's translation) from Decision No 117/2014 First Instance Court of Preveza, which was published on 17.03.2014; the same rationale was reiterated in the Decision No 33/2014 of the First Instance Court of Chios; see 10th and 11th sheet of the judgment, publ. date 18.11.2014 [in Greek].

the contested laws were violated³². The judges have ruled respectively that the relevant austerity legislation violated the rule of law and the principle of legality and good administration³³.

The lower courts' positive judgments were heralded by public opinion and created political friction. Being followed one after another, those decisions stood as the material evidence of the unconstitutionality of the austerity measures and of the opposition and deep anxiety of the society towards them. Following the change of government in January 2015, the provisions on labour reserve were repealed and all sectors, departments and specialties of the staff, who have been placed on labour reserve and whose posts were abolished, were re-established. In particular, in March 2015, i.e. only one and a half month after the Deputy Minister of Interior and Administrative Reconstruction came into office, the relevant draft law regarding the abolishment of the labour reserve measure was put into public deliberation under the striking title "restoration of injustices"³⁴. According to the law that was enacted in May 2015, the personnel were reinstated, and 3.900 employees returned to their former posts³⁵.

Before the repeal of the labour reserve law the contribution by lower courts was initially decisive so that employees wouldn't

³² See Articles 72, 74 and 76, Chapter 5 of the Greek Constitution on the Legislative Function of the Parliament under the following link provided in an official translation in English by the Hellenic Parliament, available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>, last accessed March 16, 2017.

³³ See Decision No 09/2014 First Instance Court of Xanthi on the unconstitutionality of labour reserve on the basis that this violates the principle of proportionality, equality and meritocracy in public administration, in conjunction with the rule of law and the principles of legality and good governance.

³⁴ Act 4325/2015 (Greek Government Gazette A 47/11/05/2015) "Democratization of the Administration - Fighting Bureaucracy and eGovernment. Restoration of injustices and other provisions" and in particular Chapter 4 "Restoration of injustices, staff reset and mobility", Articles 17, 18, 19 and 21, available at http://minfin.gr/web/guest/nomiko-plaisio1/-/asset_publisher/VonrJHbeXk5J/content/nomos-4325?inheritRedirect=false, last accessed December 12, 2017.

³⁵ Aftodioikisi, *With the ballot of the Parliament the re-employment of employees in the Public sector* (May 5, 2015) available at <http://www.aftodioikisi.gr/proto-thema/kai-me-ti-voula-tis-voulis-oi-epanaproslipseis-sto-dimosio-157-nai-aposiriza-anel-sto-nomosxedio-katrougkalou/>, last accessed December 21, 2017 [in Greek].

find themselves unemployed literally “overnight”. A two-speed category was created between citizens, namely those affected by the relevant legislation, and employees who were protected by lower courts. A fracture was encountered within the polity by means of inequality among people, i.e. those who remained in their positions and those who lost their jobs. Those whose actions and applications for interim relief were successfully heard before the First Instance Courts managed to maintain and secure their work positions and suffered no reduction of their salary as they were not affected by the enforcement of the measure of labour reserve. The rest, however, who had not exercised their right to interim protection or have not filed an action, were immediately affected by the measure, and were either forced to retire or to accept to be placed in reserve, followed by their dismissal. As a result, social cohesion was impaired and there has been no unity in constitutional adjudication or constitutional harmony between the judicial and legislative power.

In addition, the contribution of lower courts has been significant in the sense that these contributed³⁶ in the subsequent adoption of ‘the law of return’ of the employees to the positions they formerly held. The enactment of the new law of return of *all* employees was inevitable so as to restore justice and constitutional unity, since most of the staff enjoyed the protection granted to them by judicial decisions and held their positions, while others were affected by the law. Therefore, the adoption of the new law was not only the product of political commitment, but it was mainly the product of the positive judgments of the courts of First Instance, which have previously invalidated the austerity measures in effect. In the course of a broad ‘constitutional deconstruction’³⁷ that has been following the financial crisis that erupted in Greece, lower courts have, thus, restored with their contribution some faith in the Constitution.

³⁶ See Report of the Scientific Council of the Hellenic Parliament on Act 4325/2015 available at <http://www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/e-dioikisi-epi.pdf> accessed December 26, 2017, par.7. a., 14 [in Greek].

³⁷ See A. Marketou, *Greece: Constitutional Deconstruction and the Loss of National Sovereignty*, cit. at 13, 189, 190, 194, 198; also A. Marketou, *Economic Emergency and the Loss of Faith in the Greek Constitution, How Does a Constitution Function when It Is Dying?*, cit. at 12 on constitutional faith.

2.1.2. Highest national and European courts

The Hellenic Council of State in its landmark decision 668/2012 in the so called “Trial of the Memorandum”³⁸ found that overall the austerity measures were in conformity with the Greek Constitution³⁹, while it considered that those were justified on the basis of the overriding public interest rationale for the purposes of the common good. The Council of State stressed that the austerity measures have been prescribed by an urgent social need and that the reforms were dictated by an immediate need for serving the public interest.

Following the negative decision 668/2012⁴⁰ of the Council of State, two out of the more than thirty applicants, who filed the petition examined by the Council of State, i.e. Mrs. Ioanna Koufaki and the Greek Confederation of Public Sector Trade Unions (ADEDY), also brought their cases before the Strasbourg Court. In the joint examination of the petitions of Koufaki and ADEDY v. Greece⁴¹ concerning the applicability of the austerity measures in Greece and in particular the reductions in the remuneration, benefits, bonuses and retirement pensions of public servants, the Court rejected the case on admissibility grounds. The Strasbourg Court by acknowledging that the adoption of the impugned measures was justified by the existence of an exceptional crisis without precedent in recent Greek history⁴², reiterated *en masse* the argumentation of the Hellenic Council of State and restated that the notion of “public interest” in this context is necessarily extensive,

³⁸ See P. Pikrammenos, *Public Law in Extraordinary Circumstances from the Point of View of the Administrative Procedure for Annulment*, 71 Rev of Empl Law (2012), 385 [in Greek].

³⁹ For a provision-by-provision assessment of the compatibility of austerity measures with social rights provisions in cases brought before the Greek Council of State and the European Committee of Social Rights, see International Legal Research Group on Social Rights Final Report, *Austerity Measures and their Implications: The Role of the European Social Charter in Maintaining Minimum Social Standards in Countries Undergoing Austerity Measures* (2015), 721-724.

⁴⁰ See above Decision 668/2012 of the Hellenic Council of State.

⁴¹ ECtHR I. Koufaki and ADEDY v. Greece, Nos. 57665/12 and 57657/12, (May 13, 2013), Koufaki case hereinafter; See also S. Koukoulis-Spiliotopoulos, *Austerity v. Human Rights: Measures Condemned by the European Committee of Social Rights in the light of EU law*, at fn 9 above, 2, par. 6 (2014).

⁴² ECtHR I. Koufaki and ADEDY, cit. at 41, para. 36.

while it handed a wide margin of discretion to the national legislator in implementing social and economic policies⁴³.

Prior to that, the austerity measures in Greece had been assessed by the General Court of the European Union (GC) after the launch of two actions for annulment by ADEDY against Council Decisions including financial assistance conditionality. The General Court did not accept that the criterion of 'direct concern' was met, since the clause in the MoU was not sufficiently determinate,⁴⁴ and thus declined to go into the merits by dismissing the actions. The GC stressed that the basic act was too indeterminate in the sense that it did not give details of the proposed reductions, the manner in which these would be implemented and the categories of civil servants who would be affected⁴⁵. It further handed a wide margin to the Greek authorities by means of determining the final objective of reducing the excessive fiscal deficit⁴⁶. That is to say, both the ECtHR and the Court of Justice of the European Union⁴⁷ handed wide margins of discretion to the national authorities and have either deferred to them or declined to review the measures altogether.

2.2. An assessment of the judicial responses to the Greek austerity crisis

The European and Greek highest Courts have been criticised for displaying timidity in their judgements, and for having endorsed a procedural turn in legal thinking and having created legal confusion and stasis⁴⁸. The austerity case-law in Greece has been assessed as being rather asymmetric, since courts have not been consistent when reviewing the relevant measures by means of applying different levels of scrutiny on the examined policies and

⁴³ Ibid, para. 39, 43, 44.

⁴⁴ See ADEDY et al. v. Council, GC Case T-541/10 (November 27, 2012), para. 70.

⁴⁵ A. Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding*. Legal Opinion commissioned by the Chamber of Labour, the Austrian Trade Union Federation, the European Trade Union Confederation (ETUC) & the European Trade Union Institute (ETUI), Vienna (2014), 32, 54-55.

⁴⁶ ADEDY et al. v. Council, GC Case T-541/10, par. 84; also ADEDY et al. v. Council, GC Case T-215/11 (November 27, 2012), para. 81, 84, 97.

⁴⁷ CJEU hereinafter.

⁴⁸ Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, cit. at 3, 340.

by adhering to a statist understanding of the economy⁴⁹. In the Council of State's judgment at hand, the concept of emergency has been channelled indirectly through the public interest argument by implicitly resorting to the concept of exceptional circumstances. In line with this, it has been explicitly expressed by the Council of State that the austerity measures have been prescribed by an urgent social need for the purposes of addressing a severe budgetary and financial crisis⁵⁰. Interestingly, this was further justified on the basis of the required budgetary discipline for the preservation of the stability of the Eurozone in its entirety⁵¹. The rhetoric of fiscal emergency was paramount in the way that austerity measures were justified in the Explanatory Reports of national laws that introduced them and which stressed that the austerity measures were taken in the context of the most severe crisis of public finances of the last decades in the history of the country. This economic emergency discourse has not been embraced, though, only by national highest courts, but it was also adopted by the ECtHR, which relied heavily on excerpts from the Explanatory Report and adhered almost entirely to the findings of the Hellenic Council of State in the Koufaki case⁵². The Strasbourg Court, in this sense, by acknowledging that the measures were justified by the existence of an exceptional economic crisis, it reiterated the argumentation of the Hellenic Council of State and has set aside individuals, while it justified austerity measures on the basis of the general fiscal interests of the state⁵³. It thus adopted a similar rhetoric of the 'law of emergency', while it revealed in this way an informalised emergency practice at a supranational level⁵⁴. By adhering to the overriding and abstract general interest of the state and by asserting

⁴⁹ See A. Tsiftoglou, LSE Greece@LSE Blog, *Beyond Crisis: Constitutional Change in Greece after the Memoranda* (March 09, 2017) available at <http://eprints.lse.ac.uk/79256/>, assessed June 3, 2017.

⁵⁰ See Council of State Plenary Decision 668/2012 (20 February 2012), para. 35, 38.

⁵¹ *Ibid*, par. 35.

⁵² A. Dimopoulos, *Constitutional Review of Austerity Measures in the Eurozone Crisis*, SSRN Journal (2013) 10, available at <http://dx.doi.org/10.2139/ssrn.2320234>, accessed April 26, 2017.

⁵³ I. Pervou, *Human Rights in Times of Crisis: The Greek Cases Before the ECtHR or the Polarization of a Democratic Society*, 5 *Cambr Jour of Intern and Compar L.* 1 (2016), 117.

⁵⁴ Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, *cit.* at 3, 329.

legality, the judiciary has put forward an understanding of a sort of a *légalité élargie*⁵⁵, both in procedural and substantive terms, and gave to “a challenged system the imprimatur of the rule of law by identifying that rule with the rule of law”⁵⁶.

What is more, in the case that was brought before the Council of State by various applicants (among them by Mrs. Koufaki and by ADEDY), the applicants requested that this court would apply for a preliminary ruling from the CJEU on the question whether the measures taken by the Greek Government in application of the Memoranda were in compliance with EU primary law⁵⁷. However, interestingly enough the Council of State not only abstained from addressing this request⁵⁸, but it completely disregarded this and did this silently without providing any reasoning. However, neither did the ECtHR go into evaluating this lack of action by the Hellenic Council of State and it did not judge on either one of the complaints raised by the applicants, i.e. that article 6 par. 1 concerning the right to a fair trial was violated⁵⁹.

At the European front, the GC of the Union demonstrated a timid approach when it refrained from going into the merits; the Court thus abstained from addressing the conformity of the austerity packages with the core social values of the European Union, while it refrained from protecting the groups, which were affected by the measures⁶⁰. In addition, the ECtHR has also been criticized for being extremely reserved in its judgments on austerity policies⁶¹. The Strasbourg Court in the Koufaki case did not take

⁵⁵ P.M. Rodríguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, 12 *Eur Const Law Rev.* (2016), 269.

⁵⁶ Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, cit. at 3, 347.

⁵⁷ N. Gavalas, *The Memorandum Between a Rock and a Hard Place: From the Council of State to the European Court of Human Rights*, 72 *Rev of Empl Law* (2013) [in Greek], 756 par. 3, 760 par. 16.

⁵⁸ R. Bellamy, *Rethinking Liberalism*. Continuum International Publishing, 71 (2000); see also in E. Christodoulidis, *The European Court of Justice and “Total Market” Thinking*, 14 *German Law Journal* (2013), 2015.

⁵⁹ N. Gavalas, *The Memorandum Between a Rock and a Hard Place: From the Council of State to the European Court of Human Rights*, cit. at fn 57, 763 par. 22. στ) / f).

⁶⁰ A. Poulou, *Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?*, 15 *German Law Journal* (2014), 1172-1173.

⁶¹ A. Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding*, cit. at 45, 56.

into consideration the number of people, who were represented by the trade union and who were potentially affected by the cuts in public spending. The counterargument to this claim, could be that the concerned applicants were unable to substantiate the degree to which their personal interests were affected by the contested austerity measures. As a matter of fact, the application brought by ADEDY arguably suffered from a rather abstract and weak argumentation, as ADEDY filed an individual petition on behalf of *all* its members, i.e. both those with high incomes and those with low ones⁶². ADEDY in this respect failed to name or identify the affected individuals, nor did it provide an approximated account of the extent and the magnitude of the damage these people suffered in qualitative or quantitative terms. The ECtHR found accordingly that the applicants had not invoked in a particular and precise manner how their living standard has deteriorated and how their welfare has been compromised⁶³.

Taking aside this line of defense, though, the quantitative factor “was consciously ignored [and] the ECtHR overlooked the humanitarian aspects of the economic crisis in Greece, as it did not confer a subsistence quality to the right to property”⁶⁴. In a display of institutionalised destitution⁶⁵ the highest national and supranational Courts when balancing social rights within the crisis-related context of the Greek case, disregarded the interests of the affected persons from the social equation and promoted the general interest of the state in an abstract and moralistic way⁶⁶. The European and Greek Supreme Courts fell short in this way in

⁶² A. Koukiadaki & U. ETUC (ed.), *Can the Austerity Measures be Challenged in Supranational Courts? The Cases of Greece and Portugal*, cit. at 14, 33.

⁶³This unfortunate line of defense was highlighted by various scholars; see for instance N. Gavalas, *The Memorandum Between a Rock and a Hard Place: From the Council of State to the European Court of Human Rights*, cit. at 57, 758, para. 8; I. Pervou, *Human Rights in Times of Crisis: The Greek Cases Before the ECtHR or the Polarization of a Democratic Society*, cit. at 53, 118-119.

⁶⁴ I. Pervou, *Human Rights in Times of Crisis: The Greek Cases Before the ECtHR or the Polarization of a Democratic Society*, cit. at 53 (2016), 138.

⁶⁵ *Ibid*, 114.

⁶⁶ See A. McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 *The Modern Law Rev.* 5, 671, 675 (1999); also K. Moller, *Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights*, 29 *Oxf Jour of Leg Stud.* 4 (2009) 758, 761, 765, 773.

fulfilling the legitimate expectations that individuals have placed in them and in safeguarding the principle of legal certainty⁶⁷, while they evidenced a malfunctioning of judicial and administrative review of the bailouts⁶⁸.

The courts at the highest level of adjudication, being perceived as *quasi*-Constitutional Courts in the public conscience⁶⁹, reinforced a system of 'Bi-Constitutionality'⁷⁰ by applying only a marginal judicial review of the legislative acts in question instead of a much-anticipated social constitution. Furthermore, the highest courts at a national level handed a wide margin of discretion to the administration for implementing the austerity policies in order to uphold the imposition of the measures. In determining the provisions' agreement with the Greek Constitution, the national highest courts applied in this respect a "presumption of constitutionality"⁷¹ of the law, i.e. they applied the *in dubio pro lege* principle, which translates that in case of a Court's doubt on the constitutionality or not of the law, the law is considered to be constitutional.

Lower domestic judges followed a different path in their judgements and line of reasoning. By asking the question of labour law as a question of constitutional law⁷² the lower courts applied the levels of protection ensured by constitutional status to labour

⁶⁷ See also P.M. Rodríguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, cit. at 55.

⁶⁸ Cl. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, cit. at 3 (2015), 32.

⁶⁹ See G. Ulfstein, *The European Court of Human Rights as a Constitutional Court?*, 14 *PluriCourts Research Paper* 08 (2014); A. Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 *Global Constitutionalism* (2012), 82; A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 *Indiana Journal of Global Legal Studies* 2, Article 11 (2009), 645.

⁷⁰ D. Travlos-Tzanetatos, *Judicial Autonomy or Judicial Restraint? Article 249 of the Greek Code of Civil Procedure in Appeal Proceedings According to the Recent Jurisprudence of the Court of Cassation*, 73 *Rev Empl Law* 18 (2015) [in Greek], 1184.

⁷¹ D. Travlos-Tzentatos, "State of Emergency", *Public Interest and Constitutional Review: On the Occasion of Decision No 2307/24 of the Plenary Session of the Greek Council of State*. 74 *Rev Empl Law* 1 (2015) [in Greek], 16.

⁷² E. Christodoulidis, *Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot*, 19 *Social and Legal Studies* (2010), 217-252.

rights⁷³ and protected with their judgments the direct interests of individuals, while they acted as the interpreter of the will of people. Lower courts by resorting to a combination of constitutional principles and fundamental rights in order to safeguard social rights protection, paved the way for the protection of fundamental rights of individuals through the constitutionalisation of labour rights⁷⁴ and reinforced the re-configuration of a more resilient constitutional paradigm for the protection of social rights.

Lower judges by acknowledging the right to property as a means of subsistence in times of deep financial recession and by entrancing this as a constituent to a life with dignity, addressed social rights not under purely managerial or utilitarian parameters, but instead stroke a fair balance between efficiency and the constituencies affected. Contrary to an impoverished and narrow conception of value, being equated to economic value, lower judges prioritized individualized concerns over mere arithmetical aggregates⁷⁵. Opposite to a ‘de-constitutionalisation’ of labour rights, it seems as if lower judges have put forward a ‘re-constitutionalisation’ of labour rights, without regarding efficiency or aggregate utility as the *be-all* and *end-all* of public social policy⁷⁶. Furthermore, lower courts, while in the process of evaluating social policy, have taken individuals seriously⁷⁷ and have defended an idea of the public interest argument that is not squared merely with fiscal or economic interests.

In doing so, lower courts pointed also towards the dual nature of social rights as having not only a collective, but an individual aspect, as well. By interpreting the constitutional right

⁷³ N. Busby, R. Zahn, *The EU and the ECHR: Collective and Non-discrimination Labour Rights at a Crossroad?*, 30 *International Journal of Comparative Labour Law and Industrial Relations* 2 (2014), 154-155.

⁷⁴ *Ibid*, 154.

⁷⁵ J. Waldron, *Socioeconomic Rights and Theories of Justice*, New York University Public Law and Legal Theory Research Paper Series, Working Paper No 10-79 (2010), 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699898, accessed May 10, 2017.

⁷⁶ L.D. Sánchez, *Deconstitutionalisation of Social Rights and the Quest for Efficiency*, in Cl. Kilpatrick, Br. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, EUI Department of Law Research Paper No. 2014/05, 116, 120.

⁷⁷ J. Waldron, *Socioeconomic Rights and Theories of Justice*, cit. at 75, 4.

to the decent standard of living as a threshold to the legislator's power to social rights curtailments, the judiciary casted light to the individual dimension of the social. What is more, though, by linking the respect and protection of the value of the human, which is a primary obligation of the State⁷⁸, to social rights protection, lower courts associated social justice with the concept of solidarity. By opting for a plurality in legal sources and values of substantive equality and fraternity for the effective protection of social rights, lower judges gave a new reading to constitutional pluralism and pluralism as such. The judiciary by attesting that it is difficult to reconcile social justice with the neo-liberal values of economic maximization and profit motive⁷⁹, and by safeguarding at the same time social rights through the overarching and pluralistic framework of constitutional and human rights protection, it re-conceptualized the notion of social rights and substantive unity in constitutional terms.

3. Social rights and constitutional pluralism in the austerity context

3.1. Hierarchy *in* heterarchy

There is a plurality of pluralisms against different backgrounds let alone of legal pluralisms⁸⁰ or constitutional pluralisms as such. Legal pluralism as opposed to legal centralism⁸¹, exists whenever social actors identify hybrid legal spaces where more than one source of "law" or legal orders occupy one social space⁸² and acknowledges the plurality of legal systems. John Griffiths, in his seminal article of 1986 "What is Legal Pluralism?"⁸³, has set forth the concept of legal pluralism that is adopted by most scholars in the field, only to announce more than

⁷⁸ Article 2, para. 1 of the Greek Constitution.

⁷⁹ N. Busby, R. Zahn, *The EU and the ECHR: Collective and Non-discrimination Labour Rights at a Crossroad*, cit. at 73, 159.

⁸⁰ B.Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 *Journal of Law and Society* 2 (2000), 297.

⁸¹ J. Griffiths, *What is Legal Pluralism?*, 24 *Journal of Legal Pluralism and Unofficial Law* (1986), 3, 5.

⁸² B.Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 *Sydney Law Review* (2008), 36; P. Berman, *The New Legal Pluralism*, 5 *Annual Review of Law and Social Science* (2009), 226.

⁸³ J. Griffiths, *What is Legal Pluralism?*, cit. at 81, 1.

two decades after that, owing to its insoluble conceptual problem, legal pluralism should be discarded⁸⁴ or should be better conceptualized as “normative pluralism”⁸⁵. To the testament of that conceptual problem, legal pluralism is confronted with many questions: the definitional one, which is translated to what law, really is; the culturalist lodestar, which responds to whether and how law reflects cultural practices and the functionalist one that relates to the fundamental question of why law has been created and what is the ultimate purpose⁸⁶. Legal pluralism has also been criticized at large for having been used as an epiphenomenon⁸⁷ for political power and a resource for explaining larger issues, like power or domination forgetting in this way law as a topic in its own right⁸⁸.

Turning to the concept of constitutional pluralism, this is confronted with many of the above-mentioned questions that legal pluralism is encountered with, and to some extent it is intricately connected to the latter. An assessment of those questions along with an elaborate account of the arguments of those in favour or those criticizing this theory requires an analysis on its own merits, which is beyond the scope of this article. Against the various criticisms of the constitutional pluralism model, as being an oxymoron⁸⁹ or an intellectual fudge that is inherently unsustainable and should be put to an end⁹⁰, the present analysis stresses that constitutional pluralism is not dead⁹¹ and rather reflects on a new reading and conceptualisation of this idea.

Even though there has not been a uniform understanding or definition of constitutional pluralism, when looking at the wider

⁸⁴ B.Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, cit. at 82, 3.

⁸⁵ *Ibid*, 34, 35.

⁸⁶ See B. Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices*, 1 *European Journal of Legal Studies* 1 (2007), 302-305.

⁸⁷ P. Berman, *The New Legal Pluralism*, cit. at 84, 229.

⁸⁸ B. Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices*, cit. at 86, 312.

⁸⁹ M. Loughlin, *Constitutional pluralism: An Oxymoron?*, 3 *Global Constitutionalism* 1 (2014), 9-30.

⁹⁰ D. Kelemen, *On the Unsustainability of Constitutional Pluralism*, 23 *Maastricht Journal of European and Comparative Law* 1 (2017), 136-150, 139.

⁹¹ A. Bobic, *Constitutional Pluralism Is Not Dead: An Analysis of Interactions between Constitutional Courts of Member States and the European Court of Justice*, 18 *German Law Journal* 06 (2016).

European system, this by being comprised of discrete national and Treaty-based hierarchies⁹² is considered to be pluralistic. Indeed, there is pluralism in the European legal edifice in the sense that by means of the European regime of the European Union and the Council of Europe, it is difficult to devise one European legal order. In this respect, legal and constitutional pluralism by means of the plurality of legal sources between different legal orders⁹³ proves to be a fact for Europeans and their judges, be it national or supranational. Constitutional pluralism⁹⁴ represents, thus, a systemic condition⁹⁵ and a structural characteristic of the European legal system⁹⁶. But is the latter really pluralistic or does a structural bias towards centralism exist in the name of pluralism that renders the latter a euphemism for a new, but in fact, old type of hierarchy, i.e. of the stronger versus the weaker?

It has been stressed in theory that the relationship between national and supranational law, when primarily understood within a conventional hierarchical mind-set, presupposes the prioritization of national over supranational law and vice versa in a vertical or hierarchical relationship according to the idea of dualism or monism. Constitutional pluralism generates a shift from the hierarchical model of interaction between legal orders by collapsing the verticality of the relationship between state and supranational law to one of horizontality in a heterarchical rather than hierarchical fashion⁹⁷. By encouraging this form of interaction from a vertical to a horizontal one, or even to both in a three-dimensional relationship kind of way of hierarchy in heterarchy, as it is suggested below, constitutional pluralism provides in this way,

⁹² A. Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, cit. at 69, 61.

⁹³ M.P. Maduro, *Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism*, 1 *European Journal of Legal Studies* 2 (2007), 137-152, available at <http://www.ejls.eu/2/25UK.pdf>, accessed March 23, 2017.

⁹⁴ A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, cit. at 69, 633.

⁹⁵ *Ibid.*

⁹⁶ A. Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, cit. at 69, 60.

⁹⁷ Mac Amhlaigh, Cormac S., *Pluralising Constitutional Pluralism*, pp. 64-89, in N. Roughan, A. Halpin (eds), *In Pursuit of Pluralist Jurisprudence*, Cambridge University Press (2017).

a more nuanced approach to legal thinking in the emergent settings of global disorder.

The discourse on hierarchy and heterarchy besides reflecting at a normative level it also draws back on the discussion about the relationship of economic liberalism and pluralism at a conceptual level. Griffiths has long ago referred to legal centralism as an ideology⁹⁸; what we have come to see is that legal pluralism in the neoliberal discourse is an ideology in itself that is premised in the very same ideology legal centralism is based upon, namely hierarchy and supremacy, either by means of a state-type or any other form of supremacy such as economic supremacy in terms of economic neo-liberalism. Michaels summarises sharply the incompatibility of pluralism with neo-liberalism when he stresses that the latter as “a theory of relentless competition”⁹⁹ puts different legal systems under constant pressure to justify themselves against the forces of competition and it implies the likelihood that dominant legal systems, which in neo-liberalism is, eventually, some global economic law, will come to dominate weaker ones¹⁰⁰.

Looking at the austerity context at hand, the interpretations of the measures by lower domestic courts reflect on the rejection of a hierarchical model of adjudication at a symbolic and a pragmatic level. The recourse of lower judges to a plurality of constitutional and human rights provisions in order to safeguard social rights, attested on the one hand to the practical collapse of hierarchy for the sake of hierarchy within the national and supranational legal order. That is to say, lower judges sought to provide substantive protection to the affected individuals by looking at national constitutional and European legal provisions, instead of following a type of authority imposed from above or conforming to the blind legality of the principle of primacy of the highest courts, as the final arbiters. Thus, lower judges have employed a type of ‘interpretative pluralism’¹⁰¹, which is based on different constitutional sources and

⁹⁸ J. Griffiths, *What is Legal Pluralism?*, cit. at 81, 3, 5.

⁹⁹ R. Michaels, *On Liberalism and Legal Pluralism* (2014), 142 in M. Maduro, K. Tuori & S. Sankari (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press (2014), 142.

¹⁰⁰ Ibid.

¹⁰¹ See M. Avbelj & J. Komárek (eds.), “*Spaces of Normativity*” *Four Visions of Constitutional Pluralism – 2 Symposium Transcript*, *European Journal of Legal Studies* 1 (2008), 330-331, available at

claims in a non-hierarchical manner. On the other hand, at a symbolic level, this judicial practice brought forward the clash of an ideal for a Social Europe that postulates social justice, equality and solidarity, with the policies, which are currently pursued and are neoliberal in their orientation by being premised on economic maximization, inequality and antagonism.

In light of the above, a content-based hierarchy of norms was employed by lower courts that has advanced a hierarchy of values contrary to a purely procedure-based hierarchy, introducing in this way another reading of constitutional pluralism¹⁰². The latter calls for hierarchy to be justified in the name of substantive equality¹⁰³ for the safeguard of social values over private, economic interests, while the quest for the effective protection of those values needs to be traced to the material aspects of domestic constitutional development. Constitutional pluralism stands as an opportunity for unity by generating a shift towards understanding heterogeneity¹⁰⁴ rather than imposing homogeneity. In this sense, the recourse to heterarchy and constitutional pluralism in the European legal context should not be used eventually opposite the principle of primacy of EU law, so as to elevate national identities or economic interests as the ultimate arbiter and voice of authority; if this happens it will eventually lead to a discourse of domination and supremacy of the stronger over the weaker, which again will be a counter-pluralist claim. Heterarchy in constitutional pluralism should rather be understood as being concerned with the protection and interpretation of social values by being vigilant to the material conditions of constitutional adjudication horizontally¹⁰⁵ and by exploring not only the interaction of state and *supra*-state Courts, but of *inter*-state Courts, as well, i.e. of different state courts within the same domestic legal order. Understood in this way, there will

http://cadmus.eui.eu/bitstream/handle/1814/10154/EJLS_2008_2_1_11.pdf?sequence=1&isAllowed=y, accessed March 27, 2017.

¹⁰² C. Pinelli, *Theories Concerning the Hierarchy of Norms*, Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL] (2016), para. 5, 16, 17, 31-3, available at <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e307#law-mpeccol-e307-div1-1>, accessed December 11, 2017.

¹⁰³ M.A. Wilkinson, *Constitutional pluralism: Chronicle of a death foretold?*, 23 Eur Law J. 3-4 (2017), 219.

¹⁰⁴ See also D. Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. Review of Law & Social Change (2007), 8,12.

¹⁰⁵ Ibid, 214.

be room for hierarchy within heterarchy, in the sense that hierarchy will only exist to serve content and social equality of people. Hierarchy *in* heterarchy will, thus, mean, in Pierdominici's apt wording, "hierarchy of shared values, heterarchy of voices and institutions"¹⁰⁶.

3.2. Solidarity and the individual aspect of social rights

There is a flawed premise in the pluralism discourse of the European multilayered legal order. One that has to do with the misconception of its nature as being pluralist by means of the plurality of legal sources and another that has to do with economic neo-liberalism as the ideological substrate of the European social edifice, which translates into wealth maximization as a value and requires its preponderance over other values in a formalistic, purely procedural and efficiency-oriented manner. This illiberal liberalism¹⁰⁷ demands further that strong states "protect a 'sound economy' against the irrationality of social-democratic pressure and solidaristic reactions"¹⁰⁸ within the constellation of states. Due to this deep structural tension the relations between social and market justice, as well as, solidarity and individualism are in an increasing disequilibrium¹⁰⁹. Within the widely accepted premise that the social structure is antagonistic there is an internal struggle for reconciliation between the individual and the social and another antagonism of the social within the social. In addition, within the neoliberal context of individual utility maximization¹¹⁰ and efficiency calculation, solidarity ends up being measured on pure economic terms within a cost-benefits analysis that insists on monetarization means and attributes a financial value to solidarity, for which no market price exists whatsoever.

¹⁰⁶ L. Pierdominici, *The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?*, 9 Perspectives on Federalism 2 (2017), 129, 146 available at <https://www.degruyter.com/downloadpdf/j/pof.2017.9.issue-2/pof-2017-0012/pof-2017-0012.pdf> accessed December 29, 2017.

¹⁰⁷ A. Phillips, *Feminism and Liberalism Revisited: Has Martha Nussbaum Got it Right*, 8 Constellations 2 (2001), 252.

¹⁰⁸ M.A Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?*, 21 Eur Law J. 3 (2015), 315, 335.

¹⁰⁹ *Ibid*, 337.

¹¹⁰ K. Mathis, D. Shannon (transl.), *Efficiency Instead of Justice: Searching for the Philosophical Foundations of the Economic Analysis of Law*, 84 Law and Philosophy Library, Springer (2009), 11, 46, 47.

Looking at the cases at hand, fiscal and financial objectives were prioritized to the detriment of fundamental social values¹¹¹ and an economic analysis of law acted as the *modus operandi* in the austerity discourse. This took place by putting forward the dominance of a free market rather than of a social market economy¹¹². In this respect, economic interests trumped the interests of the affected individuals and social rights protection was curtailed on the basis of both social homogeneity and assimilation to a rigid economic model, that serves the corresponding value of wealth maximization and efficiency according to an economic reading of the law and its foundations¹¹³. The sustainability of the measures was used thereby to reinstate public order according to preference, from an account of authority based on formal agency, which was found insensitive to social justice¹¹⁴.

This lack of a social compass in Europe is not sustained only by the forceful framework of ordoliberal policies, where rule is expanded beyond the exclusive corporate-economic interests over the general economic good of the market society, which in turn must be politically entrenched by constitution-like rules¹¹⁵. As much as the discourse about pluralism and unity is associated with constitutionalism and European integration, this is also intricate to issues of definition of those in need of protection. Critical legal thinkers have long ago raised concerns on the absence of a definition of 'who the subject is' in the human rights discourse, while a broader critique pointed at the usual and problematic

¹¹¹ See also Greek National Commission for Human Rights (GNCHR) latest Urgent Statement on labour and social security rights in Greece (April 28, 2017) available at http://nchr.gr/images/English_Site/NEWS/GNCHR%20Statement_labour_social%20security_2017.pdf, accessed May 19, 2017.

¹¹² M. Salomon, *Of Austerity, Human Rights and International Institutions*, 2 LSE Working Papers (2015), 26.

¹¹³ See R.A. Posner, R.A., *Economic Analysis of Law*. 9th ed. Aspen Publishers (2014).

¹¹⁴ M.A. Wilkinson, *Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?*, cit. at 108, 318.

¹¹⁵ M. Ryner, *Europe's Ordoliberal Iron Cage: Critical Political Economy, the Euro Area Crisis and its Management*, 22 *Journal of European Public Policy* 2 (2015), 281, 282.

exclusion of the concept of the individual from jurisprudential study within a positivistic analysis of law¹¹⁶.

In the absence of a theory and justification of the subject in the countries where austerity measures have been imposed, coupled with an economic analysis of the law and a positivistic legal tradition, which understands the subject as a product of law at an abstract level and being irrelevant to the course of politics, had repercussions on the social rights front. Situating the individual within the austerity context, the latter by being constantly an elusive term that is perceived in positivistic terms as an artefact by a concise, coherent and rational law that transcends politics, was concretised within a *neo-utilitarian*, instrumentalist and individualistic ideological framework in favour of economic interests and the protection of the market.

In the examined judgments of the highest courts, the role and reason of the state stood beyond the reason of the individual and the dignity and autonomy of the person was associated with the interests of the state, which were translated in the language of general fiscal interest. That is to say, when it came to social rights the individual dimension was neglected, as those rights are considered to be collective rights that are identified to the state's interests. Staying mired in this misconception of the public/private divide, the individual was thus negated in the name of being protected. By exercising formal agency the state forced unity through questionable legislative procedures and highly contested austerity measures, while it elevated itself to the proper expression of the reason for individuals. In the examined cases of the highest courts, the people within the polity were viewed as 'a political community of fate'¹¹⁷, bound together by the power of shared fate and belonging. The type of equality that was put forward in this sense was not horizontal and inclusive, but it was rather hierarchical and exclusive, and it was subjugated to a market constitutionalism logic that was indifferent to the impact that the deterioration of social conditions had on individuals themselves.

¹¹⁶ J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, Faculty Scholarship Series Paper (1993), 273.

¹¹⁷ Phrase accommodated for the purposes of the present context; for the original context see article of S. Benhabib, *On Michel Rosenfeld's The Identity of the Constitutional Subject*, 33 *Cardozo Law Review* 5 (2012), 1907.

However, social rights are individual rights as much as they are collective rights; they are not solely individual entitlements, but instead they are trans-individual requests that can advance collective claims on the basis of “a transpersonalistic ideal of the law”¹¹⁸. They are not mere institutionalized policies for the redistribution of social wealth; instead they have a core basis that pertains to the autonomy and integrity of the social individual and relate to constitutional and fundamental rights protection. The justiciability of social rights is not “a dead end”¹¹⁹ in this respect under the conditions that the MoU pose. The fact that the legislator may have limited scope to exercise social policy in order to implement social rights by being restricted by state budgetary commitments and fiscal constraints, does not presuppose that social rights can be counter-prioritized and curtailed. That is because social rights entail an individual aspect that inheres with the individual’s autonomy and well-being and with their human dignity; social rights protection is thus not balanced against the fiscal and economic interests of the state and it’s not measured according to the extent of the state’s financial and budgetary capabilities alone. The constitutionalizing of social rights by lower judges pointed to that direction and demonstrated how these rights can be used to safeguard and entrench the individual aspect of these rights by nonetheless attesting to their social necessitation.

4. Revisiting the idea of constitutional pluralism

If we are to acknowledge constitutional pluralism beyond a legalistic and narrow understanding, a re-reading of the latter in the sense of a hierarchy of values and heterarchy of courts could offer a useful alternative. Linking this conceptualisation of constitutional pluralism to the austerity discourse, the value of social equality should be the purpose of the protective forces of constitutional order for the sake of the wider public interest contrary to attempts of dominance or exclusion, which are prone to narrow political interests without political legitimacy deriving from the people. In doing so, judicial review through the active role of judges at all

¹¹⁸ G. Gurvitch, *The Problem of Social Law*, 52 *Ethics* 1 (1941), 27-28.

¹¹⁹ A. Kaidatzis, *Do Social Rights Exist during the Times of the Memoranda?*, Keynote Speech at the Association’s ‘Aristovoulos Manesis’ Conference ‘What type of Constitution for the Next Day?’ (2017) [in Greek], 8, 12.

instances, is an issue of reflection that could help safeguard social rights.

There is a structural deficiency by means of the structure of constitutionalism and the plurality and hypertrophy of values that Europe purports to defend in theory but falls short to do so in practice. Framing the question of social rights protection as a question of constitutional law and constitutional adjudication may have positive outcomes for the discourse. By asking the question of social rights as a question of constitutional law¹²⁰, this brings forward questions of social power and represents a striving for legitimation¹²¹ and pluralism in terms of both procedure and substance¹²². For that, the evolution of constitutionalism “is largely a narrative of constitutional pluralism”¹²³ and while exploring the structure of constitutionalism this reflects on the principles of democracy itself.

If we are to ask ourselves about questions of plurality and unity in the adjudication of legal matters, we have to inevitably position law within the present political and ideological forces that run through it. That is because, constitutional pluralism engages with the “deeper seam of political thought and praxis”¹²⁴ and addresses the political dynamics and questions which underpin the legal domain and thus should be considered a matter of political theory as much of legal theory¹²⁵.

Understanding law as being produced diachronically in the course of politics raises crucial constitutional questions, which

¹²⁰ See also E. Christodoulidis, *Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot*, 19 *Social and Legal Studies*, cit. at 72, 217-252.

¹²¹ Fl. Rodl, *Re-thinking Employment Relations in Constitutional Terms* in E. Christodoulidis, R. Dukes, *Dialogue & Debate: Labour Constitution and A Sense of Measure: A Debate with Alain Supiot*, cit. at 72, 242.

¹²² K.D. Ewing, ‘*The Sense of Measure*’: *Old Wine in New Bottles, or New Wine in Old Bottles, or New Wine in New Bottles?* in E. Christodoulidis, R. Dukes, *Dialogue & Debate: Labour Constitution and A Sense of Measure: A Debate with Alain Supiot*, cit. at 72, 234-235.

¹²³ A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, cit. at 69, 633.

¹²⁴ N. Walker, *Constitutional Pluralism Revisited*, 22 *Eur Law J.* 3 (2016), 349.

¹²⁵ See also D. Bello Hutt, *Against Judicial Supremacy in Constitutional Interpretation*, 31 *Revis Journal for Constitutional Theory and Philosophy of Law* (2017), 13, 15.

cannot be answered in any fixed or pre-determined way¹²⁶. Legal and constitutional pluralism, like law itself, cannot be *achronical* and abstract, but it is situated and constructed within the operation of the political system¹²⁷. Constitutional pluralism understood and institutionalized as a realized principle of knowledge rather than a mere principle of procedural order, posits a constructivist approach to law. This occurs by bringing unity in the diversity of sources of law and by formulating the purpose or meaning of the applicable laws in terms of the social objectives which are pursued. This approach asks the courts to acquire an aesthetic knowledge of law¹²⁸ by realizing the rational and the *arrational*¹²⁹, and to adopt an ethics of care¹³⁰ by means of embracing a more contextual and sensitive approach to social matters and social experiences, instead of following a strict and sterilized thinking of high legal abstraction.

Turning to the austerity case-law, it has been stressed that the highest courts immunized states from judicial review and oversight when they took preemptive measures to curb the exercise of social rights protection. However, where constitutional review systems are relatively effective, judges can safeguard the effective protection of individuals' rights through their decisions¹³¹ especially in times of procedural abnormality. A rights-based judicial review can echo a desired rights-based approach in financial policies and regulations¹³², that will shield social rights protection. Weak judicial review does not replace in this sense legislative discussions and decisions. It can rather act, as it was manifested in the case of lower courts, as the guardian of social

¹²⁶ A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, cit. at 69, 634.

¹²⁷ A. Kaidatzis, *Greece's Third Way in Prof. Tushnet's Distinction between Strong-Form and Weak-Form Judicial Review, and What We May Learn From It*, cit. at 5.

¹²⁸ For an insightful analysis of the aesthetic knowledge of law see A. Fischer-Lescano, *Sociological Aesthetics of Law, Law, Culture and the Humanities* (2016), 2.

¹²⁹ A. Fischer-Lescano, *Sociological Aesthetics of Law*, cit. at 128, 4, 12, 18.

¹³⁰ I. Radaric, *Critical Review of Jurisprudence: An Occasional Series, Gender Equality Jurisprudence of the European Court of Human Rights*, 19 *Eur J of Intern Law* 4, 856 (2008).

¹³¹ A. Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, cit. at 69, 641.

¹³² K. Housos, *Austerity and Human Rights Law: Towards a Rights-Based Approach to Austerity Policy, a Case Study of Greece*, 39 *Fordham International Law Journal* 2 (2015), 444-445.

rights through constitutional protection so that objectionable legislative measures are eventually changed and so that the legislator and the state representatives move within their constitutional limits¹³³. In this respect, adopting a system of rights-based judicial review could be seen as enhancing the participatory aspect of democracy and decision-making by providing additional means for the implementation of the will of the people¹³⁴. That is to say, the value judgements of the people constitute the informed basis for judicial decisions. Judges, who engage in an active role when interpreting the law *in the now*, reflect and show responsiveness to social practices and to the values embodied in them¹³⁵. And thus, this is another form of participation of the people¹³⁶.

Constitutional review of the austerity legislation needs to provide the criteria for the validity of power and not act in favor of mere commands, which are not called to answer to the people and which are unconstitutionally enforced through extra-parliamentary arrangements so as to secure political conveniences. In the examined context, austerity law was legitimated based on its legality, which was defined merely in terms of procedural requirements and reasons of efficacy and was imposed by emergency, formalized procedures. Achieving formal unity by forcing economic rationality for the implementation of merely fiscal goals, brings forward an instrumentalist use of law that renders the subject of judicial interpretation into being the object. However, as lower judges stressed in the examined cases, the subject of law understood as the constituent individual that has been affected, cannot be considered as a means towards any end, let alone a fiscal end, and it is rather an end in itself.

In the same vein, social rights protection needs to guarantee self-respect¹³⁷ and the basic subsistence needs and well-being of the individuals in their own right and as members of the society. Social

¹³³ Cl. Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, cit. at 3, 310.

¹³⁴ A. Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 *Law and Philosophy* 3/4 (2003) 248, 249.

¹³⁵ *Ibid*, 260.

¹³⁶ *Ibid*, 257.

¹³⁷ See also J. King, *Judging Social Rights*, Cambridge University Press (2012), 31, 32.

rights need to be understood under a pluralist vision and constitutionally reviewed procedure, as pertaining to personal as much as collective autonomy. They need to be taken under consideration in the formation of policies for the preservation of public goals within the framework of social administrative governance¹³⁸ and need to be endorsed by a rigorous, constitutionally informed, rights-based judicial review.

Constitutional plurality in Europe is a tale of unity and solidarity that needs to balance two fundamental principles, as Wilkinson brilliantly points out. These are, “equality of persons and equality of states”¹³⁹. When constitutionalizing social rights, solidarity can be understood as entailing more than a financial value and as being in fact a source of social integration¹⁴⁰. Solidarity entrenches social recognition within the transnational order on the basis of reciprocity and mutuality. It represents a fundamental principle of social justice and a derivative constitutional principle¹⁴¹ or constitutional value¹⁴² that implies that the individual is social, as well as, autonomous. That is to say, the individual is sovereign and self-reliable against any domineering antagonism that would give access to superiority claims and commodification and that would place oneself under domination. In line with this, the solidarity principle partakes of a fundamental condition of shared liberty of all people¹⁴³, independent of state compulsion that simulates a “total market thinking”¹⁴⁴, which involves the yielding of the social to the economic “through market discipline rather than

¹³⁸ L. Feldman, *The Banality of Emergency: On the Time and Space of “Political Necessity”*, in A. Sarat (eds.), *Sovereignty, Emergency, Legality*, Cambridge University Press (2010), 93.

¹³⁹ See the analysis of M.A. Wilkinson, *Constitutional pluralism: Chronicle of a death foretold?*, cit. at 103, 231.

¹⁴⁰ S. Sciarra, *Social Law in the Wake of the Crisis*, Centre for the Study of European Labour Law “Massimo D’Antona” Working Paper, INT 108 (2014) 17, available at <http://csdle.lex.unict.it>, accessed May 7, 2018.

¹⁴¹ See article 25 para. 2 and 4 of the Greek Constitution.

¹⁴² E. Christodoulidis, *Social Rights Constitutionalism: An Antagonistic Endorsement*, 44 *Journal of Law and Society* 1 (2017), 128, 140, 149.

¹⁴³ See St. Mitas, *Solidarity as a Fundamental Legal Principle*, Karagiorgas Foundation Publishing (2016) [in Greek].

¹⁴⁴ E. Christodoulidis, *Social Rights Constitutionalism: An Antagonistic Endorsement*, 44 *Journal of Law and Society* 1 (2017), cit. at 142, 134.

through political routes”¹⁴⁵. Understood as a legal principle, on the scope of self-reliance and reciprocity rather antagonism, solidarity could further provide for a content of social rights and their normative and effective value through constitutional safeguard¹⁴⁶. Constitutionalizing solidarity by means of social rights, is to consider this as an axiomatic and dogmatic legal resource¹⁴⁷ and to establish this against the market thinking of austerity and the mathematical rationale of its budgetary and fiscal programs¹⁴⁸.

What we live nowadays in Europe is not a clash of pluralism – be it legal or constitutional – with unity. What we experience is a clash of pluralism with itself within an illegitimate type of neoliberal governance prone to mere efficiency and wealth maximization. A clash that points to the very own structural deficiencies of the European project and brings forward questions on the multi-level legitimacy deficit of Europe at a conceptual, normative and systemic level.

In 1997 a number of scholars drafted the “Manifesto for Social Europe”¹⁴⁹ where they were stressing that the European Union was lacking social legitimacy and they envisioned a ‘Social Constitution’ that would be founded on solidarity and social cohesion. In 2014, almost 20 years after the above-mentioned statement, the economist Thomas Piketty alongside 14 other scholars, described in their own “Manifesto for Europe”¹⁵⁰ the present crisis of the Union, as being an existential one. A crisis that stagnates in a formalistic and computational understanding of the role of law and is yet ignited by an economic analysis of the law as the legal equivalent to the *ordo liberal* politics that are adopted. This existential crisis calls for

¹⁴⁵ E. Christodoulidis, *The European Court of Justice and “Total Market” Thinking*, cit. at 58, 2015, 2016-2020; see also K. Mathis, D. Shannon (transl.), *Efficiency Instead of Justice: Searching for the Philosophical Foundations of the Economic Analysis of Law*, cit. at 110, 35, 145.

¹⁴⁶ St. Mitás, *Solidarity as a Fundamental Legal Principle*, cit. at 145, 140-150.

¹⁴⁷ E. Christodoulidis, *Social Rights Constitutionalism: An Antagonistic Endorsement*, cit. at 142, 126, 148-149.

¹⁴⁸ *Ibid*, 129.

¹⁴⁹ B. Bercusson, et al., *A Manifesto for Social Europe*, 3 *Eur Law J.* (1997), 189–205.

¹⁵⁰ See Th. Piketty and 14 others, *Our Manifesto for Europe*, *The Guardian* (2014) available at <http://www.theguardian.com/commentisfree/2014/may/02/manifesto-europe-radical-financial-democratic>, accessed May 7, 2018.

an 'existential revolution'¹⁵¹. That is, for a moral and political reconstitution of the society and a radical re-conceptualization of the social rights discourse and of the relationship between politics and the law. While we re-construct and re-define the foundations of our justice system, it is time that we put forward and defend the imperative for a social Europe premised on solidarity, equality and substantive unity.

¹⁵¹ J. Komárek, *Waiting for the Existential Revolution in Europe*, 12 *International Journal of Constitutional Law* (2014), 208.

THE JURISPRUDENCE OF THE CRISIS:
THE UNCERTAIN PLACE OF EUROPEAN LAW
BETWEEN PLURALISM AND UNITY

*Leonardo Pierdominici**

Abstract

The economic and financial crisis of the last years has been addressed through a wide plethora of powerful supranational legal instruments of ambiguous nature, such as the EFSF, the EFSM, the ESM, the Fiscal Compact, various Memoranda of Understanding between national and supranational institutions. It must be noted that their natural ambiguity led to an equally ambiguous jurisprudence of the crisis, in particular by national constitutional courts: it stems from the context of crisis, and it may reveal the crisis of EU law. New opportunities, however, seem to be suggested by the recent caselaw of the European Court of Justice, and are yet to be explored.

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1. Is the crisis of the Union a crisis of EU law as well?

It is no secret that the economic and financial crisis of the past years strongly affected the European Union: for some, it even casted

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doubts on its future.¹ Renowned scholars, focusing on the legal implications of the phenomenon, wrote of an «existential crisis» of the Union, and described it as a multifaceted one, affecting its «economic, financial, fiscal, macroeconomic, and political structure».²

On the other hand, it is also well known how law provided a fundamental contribution – actually a *structural* one – for the construction of the European Union. Classic comparative studies explained in detail this fundamental role of law both as an *agent* and as an *object* of integration in the European project.³ From a functionalist point of view, law served as a tool to promote the political goal of integration,⁴ but at the same time it served as a tool of promote a «new legal order», of different nature⁵, which was the other parallel goal of the integration process. From a certain phase onwards, integration *through* law and integration *of* law were simultaneous strategies and they have been openly pursued by the Union.⁶

The paper will try to make the two aforementioned points coexist, and reflect on the following research question: in addition to the current «economic, financial, fiscal, macroeconomic, political» crisis, is the EU experiencing nowadays a kind of *legal* crisis as well as a consequence of the Eurozone crisis, namely a crisis

¹ See on this, among the many interesting debates, the one among J. Habermas, *The Crisis of the European Union: A Response* (2013), C. Offe, *Europe Entrapped* (2015), W. Streeck, *Small-State Nostalgia? The Currency Union, Germany and Europe: A reply to Jürgen Habermas*, 21 *Constellations* 2 (2014).

² A.J. Menéndez, *The Existential Crisis of the European Union*, 14 *German Law Journal* 5 (2013), 453, at 454 et seq.

³ See M. Cappelletti, J.H.H. Weiler, M. Seccombe (eds.), *Integration Through Law*, Vol. 1 (1985) and, for recent reflections, A. Vauchez, '*Integration Through Law*': *Contribution to a Socio-History of EU Political Common Sense*, EUI Working paper RSCAS no. 2008/10 and D. Augenstein (ed.), '*Integration through Law*' *Revisited. The Making of the European Polity* (2012).

⁴ See the classic analysis of E. Haas, *Beyond the Nation-State: Functionalism and International Organization* (1964), and the specific reflections by G. de Búrca, *Rethinking Law in Neo-functionalist Theory*, 12 *Journal of European Public Policy* 2 (2005).

⁵ The obvious reference is Arrêt du 5 février 1963, Van Gend en Loos / Administratie der Belastingen (26/62, Rec. 1963 p. 3), para. n. 3.

⁶ See in particular C. Mac Amhlaigh, *Concepts of Law in Integration Through Law*, in D. Augenstein (ed.), '*Integration through Law*' *Revisited. The Making of the European Polity*, cit. at 3, 69.

of its powerful legal leverage, i.e. the fundamental element on which the Union founded its constitutional evolution?⁷ Answering such an existential question is interesting since other concurrent crises, like the migration or the rule of law crises, are unfolding in Europe and can lead to similar dynamics.

The article will proceed as follows. It will briefly illustrate the new legal measures adopted at the supranational level to cope with the last years' economic and financial crisis, first of all the recent international treaties adopted by many EU Member States since 2010 for rationalizing the European economic governance. It will then analyse the institutional dynamics and the first episodes of judicial adjudication stemming from those measures: so called austerity measures of various nature have been, in several national legal orders, the direct consequence of the new supranational obligations, and they gave birth to a relevant case-law by national constitutional courts and by the European Court of Justice as well.

This step-by-step analysis will lead to some conclusive reflections, which have to do with the feared mutation of EU law: is EU law losing certain connatural characteristics, is EU law risking losing its identity?

2. EU law and the new Treaties for the European economic governance

From 2010 onwards the answer of EU Member States to the economic crisis resulted in some very relevant new instruments aimed at strengthening and rationalizing common economic governance. I refer, in particular, to the European Financial Stability Facility (EFSF), the European Financial Stability Mechanism (EFSM), the European Stability Mechanism (ESM), the so called Fiscal Compact, and then, in a more general sense, to the various Memoranda of Understanding signed by countries dealing with financial assistance programmes, the European Commission, the European Central Bank, the International Monetary Fund.

⁷ According to the well-known theorization by J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (1999).

The legal nature of many of these instruments is ambiguous, albeit their undisputed form of international treaties.⁸

The first two instruments, the EFSF and the EFSM, were created one soon after the other, at the same meeting between Members States' ministers of 9 May 2010. The ministers first gathered as an ECOFIN Council and created the EFSM on the basis of Art. 122(2) TFEU, and therefore by using powers provided by the existing EU Treaties for financial assistance to states; some minutes later, the then seventeen ministers of the Euro-area countries gathered again as mere representatives of their states for the creation of the EFSF as an additional temporary instrument, of pure international law nature and with no adherence to EU law. The facility took the form of a private company under Luxembourgish law. Both instruments were simultaneously and cumulatively used for providing financial assistance to Ireland and Portugal (while Greece was already assisted through bilateral agreements).

The reasons for such bold cumulative solution were evident, and they represent a first phenomenology of formal estrangement from the EU law and a first trace of inherent weakness of the Union. Given the stringent limits of EU budgetary resources,⁹ at the time

⁸ According to C. Kilpatrick, B. de Witte, *Introduction*, in C. Kilpatrick, B. de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Working Paper LAW 2014/05, p. 2, «the legal sources underpinning bailouts raise complex legal doubts, both as to their EU or international law pedigree and as to the legal obligations they produce»; interesting reflections are also offered by G. Itzcovich, *Disordinamento giuridico. Crisi finanziaria e sviluppi costituzionali dell'unione economica e monetaria europea*, in 17 *Diritto & Questioni pubbliche* 1 (2017), who describes the legal responses to the Eurozone crisis, the relevant case law of the European Court of Justice and their constitutional impact on the Member States of the European Union «as a process of “legal disordering”, or legal disintegration, blurring the separation lines between international law, EU law and Member States' constitutional law»; see also the updated works collected in M. Cremona, C. Kilpatrick (eds), *EU Legal Acts. Challenges and Transformations* (2018).

⁹ Such a classic and central topic was debated already in H. Langes, *Report for the Committee of Budgets on the System of Own Resources in the European Union*, European Parliament Working Documents, A3-0228/94, 1994; see for recent reflections M. Poiras Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice*, EUI RSCAS Policy Paper 2012/11, and M. Monti (ed.), *Future Financing of the EU. Final report and recommendations of the High Level Group on Own Resources*, December 2016, available at the website http://ec.europa.eu/budget/mff/hlgor/library/reports-communication/hlgor-report_20170104.pdf.

the Union had not the minimal operational capacity to deal with a huge sovereign debt crisis independently from the states, and the creation of an instrument drawing in parallel from national budgetary resources became necessary; moreover, the use of community budget resources requires the involvement of all EU countries, and in this case this would have meant calling them to finance an operation aimed at ensuring the stability of the Eurozone alone (political resistance quickly arose in this respect).¹⁰

The ESM was created between 2011 and 2012, as a treaty between the then seventeen Eurozone countries to permanently replace the EFSF. ESM perpetuates certain natural ambiguities. It was meant to be an implementation of Art. 136 TFEU, which was amended for this reason to provide the possibility to «establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole», for «granting (...) required financial assistance (...) subject to strict conditionality»;¹¹ nevertheless it is not an EU law instrument, and indeed it creates a different, albeit bordering, intergovernmental organization; and actually it is no secret that Art. 136 TFEU has been reformed and the ESM was created because objections were raised (especially in German circles) on the legitimacy of 2010 financial support systems vis-à-vis the “no-bailout” rule of Art. 125 TFEU and the creation of the EFSF by a simple intergovernmental agreement with no parliamentary ratifications. Moreover, the fulfilment itself of the criterion of «exceptional occurrences beyond» the «control» of national governments provided by Art. 122(2) TFEU was questionable in the case of the beneficiary countries, since their governments had contributed to the crisis of sovereign debts.¹²

Thus, the final decision was to avoid problems of interpretation of EU primary law: it was reformed, but at the same

¹⁰ See B. De Witte, *Using International Law in the Euro Crisis - Causes and Consequences*, ARENA Working Paper 04/2013, pp. 3-4, pointing at the veto threats of some national governments.

¹¹ See the Decision 2011/119/EU of the European Council of 25th March 2011, acting by unanimity, following the procedure of article 48(6) and after consultation of the European Parliament, the Commission and the European Central Bank; on this, B. De Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, Swedish Institute for European Policy Studies (SIEPS) Europapolitisk Analys/European Policy Analysis, 2011.

¹² B. De Witte, *Using International Law in the Euro Crisis - Causes and Consequences*, cit. at 10, at 6.

time a different, separate treaty was enacted. This can be read as another episode of formal estrangement from the canons of EU law. Given this particular origin, the ESM Treaty became an interesting hybrid: it is not a formal EU law source, but it borrows to a large extent from the institutional structure of the European Union, in particular by providing for specific tasks for the EU Commission and the European Central Bank.

As per the Fiscal Compact, it was meant to introduce stricter versions of the criteria already laid down by EU primary¹³ and secondary law, in particular with the so-called Stability and Growth Pact.¹⁴ It also aimed at redefining the tools for the fulfilment of those constraints. In this sense, it was adopted to set new norms which are clearly in the scope of application of EU law, since they discipline material aspects which had been already treated (and are surely treatable) through EU law acts.¹⁵ However, the final choice, here again, was to use a separate international treaty, and this is an even more obvious move of formal estrangement from EU law: in particular, this choice was presented as a strategic move to intensify the perception by Member States of the importance of the obligations provided in terms of constitutional constraints to a balanced budget, and to overcome the difficulties of an EU treaties amendment procedure which was initially proposed.¹⁶ As well known, Article 16 of the Fiscal Compact foresees that «(W)ithin five years at most following the entry into force of this Treaty (...) the necessary steps shall be taken (...) with the aim of incorporating the substance of this Treaty into the legal framework of the European Union», and therefore provides for the possibility to insert its crucial content in formal EU law fabric. Still, the five-year deadline (1 January 2018) has passed, and the debate remains open: such a “constitutionalization” of the Fiscal Compact faces considerable criticism, in both political and legal terms,¹⁷ also after the new package of the Commission of

¹³ See Articles 121 e 126 of TFEU, and Protocol 12 on the excessive deficit procedure.

¹⁴ See the Regulation by the Council (EC) 1466/97 and 1467/97.

¹⁵ In the event of political difficulties, also through enhanced cooperation between some Member States.

¹⁶ B. De Witte, *Using International Law in the Euro Crisis - Causes and Consequences*, cit. at 10, at 8-9.

¹⁷ See D. Fromage, B. De Witte, *The Treaty on Stability, Coordination and Governance: should it be incorporated in EU law?*, *VerfassungsBlog*, 6th November 2017,

December 2017 aiming to include the Fiscal Compact under EU law and to establish a European Monetary Fund.¹⁸

Several critical points on the existential compatibility of the aforementioned instruments (in particular ESM and Fiscal Compact) with EU law were raised. There have been doubts on the interference with the exercise of (exclusive) competences of the European Union; doubts for possible conflicts with specific provisions of EU primary and secondary law; criticism on the possibility of borrowing EU institutions in the decision-making processes provided by the new treaties. All in all, the new supranational measures' legitimacy was upheld by the European Court of Justice in the famous *Pringle* case of 2012,¹⁹ in which it also insisted on the concept of *autonomy* of EU law vis-à-vis new treaties law and the *acquis communautaire's* intangibility.²⁰ It must also be noted that an important role in the reform of European economic governance is also played by new EU secondary legislation, in particular the so called *six pack* of 2011²¹ and the so called *two pack* of 2013.²²

In any case, it is true that the new fundamental supranational law dealing with the economic crisis goes beyond the boundaries of proper European Union law, in the sense that it explicitly grows apart from it for functional reasons. As authoritatively stated by the Court of Justice in *Pringle*, this does not amount to a *legal* technical problem of compatibility with EU law: but the question remains open regarding the *political* convenience of such a phenomenon and

available at the website <http://verfassungsblog.de/the-treaty-on-stability-coordination-and-governance-should-it-be-incorporated-in-eu-law/>.

¹⁸ See in general the Communication on further steps towards completing the Economic and Monetary Union - COM(2017) 821.

¹⁹ Arrêt du 27 novembre 2012, *Pringle* (C-370/12, Publié au Recueil numérique) ECLI:EU:C:2012:756.

²⁰ See *ex multis* P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20 Maastricht J. of Eur. and Comp. L. 1 (2013).

²¹ Regulations n. 1177/2011 of 8 November 2011, n. 1173/2011, n. 1174/2011, n. 1175/2011 e n. 1176/2011 of 16 November 2011 and directive n. 2011/85/UE of 8 November 2011 amending the Stability and Growth Pact.

²² Regulations n. 472/2013 e 473/2013 which introduced new procedures for coordination and control by supranational authorities on national budgetary procedures.

its consequences for the constitutional development of the Union, for its institutional balance.²³

In this sense it can be argued that the new described trend of formal estrangement from proper EU law can represent a breakthrough in the EU constitutional development. The possibility of so called *inter se agreements* between Member States has been always provided by the Treaties since the 1950's, and there have been several and important ones;²⁴ but it is also true that, in the history of European integration, *inter se agreements* have gradually decreased in number, since they were originally meant to supplement the lacunae of the founding treaties in terms of conferred competences, especially in the common market project, but this necessity also progressively disappeared. A sign of this at the formal level is that the possibility of *inter se agreements*, expressly provided by the treaties for decades,²⁵ was at the end formally expunged from primary law with the Lisbon Treaty.²⁶ As the integration process advanced, and the powers conferred to the Union increased, the trend seemed to be towards a progressive and wise «constitutional maintenance» of the founding treaties, through a «semi-permanent review process»,²⁷ and the gradual disappearance of *inter se* pacts.

Today, however, the crisis seems to be a U-turn. The founding treaties are considered very difficult to amend in the current political climate. New important forms of *inter se agreements* come back to the fore: and they are not a necessitated substitution of EU law, like in the past, but they are the vehicle of a deliberate estrangement from EU law.

Moreover, in the perspective of the impact on the Union's constitutional nature, it was also highlighted that the new stability

²³ See for a full understanding of the concept J.P. Jacqu e, *The Principle of Institutional Balance*, 41 Com. Mkt. L.R. 2 (2004).

²⁴ See for instance the Schengen convention of 1990 or the Pr um Treaty of 2005.

²⁵ See the old Art. 293 of the Treaty of Rome and Art. 34(2) of the Treaty of Maastricht.

²⁶ The Court of Justice made clear in *Pringle* that *inter se* agreements are nonetheless still possible, so that their formal expulsion from the Treaties' text is just a formal element to understand the historical trend towards the disappearance of such agreements; see on the point B. De Witte, *Using International Law in the Euro Crisis - Causes and Consequences*, cit. at 10, at 2.

²⁷ B. De Witte, *Il processo semi-permanente di revisione dei trattati*, 22 Quaderni costituzionali 3 (2002).

mechanisms such as EFSF and ESM – since they operate as separate financial institutions outside the Treaty framework, «with their own intergovernmental decision-making bodies and behind the shield of far-going immunity and confidentiality» - are at odds with the most basic principles of Art. 1 TEU, which would require the construction of «an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as close as possible to the citizens». In fact the new treaties remain outside the scope of application of the EU law principle of transparency, and in general from the scope of EU secondary law: so that the «any control by the European parliament or national parliaments, not to mention civil society and the citizenry» could become extremely difficult.²⁸ In this sense, the formal estrangement from EU law becomes also an estrangement from the substantial protection of EU law transparency discipline: and one of the most veritable democratic safeguards for the European citizen is therefore lost.

In this view, one can maintain that the crisis seems to have determined a strong impact on the EU law institutional system as historically developed in the last twenty years.

3. EU law and the constitutional jurisprudence on austerity measures.

The aforementioned stability mechanisms are important tools for financial assistance for countries in difficulty;²⁹ they are, nevertheless, as per Art. 125 TFEU, structurally linked to the criterion of strict conditionality. To put in place those mechanisms, it is necessary to define measures to be taken at the national level for the rationalization of budgetary policies.³⁰

Various so called austerity measures arose from the constraints of strict conditionality in almost each of the European countries in financial difficulties: they took the form of reductions to public expenditure and investments, rationalization of public

²⁸ In this sense K. Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, EUI Working Papers, LAW 2012/28, at 47.

²⁹ See D. Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 Eur. L.J. 5 (2012), at 667: «The Union has been transformed into a political system redistributing significant wealth within its territory».

³⁰ See the aforementioned *Pringle* case at paras. 142-143 in particular.

services, increase in the burden on taxpayers, cuts in wages and pension treatments.

In this respect, important comparative studies dealt in the last years with judicial adjudication on austerity measures, in particular by focusing on constitutional complaints against those.³¹ These studies aptly placed the new episodes of adjudication on austerity measures in the context of the historical debate on social rights justiciability³² and judicial bodies' legitimacy vis-à-vis politically legitimated powers.³³

These are customary and always relevant reflections, and are traditionally placed in a comparative perspective by scholars. However, there was a dimension of the problem that was less explored. What maybe missed in last year's comparative analysis is the other parallel dimension of the phenomenon: the potential interplay, in political and legal terms, with EU law. What was the role of supranational law in general and EU law in particular in envisaging and shaping austerity measures in debtor countries dealing with assistance packages? What could be, if any, the legal implications of this interplay?

All EU Member States are nowadays subject to the Stability and Growth Pact as reformed by the aforementioned *six-pack* and *two-pack* of 2011 and 2013: the consequent strengthened coordination mechanisms are, according to scholars, a veritable

³¹ *Ex multis*, see the refined works of X. Contiades, A. Fotiadou, *Social rights in the age of proportionality: Global economic crisis and constitutional litigation*, 10 *International Journal of Constitutional Law* 3 (2012); C.M. Akrivopoulou, *Striking Down Austerity Measures : Crisis Jurisprudence in Europe*, *International Journal of Constitutional Law Blog*, 26 June 2013, available at <http://www.iconnectblog.com/2013/06/striking-down-austerity-measures-crisis-jurisprudence-in-Europe>; B. De Witte, C. Kilpatrick (eds.) *Social Rights in Times of Crisis in the Eurozone : The Role of Fundamental Rights' Challenges*, cit. at 8; C. Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, EUI Working Paper MWP 2014/25; X. Contiades (ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (2013); D. Roman, *La jurisprudence sociale des Cours constitutionnelles en Europe: vers une jurisprudence de crise?*, 45 *Nouveaux Cahiers du Conseil constitutionnel* (2014).

³² See for recent comparative reflections on the theme M. Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008); J. King, *Judging Social Rights* (2012).

³³ See for institutional and comparative reflections N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994); V. Abramovich, C. Curtis, *Los derechos sociales como derechos exigibles* (2004).

«process of co-government of debt and deficit» between national and supranational authorities.³⁴ The renewed Regulation 1467/97 provides for new excessive deficit procedures, stringent timelines for action and correction of budgetary policies, EU Council's detailed recommendations for the definition of annual budgetary targets and deadlines for achieving them, transparency requirements for the Member States in terms of adopted measures, possibility of sanctions imposed by the European institutions. Moreover, a number of EU Member States asked on the basis of the aforementioned new supranational instruments for extraordinary plans of economic and financial assistance: these were based on an even more stringent conditionality system, and were translated in Memoranda of Understanding, decisions adopted by the Council in the context of the excessive deficit procedure within the Stability and Growth Pact under Articles 126 and 136 TFEU and incorporating the essential components of the policy conditionality, recommendations addressed by supranational institutions to national authorities.

The austerity measures which have been challenged before courts for potentially hampering constitutional social rights come from this background: a background made of the interplay of national and supranational norms, where the first stem from the latter.

And given this background, it is relevant to highlight, in comparative perspective, a common resistance in national constitutional courts' case-law: the resistance to acknowledge the interplay of national and supranational norms in determining the content of austerity measures, and the resistance to evaluate the possible legal implications of this interplay.

National courts invested of constitutional adjudication on austerity measures resisted the possibility of coordinating their judicial *dicta* through preliminary ruling procedures according to Art. 267 TFEU to the European Court of Justice: and this happened despite the fact that they have been asked to do so, for instance by the parties. Quite on the opposite, many constitutional courts expressly denied or at least underplayed the connatural nexus of

³⁴ D. Chalmers, *The European Redistributive State and a European Law of Struggle*, cit. at 29, at 680: «[t]he finding of an excessive deficit brings Member States and EU institutions into a process of co-government of debt and deficits».

the austerity measures under examination with that supranational law which required them, sometimes through unconvincing arguments.

On the formal level, this tendency is surprising.³⁵ It is settled case-law of the European Court of Justice that, although Art. 288 TFEU provides for the non-binding nature of recommendations and opinions issued by EU institutions, recommendations are nevertheless undoubtedly EU legal acts that according to Luxembourg «cannot therefore be regarded as having no legal effect». Thus, national judges «are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions», and therefore also in the context of the interpretation and application of national law.³⁶ This is a traditional line of interpretation, which is even previous in time to the renewed central role guaranteed to recommendations as formal acts in the new system of European budgetary policies coordination: in the new system their role is reinforced, since they are supplemented by sanctions.

Still, the relevance of supranational sources in national constitutional adjudication on austerity measures is obliterated.

The Portuguese case is particularly relevant in this respect. As well known, the Tribunal Constitucional has played an important and contested role in recent years with numerous judgments on austerity measures.³⁷ Moreover, the Tribunal expressly assessed the scope and legal value of the obligations arising from the new supranational stability mechanisms. This happened in particular in the well known Acórdão n^o 574/2014,³⁸

³⁵ Although one could say that it is in line with the low number of referral to the Court of Justice in particular by Constitutional courts: see in this respect the special issue of the German Law Journal n. 16/2015 devoted to *The Preliminary Reference to the Court of Justice of The European Union by Constitutional Courts*, available at the website <http://www.germanlawjournal.com/volume-16-no-06>.

³⁶ Arrêt du 13 décembre 1989, Grimaldi / Fonds des maladies professionnelles (322/88, Rec. 1989 p. 4407), paragraphs 18-19.

³⁷ A.M. Guerra Martins, *Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law*, 22 Maastricht J. of Eur. and Comp. L. 5 (2015).

³⁸ Acórdão no 574/2014 of 14th August 2014, available at the website <http://www.tribunalconstitucional.pt/tc/acordaos/20140574.html>.

which had to do specifically with Council recommendations issued within the excessive deficit procedure. The Tribunal raised several doubts on the disputed legal status of those recommendations, but it was careful not to ask for an interpretation on this to the Court of Justice: it merely underestimated the question by interpreting supranational obligations concerning public deficits as mere obligations of result and not of means - which is quite doubtful given the strict and specific nature of the new system. As a result of this interpretative move, the Tribunal, in an autarkist way, preserved its own right to judge the conformity of the adopted means (the austerity measures) to the results through its own classic proportionality test.³⁹ The possible interplay with supranational norm was obliterated through a purely national interpretation, leading to the differentiation between obligation of means and of result: but this is disputable, since, when the doubt of a possible unclear interpretation of EU norms is at stake, according to Art. 267 TFEU courts would be called to refer the question to the Court of Justice. In a certain sense, the Tribunal did not conceal its autarkist thoughts: it proposed an odd instrumental centralizing interpretation according to which, since the principles of equality, proportionality and legal certainty at stake in judging on the austerity measures are also principles of EU law and parts of the constitutional traditions common to the Member States, this would be sufficient to ensure that there cannot be - in general - a conflict between these principles and the disputed provisions.⁴⁰ This is again highly disputable: such an interpretative move ignores that different interpretations of the same principles are possible, and ignores possible conflicts that could emerge from different balancing of those principles by national and European courts.⁴¹

Greece is another relevant case study. As well known, the country had to implement stringent austerity measures. In the

³⁹ See M.P. Maduro, A. Frada, L. Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, 4 e Pública - Revista Eletrônica de Direito Público 1 (2017), at 9 et seq.

⁴⁰ Critical remarks on this in F. Pereira Coutinho, *Austerity on the Loose in Portugal: European Judicial Restraint in Times of Crisis*, 8 Perspectives on Federalism 3 (2016); still, as a contextualization, it must be clarified that the Tribunal Constitucional has never issued a preliminary reference to the Court of Justice.

⁴¹ *Ibidem*, at 124. See also M.P. Maduro, A. Frada, L. Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, cit. at 39, 11 et seq.

absence of a centralized system of constitutional adjudication, several complaints against those were lodged before the local Council of State in the form of complaints against administrative acts implementing legislative austerity measures. In a famous case concerning cuts in civil servants' salaries and pensions following the law ratifying the Memorandum of Understanding of 2010, the decision 668/2012 of the plenum of the Council of 20 February 2012,⁴² the applicants asked for a preliminary reference to the Court of Justice: they sought a ruling on the compatibility of local measures and Council Decision 2010/320/EU with European Union law. In particular, the applicants sought a ruling on the compatibility of the abolition of seasonal pension bonuses for pensioners below 60 years and their reduction for pensioners above 60 years through Law 3845/2010 with Article 1 of Protocol 1 to the ECHR on the right to property, Article 17 of the Greek Constitution enshrining the same right, and Article 34 (social security and social assistance) of the Charter of Fundamental Rights (CFS) of the European Union;⁴³ in this last respect, they argued that the measures at stake stemmed directly from the obligations contained in the Council Decision 2010/320/EU expressly «addressed to Greece with a view to reinforcing and deepening the fiscal surveillance and giving notice to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit». The request for the preliminary ruling was rejected, and the complaints dismissed after a wide (but unilateral) contextualization on the value of Community obligations and the role of Greece in the EU integration process in the judgment. Here again, in the Greek Council of State's decision n. 668/2012 (which is the only Greek case where these questions were openly discussed), we can find the same dynamics of the Portuguese case: the Greek court did not fail to declare that the legal force of the Memorandum was only that of a «program for the Government to address the country's economic problems», «although it was the result of negotiations and agreements between Greece and certain

⁴² Decision no 668/2012 of the Plenum of 20th February 2012, available at the website <http://www.dsanet.gr/Epikairothta/Nomologia/668.htm>.

⁴³ E. Psychogiopoulou, *Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges*, in C. Kilpatrick, B. de Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, cit. at 8, at 10-11.

international authorities».⁴⁴ Thus, here again, the value of supranational norms was obliterated by a unilateral, autarkist, interpretation: an interpretation that is reminiscent, not by chance, to the Portuguese one leading to the differentiation between obligation of means and of result.

The Cypriot case is also relevant, and similar. The local Supreme Court decided in 2014 two important cases on austerity measures,⁴⁵ actually in different ways, but in any case by strategically recalling the «European obligations» of the country as a mere contextualization without acknowledging them any formal legal value for the judicial adjudication, and with no reference to the European Court of Justice.

Latvia is another relevant example of debtor country: and it was actually one of the first in which a Memorandum of Understanding was negotiated,⁴⁶ and the first in which, in 2009, the local Constitutional Court had to rule on the compatibility of the consequent austerity measures with local constitutional principles.⁴⁷ The well-known judgment of the Latvian Court No. 2009-43-01⁴⁸ was yet another case in which linear cuts to the social security system were involved, and these were challenged and declared unconstitutional because alternative and more progressive measures were not foreseen by the political power. But the significance of the judgment for our purposes is in the arguments that the Court offered on the value of the country's

⁴⁴ See the report by A.I. Marketou, M. Dekastros, *Greece*, available at <http://eurocrisislaw.eu.eu/greece>, in particular sub V.4.

⁴⁵ Maria Koutselini-Ioannidou et al. v. the Republic, 7 October 2014, available at <http://www.cylaw.org/cgibin/open.pl?file=apofaseis/aad/mero>; Law on pensions of state officials (General Principles) of 2011, N.88(I)/2011, available at http://www.cylaw.org/nomoi/arith/2011_1_88.pdf; see on this C. Demetrious, *The Impact of the Crisis on Fundamental Rights across Member States of the EU Country Report on Cyprus*, Directorate General for Internal Policies, European Parliament, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510017/IPOL_STU\(2015\)510017_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510017/IPOL_STU(2015)510017_EN.pdf), at 66-67.

⁴⁶ It must be noted that Latvia joined the Eurozone only in 2014.

⁴⁷ See on this D. Roman, *La jurisprudence sociale des Cours constitutionnelles en Europe: vers une jurisprudence de crise?*, cit. at 31, 5.

⁴⁸ Judgment no. 2009-43-01 of 21st December 2009, available at the website <http://socialprotection-humanrights.org/wp-content/uploads/2015/06/Latvia-2009-Constitutional-Court-Elders-Rights-Judgment.pdf>.

international obligations arising from the assistance measures: despite the fact that in the Memorandum of Understanding of 13 July 2009 signed between Latvia, IMF and European Commission there were very detailed commitments signed by the local government for very specific cuts (defined even in the specific measure: «reduce pension costs of 10% for the unemployed pensioners and 70% for working pensioners»), again those commitments were considered as not legally binding and irrelevant for judicial adjudication, and the applicability of EU law and its principles and guarantees was not considered.

Finally, scholars⁴⁹ traced the same dynamics of substantial removal of links and bonds with supranational obligations on budgetary rationalization in the case law of the Romanian Constitutional Court:⁵⁰ in here too the national court has obliterated the question, albeit «implicitly»,⁵¹ and this can be more fiercely criticized since the financial assistance provided to the country is based on Memoranda of Understanding but also on clearly binding EU law acts such as decisions of the Council.⁵²

To sum up, comparative analysis can be also important in this area to show how several national constitutional courts of European debtor countries, when dealing with judicial adjudication on austerity measures imposed at the supranational level also through EU law acts, tend to obliterate the origin of those measures from EU law and underestimate the value of supranational obligations in general. The origin of austerity measures from the interplay between national and supranational norms, I argue, could

⁴⁹ C. Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, 10 *EuConst* 3 (2014), at 409.

⁵⁰ See the report by V. Vita, *Romania*, available at <http://eurocrisislaw.eu.eu/romania/>, and the list of cases quoted nn. 1414/2009, 1415/2009, 872/2010 e 873/2010 e 874/2010, 1655/2010, 1658/2010, 383/2011, 574/2011, 575/2011, 765/2011, 1533/2011; see also A. Zegran, T. Toader, *La Cour constitutionnelle de Roumanie*, 38 *Les Nouveaux Cahiers du Conseil constitutionnel* 1 (2013).

⁵¹ C. Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, cit. at 49, at 409.

⁵² See for instance Council Decision of 16 March 2010 amending Decision 2009/459/EC providing Community medium-term financial assistance for Romania, OJ L83/19, 30 March 2010, according to which: «the Commission shall agree with the authorities of Romania [...] the specific economic policy conditions as laid down in Article 3(5). Those conditions shall be laid down in a Memorandum of Understanding [...]».

at least justify the interpretative doubt whether to issue a preliminary reference to the Court of Justice – and it must be noted that, in these cases, according to Art. 267(3) TFEU such a doubt could lead to an obligation to issue the reference! As said, this did not happen in several debtor countries' jurisprudence.

One can speculate on the reasons for such a common move by national courts entrusted with constitutional adjudication, especially in a period in which preliminary references by constitutional courts seemed to be «on the rise».⁵³ The move is even more remarkable if one thinks that ordinary courts have instead repeatedly tried to reach the European Court of Justice, when judging on austerity measures, by pointing at the possible relevance of the Charter of Fundamental Rights of the Union – and thus by giving value to the supranational origin of those.⁵⁴ It can be argued that the constitutional courts' resistance come first of all from their fear of an intrusion by Luxembourg in the interpretation of national constitutional principles, leading to a harmonization of those: and in fact this could explain the common tendency to interpret supranational obligation as mere obligation of results, whatever their specificity and legal value, to leave the field open for autonomous/autarkic proportionality tests.⁵⁵ Other scholars argue that this is done by courts in an exercise of restraint, to cooperate with the political powers and safeguard austerity measures, by denying the idea of judging in the scope of application of EU law and therefore denying the possibility to apply the advanced

⁵³ See M. Dicosola, C. Fasone, I. Spigno, *Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*, 16 *German Law Journal* 6 (2015), and M. Claes, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, 16 *Ger. L.J.* 6 (2015).

⁵⁴ See e.g. the Romanian cases *Ordonance du 14 décembre 2011, Corpul Național al Polițiștilor* (C-434/11, Rec. 2011 p. I-196*, Pub.somm.) ECLI:EU:C:2011:830, *Ordonance du 10 mai 2012, Corpul Național al Polițiștilor* (C-134/12) ECLI:EU:C:2012:288, *Ordonance du 14 décembre 2011, Cozman* (C-462/11, Rec. 2011 p. I-197*, Pub.somm.) ECLI:EU:C:2011:831, and the Portuguese cases *Ordonance du 7 mars 2013, Sindicato dos Bancários do Norte e.a.* (C-128/12) ECLI:EU:C:2013:149; *Ordonance du 26 juin 2014, Sindicato Nacional dos Profissionais de Seguros e Afins* (C-264/12) ECLI:EU:C:2014:2036; *Ordonance du 21 octobre 2014, Sindicato Nacional dos Profissionais de Seguros e Afins* (C-665/13) ECLI:EU:C:2014:2327.

⁵⁵ See M.P. Maduro, A. Frada, L. Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, cit. at 39, 13 et seq.

protections provided by the Charter of Fundamental Rights of the European Union.⁵⁶

Trying to understand the internal logics of collective bodies such as constitutional courts is at the end of the day a matter of speculation, at best. But comparative analysis suggests that a new trend is in place, analogous to that described in the previous paragraph: the national constitutional jurisprudence of the crisis is a new chapter of estrangement from EU law, this time put in place by judicial bodies and not by the legislator. This new chapter, again, can prove problematic: in obliterating the value of obligations stemming from EU acts in adjudication, the risk is to jeopardize the uniform and correct application of supranational norms in the Member States' territories – and thus a threat to another existential trait of EU law as applied in national legal orders.

Moreover, the coherence of assistance programmes and the equality in the consequent burdens bore by the citizens of the Union are also at stake. Briefly said, without any kind of harmonization austerity measures that in a certain setting are upheld by courts and imposed to citizens can be considered unconstitutional in another. Potentially, this can lead to discriminations in the burdens to be bore by European citizens. Furthermore, it shall be noted that we looked at how debtor countries' constitutional jurisprudence is based on a case-by-case analysis of the compatibility of austerity measures with national constitutional principles, with no will to harmonize the interpretation of those: it is therefore based on a sort of case-by-case conditionality to the commitment to supranational obligations. The irony is that the same can be said of creditor countries' constitutional jurisprudence: when we look, for instance, at the German or the Estonian constitutional cases pertaining to the participation to supranational anti-crisis stability mechanisms,⁵⁷ we

⁵⁶ See C. Kilpatrick, *Are the Bailout Measures Immune to EU Social Challenge because they are not EU law?*, cit. at 49, and F. Pereira Coutinho, *Austerity on the Loose in Portugal: European Judicial Restraint in Times of Crisis*, cit. at 40.

⁵⁷ See BVerfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13 on the ratification of the European Stability Mechanism; BVerfG, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13 on the OMT program, and Case 3-4-1-6-12 of 12 July 2012, on which see C. Ginter, *Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty*, 9 *EuConst* 2 (2013) and Evas Tatjana, *Judicial Reception of EU Law in Estonia*, in B. De Witte, J.A. Mayoral et al. (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Elgar 2016), chapt. 8.

notice that complaints are raised in those countries for possible violation of the principles of parliamentary democracy and the parliamentary budgetary powers, and the decisions of the local courts pose, in turn, case-by-case conditions to the subscription of capital stock of anti-crisis stability mechanisms. So the additional irony is that, at the same time, when put together, these case laws are not compatible. If on the one hand debtor countries' courts claim that they are bound by budget targets but are free on how to reach them, creditor countries' courts make the financial assistance dependent on a concrete involvement on how those funds will be spent: the debtors' and creditors' jurisprudences of crisis are not coherent, they are not harmonized and are transient in nature, they constitute an existential threat for the coherence of financial assistance programmes.⁵⁸

4. Is the Court of Justice of the EU opening new paths?

From what said above, it is possible to argue that the Union's multi-faceted crisis affected EU law and its nature in at least two different ways. EU law has been employed only in a selective way and often set aside for strategic reasons; a comparative analysis of national courts' case-law on austerity measures reveals several examples of selective lack of application, so to say. The consequences are a threat to some of EU law's inherent characteristics, including the need of its correct and uniform application, and the risk of a weakening protection of the citizen vis-à-vis supranational anti-crisis and national austerity measures.

To complete the picture, it is necessary to look at the Court of Justice of the EU and its role. How did it act in such a problematic setting? Was the guardian and the authoritative interpreter of EU law simply inactive in this respect?

I already touched the point of the Court's role in judging the choice of the legal instruments for the construction of the new supranational stability mechanisms: in the celebrated *Pringle* case of 2012 the Court upheld the new systems and their legal nature, denied any incompatibility with primary law of the EU treaties, and

⁵⁸ The point is further developed in M.P. Maduro, A. Frada, L. Pierdominici, *A Crisis between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*, cit. at 39, 29 et seq.

gave its *placet* to the new *inter se agreements* even in the absence of enabling primary norms. The Court just insisted in preserving the autonomy of the *acquis vis-à-vis* the use of EU institutions outside the proper scope of EU law treaties, which was in any case deemed legitimate. After all, it must be noted that the new supranational treaties confer new powers to the Court of Justice: it becomes the judge and authoritative interpreter of the ESM law as an autonomous body of norms (Article 37 of the ESM Treaty); it has the power to judge the disputes between states on the correct transposition of the Fiscal Compact rules on the balanced budget rules (Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union).

But what about the substantive interpretation of the new supranational *law of the crisis*?

As said, more and more applicants have attempted in the last years to reach the Court and make it judge on austerity measures: this especially happened through preliminary references.⁵⁹ As well known, the Court frustrated those attempts, rejecting the references for procedural reasons, on grounds of competence or admissibility. This approach was criticized by scholars,⁶⁰ since it was considered at odds with the traditional will of the Court to construct «a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions», by entrusting «such review to the Community Courts».⁶¹ A doubt was raised: are there grey areas where the protection from EU law and of EU law is not possible, and where a substantial denial of justice is on the way?

For example, in terms of preliminary references on austerity measures, the Romanian and Portuguese national courts have

⁵⁹ See on this F. Costamagna, *The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights*, Carlo Alberto Notebooks n. 497 December 2016.

⁶⁰ Ibidem, 12 et seq.; see also C. Barnard, *The Charter in Time of Crisis: a Case Study of Dismissal*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a Time of Crisis* (2013), 250, and R. Pye, *The EU and the Absence of Fundamental Rights in the Eurozone: a Critical Perspective*, in *European Journal of International Relations* (2017).

⁶¹ Arrêt du 1er avril 2004, *Commission / Jégo-Quéré* (C-263/02 P, Rec. 2004 p. I-3425) ECLI:EU:C:2004:210, paragraph 30.

made several attempts in the years 2011/2014,⁶² based on the possible applicability of the Charter of Fundamental Rights of the Union. These were all rejected by the Court which opposed its interpretation on the applicability of the Charter only in cases of implementation of proper EU law,⁶³ in line with the wording of Art. 51 of the Charter.

As for direct actions, a much discussed case was ADEDY,⁶⁴ where a Greek public sector union sought to obtain the annulment of two Council decisions addressed to Greece with a view to reinforcing and deepening the surveillance of its budgetary discipline and correcting excessive deficit. The applicants sought to challenge before the EU General Court the decisions by claiming their violation of the fundamental principle of conferral provided for in Art. 5 TEU; but, coherently with its traditional case-law on the locus standi of individual applicants, Court dismissed the action because the act did not concern directly and individually ADEDY.

Another relevant case in this respect was Ledra Advertising et al.,⁶⁵ where some holders of deposits in Cypriot banks subject to restructuring under the Memorandum of Understanding on Specific Economic Policy Conditionality agreed between the Republic of Cyprus and the ESM sought to obtain the annulment of such Memorandum and the subsequent acts and compensation for the suffered damages. They complained that the European Commission, as an institution of the ESM system *borrowed* from the EU institutional setting, was negligent in performing its enduring

⁶² See again the Romanian cases Ordonnance du 14 décembre 2011, Corpul Național al Polițiștilor (C-434/11, Rec. 2011 p. I-196*, Pub.somm.) ECLI:EU:C:2011:830, Ordonnance du 10 mai 2012, Corpul Național al Polițiștilor (C-134/12) ECLI:EU:C:2012:288, Ordonnance du 14 décembre 2011, Cozman (C-462/11, Rec. 2011 p. I-197*, Pub.somm.) ECLI:EU:C:2011:831, and the Portuguese cases Ordonnance du 7 mars 2013, Sindicato dos Bancários do Norte e.a. (C-128/12) ECLI:EU:C:2013:149; Ordonnance du 26 juin 2014, Sindicato Nacional dos Profissionais de Seguros e Afins (C-264/12) ECLI:EU:C:2014:2036; Ordonnance du 21 octobre 2014, Sindicato Nacional dos Profissionais de Seguros e Afins (C-665/13) ECLI:EU:C:2014:2327.

⁶³ Arrêt du 26 février 2013, Åkerberg Fransson (C-617/10) ECLI:EU:C:2013:105.

⁶⁴ Ordonnance du 27 novembre 2012, ADEDY e.a. / Conseil (T-215/11) ECLI:EU:T:2012:627; Ordonnance du 27 novembre 2012, ADEDY e.a. / Conseil (T-541/10, Publié au Recueil numérique) ECLI:EU:T:2012:626.

⁶⁵ Ordonnance du 10 novembre 2014, Ledra Advertising / Commission et BCE (T-289/13) ECLI:EU:T:2014:981, para. 56-63.

task of guardian of Union's values and principles. According to the claimants, the Commission's unlawful behavior was substantiated in the inclusion of detrimental paragraphs in the Cypriot Memorandum of Understanding and an infringement of its supervisory obligation, to ensure that the Memorandum of Understanding was consistent with EU law. Here as well, the General Court rejected the action, by formally stating that neither the ESM nor the Republic of Cyprus are part of the EU institutions, bodies, offices and agencies whose acts can be reviewed under Art. 263 TFEU, and therefore the Court has no jurisdiction to examine the legality of the acts that they have adopted. Again, the rejection of all the complaints was based on a formal point.

But it was actually in the context of the appeal in the same case *Ledra Advertising et al.* before the Court of Justice⁶⁶ that, for the first time, new possible paths for the evolution of the case law on austerity measures found their way.⁶⁷ The Court of Justice adhered, in its judgment, to what the General Court decided in the first action of annulment, and it excepted again the Cypriot Memorandum of Understanding with ESM from the scope of the review exercised under Art. 263 TFEU. Actually, the Court also insisted in what already stated in *Pringle*, and therefore in saying that ESM acts do not fall into the scope of application of EU law, even if EU institutions such as the EU Commission and the European Central Bank are involved as borrowed institutions of that system.

Yet, *Ledra Advertising et al.* actually opens the door to new opportunities: The Court states that the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions by

⁶⁶ Arrêt du 20 septembre 2016, *Ledra Advertising / Commission et BCE* (C-8/15 P à C-10/15 P) ECLI:EU:C:2016:701.

⁶⁷ See the first interesting comments by I. Glivanos, *CJEU Opens Door to Legal Challenges to Euro Rescue Measures in Key Decision*, in *Verfassungsblog.de*, 21 september 2016, available at <http://verfassungsblog.de/cjeu-opens-door-to-legal-challenges-to-euro-rescue-measures-in-key-decision/> and A. Hinarejos, *Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising*, in *EU Law Analysis Blog*, 25 September 2016, available at <http://eulawanalysis.blogspot.it/2016/09/bailouts-borrowed-institutions-and.html>; see also the critical remarks by F. Costamagna, *The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights*, cit. at 59, 18 ff.

the EU Treaties. The European institutions, even while acting as borrowed institutions in other international organizations and legal systems, retain all their roles and obligations towards EU citizens, so that the Commission, for example, as “guardian of the Treaties”, should refrain when acting under ESM law from signing acts whose consistency with EU law is in doubt, including Memoranda of Understanding, and otherwise it could be held liable for damages under articles 268 and 340 TFEU.

For many, the judgment on appeal in *Ledra Advertising et al.* has a transformative potential: it paved the way for «legal challenges to the bailout programmes of the EFSF/ESM», in the form of actions for damages, «offering an avenue to a plethora of claimants to unpick the questionable legal underpinnings of conditionality and austerity policies».⁶⁸

In fact, actions for damages before the Court of Justice are subject to less stringent requirements in terms of criteria of admissibility and time limits in relation to annulment actions; and since in *Ledra Advertising et al.* EU law seems to reappear in the context of austerity measures adjudication, it must be noted that any breach of EU law, including for instance a simple provision of the Charter of Fundamental Rights, could lead the Court to declare an ESM act unlawful act and held an EU institution liable under Articles 268 and 340 TFEU. The potential scope of legal challenges framed in this way seems wide; and the idea of an organic completeness in judicial systems of protection against supranational measures is brought back to the fore.

Nevertheless, the path is still uncertain: only a serious breach gives rise to compensable damages under EU law, and Art. 52 of the Charter of Fundamental Rights as already interpreted in the context of *Ledra Advertising et al.* suggests that the pursuit of an objective of general interest such as ensuring the stability of the banking system of the Euro area as a whole could constitute a legitimate restriction on the exercise of EU law rights and freedoms. The existence of a legitimate objective of general interest would exclude the unlawfulness of an EU institution's behavior: and in fact, in *Ledra Advertising et al.*, the novel rule was announced, but was not applied to the Commission.

⁶⁸ I. Glivanos, *CJEU Opens Door to Legal Challenges to Euro Rescue Measures in Key Decision*, cit. at 67.

The same idea of uncertain opening is offered by the subsequent cases of the Court of Justice, *Florescu*⁶⁹ and *Associação Sindical dos Juízes Portugueses*,⁷⁰ two cases stemming from preliminary references.

In the first case, closed with a judgment on 13th June 2017, the referring Romanian court asked in essence whether the Memorandum of Understanding concluded between the European Community, represented by the Commission and Romania must be regarded as an act of an EU institution, within the meaning of Article 267 TFEU, which may be subject to interpretation by the Court. The Court replied in the affirmative, and therefore moved on in interpreting whether that act required the adoption of certain precise austerity measures and whether EU primary (Article 6 TEU and Article 17 of the Charter of Fundamental Rights of the European Union) and secondary (Article 2(2)(b) of Council Directive 2000/78/EC) law could be interpreted as precluding those certain austerity measures.

It is true that the Romanian Memorandum of Understanding was an act concluded simply between the European Community, represented by the Commission, and Romania, on the base of Article 143 TFEU (which gives the Union the power to grant mutual assistance to a Member State whose currency is not the euro), and did not involve other external institutions such as the ECB and the IMF. The Romanian case is therefore formally different from other European debtor countries. Still, the judgment argues that the Memorandum falls within the jurisdiction of the Court since it «gives concrete form to an agreement between the EU and a Member State on an economic programme, negotiated by those parties, whereby that Member State undertakes to comply with predefined economic objectives in order to be able, subject to fulfilling that agreement, to benefit from financial assistance from the EU»: a rationale that can be applied to other cases as well (where the Troika is acting), so that, here again, new paths seemed to be open for legal challenges to austerity measures stemming from supranational obligations.

⁶⁹ Arrêt du 13 juin 2017, *Florescu e.a.* (C-258/14) ECLI:EU:C:2017:448.

⁷⁰ Arrêt du 27 février 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16) ECLI:EU:C:2018:117.

This is so true that in the recently solved case *Associação Sindical dos Juizes Portugueses*, stemming from a preliminary reference of the Portuguese Supremo Tribunal Administrativo, an interesting opinion of the Advocate General Saugmandsgaard Øe was issued on 18 May 2017. The claimant seeks the annulment of certain administrative acts which introduced a transitional reduction in the remuneration paid to the persons working in the Portuguese public administration including judges; and argues that those remunerations' cut could undermine the judges' independence, protected under Art. 19 TEU as well.⁷¹ The case was, therefore, not strictly about social rights: but it was again a clear test for the Court's jurisdiction on austerity measures. Unlike the aforementioned previous cases from Portugal of 2013-2014, where the Court always declined its jurisdiction,⁷² the Advocate General today suggests to the Court to acknowledge that «that the Portuguese State was to adopt in 2014, 'in line with specifications in the Memorandum of Understanding', measures of a specific nature, and not just general measures, consisting in particular in that, within the framework of 'the 2015 consolidation strategy', 'the Government [was to] adopt a single wage scale during 2014 with a view to implementing it in 2015 and aimed at the rationalisation and consistency of remuneration policy across all careers in the public sector'». This would lead the Court to consider that the «adoption of the measures to reduce remuneration in the public sector provided for in Article 2 of Law No 75/2014, at issue in the main proceedings, constitutes an implementation of provisions of EU law, within the meaning of Article 51 of the Charter, and that the Court therefore also has jurisdiction to answer the request for a preliminary ruling in so far as it concerns» certain Articles of the Charter of Fundamental Rights allegedly violated by the consequent austerity measures. Furthermore, the Advocate

⁷¹ Art. 19, par. 1 TEU reads as follows: «The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law».

⁷² Ordonnance du 7 mars 2013, *Sindicato dos Bancários do Norte e.a.* (C-128/12) ECLI:EU:C:2013:149; Ordonnance du 26 juin 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins* (C-264/12) ECLI:EU:C:2014:2036; Ordonnance du 21 octobre 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins* (C-665/13) ECLI:EU:C:2014:2327.

General, by making reference to the AG opinion in Florescu, observes that «in a case which also concerned budgetary austerity measures adopted by a Member State in the context of undertakings given to the European Community, in order to determine whether the provisions of the Charter are applicable under Article 51 thereof, it is necessary to take into account not only the wording of the national provisions in question, but also the terms of the measures of EU law in which those commitments appear», and that it is not decisive that a margin of discretion is left to States in implementing supranational obligations, to decide on the measures best able to ensure compliance with certain commitments, «provided that the objectives of the relevant measures are sufficiently detailed and precise to constitute a specific rule of EU law in that respect, unlike mere recommendations adopted by the Council, on the basis of Article 126 TFEU, and addressed to Member States whose public deficit is considered excessive».

Associação Sindical dos Juizes Portugueses was decided by the Court in an even more *tranchant* way: it recognized its jurisdiction, and stated that Art. 19 TEU is a self-standing rule and can be a relevant parameter of review in itself, actually as «a crucial rule on the judiciary of the Union, understood in a federal sense, as a judiciary of the federation and its States».⁷³ The case of a temporary reduction in salaries of public sector employees could be easily read as a purely internal situation, therefore outside the material scope of EU law and the jurisdiction of the Court; still Art. 19 TEU demands the Member States to «provide remedies sufficient to ensure effective legal protection in the fields covered by Union law», using a specially broad phrase, the Portuguese referring Court clearly made the municipal law come within the ambit of EU law since the austerity measures were adopted in response to demands attached to EU financial assistance, and in this sense the Court of Justice remained vague by making no specific reference to obligations purportedly imposed by EU measures, but translating the considerations of the referring court as if «those measures were adopted in the framework of EU law or, at least, are European in origin, on the ground that those requirements were imposed on the

⁷³ D. Sarmiento, *On Constitutional Mode*, Despite Our Differences Blog, 6 March 2018, available at the website <https://despiteourdifferencesblog.wordpress.com/2018/03/06/on-constitutional-mode/>.

Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State.»⁷⁴ In this regard, the Court expressly remarks that «the referring court observes that the discretion which the Portuguese State has in implementing its budgetary policy guidelines, acknowledged by the EU institutions, does not relieve it, however, of its obligation to respect the general principles of EU law, which include the principle of judicial independence, applicable both to Courts of the European Union and national courts»;⁷⁵ and in fact, it adopts this same view.

The Court at the end of the day found no breach of Art. 19 TEU and no serious threat to the Portuguese judges' independence. Nonetheless the case is another crucial step for the evolution of the supranational adjudication, for at least two reasons. First of all, the Court shows a new willingness to recognize its jurisdiction on austerity measures, even beyond the *ratione materiae* criterion traditionally intended, and by operationalizing the values of Article 2 TEU with a reference to Article 4(3) TEU on the principle of sincere cooperation. Moreover, the diverse crises of the Union seem to converge and be simultaneously tackled in *Associação Sindical dos Juízes Portugueses*: as already noted by some commentators,⁷⁶ in emphasizing the essential importance and mutual reinforcement of judicial independence, the rule of law, effective judicial protection, mutual trust, sincere cooperation and the decentralized enforcement of EU law by national courts, the Court is sending a signal for the rule of law crisis as well,⁷⁷ for the cases of Poland and Hungary, where more relevant threats to judicial independence are in place, where the European Commission is called to act in legal terms.⁷⁸

⁷⁴ Arrêt du 27 février 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16) ECLI:EU:C:2018:117, par. 14 in particular.

⁷⁵ *Ibidem*, par. 15.

⁷⁶ M. Ovádek, *Has the CJEU Just Reconfigured the EU Constitutional Order*, *Verfassungsblog.de*, 28 February 2018, available at the website <https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/>.

⁷⁷ See L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 *Cambridge Yearbook of European Legal Studies* (2017); C. Closa, D. Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (2018).

⁷⁸ See the Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146

All in all, together with *Florescu, Associação Sindical dos Juizes Portugueses* can become a step towards the recognition that various national austerity measures stem from supranational obligations and therefore fall within the scope of application of EU law in general and of general principles of EU law and the Charter of Fundamental Rights in particular. This step would lead to the possibility of a protection of social rights in time of austerity before the Court of Justice, and permit the Court to perform its interpretative role for the uniform application of EU law. The centrality of the preliminary reference procedure would be restored: in fact, it must be noted that the solution offered by *Ledra Advertising et al.*, based on actions for damages under Articles 268 and 340 TFEU, amounts to a purely privatized remedy, while procedures under Art. 267 TFEU would allow *erga omnes* and uniforming effects.

5. A tentative conclusion

In sum, the situation is unsettled and evolving. The Union's multi-faceted crisis affected EU law and its nature in at least two different ways. EU law has been employed only in a selective way and often set aside for strategic reasons; a comparative analysis of national courts' case-law on austerity measures reveals several examples of selective lack of application, so to say. The consequences are a threat to some of EU law's inherent characteristics, including the need of its correct and uniform application, and the risk of a weakening protection of the citizen *vis-à-vis* supranational anti-crisis and national austerity measures. The risk of undermining the role of EU law in the treatment of the financial crisis is to undermine the delicate balance of pluralism and unity that EU law with its canons and procedures is able to strike.

The European Court of Justice first shied away from a role in giving answers in terms of adjudication on supranational anti-crisis and national austerity measures, but progressively seemed to open

(C/2017/5320), the Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland COM (2017) 835 final, and, for an up to date discussion, M. Taborowski, *CJEU Opens the Door for the Commission to Reconsider Charges against Poland*, in *Verfassungsblog.de*, 13 March 2018, available at the website <https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland>.

new possibilities. It is also soon expected to give new answers; still, the path for future challenges to austerity measures in front of EU judicial bodies seems to be opened. Irony of fate, as often happens in times of multi-faceted crisis, different malaises can also come to be joined and simultaneously tackled in single cases, as the most recent evolution shows well.

EU law, which was threatened with oblivion, seems to be back to the fore. The new judicial moves are coupled with the recent initiatives at the political level to restore the centrality of EU law: by incorporating, among the other things, the major Fiscal Compact principles in a EU directive, and by establishing a European Monetary Fund (EMF) «anchored within the EU's legal framework» which will replace the well-established structure of the European Stability Mechanism (ESM) and provide the common backstop to the Single Resolution Fund and act as a last resort lender in order to facilitate the orderly resolution of distressed banks;⁷⁹ by restating rule of law against serious and sustained rule of law shortcomings in some Member States, since it is a necessary condition of effective cooperation between States in all its aspects, in terms of mutual trust, mutual recognition of judicial decisions, effective rights of free movements in the internal market and by EU citizens.⁸⁰

After all, placing EU law again at the centre of the debate, in both judicial interpretative and political terms, is the only way to coordinate pluralism and unity in the treatment of the crisis.

⁷⁹ See again, in general, the Communication on further steps towards completing the Economic and Monetary Union - COM(2017) 821.

⁸⁰ Interesting discussions on the interplay of these factors are offered by J-W Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States*, 21 Eur. L.J. 2 (2015); A. Jakab, D. Kochenov (eds.) *The Enforcement of EU Law and Values. Ensuring Member States' Compliance* (2017); K.L. Scheppelle, *Should the EU Care About the Rule of Law at Member State Level?*, *Verfassungsblog.de*, 3 March 2018, available at the website <https://verfassungsblog.de/should-the-eu-care-about-the-rule-of-law-at-member-state-level>.

DO CONSTITUTIONAL COURTS CARE
ABOUT PARLIAMENTS IN THE EURO-CRISIS?
ON THE PRECEDENCE OF THE
“CONSTITUTIONAL IDENTITY REVIEW”

*Cristina Fasone**

Abstract

The article assesses how and to what extent Constitutional Courts dealing with Euro-crisis measures protect or limit parliamentary powers through their case law. The article argues that constitutional case law regarding the Euro-crisis measures permit national constitutional identities to emerge in a more explicit way than in the past. In this respect, Constitutional Courts' judgments are concerned with parliamentary prerogatives as long as the safeguard and enhancement of the democratic principle is considered part of the national constitutional identity and can prevail, in the specific case in question, over other supreme principles. In particular, two relevant elements may be identified. First, the case law of Constitutional Courts regarding Euro-crisis measures can be viewed on a continuum with past judgments, although the Euro-crisis law appears to have “forced” some Courts to elaborate more in their reasoning on the core and non-negotiable principles on which national Constitutions are based. Second, such an exercise in the constitutional reasoning has been triggered particularly by those Euro-crisis measures which are international and intergovernmental in nature and which have been adopted in the framework of financial assistance programmes. In conclusion, the protection of Parliaments through constitutional adjudication during the crisis is instrumental and is achieved only where it is so requested to preserve the constitutional identity.

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1. Introduction: The context in which constitutional review takes place

According to most commentators, Euro-crisis measures have deeply affected the relative stability of national constitutional orders. In particular, the Eurozone crisis has been accused of impairing the institutional balance, at both European and national levels¹, of strengthening irremediably the role of courts in the Member States², of triggering the marginalization of parliaments³, of letting technocrats prevail over politics⁴, and of overturning the principle of the rule of law⁵ and the protection of rights⁶.

¹ M. Dawson & F. De Witte, *Constitutional Balance in the EU after the Euro-Crisis*, 76 *Moder L.R.* 5 (2013), at 817 and E. Chiti & P.G. Teixeira, *The constitutional implications of the European responses to the financial and public debt crisis*, 50 *Comm. Mkt. L.R.* 3 (2013), at 683.

² M. Everson & C. Joerges, *Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?*, 63 *LSE ‘Europe in Question’ Discussion Paper Series 1*(2013), 23, <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper63.pdf>. and F. Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, 32 (1) *Berkley J. Int’L.*, 64 (2014).

³ B. Crum, *Saving the Euro at the Cost of Democracy?*, 51 *J. Comm. Mkt. Studies* 4 (2013), at 614; K. Tuori & K. Tuori, *The Eurozone Crisis. A Constitutional Analysis* (2014), 195.

⁴ P.L. Lindseth, *Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration*, 15 *Ger. L.J.* 4 (2014), 529.

⁵ C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts*, 35 *Oxf. J. Leg. Stud.* 2 (2015), at 325.

⁶ B. De Witte & C. Kilpatrick (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges*, *EUI Working Papers, LAW 2014/05*; A. Poulou, *Austerity and European Social Rights: How Can Courts Protect Europe’s*

In particular, two of these trends, namely the increasing role of courts and the threat to the powers of national parliaments, both considered to be consequences of the Euro-crisis measures, represent the focus of this article. Indeed, existing literature has thus far entirely failed to draw a connection between these two trends and to analyse them from a comparative perspective. Rather, the attention has been focused almost exclusively on the case law of the German Constitutional Court dealing with the *Bundestag*. Why has the prominent role played by this German Court been accompanied by growing levels of judicial protection provided to the national parliament, while such a relationship cannot be detected in most Eurozone countries having a Constitutional Court?

There are several reasons why this has happened. These include procedural reasons, such as the easier access to constitutional review in Germany compared with other States and, more precisely, the loose check on the admissibility requirements carried out by the German Constitutional Court on individual constitutional complaints⁷, and reasons linked to Germany's relative financial and economic stability during the crisis, which did not lead to a potential clash between the protection of the democratic principle and other competing supreme principles of the Basic Law, such as dignity. The most significant explanation underlying the varying attitudes demonstrated by Constitutional Courts towards Parliaments during the Euro-crisis appears to be based on what can be referred to as the substance of the national constitutional identity, constituted by legal principles and values that shape the very nature of the national Constitutions and whose violation connotes an attempt to overturn the Constitution itself⁸. Such constitutional identity is often based on the content of eternity clauses entrenched in rigid Constitutions. By means of constitutional review of legislation, Courts remain the ultimate interpreters of those clauses and sometimes identify new principles or values as constitutionally 'untouchable' in a given polity.

Lost Generation?, 15 Ger. L.J. 6 (2014), at 1145 and C. Kilpatrick, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, 10 EuConst 3 (2014), at 393.

⁷ P. Faraguna, *Il Bundesverfassungsgericht e l'Unione Europea, tra principio di apertura e controlimiti*, DPCE 2 (2016), at 438.

⁸ G. J. Jacobsohn, *Constitutional Identity* (2010), 271-322.

In Germany the protection of the democratic principle, through the Parliament, forms part of the national constitutional identity, according to the federal Constitutional Court and based on Art. 79.3 and 20.2 GG; the Euro-crisis constitutional case law in other Member States, by contrast, does not confer the same value as German constitutional law does on the Parliament as guarantor of citizens' rights of participation in political decisions. Rather, in light of the relevant national political and economic context, other principles and values are deemed to be superior to democratic and representative principles. For example, the values given preeminence by Constitutional Courts dealing with Euro-crisis law include the principle of sincerity in France, the principle of equality and the right to defence and to an independent judge in Italy, the principle of proportional equality in Portugal, and the principle of a balanced budget in Spain. Thus, the powers of Parliaments in the current crisis are protected through constitutional review in the case law regarding Euro-crisis measures only if and insofar as their safeguard, as in Germany, is considered to be instrumental to preserving the substance of the constitutional identity vis-à-vis other competing though unequally important legal values. This means that, in different circumstances, beyond the scope of the crisis, the judicial balancing between the democratic principle and other concurrent supreme principles shaping the German constitutional identity could permit a different principle to prevail.

When giving substance to the national constitutional identity, often Constitutional Courts do not explicitly establish a direct link between certain principles and such an identity. In other words, even if they carry out a review of the constitutional identity, Courts do not state this clearly. Hence it is for scholars to detect such trends and the more or less implicit acknowledgment of the substance of the constitutional identity. From this viewpoint, given the challenge they have posed to the stability and effectiveness of national constitutional systems, the Euro-crisis measures – which represent a mix of international, European and national measures adopted in response to the Eurozone crisis – have compelled Constitutional Courts to make a more systematic use of the core principles of the Constitution. The Courts have done this in order to defend these fundamental principles from the 'attack' of the Euro-crisis law, just as they have done during other crises, like the European migration crisis: the higher the rate of constitutional

conflict, the more likely it becomes that the Courts will resort to reference to the supreme principles and to identify such arguments in their constitutional adjudication⁹. Although they were also present in constitutional case law prior to the crisis, the volume and intensity of references to constitutional principles defining the national constitutional identity has increased in constitutional judgments dealing with Euro-crisis measures. This article maintains that the democratic principle and the protection of Parliaments are not primary concerns for most Constitutional Courts when it comes to preserving the constitutional identity of their Member State against Euro-crisis measures.

This article is structured as follows. Section 2 considers to what extent the protection of parliamentary powers had been considered inherent to the constitutional identities of Member States before the Euro-crisis erupted, and the role the EU has usually played in triggering the identification of supreme constitutional principles by Constitutional Courts. Section 3 analyses which place, if any, Parliaments occupy in the constitutional identity review during the Euro-crisis. Section 4 critically assesses the treatment afforded to Parliaments in the constitutional case law dealing with Euro-crisis measures. Finally, Section 5 concludes that while the Eurozone crisis has pushed Constitutional Courts to complete an explicit or implicit identity review, in particular in relation to the most controversial Euro-crisis measures, this has not been accompanied by an increasing judicial protection of parliamentary prerogatives.

2. The construction of constitutional identities through case law: The role of the EU (before the Euro-crisis)

Constitutional Courts are established *ad hoc* to ensure the correct enforcement of a Constitution as their primary task, by contrast, for instance, with Supreme Courts that perform this role only incidentally¹⁰. It follows that Constitutional Courts are

⁹ See, for example, the controversial judgment of the Constitutional Court of Hungary 22/2016 (XII. 5.) AB and the case-note by G. Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, *VerfBlog*, 10 January 2017, <https://verfassungsblog.de/>.

¹⁰ See V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (2009), at 36-70. J. Komárek, *National constitutional courts in the*

particularly sensitive to cases of potential encroachment on the national constitutional identity. By constitutional identity here we mean the untouchable core of a Constitution grounded in unamendable constitutional clauses, according to explicit limits set by constitutional provisions, in the Preamble and in the introductory title of the fundamental law, and very often further defined and reinterpreted by Constitutional Courts, as implicit limits¹¹.

The list of exemptions from constitutional revisions may be longer or shorter depending on the particular Constitution. Often the explicit limits to constitutional amendments are vague in their formulation and are present in most – though not all – European Constitutions, such as the reference to the form of the State, e.g. the Republic in France, Italy and Portugal (arts. 89 Fr. Const., 139 It. Const., 288 Pt. Const.), or the unity and the indivisibility of the State (France, Italy, and Portugal, for example). Constitutional Courts, however, reserve for themselves the power to orient and shape the substance of these limits, sometimes in an unexpected way when considering the plain words of constitutional texts. For instance, the Portuguese Constitution includes a long list of limitations imposed on constitutional amendments (art. 288 Pt. Const.), which has undoubtedly influenced the more or less explicit identification of supreme principles of the constitutional system as part of the national constitutional identity. For our purpose, the case of the rights of workers as an express restriction to constitutional revision (lit. e) is particularly significant to the relationship with the (supreme) principle of proportional equality that has been applied in many decisions of the Portuguese Constitutional Court on the Euro-crisis law, without often paying much attention to the effects of this case law on the role of the parliament in the constitutional system.

European Constitutional Democracy, 12(3) ICON 1474 (2014) insists that the special position that national Constitutional Court have in the EU and in the Member States should be preserved.

¹¹ See C. Grewe, *Methods of Identification of National Constitutional Identity*, in A. Saiz Arnaiz, C. Alcobarro Llivina, *National Constitutional identity and European Integration* (2013), at 37–48. On the specific point of the substantive limits to constitutional amendments and the role of Courts, see G. Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 *Constellations* 2 (2012), 182 and Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (2017), Parts I and III.

In the legal systems of the EU Member States, the identification of national constitutional identities is also triggered by EU law¹². Particularly where a national Constitution, like in Spain, is devoid of an eternity clause and hence of unamendable constitutional provisions, the participation of the State in the European integration process prompts the Constitutional Court of that country to set limits on what can be achieved through integration in order to comply with the Constitution. The identification of constitutional limits to European integration as a way of shaping the national constitutional identity has also occurred in Member States with textual limits to constitutional amendments, but is particularly significant where such literal boundaries are lacking. Being a potential threat to the endurance of a Constitution that only recognises procedural limits to its modification – like arts. 167 and 168 of the Spanish Constitution –¹³, the EU prompts the guarantor of the correct application of the fundamental law, that is, the Constitutional Court, to identify additional substantial constitutional constraints to the deepening of the European integration¹⁴. Indeed, on the occasion of the *ex ante* review of constitutionality of the Treaty establishing a Constitution for Europe in 2004, the Spanish Constitutional Court admitted that:

‘These material limits, which are not expressly included in the constitutional provision (Article 93), but which implicitly derive from the Constitution and from the essential meaning of the precept itself, are understood as respect for the sovereignty of the State, our basic constitutional structures and the system of fundamental principles and values established in our Constitution, in which fundamental

¹² See B. Guastaferrero, *Beyond the Exceptionalism of Constitutional Conflicts: The ordinary Functions of the Identity Clause*, 31 Yearbook of Eur. L. (2012), at 236; F.-X. Millet, *L'union européenne et l'identité constitutionnelle des états membres* (2013); P. Faraguna, *Ai confini della Costituzione. Principi supremi e identità costituzionale* (2015), at 171-178 and J. Sterck, *Sameness and selfhood: The efficiency of constitutional identities in EU law*, early view Eur. L.J. 1 (2018).

¹³ See L. Álvarez Álvarez, *La lealtad constitucional en la Constitución española de 1978* (2008).

¹⁴ M. Dani, *National Constitutional Courts in supranational litigation: a contextual analysis*, 23 Eur. L.J. 3-4 (2017), at 189.

rights acquire their own substantive nature (Article 10.1 CE)[emphasis added]^{15.}

The gaps identified in the vague formulation of Article 4.2 TEU, which describes national identities as inherent in Member States' 'fundamental structures, political and constitutional, inclusive of regional and local self-government,' are then filled in by national constitutional provisions and case law¹⁶. Even before this clause was inserted into the European Treaties, Constitutional Courts in some Member States had taken the opportunity to point to the 'essential elements' of their Constitutions that could not be encroached upon by their participation in the European integration process. To some extent, the European Community/Union has had a maieutic effect on these Courts. It has forced them to elicit "counter-limits" against the expansion of the European range of action by elaborating on national constitutional texts to identify the non-amendable core of a Constitution¹⁷. For instance, despite the fact that the only explicit limit to constitutional amendments under the Italian Constitution is the republican form of the State (Art. 139 It. Const.), when dealing with the then European Community law, the Italian Constitutional Court spelled out the existence of supreme principles of the constitutional legal system, that is, fundamental principles of the Constitution and inviolable rights of the person that were to prevail over the founding Treaty of the European Economic Community (TEC) and on the measures advanced by its institutions¹⁸. In a judgment dealing with the

¹⁵ Declaración 1/2004, § 2. On this point see A. Saiz Arnaiz, *Identité nationale et droit de l'Union Européenne dans la jurisprudence constitutionnelle espagnole*, in L. Burgorgue-Larsen (ed), *L'identité constitutionnelle saisie par le juges en Europe* (2011), 101-131, and P. Pérez Tremps, *National Identity in Spanish Constitutional Case Law*, in A Saiz Arnaiz & C Alcoberro LLivina (eds.), cit. at 11, at 270.

¹⁶ As pointed out by B. Guastaferrro, *Beyond the Exceptionalism of Constitutional Conflicts*, cit. at 12, 263-318 and E. Cloots, *National Identity in EU Law* (2015), 127-190, it can be questioned whether the area of protection covered by Art. 4.2 TEU and that is safeguarded by the Constitutional Courts' identity review really overlap.

¹⁷ See P. Faraguna, *Taking Constitutional Identities Away from the Courts*, 41 *Brook. J. Int'L. 2* (2016), at 501-508 and G. Van der Schyff, *Exploring Member State and European Union Constitutional Identity*, 22 *Eur. Pub. L. 1* (2016), at 231-234.

¹⁸ See Italian Constitutional Court, decisions no. 183/1973, § 9, of 18 December 1973; and 170/1984, § 7, of 5 June 1984. On these judgments, see in detail M. Cartabia, *The Italian Constitutional Court and the relationship between the Italian legal system and the European Union*, in A.-M. Slaughter, A. Stone Sweet, J. H. H. Weiler

constitutionality of the national law (n. 1023/1957) ratifying and executing the Rome Treaty of 1957, the Court had the opportunity to identify one of these supreme principles and to consider it in relation to Community law, although in the end it declared the case inadmissible. The referring court – the case having been brought before the Constitutional Court through the *incidentaliter* proceeding – asked whether Art. 177 TEC (by excluding the effects of a Court of Justice’s preliminary ruling declaring an EC Regulation invalid on the main proceeding at the national level) violated Art. 24 It. Const., where the right to defence and judicial protection is entrenched¹⁹. That this right amounts to a supreme principle of the Italian Constitution has been further confirmed in the following case law of the Italian Constitutional Court, also in the field of international law²⁰. Likewise the right to defence and to an independent judge, as supreme constitutional principle, has been adopted as a standard of review in the case law on the Euro-crisis measures.

In a more recent case that is still pending at the time of writing, dealing with VAT frauds affecting EU financial interests and the Italian statute of limitations, and featured as the last step in the “Taricco saga”, the Italian Constitutional Court’s issue of an order for a preliminary reference to the Court of Justice has cast doubt as to whether the principle of legality in criminal matters, amounting to a supreme principle of the Italian Constitution (Art. 25 It. Const.) and according to the interpretation given to this principle under Italian law, is in fact compatible with Article 325 TFEU²¹. In view of the conciliatory answer provided by the Court of Justice on 5 December 2017 (case C-42/17), it is unlikely that the

(eds.), *The European Court and National Courts - Doctrine and Jurisprudence. Legal change in its social context* (1998), 133.

¹⁹ See Italian Constitutional Court, decision n. 232/1989, § 3.2, of 13 April 1989 and the comments by M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, 12 Mich. J. Int’l L. 173 (1990-1991), at 173-174. See also judgment n. 18/1982.

²⁰ See judgment n. 238/2014 and the first effective use of the “counter-limits doctrine”.

²¹ Italian Constitutional Court, Order n. 24/2017 and the comments by D. Tega, *Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds*, Int’l J. Const. L. Blog, 14 February 2017 and the contributions collected in A. Bernardi, C. Cupelli (eds.), *Il caso Taricco e il dialogo tra le Corti. L’ordinanza 24/2017 della Corte costituzionale* (2017).

Italian Constitutional Court will use the constitutional identity review - “counter-limit doctrine” against EU law in its final decision.

In Germany, the EU has also triggered the definition by the *Bundesverfassungsgericht* of the national constitutional identity. This process started with the *Solange* saga and it ended with the protection of the democratic principle and democratic representation in EU affairs through the *Bundestag*²². In the Court’s ruling on the Treaty of Maastricht, the *Bundesverfassungsgericht* had already outlined the features of the *ultra vires* review of EU acts that transgressed the boundaries of the Treaty-based competences with the effect of declaring those acts inapplicable in Germany²³. The *ultra vires* review stood as a bulwark for the protection of the constitutional and, in particular, legislative powers of the national parliament against the EU, when the latter overstepped its jurisdiction. However, the avenues for the application of this kind of review have been restrained by the subsequent case law²⁴. Moreover, in the *Maastricht decision* the German Constitutional Court emphasized the importance of the democratic principle for the overall construction of the European integration process and as a condition for Germany’s participation in the EU. The *Bundesverfassungsgericht* spelled out the idea of the ‘complementary’ legitimacy²⁵ of the European Parliament vis-à-vis national parliaments with respect to the protection of democracy at national level. In other words, any withdrawal of legislative competence from the national parliament in favour of the EU must entail a transfer of power to the democratically elected institution, that is, the European Parliament, provided that it had sufficient democratic credentials in terms of representation and powers.

²² See German Constitutional Court, Second Senate, BVerfGE 37, 271 2 BvL 52/71 *Solange I-Beschluß*, 29 May 1974 and BVerfGE 73, 339 2 BvR 197/83 *Solange II-decision*, 22 October 1986, both cases concerning the standard of protection of fundamental rights.

²³ German Constitutional Court, Decision of 12 October 1993, BVerfGE 89, § 155.

²⁴ German Constitutional Court, BvR 2661/06, Decision of 6 July 2010, *Honeywell case*. See C. Möllers, *German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010*, 2 BvR 2661/06, *Honeywell*, 7 EuConst 1, (2011), at 161.

²⁵ J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, *EUI Working Paper Series*, EUI WP-RSCAS 2007/13, at 2-3.

The constitutional identity review, however, was expressly acknowledged by the German Constitutional Court only with the judgment on the Treaty of Lisbon.²⁶ Although it has not yet been applied, the *Bundesverfassungsgericht* has considered this particular kind of review in relation to the protection of the national parliament's powers in EU affairs in the interests of ensuring citizens' rights of participation. In the *Lisbon ruling* the Court based the constitutional identity review on art. 23.1 GG in combination with the eternity clause of the German Basic Law, Art. 79.3 GG²⁷. These two provisions are indeed closely intertwined in that the former requires that the establishment of the EU as well as changes in the Treaty foundations capable of "amending or supplementing this Basic Law" are subject either to a prior constitutional amendment (Art. 79.2 GG) or to the eternity clause (Art. 79.3 GG), i.e. they are inadmissible as long as the Basic Law remains in force. The judicial protection of the *Bundestag* then is based upon a peculiar interpretation of Art. 38.1 GG on the right to vote for the *Bundestag* as a 'right to democracy' – a right that would be irremediably impaired if the powers and the autonomy of this chamber, where the people are represented, were severely limited – in conjunction with Art. 20.2 GG, which identifies the source of the state authority in the people and in the elections, and Art. 79.3 GG, which makes the democratic principle unamendable as part of the German constitutional identity. This implies that the constitutional identity review focuses, in this regard, on the ability of the national parliament to perform its representative function towards the citizens when EU decision-making is at stake²⁸, since, according to the Court, German citizens are not adequately represented in the European Parliament nor are they directly allowed to take decisions at the supranational level. From this viewpoint, the national parliament is worth protecting insofar as it

²⁶ L. FM. Besselink, *National and constitutional identity before and after Lisbon*, 36 Utrecht L.R. 6 (2010).

²⁷ German Constitutional Court, Second Senate, 2 BvE 2/08 - 2 BvE 5/08 - 2 BvR 1010/08 - 2 BvR 1022/08 - 2 BvR 1259/08 - 2 BvR 182/09, 30 June 2009, § 240 and 273.

²⁸ Also because national parliaments have obtained new powers to participate in the EU decision-making process, after the Lisbon Treaty revision: see Art. 12 TEU and protocols no. 1 and 2 to the Treaty of Lisbon.

is the only institution through which citizens, by means of their right to vote and the elections, can retain control over the EU.

Although other Constitutional Courts have also ruled on the constitutionality of the Treaty of Lisbon, before and after its ratification, a comparable argument, connecting the national constitutional identity to the parliament, has not been raised outside Germany²⁹. Even where, like in France, the *Conseil Constitutionnel* ruling on the constitutionality of the Lisbon Treaty decided that a change to the Constitution was required to address the role of the national parliament in the new European procedures, there was no mention of a potential threat to the constitutional identity with regard to parliamentary powers³⁰. Nor, following the Treaty revision, was the change in the powers of the national parliament, regarding its representation of French citizens in EU affairs, deemed to overcome the limits of constitutional amendability, despite the democratic principle appearing to be part of the French constitutional identity³¹.

Likewise, when the Polish Constitutional Court decided on the Law of ratification of the Treaty of Lisbon, despite touching upon the role of the national parliament regarding the transfer of competences to the EU, it did not invoke the ‘spectrum’ of the constitutional identity review and did not identify any violation of the Constitution deriving from the new Treaty provisions. The Polish Constitutional Court held that the strengthening of parliamentary powers in EU affairs at the domestic level was a matter for the national legislature, to be achieved through the Act of Cooperation of the Council of Ministers with the *Sejm* and the Senate³². The constitutional identity was not invoked and the

²⁹ See M. Wendel, *Lisbon Before the Courts: Comparative Perspectives*, 7 *EUConst.* 1 (2011), at 93.

³⁰ French *Conseil constitutionnel*, Décision 2007-560 DC, however, has further developed the case law of the *Conseil constitutionnel*, e.g. Décision 70-39 DC, implicitly dealing with the French constitutional identity in relation to EU law and the potential “threat to the essential conditions for the exercise of the national sovereignty (Considérant 9)”. See extensively M. Quesnel, *La protection de l’identité constitutionnelle de la France* (2015), 15 ff.

³¹ See French *Conseil Constitutionnel*, Décision n. 2007-560 DC, 20 December 2007, § 28-32. See M. Quesnel, *La protection de l’identité constitutionnelle de la France*, cit. at 30, 187-188.

³² Polish Constitutional Court, K32/09, 24 November 2010, § 4.2.14.

judgment did not link the powers of the national parliament to the untouchable core of the Polish Constitution³³.

Finally, the process of European integration and in particular the creation of the Economic and Monetary Union (EMU) has led Eurozone countries to add new fundamental principles to be balanced against more “traditional” supreme principles of national Constitutions. The Euro-crisis has further reinforced such a potential – and sometimes actual – conflict between supreme principles. The principle of sincerity of the budget, which appeared for the first time in France in the case law of the *Conseil Constitutionnel* in 2000 and was codified one year later in the *loi organique relative aux lois de finances* (LOLF), derives from the European Stability and Growth Pact of 1997 and from the obligation to maintain a reliable budget³⁴. The *Conseil constitutionnel* has reviewed the principle of sincerity in relation to the parliamentary scrutiny foreseen by the law and has concluded that if the Parliament, including through its committees, is promptly informed by the government about the budgetary measures to be adopted and is able to examine them, this is a further element in favour of the sincerity of the budgetary measure at stake, which has survived the scrutiny of the elected assembly³⁵. This further condition makes it particularly difficult for the *Conseil* to declare unconstitutional an act on the basis of the principle of sincerity.

More recently, for example in Italy and in Spain, the constitutionalization of the principle of a balanced budget during the Euro-crisis has prompted a sort of “competition” between the “golden rule” and other principles, like the principle of equality, when welfare cuts are imposed upon selected categories of people. Constitutional Courts have been asked to resolve this “competition” on a case by case basis, sometimes with no consistent line of reasoning produced over time. Indeed, in addition to the right to defence and judicial protection, in Italy the principle of equality has been considered by the constitutional case law and

³³ See C. Fasone & N. Lupo, *Constitutional Review and the Powers of National Parliaments in EU Affairs. Erosion or Protection?*, in D. Jancic (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (2017), 69-70.

³⁴ French *Conseil Constitutionnel*, décision n. 2000-441 DC and décision n. 2005-519 DC.

³⁵ French *Conseil Constitutionnel*, décisions n 2001-453 DC and n 2001-456 DC,

scholarship to be a supreme principle of the Italian Constitution, which thus shapes the Italian constitutional identity³⁶. In Belgium, where the Constitutional Court had never carried out a constitutional identity review, a first cautious development regarding the use of the Belgian constitutional identity as a barrier to further integration has occurred, for the first time, in 2016 by means of the adjudication of the Fiscal Compact. However, as explained in the next section, this remains in very vague and generic terms.

3. The marginal place of Parliaments in the “constitutional identity review” during the Euro-crisis

The definition of the constitutional identity through case law is prompted especially in moments when the enforcement of the Constitution is under stress, due to domestic political and economic crises and even more so by virtue of external events and the legal reaction to them. Hence, in the last few years, Euro-crisis measures and particularly those having the most controversial nature – because of their form and substance – like the intergovernmental agreements negotiated outside EU law and the rescue packages, have strengthened the “maieutic” effect EU law had already prompted in triggering the identification of the supreme principles of Member States’ Constitutions through the case law of Constitutional Courts, even when they do not expressly acknowledge them as constituting the national constitutional identity.

Although the protection of parliamentary powers in the Euro-crisis has been invoked via the constitutional complaints and challenges before Constitutional Courts, the argument of the safeguards to the prerogatives of parliaments has been somewhat disregarded. Even when, like in Poland and Belgium, the role of the Parliament was at the very centre of the Euro-crisis case law, this did not necessarily result in a higher level of protection for this institution.

³⁶ See, for example, Italian Constitutional Court, decision n. 1146/1988, § 1, and n. 15/1996, § 2. See A. Celotto, *Art. 3*, in R. Bifulco, A. Celotto & M. Olivetti (eds), *Commentario alla Costituzione* (2006), 68.

The Constitutional Court of Poland had the opportunity to intervene in support of the Parliament twice, but it chose either to dismiss the case or to resolve it on other grounds. In a first case, a parliamentary minority challenged *ex post* the compliance of the Act ratifying art. 136 TFEU amendment – based on Decision 2011/199/EU – with art. 48.6 TEU, establishing a simplified Treaty revision procedure, and art. 90 of the Polish Constitution, in view of the national procedure followed in spite of the content of the Treaty amendment. In particular, the parliamentary opposition contended that the Treaty amendment had extended the EU's competences and especially the jurisdiction of the Court of Justice and the Court of Auditors in breach of art. 48.6 TEU. Moreover, according to the parliamentary minority, the role of the Parliament in the ratification procedure had been undermined. Given the alleged extension of the EU's competences, the ratification of this conferral of competence beyond the State authorities required authorisation pursuant to art. 90 of the Polish Constitution, i.e. the Ratification Act must be approved in each Chamber by two thirds majority or by a national referendum, and not by simple majority in both Chambers in compliance with art. 89 Const., as in fact occurred³⁷. The Constitutional Court, however, did not address the question at all, since it held that “the addition of Paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union” and also relied on the *Pringle* case law of the Court of Justice to support this statement³⁸.

In a second case, when it was asked to review the constitutionality of the Fiscal Compact, although Poland was only bound by Title V of the treaty being outside the Eurozone, the Constitutional Court dismissed the case on procedural grounds despite having the opportunity to address the problem of the Parliament's constrained budgetary autonomy³⁹. Most claims of

³⁷ K. Granat, *Approval of Article 136 TFEU Amendment in Poland: The Perspective of the Constitutional Court on Eurozone Crisis Law*, 21 Eur. Pub. L. 1 (2015), at 33.

³⁸ The case of the Polish Constitutional Court is K 33/12 of 26 June 2013, § 7.4.1. The *Pringle* case, C-370/12, of the Court of Justice, was decided on 27 November 2012 and was based on a preliminary reference of the Supreme Court of Ireland also dealing with art. 136 TFEU amendment.

³⁹ Polish Constitutional Court, joint cases K 11/13 and K 12/13, judgment of 28 March 2013. See A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (2015), 148, note 107.

alleged violation of the Constitution advanced by a group of MPs and senators against the Fiscal Compact and the Ratification Bill actually dealt with the illegal transfer of powers from the Parliament to the European Commission and the EU in general, with the result being the limitation of the scope of parliamentary decisions, for instance regarding the “golden rule” in light of the prospective accession to the Eurozone.

In Belgium, given the delayed implementation of the Fiscal Compact in domestic law, the Constitutional Court was asked to decide quite late, compared with other countries, on the constitutionality of the Law of 18 June 2013 giving execution to the agreement, with the cooperation agreement between the Federation, the Communities, the Regions and the Communities’ Commissions on the implementation of Article 3 of the Fiscal Compact and with the Flemish Decree giving assent to that agreement⁴⁰. Interestingly, several actions for annulment that were brought before the Court related to the limitation of parliamentary powers on budgetary decision-making. For example, a number of individual applicants invoked the impairment, by the Fiscal Compact and by the national sources implementing it, of their ability to participate in decisions dealing with budgetary issues precisely because of the marginalization of national parliaments’ prerogatives. Moreover, a member of the Parliament of the German-speaking community in Belgium contested the severe restriction of his duties and rights as an MP regarding budgetary decisions⁴¹. However, all these actions for annulment were declared inadmissible because of the lack of standing of the applicants, who had failed to prove their direct interest in the outcome of the case⁴². Nevertheless, the case is interesting, for two main reasons, despite constitutional identity review and the role of national parliaments not directly being considered by the Court. First, the constitutional

⁴⁰ See Belgian Constitutional Court, Arrêt 62/2016 of 28 April 2016 and the case note by P. Dermine, *La Discipline Budgétaire Européanisée À L'Aune De La Constitution Belge - Obs. Sous C. Const., N° 62/2016, 2016/27, 6655 Journal des Tribunaux* 470 (2016).

⁴¹ See, in detail, P. Gérard & W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse. Belgian Constitutional Court No. 62/2016, 28 April 2016*, 13 *EuConst* 1 (2017), 184.

⁴² Although, in contrast to the case mentioned, typically the scrutiny of this standard by the Constitutional Court has not been very strict: see M. Verdussen, *Justice constitutionnelle* (2012), 169-173.

judges briefly elaborated on the authority of the Parliament in light of the Fiscal Compact. The power of the federal Parliament to decide on the budget (Article 174 Belg. Const.), and its discretion to set the medium-term objective together with other institutions and to vote on relevant international agreements are expressly acknowledged by Constitutional Court in the case. The Court assessed the Fiscal Compact as being in accordance with Article 174 Const.; that is, the treaty does not jeopardise the discretion of the Parliament in the implementation of the budgetary constraints. Second, for the first time in the Court's case law, the constitutional judges referred expressly to the Belgian constitutional identity. Therefore, a Constitutional Court that had never previously elaborated on, or even referred to, the constitutional identity argument and to the limits to constitutional amendments did so in the context of the Euro-crisis, alongside other Courts that had already cited or used these tools. In doing so, the Court confirmed that the discourse on constitutional identity review may be framed within the phenomenon of the "migration of legal ideas"⁴³ and that this crisis has further fostered such a "migration" from one country to another.

When dealing with the attribution by the Fiscal Compact of new competences to the European Commission and to the Court of Justice, the Belgian Constitutional Court outlined new limits as to what the legislature can do in terms of further conferral of powers to institutions under public international law, based on Article 34 Const. The national legislature and the international institutions in question are not given "an unlimited licence" in this regard⁴⁴. The boundary here, according to the vague formula used by the Court in an *obiter dictum*, and mirroring in part Article 4.2 TEU, is represented by "a discriminatory derogation to national identity inherent in the fundamental structures, political and constitutional, or to the basic values of the protection offered by the Constitution to all legal subjects"⁴⁵. The Court failed to clarify the content of the national identity in this case, in part because it decided ultimately that neither the Commission nor the Court of Justice are granted an extended jurisdiction to control and constrain national budgets by

⁴³ See Y. Roznai, *Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea*, 61Am. J. Comp. L. 3 (2013), at 657.

⁴⁴ See Belgian Constitutional Court, Arrêt 62/2016, B.8.7.

⁴⁵ *Ibidem*.

the Fiscal Compact. Some attempts have been made to identify that which the Court did not express, namely the precise meaning of the Belgian national identity. Although the democratic principle and the principle of representative democracy do not stand out clearly on the list, the principle of legality does, and it may in fact play a role in preserving parliamentary powers such that some domains, like tax, are reserved for parliamentary legislation⁴⁶. Hence, according to the case law, the safeguard of Parliament's prerogatives does not appear to be a part of the Belgian national identity at present, but in the future, it may be explicitly included in order to enhance the protection of the principle of legality.

By contrast, in Germany, alleged violations of the democratic principle and the powers of the *Bundestag* not only have formed the basis for the many constitutional challenges and individual complaints on which the Constitutional Court has been requested to judge. The Court itself, in line with its Lisbon ruling of 2009, has deemed the protection of the budgetary powers of the *Bundestag* to be part of the unamendable core of the German Basic Law and to serve as a standard for the constitutional identity review. In its first judgment on the matter, of 7 September 2011, regarding the loan agreement between Greece and the European Financial Stability Facility (EFSF), the German Constitutional Court clarified which standard must be followed to grant the *Bundestag* the power to control and orient the government during the Eurozone crisis⁴⁷. The reasoning of the Court from this judgment onward has been based on the argument of the overall budgetary responsibility of the *Bundestag*, and therefore on the constitutional requirement to keep budgetary powers in the hands of the national parliament. The standard for review was constituted, as usual since the *Maastricht* decision⁴⁸, by Art. 38.1 GG in conjunction with Art. 20.1. and 2 GG, and Art. 79.3 GG.

In the 2011 judgment, the Court held that the fact that the *StabMechG* of 22 May 2010⁴⁹ simply requested the Government to 'try to involve' the *Bundestag*, through its Committee on budget,

⁴⁶ See P. Gérard & W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse*, cit. at 41, 201-204.

⁴⁷ German Constitutional Court, BVerfG, 2 BvR 987/10, 7 September 2011.

⁴⁸ German Constitutional Court, 2 BvR 2134/92, 12 October 1993.

⁴⁹ Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, Euro Stabilisation Mechanism Act.

before issuing the guarantees for the EFSF, led to a violation of the *Bundestag's* power to make decisions on revenues and expenditures with responsibility to the people. People are democratically represented by this institution, which in turn would be deprived by the *StabMechG* of the right to decide, should the Government make the agreement of the *Bundestag* unnecessary in order to issue guarantees. The Government must obtain the consent of this Chamber before it acts. As a consequence of this judgment, the *StabMechG* has been amended, thereby commencing a process of incremental strengthening of the decision-making powers of the *Bundestag* regarding financial procedure.

In its ruling of 28 February 2012⁵⁰, regarding the *Bundestag's* right of participation in the EFSF and particularly in the authorization of extension of the guarantees for the Fund, the Constitutional Court clarified whether, and if so to what extent, a temporary limitation of the rights of MPs to be informed could be permitted. According to the *StabMechG* (Art. 3.3), in situations of particular urgency and confidentiality, the consent to the extension of the EFSF guarantees was to be provided on behalf of the *Bundestag* by a new parliamentary body, the *Sondergremium*, elected from among the members of the Budget Committee. In cases of particular confidentiality, the *Sondergremium* was also informed about the government's operation on the EFSF in the place of the *Bundestag* (Art. 5.7 *StabMechG*). Although the transfer of the right to be informed from the plenary to a minor parliamentary body was not found to be in violation of Art. 38.1 GG, the rights of every MP to be informed can be restricted 'only to the extent that is absolutely necessary in the interest of the Parliament's ability to function.' Consequently, an interpretation of the provision in conformity with the Constitution was required: the right to be informed may only be temporarily suspended for as long as the reasons for keeping the information confidential remain in place. Once they have been overcome, the Government must inform the entire *Bundestag*.

The reasoning used in this decision regarding the right to information was further developed in a subsequent judgment of the German Constitutional Court of 19 June 2012⁵¹. The Court acknowledged that Article 23.2 sentence 2 GG, which obliges the

⁵⁰ German Constitutional Court, 2 BvE 8/11, 28 February 2012.

⁵¹ German Constitutional Court, 2 BvE 4/11, 19 June 2012.

Federal Government to keep the *Bundestag* informed, comprehensively and at the earliest possible time, ‘in matters concerning the European Union’, also applies to international treaties and political agreements negotiated outside the EU legal framework though linked to the European integration. The *Bundesverfassungsgericht* also outlined specific standards of quality and quantity for the information to be transmitted to the *Bundestag* in order to enable the Parliament to contribute effectively to shaping the government’s position (as the Parliament must have a direct influence on it). These standards have been entrenched in the Act on Financial Participation in the European Stability Mechanism (*ESMFinG*) and Law on the Pact of 2 March 2012 on Stability, Coordination and Governance in the EMU, regarding the Fiscal Compact, both adopted on 29 June 2012.

In the latest decisions concerning this ‘saga’, the German Constitutional Court went a step further by aspiring to protect the *Bundestag* against its inaction. For example, in the OMT reference by this Constitutional Court to the Court of Justice of 14 January 2014, the issue of parliamentary passivity was invoked by the (majority) opinion of the Court. According to the Court, it was the inactivity of the parliament (as well as of the government) towards the OMT decision of the ECB that could threaten a violation of the complainants’ constitutional rights as well as the position of the German *Bundestag* invoked by the applicant in the *Organstreit* proceedings⁵².

After the OMT saga had come to an end, following the judgment of the Court of Justice and the final judgment of the *Bundesverfassungsgericht*⁵³, a new chapter began with the second reference for a preliminary ruling issued by the German Court, this time on the matter of quantitative easing⁵⁴. Indeed, in its order of

⁵² See BVerfG, 2 BvR 2728/13, the first question referred for a Preliminary Ruling, § 33.

⁵³ See, respectively, Court of Justice of the European Union, Grand Chamber, Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*, 16 June 2015, ECLI:EU:C:2015:400 and German Constitutional Court, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13, Judgment of 21 June 2016.

⁵⁴ See German Constitutional Court, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, Order of 18 July 2017 and the commentary by M. Goldmann, *Summer of Love: Karlsruhe Refers the QE Case to Luxembourg*, *Verfassungsblog*, 16 August 2017, <https://verfassungsblog.de/summer-of-love-karlsruhe-refers-the-qe-case-to-luxembourg/> and by G. Zaccaroni, *The good, the bad, and the ugly*:

referral, the Court in Karlsruhe once again repeated its usual mantra about the protection of parliamentary powers in the name of the German citizens' right to democratic self-determination and the authority of the Court to ascertain whether EU institutions, in particular the ECB, through their acts have encroached upon the national constitutional identity.

Although in Portugal none of the constitutional challenges brought before the Constitutional Court have concerned parliamentary powers, but rather related to social rights, the Euro-crisis constitutional case law has profoundly contributed to undermining the role of the legislature in the implementation of the rescue package. Being a bailout country from 2011 to 2014, the Portuguese Government and, in turn, the Parliament were forced by the Troika to adopt a series of structural reforms involving serious welfare cuts in exchange for financial assistance. Starting from 2012, when this Court began to declare provisions of the Budget Acts determining pensions and salary cuts for public workers unconstitutional, the Portuguese Constitutional Court resorted to reliance upon supreme constitutional principles against the legislation passed by the Parliament under the auspices of the emergency of the rescue operations and despite the fact that most constitutional challenges had been promoted by parliamentary minorities (sometimes alongside challenges from the President of the Republic and the Ombudsman)⁵⁵. Depending on the case and within a highly divided Court, the principles on which the Court relied to strike down provisions of the Budget Acts were those of proportional equality, of equality *tout court*, and of legitimate expectations, often in conjunction with one another. The economic emergency – according to the Court – does not justify *per se* the overthrow of fundamental principles of a democratic State based

national Constitutional Courts and the EU constitutional identity, in this special issue. Meanwhile, in 2015, and although dealing with the constitutionality of an order for a European Arrest Warrant issued against a US citizen convicted in Italy *in absentia*, thus outside the framework of Euro-crisis law, the German Constitutional Court used the tool of the constitutional identity review once again (BVerfG, 2 BvR 2735/14). This time the Court annulled the order by advancing an interpretation of EU law which complies with the German Constitutional identity and, in particular, with the principle of human dignity.

⁵⁵ For example, judgment 187/2013 decided jointly four constitutional challenges brought before the Court by a variety of actors, the President of the Republic, parliamentary minorities, and the ombudsman, based on individual complaints.

on the rule of law (art. 2 Pt. Const.), particularly when the same cohort, i.e. civil servants and pensioners, is systematically affected year after year by austerity measures by comparison with the less adverse conditions faced by other groups of citizens. Moreover, the public status and working or retirement conditions of an individual do not amount to persistent, or permanent, discriminatory treatment. In particular, according to the Constitutional Court, there was no evidence that the conditions imposed by the MoU and the loan agreement, which the Court recognized as international agreements⁵⁶, did not leave discretion to the Parliament as to their implementation. At the opposite end of the spectrum, the Parliament could have explored alternative avenues to implement the rescue package. This has been the Court's warning since judgment n. 353/2012, which has provided the basis for most declarations of unconstitutionality of the Budget Acts from judgment n. 187/2013 onwards⁵⁷.

The long catalogue of social rights protected by the Portuguese Constitution, and the limits to constitutional amendments of workers' rights, might also have contributed to pushing the Court in this direction, although social rights have not been used as a standard for review (except in judgments 794/2013 and 572/2014). Rather, as noted above, the Court resorted to the supreme principles of the Constitution, which were eventually explicitly linked to Portugal's national (constitutional) identity. In judgment n. 575/2014, the Court finally disclosed its position vis-à-vis Euro-crisis law, in particular EU law in the context of the excessive deficit procedure. In this field – according to the Court – EU law is binding upon Member States only with regard to the objectives set, and not on the national means chosen to reach those objectives. The Court went on to say, though in an *obiter dictum*, that the national Constitution enjoys priority over EU law by relying on

⁵⁶ On the disputed nature of those agreements, see F. Pereira Coutinho, *A natureza jurídica dos Memorandos da "Troika"*, XIII 24/25 Themis 147 (2013).

⁵⁷ See, Portuguese Constitutional Court, judgments 353/2012, 187/2013, 474/2013, 602/2013, 862/2013, 413/2014, 574 and 575/2014 and the case-notes by M. Nogueira De Brito, *Comentário ao Acórdão n.º 353/2012 do Tribunal Constitucional*, 1 Direito & política 108 (2012) and by R. Cisotta & D. Gallo, *Il Tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità ed il rispetto dei vincoli internazionali ed europei*, 7 Diritti umani e diritto internazionale 2 (2013), at 465.

the national identity clause included in the Treaty of Lisbon (art. 4.2 TEU) and that, in the particular field of Euro-crisis law under review, no divergence could be detected. There is, instead, a convergence between constitutional law and EU law, based on the fact that the guiding principles used by constitutional judges to resolve the case law regarding Euro-crisis measures, that is, the principles of equality, proportionality, and protection of legitimate expectations, are at the core of the rule of law and an inherent part of the common European legal heritage, which the EU is also bound to respect. Hence, this case made clear the impact of the Euro-crisis law – especially the budgetary measures implementing the conditions posed in the rescue packages – in making the core of the Portuguese constitutional identity explicit; that is, a constitutional identity which gives precedence to constitutional values and principles other than that of representative and parliamentary democracy. The effect of this series of rulings was ultimately the marginalization of the Parliament, constrained between these constitutional judgments, on the one hand, and the pressure of the executive, on the other hand, to fulfill European and international obligations and reassure the financial markets.

The tensions to which the French constitutional system has been subject during the Euro-crisis have been far less than those observed in the Portuguese context. Perhaps for this reason, the adjudication of the Euro-crisis law has not prompted the *Conseil constitutionnel* to refer to the protection of French constitutional identity in its case law on the Euro-crisis measures. The only, partial, exception has been the judgment of the *Conseil* of 2012 regarding the Fiscal Compact, which nevertheless included no special consideration for the power of the Parliament⁵⁸. The *Conseil* found the agreement to be in compliance with the Constitution but specified that, with respect to the jurisdiction of the Court of Justice of the European Union, such a conclusion had been reached because that Court had not been conferred the authority to adjudicate on the respect of the Fiscal Compact requirements by the French Constitution. Had this not been the case, the extended jurisdiction of the Court of Justice would have amounted to a threat to the essential conditions for the exercise of national sovereignty. Beyond this exceptional case, the constant reference by the *Conseil*

⁵⁸ *Conseil Constitutionnel*, Décision 2012-653 du 9 août 2012, Considérant 30.

to the principle of budgetary sincerity, almost always used as the standard of review when adjudicating the fiscal measures, has been very much consistent with the pre-crisis case law⁵⁹. A series of cases was brought before the *Conseil Constitutionnel* by parliamentary minorities (also) on this ground, although they have never succeeded⁶⁰. For instance, in a *saisine parlementaire* against the Social Security Financing Act of 2014, law n° 2013-1203, a minority of senators and MPs challenged the constitutionality of the law taking into account that, according to the opinion of the *Haut Conseil*, the macroeconomic forecasts on which the Social Security Financing Act was based were insufficiently reliable and, hence, the principle of sincerity had been violated⁶¹. This case could have been an opportunity for the Parliament, through its parliamentary minorities, to use independent information to closely scrutinize the government's fiscal policy, and, if necessary, to challenge its effectiveness. The Constitutional Council, however, dismissed the constitutional challenge. It held that no evidence supported the hypothesis that the Social Security Financing Act would have impaired the achievement of the national objective as to expenditure for health care insurance. Moreover, according to the Constitutional Council, the government during the legislative process tabled an amendment – which was adopted – aimed at reducing the negative impact on public expenditures.

When, on 13 July 2012, the new President of the French Republic, François Hollande, requested the *Conseil constitutionnel* to decide on whether the authorization to the ratification of the Fiscal Compact had to be preceded by a constitutional reform, thus departing from the approach pursued by his predecessor, Sarkozy, to constitutionalize the balanced budget clause, the reasoning of the Court regarding the consequences for parliamentary powers remained very superficial. The *Conseil* considered the constitutionalization of the balanced budget clause unnecessary

⁵⁹ *Conseil Constitutionnel*, Décision no. 2012-658 DC du 13 décembre 2012, para 19.

⁶⁰ See *Conseil Constitutionnel*, Décision no. 2013-682 DC, due 19 décembre 2013; Décisions no. 2014-698 DC and 2014-699 DC du 06 août 2014; and Décision no. 2014-707 DC du 29 décembre 2014.

⁶¹ *Conseil Constitutionnel*, Décision no. 2013-682 DC, 19 December 2013, in particular paras 2-7.

and consequently its inclusion in an organic law sufficient⁶². As a result, the Court only touched upon the protection of the Parliament's budgetary autonomy to say that the implementation of the Fiscal Compact could not be fulfilled in a way that encroached upon the prerogatives of this institution without further specifications. In support of the idea that the Fiscal Compact did not violate parliamentary powers, the Court cited art. 3.2 of this Treaty, providing that the correction mechanism cannot breach the prerogatives of the national parliaments, which, however, appears to be a programmatic provision to be further elaborated upon and implemented at the domestic level by each contracting party⁶³.

In contrast to France, Spain has been one of the very few countries to have constitutionalized the balanced budget clause during the Eurozone crisis (Article 135 Sp. Const.). This choice – also triggered by the unstable financial situation, especially of the Spanish banking sector – has certainly constrained the budgetary autonomy of the Parliament. In fact, a balanced budget requirement had been in force in this country for all public administrations (state, regional and local) well before the Eurozone crisis exploded, although it was not embedded in the Constitution. Law no. 18/2001 (*Ley General de Estabilidad Presupuestaria*) and Organic law no. 5/2001 (*Ley Orgánica complementaria a la Ley General de Estabilidad Presupuestaria*), as subsequently modified, imposed an obligation of a balanced budget for the public sector⁶⁴. After the constitutional reform of 2011, the Constitutional Court explicitly stated that, following the acknowledgment of the principle of a balanced budget in the Constitution, this principle has become a standard of review based on the doctrine of the *ius superveniens*⁶⁵.

⁶² French *Conseil Constitutionnel*, décision n° 2012-653. Art. 34 Fr. Const., provides: 'Social Security Financing Acts shall lay down the general conditions for the financial equilibrium thereof, and taking into account forecasted revenue, shall determine expenditure targets in the conditions and with the reservations provided for by an Institutional Act.' However, as pointed out by G. Carcassonne, *La Constitution*, 11 ed. (2013), §232-233, this provision has always been interpreted simply as fixing a mere objective rather than an immediately enforceable rule.

⁶³ *Conseil Constitutionnel*, décision n° 2012-653, § 25.

⁶⁴ J. García Roca & M. Á. Martínez Lago, *Estabilidad presupuestaria y consagración del freno constitucional al endeudamiento* (2013), at 63-65. See also decision n. 134/2011.

⁶⁵ Spanish Constitutional Court, decision n. 157/2011, 18 October 2011, § 3.

The constitutional amendment process leading to the constitutional entrenchment of the new clause has raised many concerns regarding the respect for Parliament's constitutional prerogatives. From the proposal of the constitutional bill to its publication in the Official Journal (BOE) only thirty-two days elapsed, from the end of August to the end of September 2011⁶⁶. The constitutional bill was examined by means of the urgency procedure and in *lectura única*, i.e. directly debated and adopted by the *plenum* without prior scrutiny by standing committees. The overall majority of the two Chambers agreed on the reform, with the support of the socialist government and of the main opposition party, *Partido Popular*. However, a *recurso de amparo* was brought before the Spanish *Tribunal constitucional* by some MPs from the political group of *Esquerra Republicana-Izquierda Unida-Iniciativa Per Catalunya Verds* against the constitutional amendments which had just passed. In particular, the *amparo*, on the one hand, sought the annulment of the parliamentary resolutions and agreements leading to the constitutional reform's adoption through the urgency procedure and in *lectura única*. On the other hand, the *amparo* contested the use of the ordinary procedure to revise the Constitution (Article 167) instead of the process requested for the total revision of the Constitution or the amendments affecting fundamental rights (Article 168 Sp. Const.), although the constitutional bill was able to impair the rights' protection and to limit the prerogatives of MPs and citizens. The *amparo* was declared inadmissible as, according to the majority of the judges, the governing bodies of the Parliament had rightly applied parliamentary standing orders. The *Tribunal constitucional* simply decided not to engage with the substantive issues at stake in the *amparo*⁶⁷. However, the dissenting opinions of Justice Pablo Pérez Tremps and Justice Luis Ignacio Ortega Álvarez pointed to the missed opportunity for the Court to address for the first time ever the issue of constitutionality of constitutional amendments in the Spanish democratic system, an issue of special complexity and institutional significance that should have deserved much more careful consideration. Should the Court have declared the case

⁶⁶ See F. Balaguer Callejón, *Presentación*, 16 *Revista de derecho constitucional europeo* 17 (2011).

⁶⁷ See *Auto 9/2012*, BOE no. 36/2012, 11 February 2012, p. 152.

admissible, it could not have avoided taking a stance on the powers of the Parliament during the constitutional reform.

Italy also constitutionalized the balanced budget clause in 2012 (Const. Law n. 1/2012)⁶⁸. This decision was triggered by the turbulence in the financial markets, the rise of the spread and the conditions imposed for the financial support by the European Central Bank. In light of the dramatic economic circumstances and despite being, in theory, the key player in the Italian constitutional amendment procedure, according to Art. 138 Const.⁶⁹, the Italian Parliament in fact marginalised itself in the approval of Const. Law 1/2012. The constitutional amendment bill was passed in less than six months, which is a very short timeframe when one considers that two successive parliamentary deliberations by the Houses of Parliament on the same text must take place at intervals of no less than three months after one another, and in three out of four readings the text was approved without 'nays'. Since the entry into force of the constitutional reform of 2012, the Constitutional Court has started to refer more and more often to the compelling interest in having a balanced budget and sound public accounts. Although the new clause could not be officially used as a standard for constitutional review until 2014, constitutional case law has nonetheless been inspired by it being in the background of the Court's reasoning⁷⁰.

⁶⁸ There were, however, academic opinions that considered a balanced budget rule to already be entrenched in the Italian Constitution (see, for example, C. Colapietro, *La giurisprudenza costituzionale nella crisi dello Stato sociale* (1996).

⁶⁹ According to Art. 138 It. Const., constitutional amendment bills are to be approved by each House after two successive votes, at least three months apart from one another, by absolute majority. In this case a confirmative and optional referendum can be requested by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils within three months from the publication of the reform. If the term elapses without a referendum being requested, the constitutional amendment bill enters into force. The same applies if the reform is approved at the second voting by a two-thirds majority of each House.

⁷⁰ For instance, in decision n. 310/2013 the Italian Constitutional Court rejected a challenge of unconstitutionality by using *ad adiuvandum* – although not as the main ground for the decision – new Article 81 Const., not yet in operation in 2013, and Council Directive 2011/85/EU on requirements for the budgetary frameworks of the Member States.

However, at least since the 1990s, and by contrast with its case law of the 1960s and 1970s⁷¹, the Italian Constitutional Court has usually paid close attention to the financial sustainability of its decisions (also in light of the then art. 81.4 Const.). In the landmark judgment no. 455/1990, the Court developed a ‘balancing test’ to accommodate social rights’ protection with the shortage and distribution of fiscal resources⁷². In the background of this reasoning was the idea to enforce the supreme principle of equality among generations in a context where the welfare system was put under stress. Likewise, in the wake of the Euro-crisis, the ‘balancing test’ was used by the Italian Constitutional Court to limit social rights, for example in a case involving the calculation of the pensions of cross-border workers between Italy and Switzerland, it led to the validity of a retroactive legislative act of ‘authentic interpretation’ being upheld, thereby confirming the legitimacy of the Parliament’s choice⁷³.

The actual need for the Court to combine the application of the equality principle (art. 3 It. Const.) with the principle of the balanced budget – new art. 81.1 It. Const. – that could not be immediately used as a standard for review, but was nonetheless entrenched in the Constitution, led the Court to make decisions that have not always appeared very consistent or predictable over time⁷⁴. For instance, provisions of decree-laws adopted during the Eurozone crisis with the aim of redistributing resources among workers and pensioners have been declared unconstitutional on some occasions and have been upheld as being compliant with the Constitution on others. Decree-law no. 78/2010 blocked the salary adjustment mechanism for magistrates and reduced their special allowance as a form of ‘solidarity contribution’, based on the fact that these workers already benefited from high levels of income. The Court considered the reduction of the allowance to be a form

⁷¹ See S. Scagliarini, *La quantificazione degli oneri finanziari delle leggi tra governo, parlamento e Corte costituzionale* (2006); G. Rivosecchi, *L’indirizzo politico finanziario tra Costituzione italiana e vincoli europei* (2007) and M. de Visser, *Constitutional Review in Europe. A Comparative Analysis* (2014), at 315.

⁷² See D. Tega, *Welfare Rights and Economic Crisis Before the Italian Constitutional Court*, 63 *Eur. J. of Social L.* 1-2 (2014).

⁷³ See Italian Constitutional Court, decision n. 264/2012, § 5.3.

⁷⁴ P. Faraguna, *The Economic Crisis as a Threat to the Stability of Law*, 8 *Hague J Rule Law* 2 (2016), at 268.

of taxation and declared it inconsistent with the Constitution because it violated the principle of equality, the principle of the progressive nature of the tax system (art. 53 It. Const.), and the principles of independence and autonomy of the judiciary (arts. 100, 101, 104 and 108 It. Const.)⁷⁵. The invocation of these latter principles is of special importance as the protection of the constitutional guarantees of the judiciary can be seen as a precondition for the enforcement of one of the supreme principles of the Italian Constitution mentioned above, namely the right to defence and to judicial protection. In particular, the breach of the principle of equality relied upon the introduction of a measure that was targeted at a specific group of people – magistrates – whose independence and neutrality also derives from their income, and imposed upon them a curtailment of their living conditions⁷⁶.

One could have expected that this decision would set a precedent for subsequent case law, such as decisions no 241/2012 and no. 116/2013. Instead, the difficulty of striking a balance between financial sustainability and the balanced budget rule with long-standing supreme principles of the Italian Constitution has led to disputable and incoherent developments of the constitutional case law. For example, when the Constitutional Court ruled again on the constitutionality of Decree-law no. 78/2010, the freezing of the salary adjustment mechanism for non-contracted people working in the public sector was not considered a form of taxation and it appeared to be a reasonable sacrifice for the purpose of restoring sound public accounts in the present economic crisis (decision no. 310/2013). In addition, by contrast with decision n. 223/2012, in the case in question, there were no exemptions to be invoked, like the special position of independence of magistrates to be protected in the constitutional system.

Although the Italian Constitutional Court has never developed a line of reasoning that has embedded the protection of parliamentary prerogatives into the supreme principles of the Constitution, the decisions just examined showed a rather deferential approach by the Court towards the Parliament. The

⁷⁵ Italian Constitutional Court, decision n. 223/2012, § 11.5.

⁷⁶ Judgment no. 223/2012, in relation to which see D. Piccione, *Una manovra governativa di contenimento della spesa «tra il pozzo e il pendolo»: la violazione delle garanzie economiche dei magistrati e l'illegittimità di prestazioni patrimoniali imposte ai soli dipendenti pubblici*, 55 Giur. Cost. 5 (2012), at 3353.

Court affirmed that it is for the Parliament, in the exercise of its legislative discretion, to decide to give precedence to the fundamental needs of the economic policy rather than to competing constitutional values⁷⁷.

However, a *revirement* suddenly appeared in the Court's case law, which this time resulted in a shock for both the Parliament and the Government⁷⁸. The Court declared unconstitutional the article of decree-law 201/2011 providing for the temporary block to the inflation rate, only in 2012 and 2013, of the adjustment of public pensions that were at least three times beyond the minimum level of pension established by law. The decision was based on the principle of equality in combination with the right of pensioners to a remuneration commensurate with the quantity and quality of their work and capable of ensuring a dignified existence (art. 36.1 It. Const.) and of assuring adequate means for their needs and necessities (art. 38.2. it. Const.). In particular it was the threshold chosen by the decree-law – three times beyond the minimum level of pension – that was considered to be irrational and inadequately justified. What is more striking, however, is the fact that the Court's reasoning does not even mention the new principle of the balanced budget clause, which had been a constant reference featured in previous cases, despite not forming a standard of review.

This judgment has disregarded the budgetary autonomy of the Parliament (and the Government) and has forced the budgetary institutions to find enough resources (billions of euro were mobilized through decree law 65/2015⁷⁹) to compensate pensioners for the illegitimate block of the pension adjustment, which measure was adopted during the most acute phase of the speculative attack against Italy. In an outcome that very much resembles some of the decisions of the Portuguese Constitutional Court, this judgment again raises several doubts about the ambivalent attitude shown by the Italian Constitutional Court in its adjudication of the Euro-crisis

⁷⁷ See Italian Constitutional Court, decisions n. 304 and 310/2013, and 154/2014, § 5.3, 10/2015.

⁷⁸ See Italian Constitutional Court, decision n. 70/2015, § 5. Among the many critical case notes, see A. Barbera, *La sentenza relativa al blocco pensionistico: una brutta pagina per la Corte*, 2 Riv. AIC 1 (2015), 1-5 and C. Bergonzini, *The Italian Constitutional Court and Balancing the Budget: Judgment of 9 February 2015, no. 10 and Judgment of 10 March 2015, no. 70*, 12 EuConst. 1 (2016), at 177.

⁷⁹ Upheld in its constitutional validity by decision no. 250/2017.

law, where the balance struck between constitutional principles in the different cases appears somewhat unpredictable. As a consequence, the treatment that the Constitutional Court affords to the Parliament as a budgetary authority is equally unpredictable, although it appears that when social rights are limited through a general legislative intervention, without a particular target of workers and pensioners, and is temporary, the Court is more keen to uphold the validity of the legislation⁸⁰.

4. Parliaments as a second-order concern for Constitutional Courts in the Euro-crisis

The case law of many Constitutional Courts on Euro-crisis measures has been determined in the light of supreme principles of the Constitutions, most often in line with pre-crisis decisions that had explicitly or implicitly defined the national constitutional identity. Concerns for the powers of national parliaments in the crisis have rarely surfaced in the decisions of these Courts, even if a reference to them was made in the constitutional challenge or complaint that reached the Court.

The judgments of the Portuguese Constitutional Court, in particular in 2013 and 2014, possibly represent the most evident example in the adjudication of the Euro-crisis law of a clear lack of consideration by a Court for the effects of its rulings on the Parliament. Some justifications for this aspect of the Portuguese Court's case law may nonetheless be provided. In the Portuguese constitutional system, it appears that many institutional actors were equally concerned by the challenged measures; first and foremost parliamentary minorities, the ombudsman and the President of the Republic, who repeatedly brought cases before the Constitutional Court. Further, before striking down parts of the Budget Acts, in 2012 the Constitutional Court had warned the Parliament not to adopt budgetary provisions which introduced unreasonable discriminations against public workers and pensioners, yearly permanent reductions in public wages and pensions, or retroactive measures. Those provisions were unconstitutional and the Court, in the exercise of its powers, under art. 278.4 Pt. Const., decided to suspend the effects of the declaration of unconstitutionality in order

⁸⁰ See Italian Constitutional Court, decision n. 124/2017.

to not affect the ongoing execution of the budget in the fiscal year. Furthermore and, perhaps, most importantly, the constitutional challenges and complaints that the Court has been asked to address were focused on the violation of social rights. By contrast, the infringement of the constitutional prerogatives of parliaments has been never invoked as a standard for review, although there were pre-crisis precedents in which the Court had elaborated on arguments comparable to those used by the German Constitutional Court on the Parliament.

The Portuguese Constitutional Court claimed that the Parliament, in light of the avenues provided by the MoU, could have used less restrictive and more proportionate and equitable measures to reduce public spending. The Court failed to take into account the context in which the Parliament was operating, in the extraordinary circumstances of a bailout and the periodical review missions of the Troika representatives. The protection of parliamentary powers was not discussed, and the Court has not always shown a very cooperative approach towards the legislature either. For example, in judgment n. 413/2014 the Portuguese Constitutional Court held that a further reduction of public salaries, provided for by the Budget Act 2014, was inconsistent with the principle of equality, but declined to give its judgment retroactive effect, and the wage cuts were annulled *ex nunc* starting from the date of the ruling. Following this ruling, the Portuguese Parliament referred several questions to the Court seeking clarification on the temporal effects of this judgment. Some practical aspects of the implementation of the Court's decision regarding the quantification of the holiday allowance and the timing for paying it remained unclear in the view of the Parliament, which was responsible for implementing the ruling. However, the Court stated that no ambiguities in the implementation of the ruling derived from the text of the judgment itself. The Constitutional Court is not a legislature and it is beyond its mandate to define the aspects of the decision requested, which concern the administrative competence of the Government and its exercise of rule-making powers. Nor, according to the Court, could the principle of inter-institutional cooperation be invoked by the Parliament to this end. Thus, the doubts remained unresolved and the judgment proves how difficult the relationship between the Parliament and the Constitutional Court can be during the Euro-crisis.

By contrast with the case law of the Portuguese Court, the French *Conseil constitutionnel* has not directly undermined the budgetary authority of the Parliament, but it certainly has not exerted itself to protect parliamentary powers either. Rather, the *Conseil* has determined matters in the government's favour so long as the principle of sincerity, which has shaped the constitutional case law since 2000s, is preserved. This outcome is consistent with the French form of government and with the system of constitutional review of legislation⁸¹. Thus, the options for the non-constitutionalization of the balanced budget clause (décision n° 2012-653), for the inclusion of the medium-term objective in ordinary legislation, specifically in the Programming Act (décisions n° 2012-658), and for the non-binding effects of the opinions of the *Haut Conseil des finances publiques* (décisions n° 2013-682 and n° 2014-699), are all signs of the Court's will to permit the government a wide margin of manoeuvre in the economic governance. The *Conseil constitutionnel* had the opportunity to take a stance in favour of the protection of parliamentary powers, for instance when parliamentary minorities claimed that the fiscal measures advanced by the government were based on unreliable economic sources and consequently that the Parliament had been asked to make decisions on the basis of misrepresented information. However, without elaborating much, the Court concluded that the principle of sincerity had been respected, while occasionally considering some provisions to be unconstitutional on different grounds.

It is more difficult to assess whether and if so to what extent the Spanish and the Italian Constitutional Courts took the Parliament's position into account when adjudicating on Euro-crisis law, despite usually being quite deferential towards the legislature. Certainly in both cases these Courts were not directly requested to decide on the matter of the Parliament's budgetary autonomy, with the partial exception of the Spanish case on the constitutionalisation of the balanced budget clause, which the Court declared inadmissible.

⁸¹ As A. Stone Sweet, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective* (1992), 140-191, points out, only on a few – though significant – occasions, the Constitutional Council has ruled against legislation implementing governmental programmes, for instance when a new party assumed power, like the socialist party under the leadership of President François Mitterand in 1981.

The self-restraint of the Spanish Constitutional Court in the adjudication of Euro-crisis law is clearly shown in *Auto* 113/2011. This case, decided upon a preliminary reference of constitutionality, dealt with a very complicated issue in Spain, namely rights protection in the event of mortgage eviction (Articles 9.3, 24.1 and 47 Sp. Const.), which is a problem affecting thousands of families as a consequence of the financial crisis. According to Spanish law, if a contractual term in a mortgage is unfair and illegal, compensation may be granted, but in a separate proceeding from the mortgage enforcement proceeding, which forces the owners to move out of their house in any event. In other words, the court in charge of the enforcement proceedings cannot grant interim relief. The Constitutional Court declared the preliminary reference inadmissible as the order of referral, on the one hand, was too generic and abstract for the Court to evaluate whether the challenged provisions were really relevant to the main proceedings, and on the other hand, it proposed an alternative regime. In this regard, the majority of the Constitutional Court found the order of referral to go beyond its remit, as an ordinary judge cannot invade the competence of the Parliament by putting forward a new legislative scheme and nor can constitutional judges be asked to assess the validity of this new (judicial) solution. Decisions on the Code of Civil Procedure are matters for the legislative power alone, and therefore, the issue was treated as a ‘political question’. Although to a significant extent it reached a disputable conclusion on the ground of the protection of the contested rights and of the compliance with EU law⁸², in this case the Constitutional Court adopted a very deferential stance – perhaps too deferential – towards the Parliament, which, however, had failed to update the legislation on mortgages according to the new financial situation.

Therefore, the Spanish constitutional case law on the Euro-crisis measures has not aimed to protect or strengthen parliamentary powers directly or specifically, but has had the effect of preserving legislative discretion in general, in particular the choices made by both the Government and the Parliament before or in the aftermath of the crisis, by means of declarations of

⁸² Two years later the Spanish legislation was found to be in breach of Directive 93/13/CEE, regarding unfair terms in consumer contracts, by the Court of Justice of the European Union (case C-415/11, *Mohamed Aziz*).

inadmissibility and of interpretations in conformity with the Constitution.

In many respects, when considering the outcomes of constitutional case law in relation to the Parliament, the position of the Italian Constitutional Court on the Euro-crisis law has been similar to that of the Spanish Court. However, since 2012 the position of the Italian Constitutional Court has been much more ambivalent. Indeed, three different types of reaction of the Court towards Euro-crisis law have been detected: deference, resistance and correction⁸³. In a few cases, the Italian Constitutional Court declared legislative provisions dealing with pension and allowance cuts unconstitutional (e.g. judgment n. 223/2012), for example in the name of the principle of equality and of the need to protect the independence of the judiciary through the level of its salary. Similarly contested has been the judgment of the Italian Constitutional Court n. 70/2015 that annulled – to the benefit of the greatest majority of pensioners – the block of the pension adjustment to the inflation rate in 2012 and 2013 and hence forced the political authorities to give billions of euro back to pensioners in an effort to redistribute resources, which would usually result from a political choice rather than from the decision of a Court.

The Italian Constitutional Court has to cope with the retroactive effects of the declaration of unconstitutionality provided by the combined reading of Art. 136 It. Const. with Art. 30.3 of Law 87/1953 and until very recently it had seldom applied those techniques which allow it to split the content of a declaration of unconstitutionality from its effects. This is why the Italian Constitutional Court, with a few remarkable exceptions, has usually preferred to uphold the validity of the norms under review during the Eurozone crisis, being conscious of the drawbacks of its judgments for fiscal policy and people's legitimate expectations. However, in order not to overstep the powers of the budgetary authorities, in judgment n. 10/2015 – although the Court considered the levy of the extra corporate income taxation from oil enterprises, established five years prior by Decree-law n. 112/2008, unconstitutional – it constrained the validity of the judgment's effects, from its publication onward, i.e. only *pro futuro*. The Court

⁸³ M. Dani, *Il ruolo della Corte costituzionale italiana nel contesto della governance economica europea*, 32 *Lavoro e diritto* 1 (2018), at 147.

justified this decision at length and it is clear that reasons based on the new constitutional balanced budget principle and the obligation of financial sustainability played a role. Otherwise the State would have been obliged to compensate oil companies for the illegitimate taxation which had occurred over the previous seven years. This is why judgment n. 70/2015, also on this ground, came as a surprise. The Court adopted a completely different approach compared to decision n. 10/2015. It did not use the tool applied in the previous judgment, namely postponing the effect of judgments *ex nunc*, so as to limit the institutional and financial impact of the case law, which eventually it did a few months later in judgment 178/2015⁸⁴. It is clear, however, that, behind these shifts in the Italian constitutional case law, considerations of social justice and fairness in a period of crisis prevail. This helps explain why, despite the declaration of unconstitutionality, oil companies were not refunded while pensioners with a relatively low income were.

It appears that in the difficult accommodation of traditional and new constitutional principles, where the balanced budget clause is now in operation but was not a standard for review in these cases (as it was not in force at the time the contested legislation was adopted), the role of the Parliament in the Euro-crisis is not certainly the Court's first concern. The power and the discretion of the legislature in fiscal decisions features in the case law incidentally, and the protection of the democratic principle through the Parliament has never been used as a standard of review to resolve a case.

However, as the two cases decided by the Polish Constitutional Court on Euro-crisis law demonstrate, even where the protection of the Parliament's budgetary powers was invoked in the challenge, the Court either dismissed the case on procedural grounds or determined it on a different ground. In the end, no judicial protection of parliamentary prerogatives was ensured despite the fact that the Court could have ruled on the issue. The same holds true in the Belgian case, where the actions for annulment were declared inadmissible and, yet, the Constitutional Court referred to the national constitutional identity without further elaborating on it and certainly did not emphasise the issue

⁸⁴ The latter judgment, however, had to do with a case of *illegittimità costituzionale sopravvenuta* (supervening unconstitutionality).

of the marginalization of parliamentary prerogatives, which instead had been invoked by the applicants.

The only patent exception in this landscape of constitutional case law is represented by the judgments of the German Constitutional Court. However, even in this case, is the *Bundestag* the primary concern of the Court in the adjudication of the Euro-crisis law? Through its many judgments the *Bundesverfassungsgericht* has developed a paternalistic stance toward the Parliament that, in the view of the Court, has not proven to be able to defend its own budgetary powers in the wake of the crisis, and this is of concern because the political rights of citizens to be represented by the Parliament are undermined. The protection of the Parliament counts because it amounts to an indirect protection of the voters. From the OMT reference onwards it has become even clearer that the German Constitutional Court does not safeguard the budgetary powers of the *Bundestag* for the sake of protecting the Parliament as an institution, but just because it is the instrument for the exercise of democratic powers by citizens. The *Bundesverfassungsgericht* has always considered the democratic principle and the effective representation of citizens through the *Bundestag* as a non-negotiable value entrenched in the Basic Law alongside other supreme principles. Therefore, as soon as Parliament's inactivity – against the ECB decisions on the OMT and on the quantitative easing – is challenged as a violation of the democratic principle, the *Bundestag* can easily become the 'victim' of the German constitutional case law that once glorified it. The view of the German Court blaming the Parliament for the (unspecified) unconstitutionality by omission goes in this direction. Furthermore, by linking the attempt to overturn the Parliament's budgetary prerogatives to the possibility of carrying out the constitutional identity review, the German Constitutional Court appears, in the end, to actually have strengthened its own powers, by enlarging its scope of intervention. Indeed, the adjudication of legislative omissions in constitutional case law is commonly perceived in itself as problematic because it affects the role of Constitutional Courts as a "positive" or "negative" legislator⁸⁵. By

⁸⁵ See J.L. Requejo Pagés, *The problems of legislative omission in constitutional jurisprudence*, XIV Conference of Constitutional Courts of Europe, Vilnius - May 2008, http://www.confueconstco.org/reports/rep-xiv/report_Spain_en.pdf

reviewing those omissions and possibly compelling the Parliament to act on the ground of the German constitutional identity that is, in this case, a purely judicial creation, the Constitutional Court may have gone one step too far in empowering itself⁸⁶.

5. Conclusion

This article concludes that while the Eurozone crisis has pushed Constitutional Courts to carry out an explicit or implicit constitutional identity review, in particular in response to the most controversial Euro-crisis measures⁸⁷, this has not been accompanied by an increasing judicial protection of parliamentary prerogatives, with the patent exception of Germany. In this country, in part because of its stable financial situation and strong economy, a potential clash between the principle of representative democracy and other supreme principles has not surfaced.

The number of complaints that, by invoking a violation of parliamentary prerogatives by Euro-crisis measures, could have led Constitutional Courts in other Member States to also establish a judicial safeguard to the budgetary authority of the legislature has been remarkable. Preferably in compliance with the pre-crisis constitutional case law, however, Constitutional Courts have given precedence and priority to other constitutional principles – equality, independence of the judiciary and judicial protection, sincerity, and balanced budget – that shape national constitutional identities rather than the democratic principle. As a consequence, Parliaments have been a second-order concern for most Constitutional Courts in the aftermath of the Eurozone crisis and, when they have been protected, this has occurred because such protection was instrumental to safeguard other primary goods and principles.

At the same time, the Court that, aiming to preserve the national constitutional identity, has made the protection of parliamentary powers a *mantra* in its Euro-crisis constitutional case law, namely the German Constitutional Court, has been criticized for its position. And the critiques even came from within the Court.

⁸⁶ See the dissenting opinions of Justice Lübke-Wolff and Justice Gerhardt on the Order of the Second Senate of 14 January 2014, - 2 BvR 2728/13 and others.

⁸⁷ On this point, see M. Dani, *National Constitutional Courts in supranational litigation*, cit. at 14, 208-211.

The OMT order of referral to the Court of Justice was not unanimously adopted and was seen as an attempt by the Court to overstep its role. By contrast with the majority view, the dissenting opinion of Justice L ubbe-Wolff claimed that ascertaining whether the federal inaction on the OMT violated the *Bundestag*'s prerogatives amounted to a violation 'of judicial competence under the principles of democracy and separation of powers'.⁸⁸

⁸⁸ See in detail M. Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, 10 *EuConst* 2 (2014), at 281.

III. RECONCILING IN CONSTITUTIONAL ADJUDICATION: RULES OF ENGAGEMENT IN THE COMPOSITE EUROPEAN CONSTITUTION

FUNDAMENTAL RIGHTS PROTECTION IN THE EU:
THE ECJ'S DIFFICULT MISSION TO STRIKE A BALANCE
BETWEEN UNIFORMITY AND DIVERSITY

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Abstract

Over the past few years, the Court of Justice of the European Union (ECJ) case law on fundamental rights protection has become increasingly differentiated, as the Luxemburg court often claims the “last word” when it comes to fundamental rights protection in the European Union (EU). On the other hand, member states’ constitutional courts, too, are eager to keep the final say in EU-related fundamental rights cases. This not only threatens the supremacy of EU law, but also challenges its uniform interpretation and application. To avoid conflicts of jurisdictions, the ECJ should adopt a margin of appreciation concept like the one developed by the European Court of Human Rights or like the Swiss Federal Supreme Court’s approach of varying judicial scrutiny towards cantonal courts. This would enable the ECJ to strike a balance between uniformity and diversity when it comes to fundamental rights protection in the EU.

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1. Introduction

“Le droit national reste [...] le domaine réservé des juridictions nationales et la Cour se concentre sur le droit de l’Union, pour que celui-ci soit interprété et appliqué de façon uniforme dans tous les États membres.”¹ This is how the former President of the European Court of Justice (ECJ), *Vassilios Skouris*, on a conference back in 2014, described his vision of dividing responsibilities between national courts and the Court of Justice of the European Union (ECJ) with regard to the preliminary reference procedure. Reflecting about the consequences of the ECJ’s *Melloni* judgment, the current President of the ECJ, Koen Lenaerts, pointed out that European Union (EU) member states, on the one hand, had to respect the primacy of EU law even over national constitutional law, while, on the other hand, EU law had to leave room for protecting the member states’ constitutional identity as well as for diverging national standards, even when EU law is implemented.² However, it remains unclear what these statements mean for the constitutional adjudication in the EU and the position of the ECJ towards national constitutional courts, in particular when it comes to fundamental rights protection. Over the past few years, ECJ case law in the field of fundamental rights protection has become increasingly differentiated, with the ECJ claiming the “last word” when it comes to fundamental rights protection in the EU. On the other hand, member states’ constitutional courts, too, are eager to keep the final say in EU-related fundamental rights cases, which not

¹ V. Skouris, *Speech*, in U. Neergaard & C. Jacqueson (eds.), *Proceedings: Speeches from the XXVI FIDE Congress, Copenhagen 2014* (2014), 112, 123; Translation: “National law remains the exclusive domain of the national courts and the ECJ concentrates on EU law in order to ensure that this is interpreted and applied uniformly in all member states.”

² K. Lenaerts, *Kooperation und Spannung im Verhältnis von EuGH und nationalen Verfassungsgerichten*, *EuR* 3, 27 (2015).

only threatens the primacy of EU law, but also challenges its uniform interpretation and application.

This article explores the ECJ's difficult mission to strike a balance between uniformity and diversity when it comes to fundamental rights protection in the EU, analyzing both the ECJ's and the national constitutional courts' positions on the applicability of the EU Charter of Fundamental Rights (CFR) and of national fundamental rights. It will be argued that both positions, basically, are incompatible with each other, so that potential conflicts can only be solved by means of constitutional dialogue and mutual consideration. For this purpose, the article will examine how other courts facing a wide range of political, social and cultural diversities deal with these challenges and in what way their solutions might be adopted to the EU. In this context, the *margin of appreciation* doctrine developed by the European Court of Human Rights (ECtHR) and the Swiss Federal Supreme Court's (SFSC) approach of varying judicial scrutiny towards cantonal courts in certain cases can serve as a role model for a consistent approach of the ECJ towards national constitutional courts and their desire to preserve diversity in the EU. The ECtHR's and the SFSC's approaches must be studied carefully to figure out the criteria suitable for the development of an ECJ *margin of appreciation* doctrine which allows for a reasonable constitutional adjudication in the EU. Conversely, it will be argued that the principle of discretion can also be applied in favor of the ECJ, with national constitutional courts reducing their intensity of scrutiny towards the ECJ.

2. Striving for uniformity: The ECJ's approach

One of the main features of EU law is its primacy over national law, which, along with its direct effect, guarantees the uniform application of Union law in all EU member states. Back in 1964, in its landmark *Costa v. E.N.E.L.* judgment, the ECJ decided that Community law had primacy over national law,³ demanding that contradicting national law be "disapplied". This principle shapes the relationship between EU law and national law to this day. In *Internationale Handelsgesellschaft*, the ECJ stressed that in order to guarantee the uniformity and efficiency of Community

³ ECJ, C-6/64, *Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, p. 1251, 1270.

law, Community law prevailed also over national constitutional law,⁴ which means that the primacy of EU law is “absolute” and that national fundamental rights can no longer be applied if they contradict EU law. This is of particular importance, as EU competences have significantly increased over time, enabling the Union to adopt legal norms in a variety of fields. With the entering into force of the Lisbon Treaty in 2009, the CFR became part of EU primary law, prevailing over contradicting national fundamental rights. However, Art. 51(1) CFR, in accordance with the ECJ case law developed in the cases *Wachauf*,⁵ *ERT*⁶ and *Annibaldi*,⁷ states that the CFR is binding on the member states only when they are implementing Union law. In its *Åkerberg Fransson* judgment, the Court ruled that EU fundamental rights are applicable “in all situations governed by European Union law, but not outside such situations”⁸. The Court continued that “the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter”⁹, whereas “where, on the other hand, a legal situation does not come within the scope of European Union Law, the Court does not have jurisdiction to rule on it”¹⁰. Following the ECJ’s wide interpretation of Art. 51(1) CFR, the Charter is also applicable in situations with little connection with EU law. Subsequent decisions like *Hernández*,¹¹ in which the Court tried to clarify and circumscribe its approach, have changed little in this regard, especially since the Court, in its latest decisions, has returned to its position taken in *Åkerberg Fransson*.¹²

The impact of the wide applicability of the CFR on the fate of national fundamental rights was further intensified by the ECJ’s position in the *Melloni* case, the consequence of which is that national fundamental rights can coexist with EU fundamental rights and supplement them only as long as the effective

⁴ ECJ, C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para. 2 et seq.

⁵ ECJ, C-5/88, *Wachauf*, ECLI:EU:C:1988:321, para. 19.

⁶ ECJ, C-260/89, *ERT*, ECLI:EU:C:1991:254, para. 43.

⁷ ECJ, C-309/96, *Annibaldi*, ECLI:EU:C:1997:631, para. 21 et seq.

⁸ ECJ, C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:280, para. 19.

⁹ ECJ, C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:280, para. 20.

¹⁰ ECJ, C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:280, para. 21.

¹¹ ECJ, C-198/13, *Hernández*, ECLI:EU:C:2014:2055, para. 37; s. also EJC, C-206/13, *Siragusa*, ECLI:EU:C:2014:126, para. 24 et seq.

¹² Cf. ECJ, C-218/15, *Paoletti and Others*, ECLI:EU:C:2016:748, para. 13 et seq.

application of EU law is not affected.¹³ The *Melloni* decision was a clear sign of the ECJ's strive for a uniform application of EU law, leaving little space for the application of national fundamental rights even in cases with a very loose connection to EU law, which, in the long run, could threaten the standing of national constitutional courts.¹⁴

However, it remains to be seen if the ECJ will really stick to *Åkerberg Fransson* and *Melloni*.¹⁵ In the *Taricco II* case, the ECJ, after a preliminary reference by the Italian Constitutional Court asking for clarification on the ECJ's rather robust and harsh *Taricco I* decision,¹⁶ recently ruled that Art. 325 TFEU did not require the disapplication of national provisions in cases in which such a disapplication would result in an infringement on the supreme principles of a member state's constitutional identity.¹⁷ This shows that the ECJ, in spite of *Åkerberg Fransson* and *Melloni*, does not aim at fully marginalizing national fundamental rights, but is rather ready to accept a higher national standard of protection at least under certain conditions without, however, giving up the general principle of primacy of EU law.¹⁸ All in all, *Åkerberg Fransson* and *Melloni* seem to be watered down at least slightly by *Taricco II*.¹⁹

¹³ B. De Witte, *Art. 53 – Level of protection*, in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.) *The EU Charter of Fundamental Rights* (2014), para. 53.27.

¹⁴ Cf. R. Streinz, *Streit um den Grundrechtsschutz? Zum Grundrechtsschutz in der Europäischen Union nach den Urteilen des EuGH in den Fällen Åkerberg Fransson und Melloni und des BVerfG zur Antiterrordatei*, in D. Heid, R. Stotz & A. Verny (eds.), *Festschrift für Manfred A. Daus zum 70. Geburtstag* (2014), 429, 442; C. Franzius, *Zwischen Selbstbehauptungen und Selbstbeschränkungen der Rechtsordnungen und ihrer Gerichte*, *ZaöRV* 75 383, 400 (2015); F. Vecchio, *I casi Melloni e Akerberg: il sistema multilivello di protezione dei diritti fondamentali*, *Quaderni costituzionali*, 454, 456 (2013); P. Hallström, *Balance or Clash of Legal Orders – Some Notes on Margin of Appreciation*, in J. Nergelius & E. Kristoffersson (eds.), *Human Rights in Contemporary European Law* (2015), 59, 71.

¹⁵ On the debate cf. C. Peristeridou & J. Ouwerkerk, *A Bridge over Troubled Water – a Criminal Lawyer's Response to Taricco II*, *VerfBlog* 12/12/2017, <http://verfassungsblog.de/a-bridge-over-troubled-water-a-criminal-lawyers-response-to-taricco-ii/> (accessed 4 January 2018).

¹⁶ ECJ, C-105/14, *Taricco and Others* ("*Taricco I*"), ECLI:EU:C:2015:363.

¹⁷ ECJ, C-42/17, *M.A.S. and M.B.* ("*Taricco II*"), ECLI:EU:C2017:936, para. 62.

¹⁸ K. Wegener, *Vorhang zu und alle Fragen offen? – Zum Verhältnis von nationalem Verfassungsrecht und unmittelbar anwendbarem Unionsrecht nach „Taricco II“*, *JuWiss* 143-2017 (accessed 8 January 2018).

¹⁹ Cf. D. Burchardt, *Belittling the Primacy of EU Law in Taricco II*, *VerfBlog*, 7/12/2017, <http://verfassungsblog.de/belittling-the-primacy-of-eu-law-in->

3. Challenging uniformity: National constitutional courts and their desire to uphold diversity

Since the EU is not (and perhaps will never be) a state, member states' constitutional courts generally refuse to accept the concept of "absolute" primacy of EU law over national law, claiming that primacy of EU law is both granted and limited by national constitutional law. Most prominently, the German Federal Constitutional Court (FCC) that had developed its *Solange II* doctrine²⁰ of judicial self-restraint back in 1986 insists that any transfer of sovereign powers to the EU is itself limited by the "constitutional identity" ('Verfassungsidentität') of the German state,²¹ which means that EU law must not violate national fundamental rights that shape this constitutional identity and that the FCC itself retains the "last word" with regard to the competences of the EU and a possible *ultra vires* review of EU acts. Against this backdrop, it was not surprising that the FCC reacted very harshly to the ECJ's *Åkerberg Fransson* and *Melloni* judgments. In its *Antiterrordatei* decision, the German Court claimed that EU fundamental rights were not applicable, because the Counter-Terrorism Database Act and the activities carried out on its basis were no implementation of Union law within the meaning of Art. 51(1) CFR, since the connection with EU law was too weak.²² In the FCC's view, the ECJ's decision in *Åkerberg Fransson* did not challenge this conclusion, since it "must not be read in a way that

taricco-ii/ (accessed 8 January 2018); M. Bassini & O. Pollicino, *Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome*, VerfBlog, 5/12/2017, <http://verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/> (accessed 8 January 2018); P. B. Donath, *EuGH zum Verhältnis von EU-Recht und nationalem Recht: Unionsrecht hat nicht immer Vorrang*, Legal Tribune Online, 5 December 2017, <https://www.lto.de/recht/hintergruende/h/eugh-urteil-c4217-vorrang-gesetz-europaeisches-nationales-recht-europa-eu-union/> (accessed 8 January 2018); D. Sarmiento, *To bow at the rhythm of an Italian tune*, 5 December 2017, <https://despiteourdifferencesblog.wordpress.com/2017/12/05/to-bow-at-the-rhythm-of-an-italian-tune/> (accessed 8 January 2018); B. Budinska/Z. Vikarska, *Judicial dialogue after Taricco II: who has the last word, in the end?*, EU Law Analysis, 7 December 2017, <https://goo.gl/dE279s> (accessed 8 January 2018).

²⁰ BVerfGE 73, 339, 375 et seq. – *Solange II*.

²¹ BVerfGE 73, 339, 375 et seq. – *Solange II*; cf. also BVerfGE 89, 155, 187 et seq. – *Maastricht*; BVerfGE 123, 267, 351 et seq. – *Lissabon*; BVerfGE 126, 286, 302 – *Honeywell*.

²² BVerfGE 133, 277, para. 88 et seq. – *Antiterrordatei*.

would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the Member States [...] in a way that questioned the identity of the Basic Law's constitutional order"²³. In its press release on the decision, the German Court emphasized that it acted on the assumption that the ECJ's reasoning in *Åkerberg Fransson* was based on the distinctive features of the particular case and that it expressed no general view.²⁴ Without being a "threat of war" against the Luxemburg Court,²⁵ the FCC's *Antiterrordatei* decision constitutes a clear warning signal towards the ECJ,²⁶ with the FCC, nonetheless, seeming to accept the application of the Charter on national provisions determined by EU law.

Another example of the FCC's desire to uphold diversity in the field of fundamental rights protection is its 2015 decision on the European Arrest Warrant.²⁷ On this occasion, the German Court undertook an "identity control" ('Identitätskontrolle') over the implementation of a European Arrest Warrant, i.e. in a case fully covered by EU law, where, in principle, there would have been no space for the application of national fundamental rights. By means of its "identity control", the FCC indirectly reviewed the EU Framework decision itself, applying the German standard of fundamental rights protection on EU secondary law,²⁸ which is widely regarded as a modification or even partial withdrawal of the FCC's *Solange II* doctrine²⁹ of judicial self-restraint.³⁰ This

²³ BVerfGE 133, 277, para. 91 – *Antiterrordatei*.

²⁴ FCC, Press Release No. 31/2013 of 24 April 2013.

²⁵ Assuming a harsh threat towards the ECJ, however, M. Steinbeis, *Antiterrordatei-Urteil: Fäusteschütteln in Richtung Luxemburg*, *VerfBlog*, 24/04/2013, <http://verfassungsblog.de/antiterrordatei-urteil-fausteschutteln-in-richtung-luxemburg/> (accessed 19 October 2017)

²⁶ J. Schwarze, *Die Wahrung des Rechts durch den Gerichtshof der Europäischen Union*, *DVBl.*, 537, 541 (2014); ähnlich N. Lazzerini, *Il contributo della sentenza Åkerberg Fransson alla determinazione dell'ambito di applicazione e degli effetti della Carta dei diritti fondamentali dell'Unione Europea*, *Rivista di diritto internazionale* 96, 883, 898 (2013); F. Fontanelli, *National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?*, *HRLR* 14, 231, 262 et seq. (2014).

²⁷ BVerfGE 140, 317 – *Europäischer Haftbefehl II*.

²⁸ BVerfGE 140, 317 para. 51 et seq – *Europäischer Haftbefehl II*.

²⁹ BVerfGE 73, 339, 375 et seq. – *Solange II*.

³⁰ D. Burchardt, *Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 („Solange III“ / „Europäischer Haftbefehl II“)*, *ZaöRV* 76, 527,

demonstrates that the FCC is not willing to give in to the ECJ's strive for creating a uniform standard of fundamental rights protection in the EU.³¹

The Spanish Constitutional Court, in its 2014 *Melloni* decision, stressed that the EJC judgment in the *Melloni* case was "of great use", but not a binding decision,³² accepting the ECJ's criteria, but only on the grounds of the Spanish constitution.³³ This shows that the Spanish Constitutional Court, too, seeks to defend national fundamental rights against the influence of the CFR and its unifying effects.

Last but not least, also the UK Supreme Court expressed its displeasure with the *Åkerberg Fransson* and *Melloni* judgments, emphasizing in its 2014 *HS2* decision that the UK constitution or common law may contain "fundamental principles, [...] of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation"³⁴, so that the primacy of EU may face certain constitutional limits. Some weeks before the *HS2* judgment was released, Supreme Court Judge *Lord Mance*, publically, had agreed with the FCC's

543 (2016); F. Schorkopf, *BVerfG aktiviert Identitätskontrolle: Karlsruhe will Kommunikation, nicht Konfrontation*, Legal Tribune Online, 29 January 2016, <http://www.lto.de/recht/hintergruende/h/bverfg-2bvr273514-eu-haftbefehl-auslieferung-verfassungsidentitaet-menschenwuerde-gg-eu-recht-emrk/> (accessed 19 October 2017); M. Hong, *Human Dignity and Constitutional Identity: The Solange III-Decision of the German Constitutional Court*, VerfBlog, 18/02/2016, <http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/> (accessed 19 October 2017).

³¹ In this context see also the judgment of the Danish Supreme Court of December 6, 2016 - 15/2014 - in reaction to ECJ, C-441/14, *Dansk Industri*, ECLI:EU:C:2016:278; for a fundamental challenge to the applicability of the CFR and its primacy over national law see the judgment of the Hungarian Constitutional Court of November 30, 2016 - 22/2016 (XII. 5.) -.

³² Spanish Constitutional Court, Judgment of February 13, 2014 - STC 26/2014 -, para. 2 et seq.

³³ D. Sarmiento, *The German Constitutional Court and the European Arrest Warrant: The latest twist in the judicial dialogue*, EU Law Analysis, 27 January 2016, <http://eulawanalysis.blogspot.de/2016/01/the-german-constitutional-court-and.html> (accessed 19 October 2017).

³⁴ Supreme Court, Judgment of January 22, 2014, R (on the application of HS2 Action Alliance Limited) (Appellant) v. Secretary of State for Transport and another (Respondents) [2014] UKSC 3, para. 207.

Antiterrordatei decision and its criticism of *Åkerberg Fransson*.³⁵ Moreover, Supreme Court President, Lord Neuberger, in a public lecture, joined his colleague's position, pointing out that the UK, in the absence of a written constitution, lacked the possibility of setting limits to the ECJ's proactive approach.³⁶ These reactions by the UK Supreme Court and some of its judges show that the court is no longer willing to accept the "absolute" primacy of EU law over British law,³⁷ even though this problem will resolve itself with Brexit on the horizon.

By contrast, the Austrian Constitutional Court refrained from openly criticizing the *Åkerberg Fransson* judgment. Instead, it stressed its readiness to follow the ECJ's clarifying case law put forward in *Hernández* and subsequent decisions, elaborating that the CFR was applicable when the case at hand provided for a sufficient link to EU law.³⁸

The Italian Constitutional Court, in the *Taricco* saga, eventually did not apply its *controlimiti* doctrine, but rather submitted a preliminary reference to the ECJ,³⁹ seeking dialogue, not confrontation with the Luxembourg Court,⁴⁰ in spite of the critical tones that the preliminary reference did contain toward *Taricco I* and thus, more implicitly, also toward *Åkerberg Fransson* and *Melloni*.

All in all, however, member states' constitutional courts mostly have reacted at least reluctantly to the ECJ's approach taken in *Åkerberg Fransson* and *Melloni*, fearing that national fundamental rights may lose their relevance if the CFR is applied even in fields

³⁵ Lord Mance, *Destruction or Metamorphosis of the Legal Order?*, World Policy Conference, 14 December 2013, <https://www.supremecourt.uk/docs/speech131214.pdf> (accessed 19 October 2017).

³⁶ Lord Neuberger, *The British and Europe*, Cambridge Freshfields Annual Law Lecture, 12 February 2014, <https://www.supremecourt.uk/docs/speech-140212.pdf> (accessed 19 October 2017).

³⁷ Cf. F. Fontanelli, *Implementation of EU law through domestic measures after Fransson: the Court of Justice buys time and "non-preclusion" troubles loom large*, *ELRev* 39, 682, 684 (2014).

³⁸ Cf. Austrian Constitutional Court, Judgment of 12 March 2014 – B 166/2013 –, para. 24.

³⁹ Corte costituzionale, Order n. 24 of 26 January 2017, ECLI:IT:COST:2017:24.

⁴⁰ Cf. D. Tega, *The Italian Way: A Blend of Cooperation and Hubris*, *ZaöRV* 77, 685, 709 et seq. (2017).

with little connection with EU law, which would bring about a harmonized standard of fundamental rights protection.

4. Implementation of the margin of appreciation doctrine in the ECJ case law

4.1. The ECtHR's margin of appreciation doctrine

Even more than the ECJ, the ECtHR faces the challenge of having to reconcile a huge variety of political, social and cultural traditions in its case law when interpreting the European Convention on Human Rights (ECHR) that, unlike the EU, is not a composite constitution with an established system of institutional communication, so that any comparison has to be exercised with caution. To reconcile the various national traditions, the Strasbourg Court developed its so-called margin of appreciation doctrine that grants contracting parties a certain margin of discretion, subject to the Court's supervision, when it comes to deciding whether or not a measure is necessary in a democratic society, when the Convention provision at hand contains vague expressions or when the contracting party has to fulfill a positive obligation from the Convention.⁴¹ The margin of appreciation doctrine is a procedural instrument to express judicial self-restraint,⁴² rather than a modification of the principle of proportionality.⁴³ The doctrine was first explained in the *Handyside* case back in 1976, where the Court stated that "by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on

⁴¹ J. Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, HRLJ 19, 30, 31 et seq. (1998).

⁴² P. Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, HRLJ 19,1, 3 (1998); R. St. J. Macdonald, *The Margin of Appreciation*, in R. St. J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), 83, 84.

⁴³ Assuming a modification of the principle of proportionality, however, J. Kühling, *Grundrechte*, in A. v. Bogdandy & J. Bast (eds.), *Europäisches Verfassungsrecht* (2009), 657, 695 et seq.; A. Nußberger, *Das Verhältnismäßigkeitsprinzip als Strukturprinzip richterlichen Entscheidens in Europa*, NVwZ-Beilage, 36, 41 (2013).

the ‘necessity’ of a ‘restriction’ or ‘penalty’ to meet them”⁴⁴. However, the ECtHR also stressed that the domestic margin of appreciation had to go hand in hand with a European supervision.⁴⁵ Thus, the margin of appreciation doctrine reflects the subsidiary role of the Convention in protecting human rights.⁴⁶ Metaphorically speaking, the margin of appreciation doctrine serves as “a mechanism by which a tight or slack rein is kept on state conduct, depending upon the context”⁴⁷. Moreover, the concept manifests the “international” division of power between national courts and the ECtHR, which is why the margin of appreciation doctrine, by its origin, is a concept of international law.⁴⁸

The margin of appreciation doctrine is applicable to all Convention articles and beyond that, to provisions in Additional Protocols to the ECHR. The scope of state discretion varies from a wide margin of appreciation to almost no margin at all, depending upon the context of the case. The ECtHR has developed certain criteria, according to which the scope of the margin of appreciation can be determined. For instance, a Convention party is allowed a considerable discretion when it comes to the protection of public morals⁴⁹ or when they are implementing social and economic policies.⁵⁰ On the contrary, Convention parties usually enjoy little or almost no discretion when “a particularly important facet of an

⁴⁴ ECtHR, judgment of 7 December 1976 – 5493/72 – *Handyside v. United Kingdom*, A24, para. 48.

⁴⁵ ECtHR, judgment of 7 December 1976 – 5493/72 – *Handyside v. United Kingdom*, A24, para. 49.

⁴⁶ D. Harris, M. O’Boyle, E. Bates & C. Buckley (eds.), *Law of the European Convention on Human Rights*, 2nd ed., 13 (2009); P. Tanzarella, *Il margine di apprezzamento*, in M. Cartabia (ed.), *I diritti in azione* (2007), 145, 154; D. Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, *Duke J. Comp. & Int’l L.* 13, 95, 129 (2003); A.-D. Olinga & C. Picheral, *La théorie de la marge d’appréciation dans la jurisprudence récente de la Cour européenne des droits de l’homme*, *RTDH*, 567, 568 et seq. (1995).

⁴⁷ D. Harris, M. O’Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, cit. at 46, 13.

⁴⁸ J. Kühling, *Grundrechte*, cit. at 43, 697.

⁴⁹ ECtHR, judgment of 7 December 1976 – 5493/72 – *Handyside v. United Kingdom* – A24, para. 48; judgment of 24 May 1988 – 10737/84 – *Müller and Others v. Switzerland*, A133, para. 35; judgment of 22 October 1981 – 7525/76 – *Dudgeon v. United Kingdom*, A45, para. 52.

⁵⁰ ECtHR, judgment of 8 July 2003 – 36022/97 – *Hatton and Others v. United Kingdom*, RJD 2003-VIII, para. 97.

individual's identity or existence is at stake",⁵¹ which means that the nature or importance of the fundamental right concerned influences the scope of the margin of appreciation. The same can be said of the aim pursued with the interference in the Convention right.⁵² However, the margin of appreciation is wide when there is no consensus within the Convention parties on the issue at stake, particularly if the case raises sensitive moral or ethical questions.⁵³ Though a wide margin of discretion usually applies "if the state is required to strike a balance between competing interests or Convention rights",⁵⁴ there are also cases in which the respondent state was granted very little or no discretion, despite the fact that competing interests or Convention rights were at stake.⁵⁵ This demonstrates that conflicting interests or rights alone are not enough to justify a wide margin of appreciation. By contrast, particularly in recent cases, the width of the margin of appreciation also depends on whether or not domestic courts have weighed

⁵¹ D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, cit. at 46, 13; cf. ECtHR, judgment of 22 October 1981 - 7525/76 - *Dudgeon v. United Kingdom*, A45, para. 52 et seq.

⁵² ECtHR, judgment of 22 October 1981 - 7525/76 - *Dudgeon v. United Kingdom*, A45, para. 52; E. Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, *ZaöRV* 56, 240, 256 et seq. (1996); P. Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, cit. at 42, 5; J. Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, cit. at 41, 34.

⁵³ ECtHR, judgment of 10 April 2007 - 6339/05 - *Evans v. United Kingdom*, para. 77; judgment of 1 July 2014 - 43835/11 - *S.A.S. v. France*, RJD 2014, para. 129.

⁵⁴ ECtHR, judgment of 4 December 2007 - 44362/04 - *Dickson v. United Kingdom*, RJD 2007-V, para. 78; similarly already ECtHR, judgment of 13 March 2003 - 42326/98 - *Odièvre v. France*, RJD 2003-III, para. 46; judgment of 10 April 2007 - 6339/05 - *Evans v. United Kingdom*, RJD 2007-I, para. 77; judgment of 15 January 2013 - 48420/10, 59842/10, 51671/10 and 36516/10 - *Eweida and Others v. United Kingdom*, RJD 2013, para. 106; cf. F. Wollenschläger, *Die Gewährleistung von Sicherheit im Spannungsfeld der nationalen, unionalen und EMRK-Grundrechtsordnungen*, in J. Iliopoulos-Strangas, O. Diggelmann & H. Bauer (eds.), *Rechtsstaat, Freiheit und Sicherheit in Europa* (2010), 45, 75.

⁵⁵ Cf. ECtHR, judgment of 24 June 2004 - 59320/00 - *von Hannover v. Germany* (No. 1), RJD 2004-VI, paras. 57 and 79.

conflicting interests carefully.⁵⁶ If this was the case, the ECtHR often, but not always, exercises judicial self-restraint.⁵⁷

It is for its lack of predictability that the margin of appreciation concept is criticized frequently, with opponents claiming that the ECtHR decided on a rather random basis whether or not a Convention party should be given a margin of appreciation.⁵⁸ Moreover, the doctrine is controversial, as when it is applied widely, it may give a state a blank cheque or help tolerate questionable national practices or decisions.⁵⁹ However, such criticism brought forward against the margin of appreciation doctrine is not convincing, since the Court has developed certain well-defined groups of cases in which Convention states enjoy a wide margin of appreciation, making the application of the doctrine

⁵⁶ ECtHR, judgment of 23 September 2010 – 425/03 – *Obst v. Germany*, paras. 42 and 52; judgment of 3 February 2011 – 18136/02 – *Siebenhaar v. Germany*, paras. 39, 45 and 47; judgment of 12 June 2014 – 56030/07 – *Martínez v. Spain*, para. 147 et seq.; generally on the domestic courts' weighing of interests cf. M. Pellonpää, *Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen*, EuGRZ, 483, 484 (2006); W. Hoffmann-Riem, *Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen*, EuGRZ, 492, 496 et seq. (2006).

⁵⁷ Granting a wide margin of appreciation in such a case ECtHR, judgment of 26 February 2002 – 36515/97 – *Fretté v. France*, RJD 2002-I, para. 42; judgment of 10 April 2007 – 6339/05 – *Evans v. United Kingdom*, RJD 2007-I, para. 83 et seq.; reducing the Convention party's discretion in a similar case, however, ECtHR, judgment of 17 December 2004 – 49017/99 – *Pedersen and Baadsgaard v. Denmark*, RJD 2004, para. 68 et seq.; judgment of 23 September 2010 – 1620/03 – *Schüth v. Germany*, RJD 2010, paras. 55 et seq. and 61 et seq.

⁵⁸ Cf. F. C. Mayer, in U. Karpenstein & F. C. Mayer, *EMRK* (2015), Introduction, para. 67; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2009), 80 et seq.; R. St. J. Macdonald, *The Margin of Appreciation*, in R. St. J. Macdonald, F. Matscher, H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), 83, 84 et seq.; J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, ELJ 17, 80, 114 (2011); P. Tanzarella, *Il margine di apprezzamento*, cit. at 46, 148 and 158 et seq.; to demonstrate that this criticism has a point cf. ECtHR, judgment of 15 January 2013 – 48420/10, 59842/10, 51671/10 and 36516/10 – *Eweida and Others v. United Kingdom*, RJD 2013, paras. 94 and 106.

⁵⁹ D. Harris, M. O'Boyle, E. Bates & C. Buckley, *Law of the European Convention on Human Rights*, cit. at 46, 13; De Meyer, partly dissenting opinion in ECtHR, judgment of 25 February 1997 – 22009/93 – *Z. v. Finland*, Reports 1997-I, 323; s. also J. Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, cit. at 41, 35.

at least to some degree predictable.⁶⁰ Moreover, the margin of appreciation concept, by its nature, is very much context-related, making an abstract definition impossible.⁶¹ Last but not least, the Court's case law is far from granting Convention parties a blank cheque when it comes to fundamental rights protection, since the Court, in the majority of cases, reviews the acts of the Convention parties very carefully.⁶² All in all, the margin of appreciation doctrine has proven to be a useful instrument for the ECtHR when it comes to striking the right balance between strict control and abdication of responsibilities.

4.2. The SFSC's concept of varying judicial scrutiny towards cantonal authorities

Similar to the ECtHR with regard to Convention parties, the SFSC, varies the intensity of judicial scrutiny towards cantonal authorities, especially cantonal courts, depending on the case at hand, with the intensity of review reaching from a full-scale review to a mere arbitrary test, which is relatively rare in ECtHR case law. The Swiss Court may grant cantonal courts a certain degree of discretion even in cases in which, according to its concept of judicial cognition, it has full cognizable authority.⁶³ The intensity of judicial scrutiny depends on various factors, including the intensity of the interference, the right concerned, the degree of federal harmonization, special knowledge of cantonal authorities, aspects of division of power, the existence of local or personal particularities, especially local customs and traditions, the existence

⁶⁰ J. Callewaert, *Quel avenir pour la marge d'appréciation?*, in P. Mahoney et al. (eds.), *Mélanges en mémoire à Rolv Ryssdal* (2000), 147, 148; M. Pellonpää, *Kontrolldichte des Grund- und Menschenrechtsschutzes in mehrpoligen Rechtsverhältnissen*, cit. at 56, 486; J. Rubel, *Entscheidungsfreiräume in der Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte und des Europäischen Gerichtshofes* (2005), 83.

⁶¹ R. St. J. Macdonald, *The Margin of Appreciation*, cit. at 58, 85.

⁶² F. C. Mayer, in U. Karpenstein/F. C. Mayer, *EMRK*, cit. at 58, Introduction, para. 67; U. Prepeluh, *Die Entwicklung der Margin of Appreciation-Doktrin im Hinblick auf die Pressefreiheit*, *ZaöRV* 61, 771, 826 and 831 (2001) with regard to Art. 10 ECHR.

⁶³ Generally on the cognizable authority of the SFSC s. W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde* (1994), 157 et seq.; R. J. Schweizer, *Durchsetzung des Grundrechtsschutzes*, in D. Merten & H.-J. Papier (eds.), *Handbuch der Grundrechte*, Vol. VII/2 (2007), § 229 paras. 27 et seq. and 76.

of conflicting rights or interests, consideration of cantonal issues and the lack of uniform legislation on cantonal level.⁶⁴ Even though cantonal aspects must not influence the interpretation of Swiss federal law, because otherwise, the uniform application of federal law would be threatened, the SFSC, when controlling the proportionality of a cantonal measure, reduces the intensity of its judicial scrutiny in certain well-defined cases, which implies that the SFSC's concept of granting cantonal authorities a margin of appreciation, like the ECtHR's margin of appreciation doctrine, constitutes a procedural instrument. The main reason for the SFSC to lower the intensity of its review is the principle of subsidiarity, which in the Swiss federal state has constitutional rank (Art. 5a of the Swiss Constitution). In addition, Switzerland with its 26 cantons and four official languages (German, French, Italian and Rhaeto-Romanic) is a culturally diverse country in which political decision-making is based on the principle of consensus.⁶⁵ Consequently, cantonal authorities are granted a margin of discretion if the case at hand requires particular knowledge of the local situation, which cantonal authorities are more likely to have than the Lausanne-based SFSC.⁶⁶ The cantonal courts' margin of discretion will be particularly wide when ethical or moral questions are at stake.⁶⁷ For instance, in a case concerning the ban on a peepshow in the Canton of St Gall, the SFSC argued that cantonal authorities were more familiar with the mentality of local citizens than the SFSC itself.⁶⁸

⁶⁴ B. Schindler, *Beschwerdegründe, Kognition und Prüfungsdichte*, in I. Häner & B. Waldmann (eds.), *Brennpunkte im Verwaltungsprozess* (2013), 47, 54 et seq.; Y. Hangartner, *Richterliche Zurückhaltung in der Überprüfung von Entscheidungen von Vorinstanzen*, in B. Schindler & P. Sutter (eds.), *Akteure der Gerichtsbarkeit* (2007), 159, 167 et seq.; see also W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, cit. at 63, 197 et seq.; F. D. A. Bertossa, *Der Beurteilungsspielraum* (1984), 78 et seq., M. Leuthold, *Die Prüfungsdichte des Bundesgerichts im Verfahren der staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte* (1992), p. 46 et seq. and 160 et seq.

⁶⁵ P. Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft*, 4th ed. (2016), § 3 para. 31.

⁶⁶ BGE 115 Ia 370, 372 E. 3; 116 Ia 401, 414 E. 9a); 117 Ia 141, 143 E. 2a; more recently BGE 136 II 539, 548 E. 3.2; 140 I 218, 237 E. 6.7.4; W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, cit. at 63, 202; M. Leuthold, *Die Prüfungsdichte des Bundesgerichts im Verfahren der staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte*, cit. at. 64, 157.

⁶⁷ BGE 101 Ia 252, 256 f. E. 3c); 106 Ia 267, 272 E. 3; 87 I 114, 119 E. 3.

⁶⁸ BGE 106 Ia 267, 272 E. 3.

Furthermore, the SFSC exercises judicial self-restraint when the legislative competence⁶⁹ for the subject concerned lies with the cantons or if the issue at hand had been the subject of political controversy in the canton.⁷⁰ In addition, cantonal authorities enjoy a wide discretion when conflicting interests or rights have to be balanced.⁷¹ The intensity of judicial control is also lowered when cantonal authorities had to assess complex technical or rapidly-changing matters.⁷² Finally, the SFSC reduces the intensity of its control when the interpretation of cantonal fundamental rights is not intended to bring about a Swiss-wide, uniform solution, but instead, the existing diverging cantonal approaches shall be conserved.⁷³ This approach is also used in cases in which the SFSC had to review the constitutionality of a cantonal legal provision which exists in a similar fashion in most other cantons, as the SFSC, due to fears of potential consequences, shows a tendency to shy away from declaring cantonal law unconstitutional.⁷⁴ At this point, the SFSC's reasoning is different from the ECtHR's position, with the Swiss court primarily aiming at preserving an inter-cantonal consensus, while the ECtHR intends to apply a strict review if a Convention party does not stick to a common European consensus, which, however, does not make both approaches incompatible with each other, since the SFSC's reasoning primarily results from the fact that it does not want to endanger cooperation between the cantons in the Swiss federal state, a goal that is not that preeminent within the ECHR system, which is not a state entity.

4.3. General applicability of the margin of appreciation concept on the ECJ

In spite of its international nature, the margin of appreciation concept, as developed by the ECtHR and, in quite a similar manner,

⁶⁹ BGE 111 Ia 184, 187 E. 2c); similarly BGE 103 Ia 272, 278 E. 6c).

⁷⁰ BGE 115 Ia 234, 244 E. 3c); 111 Ia 184, 187 E. 2c); 103 Ia 272, 278 E. 6c); s. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, cit. at 63, 201 et seq.

⁷¹ BGE 112 Ia 97, 106 E. 6e); s. M. Leuthold, *Die Prüfungsdichte des Bundesgerichts im Verfahren der staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte*, cit. at 64, 52.

⁷² BGE 115 Ib 131, 135 E. 3; 112 Ib 543, 549 E. 1d); 103 Ia 272, 278 E. 6c).

⁷³ BGE 97 I 839, 844 E. 6; 99 Ia 262, 271; M. Leuthold, *Die Prüfungsdichte des Bundesgerichts im Verfahren der staatsrechtlichen Beschwerde wegen Verletzung verfassungsmässiger Rechte*, cit. at 64, 50.

⁷⁴ Cf. BGE 114 Ia 221, 232 E. 6c).

also applied by the SFSC, can be adopted by the ECJ,⁷⁵ even though the EU is no longer a simple international organization, but rather a supranational federal union of states.⁷⁶ One reason for the general possibility of applying the margin of appreciation doctrine on the ECJ is the fact that the EU itself still displays intergovernmental features, in particular with regard to the Common Foreign and Security Policy (CFSP). Moreover, the idea of subsidiarity, on which the margin of appreciation concept is based, cannot only be found in Swiss law, but also in Art. 5(1)(2) and Art. 5(3) TEU.⁷⁷ In addition, the founding treaties of the EU constituted international law, which means that the idea of implementing an international doctrine to the EU has its historical precedents.⁷⁸ Art. 4(2) TEU, according to which the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, also argues for the adoption of the margin of appreciation concept,⁷⁹ since in the absence of any member states' discretion, their national identity might be trampled all over. The protection of national peculiarities is all the more important as there is an enormous legal heterogeneity within the EU that reaches from common law systems to civil law systems, from countries with a constitutional court in the Kelsenian sense to

⁷⁵ J. Kühling, *Grundrechte*, cit. at 43, 696; M. Herdegen, *Grundrechte der Europäischen Union*, in J. Isensee & P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. X (2012), § 211 para. 38; J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 80 et seq. and 102 et seq.; E. Schmidt-Aßmann, *Einheit und Kohärenz der Europäischen Mehrebenenrechtsordnung*, *EuGRZ*, 85, 92 (2016); I. Canor, *Harmonizing the European Community's Standard of Judicial Review?*, *EPL* 8, 135, 165 et seq. (2002); J. Cirkel, *Die Bindungen der Mitgliedstaaten an die Gemeinschaftsgrundrechte* (2000), 198; see also E. M. Frenzel, *Die Charta der Grundrechte als Maßstab für mitgliedstaatliches Handeln zwischen Effektivierung und Hyperintegration*, *Der Staat* 53, 1, 12 (2014).

⁷⁶ Cf. *supra*, section 3.

⁷⁷ D. Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, cit. at 46, 95, 135 et seq.; A. Torres Pérez, *Conflicts of Rights in the European Union* (2009), 170.

⁷⁸ BVerfGE 140, 317, para. 44 – Europäischer Haftbefehl II; M. Schweitzer & H.-G. Dederer, *Staatsrecht III*, 11th ed. (2016), para. 78.

⁷⁹ P. Hallström, *Balance or Clash of Legal Orders – Some Notes on Margin of Appreciation*, cit. at 14, 70; C. Walter & M. Vordermayer, *Verfassungsidentität als Instrument zwischen Konstitutionalisierung und Fragmentierung*, *JöR* 63 N.F., 129, 148 (2015); H. D. Jarass, *Charta der Grundrechte der Europäischen Union*, 3rd ed. (2016), Art. 53 para. 32 et seq.

member states with only very restricted judicial review and from post-socialist member states and member states inspired by the Nordic model of welfare states. This legal heterogeneity is based on factual differences between the EU member states with regard to language,⁸⁰ culture and religion that have increased further after the accession of 10 countries from Central and Eastern Europe to the EU in 2004.

Moreover, Art. 6(3) TEU as well as Art. 52(3)(1) and Art. 53 CFR require a congruent interpretation of the CFR and the ECHR, including ECJ and ECtHR case law. If the ECtHR, under certain circumstances, grants Convention parties a margin of appreciation, the ECJ should follow this example in order to avoid incongruities in the interpretation of parallelly guaranteed fundamental rights. Another reason why the margin of appreciation concept can and should be adopted by the ECJ is that by means of this procedural instrument, conflicting rights or interests can be balanced more easily, a goal that cannot be achieved with the help of minimum standard clauses like Art. 53 ECHR. Most importantly, however, the ECJ itself, quite frequently, refers to the legal situation in the EU member states, taking into account national particularities without explicitly using the term "margin of appreciation".⁸¹ Finally, even the SFSC, the Supreme Court of a federal country, under certain conditions, grants cantonal authorities a margin of discretion, which implies that the margin of appreciation concept is actually applicable outside the scope of international organizations. If the idea of reducing the intensity of judicial review, therefore, can also be made fruitful within a federal state, this applies all the more to the EU which is not a federal state, but a federal union of states that is more similar to an international organization than a country like Switzerland.

4.4. Common criteria and their applicability on ECJ case law

Due to the fact that the criteria applied by the ECtHR and the SFSC for granting a margin of discretion are not entirely congruent, it has to be examined if and how each criterion can be applied to

⁸⁰ Currently, the EU has 24 official languages.

⁸¹ ECJ, C-159/90, Grogan, ECLI:EU:C:1991:378, para. 20; cf. D. Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, cit. at 46, 136.

ECJ case law. Additionally, since the EU is neither a federal state nor a simple international organization, each criterion identified in ECtHR and SFSC case law must be tested for its applicability to the EU context.

4.4.1. Nature and importance of the fundamental right concerned

One of the factors that determine the scope of the margin of appreciation in ECtHR case law is the nature and importance of the fundamental right concerned.⁸² The SFSC, by contrast, does not only refer to these criteria,⁸³ but also takes into account the intensity of the interference,⁸⁴ which, however, is often connected directly to the right at stake. The criterion of the nature and importance of the fundamental right concerned can be applied to ECJ case law as well, particularly in the light of the fact that CFR and ECHR provisions widely have the same content and importance. Moreover, interferences with fundamental guarantees like the guarantee of human dignity or the right to life must be subject to careful judicial scrutiny in the EU as well. By contrast, when it comes to social or economic matters, Convention parties usually enjoy a wide margin of appreciation, which can be explained by the fact that the ECHR, by its nature, governs those areas only very fragmentarily. This reasoning, however, does not apply to the EU, with the Union disposing of far-reaching competences related to the European Single Market and economic matters in general. This applies even more, as the EU has passed extensive economic legislation, thus bringing about a wide-scale harmonization of the area. Therefore, generally reducing the ECJ's intensity of judicial review in this field seems not convincing, especially as the EU itself is more likely to interfere with fundamental rights in economy-related contexts than the member states, which only implement entirely determined EU law. This approach is fully in line with the SFSC's position to reduce the intensity of its scrutiny only where the relevant legislative competences have remained with the cantons. On the other hand, however, EU member states can enjoy a wide margin of

⁸² See *supra*, section 4.1.

⁸³ Cf. BGE 96 I 586, 592 E. 6.

⁸⁴ See *supra*, section 4.2.

appreciation when it comes to social legislation, since the EU has only limited competences in this area.

4.4.2. Existence of a Union-wide consensus

The ECtHR grants Convention parties a wide margin of appreciation when there is no European consensus on the question at hand.⁸⁵ In spite of differences in reasoning, the SFSC's position in this regard is quite similar, with the Swiss Court reducing the intensity of its review when there is an inter-cantonal consensus.⁸⁶ Adopting the margin of appreciation concept to the EU in consequence means that the ECJ has to reduce the intensity of its scrutiny towards member states when there is no EU-wide consensus, or, putting it differently, where there is no EU harmonization, a wide margin of appreciation has to be granted. On the contrary, it is less obvious what the ECJ should do when there is an EU-wide consensus and one member state steps out of line. One option would be to refer to the identity-clause, provided that peculiar identities are protected by Article 4(2) TEU. Whereas, against the backdrop of the need for a uniform interpretation of EU law, there can be no room for the ECJ to lower the intensity of scrutiny if EU law brings about a full harmonization of a specific area, things look quite differently when the consensus exists on member states' level only. Moreover, if there is a member states-wide consensus on a certain fundamental right, at least theoretically, the creation of an unwritten EU fundamental right by the ECJ is possible,⁸⁷ which means that the ECJ could take steps towards the harmonization of fundamental rights protection in this area. Against this background, it would be inconsequential if the ECJ had to reduce the intensity of its judicial review towards a member state that does not stick to an EU-wide consensus, which means that the criterion brought forward by the ECtHR and shared by the SFSC should be adopted by the ECJ.

4.4.3. National or regional particularities

Both the ECtHR and the SFSC exercise judicial self-restraint when national or, respectively, cantonal particularities exist, which

⁸⁵ See *supra*, section 4.1.

⁸⁶ See *supra*, section 4.2.

⁸⁷ ECJ, C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para. 4; C-4/73, *Nold*, ECLI:EU:C:1974:51, para. 13.

can be better assessed by the national/cantonal authorities.⁸⁸ This criterion can be applied to ECJ case law without a second thought, because within the EU, many fields still fall short of full harmonization, with member states having upheld their own specific political, social and cultural traditions, even though diversities within in EU are less pronounced than between the 47 ECHR Convention parties. On the other hand, the EU is more heterogeneous than the Swiss Confederation. For instance, when it comes to the relationship between the state and religious communities, differences within the EU are overwhelming. While France sticks to the model of laicism, countries like the United Kingdom or Greece still have a state church, whereas the German system is characterized by the “friendly” separation between the state and religious communities.⁸⁹ In a certain way, the different models reflect the EU member states’ national identities, which are protected by Art. 4(2)(1) TEU and which should be taken account of by means of a reduction of judicial scrutiny. Moreover, when it comes to the freedom of expression and the assessment of expressions potentially incompatible with the protection of morals, national authorities are in a far better position to deal with the case, since they usually have better knowledge of the local language than judges from the Luxembourg Court. Finally, the acceptance of the EU with the citizens of the member states can be increased if national authorities are granted a margin of discretion in order to take into account national particularities, which is crucial with regard to the future of the EU and the current crisis of confidence that has, among others, led to the Brexit vote in the United Kingdom.

4.4.4. Conflicting rights or interests

Both the ECtHR and the SFSC tend to reduce the intensity of judicial scrutiny when there is a conflict of rights or interests, particularly, if other criteria like regional particularities are met as well.⁹⁰ Even though the mere existence of a conflict of rights or interests usually is not sufficient for Convention parties or cantons to enjoy a margin of discretion, the general tendency shown by the

⁸⁸ See *supra*, sections 3.1. and 3.2.

⁸⁹ Cf. A. Freiherr von Campenhausen & H. de Wall, *Staatskirchenrecht*, 4th ed. (2006), 90 et seq.

⁹⁰ See *supra*, section 4.1 and 4.2.

ECtHR and the SFSC in such cases should be taken up by the ECJ. This is particularly true, as for cases of conflicting rights or interests, national courts often have developed specific guidelines and ways of balancing. This would be undermined if the ECJ imposed its own way of reasoning by hook or crook. Consequently, a wide margin of appreciation in case of conflicting rights or interests would be in line with Art. 5(3) TEU and the principle of subsidiarity.

4.4.5. Sufficient weighing of conflicting rights or interests by national courts

In direct connection with the existence of conflicting rights or interests stands the question of whether or not national authorities have sufficiently assessed and balanced those conflicting rights or interests. The ECtHR reduces the level of scrutiny if national authorities carried out a thorough judicial review and considered carefully the various interests at stake.⁹¹ The SFSC, even though not mentioning this criterion explicitly, lowers the intensity of its judicial review as well if cantonal authorities took into account the different conflicting positions.⁹² Both the principle of subsidiarity and the protection of the member states' national identities imply the application of the criterion to ECJ case law, since by renouncing a thorough review, the ECJ can demonstrate its respect for national courts, especially constitutional courts and their case law, which is crucial for a reasonable division of constitutional adjudication within the EU.

4.5. Consequences of an adoption on ECJ case law

4.5.1. The ECJ's current approach

Generally speaking, the intensity of the ECJ's judicial review on member states' measures is relatively high in comparison to the obvious judicial self-restraint with regard to EU acts that still prevails in ECJ case law.⁹³ On the other hand, even though not

⁹¹ See *supra*, section 4.1.

⁹² See *supra*, section 4.2.

⁹³ Cf. ECJ, C-399/11, Melloni, ECLI:EU:C:2013:107, para. 55 et seq.; C-112/13, A, ECLI:EU:C:2014:2195, paras. 41 and 44; in detail on the intensity of the ECJ's judicial scrutiny before and after the entering into force of the Lisbon S. A. de Vries, *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon - An Endeavour for More Harmony*, in S. A. de Vries, U. Bernitz & St. Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (2013),

referring directly to the margin of appreciation concept, the ECJ, in its case law, already uses certain criteria to justify a reduction of judicial review on member states' measures. This is particularly true when it comes to interferences with the basic freedoms of the internal market. In the *Omega* case, for instance, the ECJ pointed out that it was not the Court's intention "to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity"⁹⁴, with the national provisions concerned not being excluded "because one Member State has chosen a system of protection different from that adopted by another State"⁹⁵. The ECJ's reasoning in this case shows that the Court, at least in certain cases, is ready to grant member states a margin of discretion if there is no EU-wide consensus on the aspect concerned and if national moral, cultural or religious particularities are at stake.⁹⁶ As a consequence, in *Omega*, Germany could refer to the principle of respect for human dignity, which has a particular status as an independent fundamental right in the German constitution, to ban certain laser games the object of which was to fire on human targets and thus "play at killing people", even though neither Community Law nor other member states' constitutions, at the time, granted the respect for human dignity constitutional rank. Some months earlier, in the *Schmidberger* case, the Luxembourg court had already demonstrated that it was willing to accept the assessment of national authorities when reviewing their proportionality test.⁹⁷ In the *Viking* case, by contrast, the ECJ reviewed very carefully the objectives pursued by the labor unions and the national courts' assessment in this regard,

59, 93 et seq.; W. Weiß, *Grundrechtsschutz durch den EuGH: Tendenzen seit Lissabon*, EuZW, 287, 290 (2013); J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 92 et seq., who points out that the intensity of the ECJ's judicial review is particularly high where EU interests are at stake.

⁹⁴ ECJ, C-36/02, *Omega*, ECLI:EU:C:2004:614, para. 37.

⁹⁵ ECJ, C-36/02, *Omega*, ECLI:EU:C:2004:614, para. 38.

⁹⁶ See also ECJ, C-470/11, *SIA Garkalns*, ECLI:EU:C:2012:505, para. 36; C-42/07, *Liga Portuguesa de Futebol Profissional u. Bwin International*, ECLI:EU:C:2009:519, para. 57; C-244/06, *Dynamic Medien*, ECLI:EU:C:2008:85, para. 44; C-275/92, *Schindler*, ECLI:EU:C:1994:119, para. 32; C-53/80, *Eyssen*, ECLI:EU:C:1981:35, para. 16 et seq.; C-204/90, *Bachmann*, ECLI:EU:C:1992:35, para. 10; generally s. R. Streinz, *Die Rolle des EuGH im Prozess der Europäischen Integration*, AöR 135, 1, 10 with n. 130 (2010).

⁹⁷ ECJ, C-112/00, *Schmidberger*, ECLI:EU:C:2003:333, para. 69 et seq.

reducing the margin of discretion of the latter almost to vanishing point.⁹⁸ On the other hand, however, the ECJ refrained from replacing the national courts' proportionality test by its own assessment, granting national judges at least a minimum amount of discretion when it comes to reviewing the result of the proportionality test.⁹⁹ The Court argued in a similar way in the *Laval* case, where the margin of discretion national authorities enjoyed with regard to the assessment of the aims pursued was also extremely narrow.¹⁰⁰ Even though there are cases like *Omega* and *Schmidberger*, in which the ECJ conceded national authorities a wide margin of discretion due to national particularities and the absence of an EU-wide consensus, there are other occasions concerning national security,¹⁰¹ public order,¹⁰² morals¹⁰³ or cultural diversity¹⁰⁴ to be taken into account. On those occasions, the Court proved to be very reluctant when it had to decide whether or not it should reduce the intensity of its judicial review. This shows that the ECJ's approach in this regard is far less coherent than the ECtHR's and also the SFSC's position.

The ECJ's level of judicial review is also influenced by the nature of the fundamental right concerned. As a result, the Court reviews national measures particularly carefully if there has taken

⁹⁸ ECJ, C-438/05, *Viking*, ECLI:EU:C:2007:772, para. 81 et seq. and 88 et seq.

⁹⁹ ECJ, C-438/05, *Viking*, ECLI:EU:C:2007:772, para. 85 et seq. and 88 et seq.

¹⁰⁰ ECJ, C-341/05, *Laval*, ECLI:EU:C:2007:809, para. 107 et seq.

¹⁰¹ ECJ, C-50/83, *Commission v. Italy*, ECLI:EU:C:1984:128, para. 18.

¹⁰² ECJ, *Joined Cases C-340/14 and C-341/14, Trijber*, ECLI:EU:C:2015:641, para. 68 et seq.

¹⁰³ ECJ, C-121/85, *Conegate*, ECLI:EU:C:1986:114, para. 23 et seq.; granting a margin of discretion, however, ECJ, C-34/79, *Henn & Derby*, ECLI:EU:C:1979:295, para. 16; s. cf. G. de Búrca, *The Principle of Proportionality and its Application in EC Law*, YEL 13, 105, 128 et seq. (1993).

¹⁰⁴ ECJ, C-288/89, *Stichting Collectieve Antennevoorziening Gouda*, ECLI:EU:C:1991:323, para. 27 et seq.; C-134/10, *Commission v. Belgium*, ECLI:EU:C:2011:117, para. 44 et seq.

place an alleged discrimination for reasons of sex¹⁰⁵ or age¹⁰⁶, which constitutes a difference to ECtHR and SFSC case law where interferences with the principle of non-discrimination not automatically lead to an intensification of the level of judicial review. Consequently, there is very little room for national particularities when it comes to the application of EU antidiscrimination law.¹⁰⁷ Moreover, the ECJ tends to apply a strict level of control when there is a presumed interference with fundamental guarantees like the right to liberty,¹⁰⁸ the respect for private and family life¹⁰⁹ or the freedom of expression.¹¹⁰

ECJ case law differs from ECtHR and SFSC case law insofar, as conflicting rights or interests and their balancing have had little relevance in ECJ case law so far. However, even though the ECJ has not confirmed explicitly that a conflict of rights and interests could reduce the intensity of its judicial review, cases like *Omega* and *Schmidberger* imply that this option has at least not completely been ruled out, which leaves open the door for the implementation of a structured margin of appreciation doctrine.

When it comes to the criterion of national authorities having balanced conflicting rights or interests properly, the ECJ tends to exercise strict judicial review even if national authorities have weighed the interests involved very carefully. One example of this approach is the *Carpenter* case where the ECJ replaced the assessment of the national courts, which had balanced the

¹⁰⁵ ECJ, C-285/98, Tanja Kreil, ECLI:EU:C:2000:2, para. 24 et seq.; C-222/84, Johnston, ECLI:EU:C:1986:206, para. 38 et seq.; C-318/86, Commission v. France, ECLI:EU:C:1988:352, para. 28 et seq.; C-423/04, Richards, ECLI:EU:C:2006:256, para. 33 et seq.; in detail, s. O. Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (2003), 488 et seq.

¹⁰⁶ ECJ, C-499/08, Ingeniørforeningen i Danmark, ECLI:EU:C:2010:600, para. 33; C-388/07, Age Concern England, ECLI:EU:C:2009:128, para. 51; C-144/04, Mangold, ECLI:EU:C:2005:709, para. 61 et seq.

¹⁰⁷ ECJ, C-13/05, Chacón Navas, ECLI:EU:C:2006:456, para. 56; Opinion of Advocate General Sharpston, C-188/15, Bougnaoui and ADDH, ECLI:EU:C:2016:553, para. 62 et seq.; granting a margin of discretion in such cases, however, Opinion of Advocate General Kokott, C-157/15, Achbita, ECLI:EU:C:2016:382, para. 125.

¹⁰⁸ ECJ, C-601/15 PPU, J. N., ECLI:EU:C:2016:84, para. 56 et seq.

¹⁰⁹ ECJ, C-465/00, Österreichischer Rundfunk and Others, ECLI:EU:C:2003:294, para. 83.

¹¹⁰ ECJ, C-73/07, Tietosuojavaltuutettu, ECLI:EU:C:2008:727, para. 56 et seq.

conflicting rights sufficiently, by its own opinion.¹¹¹ Similarly, in *Schmidberger*, in spite of granting Austrian authorities a margin of discretion, the ECJ actually reviewed the national courts' balancing of rights very carefully.¹¹² Therefore, with regard to the assessment of national/cantonal courts, both the ECtHR and the SFSC seem to exercise more judicial self-restraint than the ECJ.

4.5.2. ECJ case law after the adoption of the margin of appreciation concept

Gerards suggests that the ECJ introduce three levels of judicial review: strict scrutiny, intermediate review and marginal review.¹¹³ Unlike the SFSC, the ECJ, so far, very rarely reduces the intensity of its judicial review to a mere arbitrary test, an approach that is likely be pursued also after the adoption of the margin of appreciation concept to ECJ case law. Apart from that, the approach proposed by *Gerards* could help the ECJ determine the scope of the margin of appreciation adequate in the case at hand. However, the question remains as to how the ECJ should decide on the appropriate level of review if intensity-determining factors like the existence of an EU-wide consensus and the nature and importance of the right concerned are pulling in different directions. In this context, *Gerards* mentions the example of national measures aimed at protecting important constitutional values or complex socio-economic interests seriously hampering fundamental interests such as the right to personal autonomy.¹¹⁴ So far, neither the ECtHR nor the SFSC or the ECJ have presented a coherent approach as to how to select the appropriate level of review in such cases, limiting themselves to stating that conflicting factors or criteria are present.¹¹⁵ To solve the problem, *Gerards* suggests the recourse to classical theories of procedural democracy, according to which important decisions that require value judgments or specific expertise should normally be taken by the legislature and the

¹¹¹ ECJ, C-60/00, *Carpenter*, ECLI:EU:C:2002:434, para. 40 et seq.

¹¹² ECJ, C-112/00, *Schmidberger*, ECLI:EU:C:2003:333, para. 93.

¹¹³ J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 117.

¹¹⁴ J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 117.

¹¹⁵ J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 117.

executive, not by courts.¹¹⁶ Accordingly, the general approach to be taken by the ECJ should be the application of a marginal test, with intensive scrutiny only applicable if there is clear evidence that the national decision-making process was obviously tainted by essential flaws and defects.¹¹⁷ The approach brought forward by *Gerards* seems a step into the right direction, as it allows for the consideration of the specific circumstances of a case, but nonetheless requires some specification as to how precisely the adequate level of review can be determined. For this purpose, firstly, the relevant criteria that justify the reduction of judicial scrutiny must be identified to figure out where only marginal review is adequate and where an intermediate level of review should be applied. With regard to factors pulling in different directions, in a second step, the “mean value” (‘Mittelwert’) of judicial scrutiny has to be identified, with factors in favor of a reduction of judicial review as well as aspects suggesting a strict review being taken account of. Such an approach is not completely uncommon within the framework of the application of the principle of proportionality and its judicial review, with German administrative authorities and courts relying on the idea as well when it comes to determining the amount of pollution or noise tolerable in a certain type of area.¹¹⁸ Therefore, if one factor like the interference with a fundamental interest such as the right to life requires a strict scrutiny while another aspect like the fact that national courts have weighed all relevant factors very carefully argues for a wide margin of appreciation, a compromise has to be found, which means that the ECJ has to apply an intermediate level of scrutiny and concede member states a “corridor” when it comes to determining adequate solutions in such cases.

Applied to cases already decided by the ECJ, it becomes obvious that the judgment of the ECJ, at least in some cases, would have been different, if the Luxembourg court had stuck to the

¹¹⁶ J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 118.

¹¹⁷ J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, cit. at 58, 119.

¹¹⁸ BVerwGE 50, 49, 54 et seq.; detailed on the matter s. O. Reidt & G. Schiller, in R. v. Landmann & G. Rohmer (eds.), *Umweltrecht* (2017), § 2 18. BImSchV, para. 28 et seq.; H. Schulze-Fielitz, in M. Führ (ed.), *GK-BImSchG* (2016), § 50 para. 81.

concept outlined above. For instance, in the *Viking* case, where the scope of the margin of discretion granted to national authorities was very narrow,¹¹⁹ the ECJ would have been forced to acknowledge that there was no EU-wide consensus on the matter at hand. Moreover, it would have had to take into account Finnish particularities with regard to labor law and the right to strike. Furthermore, the fact that conflicting interests lay at the core of the case could not have been neglected. In addition, the ECJ would have had to consider that the EU had no competence for regulating labor disputes. On the contrary, the Luxembourg court could have stuck to the fact that national industrial dispute measures interfered with the freedom of establishment, one of the basic freedoms of the EU Single Market. All in all, in *Viking*, the ECJ consequently should have applied an intermediate level of review instead of a strict review.

In the *Omega* case, by contrast, the approach outlined in this paper would have changed little with regard to the intensity of judicial review, with national authorities enjoying an intermediate margin of discretion also under these premises. In spite of the fact that the freedom of services had been interfered with, the protection of human dignity constituted a national guarantee unique within the EU at the time, implying a reduction of the level of judicial review for reasons of national particularities. Moreover, German authorities had balanced the conflicting rights and interests carefully, so that, in sum, the “mean value” of scrutiny had to be intermediate. This shows that the approach developed in this paper could change ECJ case law in some circumstances, while it has to be acknowledged that in other cases, the results might not differ very much from those found by the ECJ without the application of a coherent margin of appreciation doctrine.

5. National constitutional courts’ judicial self-restraint towards the ECJ

However, the approach of exercising judicial self-restraint is not only applied by European courts to protect national courts, but, inversely, can be used by national courts in favor of European

¹¹⁹ ECJ, C-438/05, *Viking*, ECLI:EU:C:2007:772, para. 81 et seq. and 88 et seq.; s. supra, section 4.4.1).

courts like the ECJ, shaping the division of constitutional adjudication in Europe as such. This is even true in the absence of national examples from federal states like Switzerland or Germany, where state courts usually do not reduce the intensity of judicial review to grant federal courts a margin of discretion. With regard to the EU and its relationship with member states, however, things are quite different, indicating that the Union is not a state. In comparison to the margin of appreciation doctrine, the concept of conceding the ECJ a right “to tolerance of error” implies that national courts review ECJ decisions very carefully and establish an error, but refrain from considering it sufficiently qualified to draw consequences from it. The concept in favor of the ECJ was first introduced by the FCC in its *Honeywell* decision back in 2010. Giving reasons for its decision, the German court argued that *ultra vires* review may only be exercised in an EU-friendly manner.¹²⁰ This means that *ultra vires* review can only be considered if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences.¹²¹ According to the FCC, a breach of the principle of conferral is “only manifest if the European bodies and institutions have transgressed the boundaries of their competences in a manner specifically violating the principle of conferral, the breach of competences is in other words sufficiently qualified”¹²² (‘hinreichend qualifiziert’). Therefore, if an ECJ judgment is to be considered *ultra vires*, it must be “manifestly in violation of competences and [...] the impugned act [must be] highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law”,¹²³ a formula that is also found in the *OMT* decision¹²⁴ and that can be made fruitful both with regard to the exercise of competences and the interpretation of the CFR, since an extremely wide interpretation of the scope of the CFR can also constitute an *ultra vires* act. Other national courts, in particular the

¹²⁰ BVerfGE 126, 286, 303 – Honeywell.

¹²¹ BVerfGE 126, 286, 304 – Honeywell.

¹²² BVerfGE 126, 286, 303 – Honeywell.

¹²³ BVerfGE 126, 286, 303 – Honeywell.

¹²⁴ BVerfGE 142, 123, 147 et seq. – OMT; see also FCC, preliminary reference of July 18, 2017 – 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 –, NJW 2017, 2894, para. 63.

Czech Constitutional Court and the Danish Supreme Court, who have declared ECJ judgments *ultra vires* in the past,¹²⁵ should follow the FCC's example and grant the ECJ a right "to tolerance of error" when exercising *ultra vires* review, which would facilitate the cooperation between national courts and the ECJ significantly.

6. Conclusion

"Le droit national reste [...] le domaine réservé des juridictions nationales et la Cour se concentre sur le droit de l'Union"¹²⁶ – this idea expressed by the former ECJ President Skouris, after *Åkerberg Fransson* and *Melloni*, seems to be wishful thinking, with the ECJ interpreting Art. 51(1) CFR very widely and reducing the room for the application of national fundamental rights in EU law-related cases to an absolute minimum, even though *Taricco II*, most recently, has offered some light on the horizon for national courts. In reaction to *Åkerberg Fransson* and *Melloni*, various national courts had shown their frustration over ECJ case law, emphasizing that they were ready to apply national fundamental rights when, in their view, the connection with EU law in the case at hand was too loose to speak of an implementation of EU law. This comes at a time when anger and disappointment with the EU, its policy and its institutions are increasing, culminating in the UK's Brexit decision and anti-EU movements in numerous EU countries. The only way to restore trust in the Union, therefore, is to respect member states' constitutional identity, which starts with preserving diversity in the EU without threatening the uniform interpretation and application of EU law. For this purpose, the margin of appreciation doctrine developed by the ECtHR and, in a similar form, also applied by the SFSC, with some due modifications, should be adopted by the ECJ to guarantee a more reasonable division of constitutional adjudication in the EU. This approach would enable the ECJ to vary the level of its judicial scrutiny from marginal review over intermediate review to strict review, depending upon the circumstances of the case at hand and the presence of certain criteria requiring the exercise of judicial self-

¹²⁵ Czech Constitutional Court, judgment of February 14, 2012 – Pl ÚS 5/12 –, Slovak Pensions –, and Danish Supreme Court, judgment of December 6, 2016 – 15/2014.

¹²⁶ V. Skouris, *Speech*, cit. at 1, 123.

restraint towards national courts, a strategy that is similar to the doctrine of judicial self-restraint¹²⁷ developed in the US Supreme Court's jurisprudence in favor of other branches of government. Conversely, member states, too, should reduce the intensity of scrutiny towards the ECJ in accordance with the FCC's position in *Honeywell*. Under these conditions, the EU system of fundamental rights protection is far from doomed to failure, but could show the Union as such which direction to take in the future if it wants to survive.

¹²⁷ T. A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, HRQ 4, 474, 478 (1982).

THE GOOD, THE BAD, AND THE UGLY:
NATIONAL CONSTITUTIONAL JUDGES
AND THE EU CONSTITUTIONAL IDENTITY

*Giovanni Zaccaroni**

Abstract

This article offers an analysis of three judgements concerning the relationship between the Court of Justice of the EU and three EU national Constitutional Courts. The judgments, from the Danish Supreme Court and the German and Italian Constitutional Courts, where occasions where the latter Courts have threatened to oppose to distinctive elements of the EU constitutional legal order. These elements can ultimately lead to the theorisation of an EU constitutional identity. In particular, this article analyses the *Dansk Industri* judgment of the Danish Supreme Court, where the Danish court decided not to apply a preliminary ruling of the Court of Justice declaring the horizontal direct effect of the principle of non discrimination on the ground of age; the *OMT* judgment of the German Constitutional Court, where the German Court, after having threatened to declare the ECB OMT programme as *ultra vires* decided to accept the functional interpretation of the principle of conferred powers at the conditions established by the Court of Justice in the *Gauweiler* judgment; and the request for a preliminary ruling made by the Italian Constitutional Court in the *Taricco II (M.A.S. and MB)* judgment, where the Court of Justice has ruled on the balance between the primacy of EU law and the constitutional principle of legality.

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1. Introduction: a case study in constitutional adjudication from an EU Constitutional Identity perspective

The “constitutional” nature of the EU legal order is surely one of the most debated and contended results of the gradual development of the process of European integration¹. The lack of a consensus on the constitutional nature of the EU legal order² is the main driver (but hardly the only one)³ that fuels the confrontation between the EU Court and the national constitutional judges. The main reason for the analysis at hand is that, while these three decisions are usually representative of the *revirement* of the pluralism of national constitutional identities within the EU, they are at the same time supporting the emersion of distinctive elements of the EU constitutional legal order. These elements are

¹ For some commentators this process is a fragile compromise between the different voices within the EU. See i.e. B. de Witte, A. Ott & E. Vos (eds.), *Between Flexibility and Disintegration, the Trajectory of Differentiation in EU Law* (2017). For other commentators, the fragmentation of the process of European integration is caused by a more serious “system deficiency”. See A. von Bogdandy & M. Ioannidis, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*, 51 *Comm. Mkt. L.R.* 1 (2014).

² Historically, in favour see G. F. Mancini, *The making of a constitution for Europe*, 26 *Comm. Mkt. L.R.* 4 (1989), *contra* D. Grimm, *Does Europe need a Constitution?*, 1 *Eur. L.J.* 3 (1995), at 219. See also J.H.H. Weiler & J. P. Trachtman, *European Constitutionalism and its discontent*, 17 (1) *Nw. J. Int'l L. & Bus.* (1997) 354. Recently, see K. Tuori, *European Constitutionalism* (2015), as well as the critique of the book made by P.L. Lindseth, *The Perils of 'As If' European Constitutionalism*, 22 *Eur L.J.* 5 (2016), at 696.

³ The political situation in several Member States makes it more difficult for national constitutional judges to back convincingly the process of EU integration, as was done in the past, without falling into the trap of “elitism” or even “globalism”. Words are swords, and these concepts, widely abused in the current political debate, can make the difference in a national political election.

part of the conceptualisation of the “EU constitutional identity” that is, in the mind of the author, pursued by the Court of Justice as a further development of its doctrines of primacy and direct effect of EU law. The hypothesis behind this article is that the Court of Justice, in identifying through its case law, is advancing certain fundamental elements of EU law that are part of the EU constitutional identity, but that there is still a lack of a substantial theorisation of the latter. This struggle of the Court of Justice for the clarification of the extent of an EU constitutional identity counterweights and perhaps enriches the pluralism of national constitutional identities in Europe.

The main problem that such an ambitious assumption poses is, by far, determining what is the EU constitutional identity. In general, identity represents the self-awareness of an individual, and the physical, cultural or anthropological characteristics that allow for self-determination. As for legal orders, constitutional identity joins together the elements that allow for the external and internal self-determination of the constitutional legal order.⁴ However, when it comes to the enumeration of the elements that specifically belong to the EU constitutional identity, we realize that, as Rosenfeld said, it is a rather elusive concept⁵. Within EU law scholarship,⁶ the EU constitutional identity is composed of values, principles and rights that are included in the EU Treaties and, since 2009 (with the entrance into force of the Lisbon Treaty), in the Charter of Fundamental Rights of the European Union, as well as in the case law of the EU Court of Justice. It is not clear, however,

⁴ M. Rosenfeld, *The Identity of the Constitutional Subject*, 16 (3-4) *Cardozo L.R.* (1995). Id., *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, (2009).

⁵ M. Rosenfeld, *The Identity of the Constitutional Subject*, cit. at 4, 1049-1055.

⁶ See L.S. Rossi, *Fundamental Values, Principles, and Rights after the Treaty of Lisbon: The Long Journey toward an European Constitutional Identity*, in *Europe(s), Droit(s) européen(s) – Liber Amicorum en l'honneur du professeur Vlad Constantinesco*, (2015). For a broader picture, encompassing *inter alia* the relationship between the EU and the Member States Constitutional Identity see A. Saiz Arnaiz & C. Alcobero Llivina (eds.), *National Constitutional Identity and European Integration* (2013), F.X. Millet, *L'Union Européenne et l'identité constitutionnelle des Etats Membres* (2013), E. Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, 45 *Netherland J. of Legal Philosophy* 2 (2016) and P. Faraguna, *Constitutional Identity in the EU – A Shield or a Sword?*, 18 *Ger. L.J.* 7 (2017).

the extent to which a certain right, principle or value belongs to the EU constitutional identity and the extent to which it does not.

It would be overwhelmingly ambitious to attempt to clarify in this article all the elements that belong to such an identity. The scope of this work is mainly restricted to the analysis of the reaction of three national constitutional courts to the attempt of the Court of Justice to affirm certain specific elements, which allow the recognition of the EU constitutional identity, at least from a scholarly perspective. This happens as a necessary counterpart to the restatement of the national constitutional identities in the latter judgments. The three specific areas are, first, the principle of non-discrimination on the ground of age and its horizontal direct effect (para.2 of this article), second, the principle of conferred powers (para.3) and, third, the protection of the financial interest of the EU (para.4). To a certain extent, it is possible to argue that the Court of Justice is bringing to another level the process of constitutionalisation of specific elements of EU law. That is why a certain degree of scepticism from national constitutional judges towards these techniques persists, as their national constitutional legal orders have already been passed and guided through the respective national process of constitutionalisation. The Court of Justice still lies in the middle of the path. That is why an analysis of the three judgments that follow is needed: it acknowledges the central importance of the jurisdiction of the Court of Justice for the national legal orders, and the fact that the constitutionalisation of the process of European integration will be difficult without the involvement of the national constitutional courts.

2. The Danish Supreme Court and the principle of non-discrimination (on the ground of age)

The first judgment to be analysed is the judgment of the Danish Supreme Court in *Dansk Industri*, where the Danish Supreme Court refused to apply a preliminary ruling of the Court of Justice of the European Union. In order to pursue this analysis, we will firstly analyse the judgment of the Court of Justice, in order to understand its importance, and, secondly, we will examine the elements of the judgment of the Danish Supreme Court rejecting its application.

2.1 The Court of Justice applies horizontally the principle of non-discrimination on the ground of age

The judgment of the Court concerned the dismissal of a Danish worker (Mr. Rasmussen). According to the legislation in force in Denmark,⁷ the dismissed worker was entitled to a severance allowance of 1, 2 or 3 months of salary in the event that the working relationship is terminated in advance, after respectively 12, 15 or 18 years. The decision of the Court of Justice was divided in two main parts. In the first part, the Court of Justice tackles the issue of the scope of application of the principle of non-discrimination against the Directive 2000/78/EC⁸. The Court departs from the traditional definition of the principle of non-discrimination as a general principle of EU law⁹, which finds its roots in the constitutional traditions common to the Member States and finally in the Charter of Fundamental Rights, mentioning the leading case law in *Mangold*¹⁰ and *Küçükdeveci*¹¹. The Court also underlines that “the scope of the protection conferred by the directive does not go beyond that afforded to the principle”¹², which appears to confirm that the principles of EU law have a scope of application that is broader than the one of the directive. However, the Court stresses that to apply the principle, the case should fall within the scope of the prohibition of discrimination in Directive 2000/78/EC¹³. The Court finds that the case falls within the scope of the above-mentioned prohibition as it regards the dismissal of a worker within the meaning of Article 3.1 c) of Directive 2000/78/EC. Therefore, the principle of non-discrimination on the ground of age should be applied to the dispute, which involves two private persons¹⁴. In the second part of its decision, the Court of Justice has been asked by the national Court how to balance the principle of non-discrimination, found to be applicable, and the principle of legal certainty and legitimate

⁷ Paragraph 2 a (1) of the Danish Law on legal relationships between employers and employees.

⁸ Directive 2000/78/EC, OJ L 303 2000.

⁹ Court of Justice of the EU (CJEU), case C-441/14, *Dansk Industri (DI)* [2016], para. 22.

¹⁰ CJEU, case C-555/07, *Küçükdeveci* [2010].

¹¹ CJEU, case C-144/04, *Mangold* [2004].

¹² *Ibid.*, para. 23.

¹³ *Ibid.*, para. 25.

¹⁴ *Mangold*, para. 26.

expectations, justified, according to the national court, by the impossibility to interpret the national legislation according to EU law¹⁵. The Court accordingly provides the national court with the necessary guidance as to discern between consistent interpretation and the horizontal application of a general principle.

The judgment tackles two relevant issues, which makes it worthy of in-depth analysis. It represents an answer of the Court of Justice to some of the criticism that has been put forward either on the opportunity of the horizontal application of the principle of non-discrimination on the ground of age¹⁶ or on the theoretical systematization of the doctrine of direct effect, clarifying the distinctive character of horizontal direct effect and of consistent interpretation¹⁷. In both ambits the judgment is to be warmly welcomed, as other than providing a clearer indication of the differences between horizontal direct effect and consistent interpretation¹⁸, it gives the dimension of the importance of the principle of non-discrimination in the EU legal order. This article will focus mainly on the first part of the decision.

2.2. The “constitutional status” of the principle of non-discrimination (on the ground of age)

The previous case law, in particular *Mangold* and *Küçükdeveci*, introduced a new approach to the application of the

¹⁵ *Ibid.*, para. 29.

¹⁶ Criticism towards the horizontal application of general principles has been developed at different levels. In literature, see T. Papadopoulos, *Criticizing the horizontal direct effect of the EU general principle of equality*, 17 (4) *European Human Rights Law Review* 437 (2011). However, some of the fiercest challengers of the horizontal application have been Advocate Generals of the Court of Justice. See, for instance: CJEU, Opinion of AG Ruiz-Jarabo Colomer in case C-397/01, *Pfeiffer* [2004], para. 46 and in joint cases C-55/07 and C-56/07, *Michaeler* [2008], para. 22; Opinion of AG Kokott in case C-321/05, *Kofoed* [2007], para. 67; Opinion of AG Trstenjak in case C-282/10, *Dominguez* [2012], paras 127 - 128. AG Trstenjak in particular maintains that the horizontal application of general principles would be in contrast with the limits towards the application of fundamental rights included in Art. 51 (2) of the Charter.

¹⁷ See, for instance, the traditional case law on consistent interpretation, where the principle of legal certainty is expressly regarded as a limit towards consistent interpretation. For a restatement of this case law, see CJEU, case C-268/06, *Impact* [2008], paras 100 - 101.

¹⁸ See E. Gualco, L. Lourenço, *Clash of Titans. General Principles of EU Law: Balancing and Horizontal Direct Effect*, 1 *European Papers* 2 (2016).

doctrine of direct effect to general principles and secondary EU legislation. The usual understanding of their relationship had been, before these two seminal decisions, that general principles did not enjoy a scope of application broader than the legal instrument to which they were linked. As to the nature of the legal instrument involved, this had not represented an issue for regulations as well as for decisions, in as much as their scope of application was not limited by the Treaties. But, as it is quite trite EU law, directives are binding “only as to the results to be achieved” by the Member States¹⁹. This has limited the application and enforcement of directives by the national jurisdictions to litigation between the State and the citizens (vertical direct effect). Again, the problem comes when the judgment involves two private parties, as directives cannot generate obligations on individuals, but only confer on them rights (horizontal direct effect). The direct application of the content of a directive in front of a national Court would rather lead to the imposition on individuals of obligations that should have been dealt with by the State. The reasoning of the Court of Justice in *Dansk Industri*, accordingly, attempts to reorder the rules on the application of the above-mentioned principle to litigation involving private parties. The Court clarifies that the principle of equal treatment finds its roots in various international instruments as well as in the constitutional traditions common to the Member States. It mentions additionally the Charter of Fundamental Rights, which is recognized as the source of the general principle²⁰. Up to this point, the legal reasoning appears consistent with the previous in *Mangold* and *Kücükdeveci*. The Court of Justice, however, takes a few steps further. First, it tackles directly and with a systematic approach the issue of the scope of application of the Directive and of the principle, clearly stating, “the scope of the protection conferred by the directive does not go beyond that afforded by the principle”²¹. Second, the Court openly recognizes that the principle of non-discrimination holds a specific, distinctive place within the constitutional legal order of the EU. In paragraph 26 of the judgment, the Court maintains, given that it had already found in previous case law the applicability of

¹⁹ Art. 288.3 TFEU.

²⁰ *Dansk Industri (DI)*, para. 22.

²¹ *Ibid.*, para. 23.

Directive 2000/78/EC to the Danish legislation in force, the same “[A]pplies with regards to the fundamental principle of equality, the general principle prohibiting discrimination on grounds of age being a merely specific expression of that principle”²². It is worthy to note that Lenaerts theorized a similar approach, which envisages the fundamental role of the principle of non-discrimination within the EU constitutional order, pointing out that “general principles of EU law enjoy a ‘constitutional status’”²³. The doctrine is not unanimous on this assumption, as other authoritative voices have raised different views in the past²⁴. This cannot, however, undermine the potential of the innovation that the Court is supplying, opening the way to the use of the principle of non-discrimination on the ground of age when EU secondary legislation is not applicable.

2.3. The Danish Supreme Court and the “lack of a written provision”: A classic case of “ultra vires review?”

The solution given by the Court of Justice in *Dansk Industri* represents an important systematization of the case law on the principle of non-discrimination. Notwithstanding that, the Danish Supreme Court decided not to follow the indication provided for by the Court and decided not to apply the principle of non-discrimination. The Danish Supreme Court maintained that it was not possible to interpret Danish law in conformity with EU law, since, as anticipated in its question for preliminary ruling, this would have been regarded as a *contra legem* interpretation²⁵. The main reason for refusing the application of the preliminary ruling as resulting from the reasoning of the Danish Supreme Court can be summarized as follows: the principle of conferral does not allow the Court of Justice to claim the power to apply the principle of non-discrimination to a litigation between private parties²⁶. In

²² *Dansk Industri (DI)*, para.26.

²³ K. Lenaerts, *The Principle of Equal Treatment and the European Court of Justice*, *Dir. Un. Eur.* 3 (2013), at 470, K. Lenaerts & J.A. Gutierrez Fons, *The Constitutional Allocation of Powers and General Principles in EU law*, 47 *Comm. Mkt. L. R.* 6 (2010), at 1648.

²⁴ See, inter alia, V. Skouris, *Effet utile Versus Legal Certainty: The Case-law of the Court of justice on the Direct Effect of Directives*, 17 *Eur. Business L.R.* 2 (2006), 254.

²⁵ It is worthy to note that the Advocate General was convinced of the opposite. See the Opinion of AG Bot in *Dansk Industri (DI)*, paras 63-64.

²⁶ S. Klinge, *Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-*

particular, the Danish Court holds that the Danish Accession Agreement to the European Union of 1973 (as well as the Preparatory Works of the Danish Parliament) do not contain any legal basis to confer to an unwritten EU principle the right to prevail over a provision of national law²⁷. This restrictive and literal interpretation of the principle of conferred powers is not surprising as this is not the first case in which a national Supreme or Constitutional Court has refused to follow the indications received from the Court of Justice²⁸. However, the argument used seems not to take into account that the reasoning of the Court of Justice on primacy and direct effect is based on unwritten principles. Should it therefore accordingly be assumed that this decision of the Danish Supreme Court is a challenge to the primacy of EU law over national law? Perhaps the real meaning of the judgment is that the Danish Supreme Court wants the Court of Justice to withdraw from its *Kucukdeveci* and *Mangold* case law and to go back to its *Dominguez* decision.²⁹ In that judgment the Court openly recognized that it is for the national Court to decide if it is possible to apply national law in conformity with EU law, without imposing the horizontal application of the principle of non-discrimination³⁰. The *Dominguez* decision represents, however, a step back in the process of the constitutionalisation of EU law through general principles that the Court has strongly upheld in the recent past, and which clearly represents the approach taken in *Dansk Industri*. The refusal of the Danish Supreme Court to follow the preliminary ruling of the Court of Justice is also a sign of the rejection of a pluralist approach towards European and national constitutional identities: it is not however sufficient to reduce the impact and the

principle, EU Law Analysis (2016), available at <http://eulawanalysis.blogspot.it/2016/12/dialogue-or-disobedience-between.html> (lastly visited 1 February 2018).

²⁷ Danish Supreme Court (DSC), judgment n. 15/2014, [2016], 40. An unofficial English translation is available at <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf> (lastly visited 1 February 2018).

²⁸ CJEU, case C-399/09, *Marie Landtová* [2011]. On this point see generally O. Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, 29 Yearbook Eur. L. 1 (2010), at 65.

²⁹ CJEU, case C-282/10, *Dominguez* [2012].

³⁰ *Ibid.*, para. 44.

importance of the decision of the Court in *Dansk Industri*. The authority of the decisions of the Court of Justice does not depend simply on the implementation at national level. Other national courts can equally apply the judgment and at the same time other private parties can rely on the principle of non-discrimination in front of national courts, provided that it is not possible to interpret national legislation according to EU law.

3. The German Constitutional Court and the OMT and PSPP programmes: shortcomings on the principle of conferred powers

3.1. The Gauweiler decision and the CJEU functional interpretation of the principle of conferred powers

The *Gauweiler*³¹ case originated from a complaint brought to the Federal Constitutional Court of the German Republic by Peter Gauweiler, who was at the time of the action a German member of the Bundestag. This decision originates, as widely acknowledged, from the notorious OMT (Outright Monetary Transactions) programme. In particular, the question for preliminary ruling raised by the German Constitutional Court asks, in essence, the Court of Justice to assess the validity of the decisions of the Governing Council of the European Central Bank of 6 September 2012³² in light of the interpretation of Articles 119 TFEU, 123 TFEU and 127 TFEU and of Articles 17 to 24 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank³³. These decisions regulate a number of the technical features regarding the OMT in the secondary sovereign bond markets of the Eurozone, as a part of a wider strategy carried out by the Eurozone countries in order to react to the sovereign debt crisis that has affected some EU Member States since 2008. Briefly summarised, since 2012, the ECB has launched a programme to buy, under clearly defined circumstances, the sovereign bonds of EU Member States that have the Euro as a common currency. This

³¹ CJEU, case C-62/14, *Gauweiler* [2015].

³² European Central Bank, press release of 6 September 2012, available at https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (lastly visited 1 February 2018).

³³ Protocol (No 4) on the statute of the European System of Central Banks and of the European Central Bank, OJ 2012 C 326.

represented a major issue for those Member States³⁴ that have traditionally been opposed to “sharing the risk” of the sovereign debt of States who pay a lower rate interest on their placed sovereign debt compared to those Member States paying a considerably higher interest rate on their bonds.³⁵ One of the points which the judgment concerns is if the decisions taken by the Governing Board of the European Central Bank complies with the principle of conferred powers³⁶. The above-mentioned principle is, according to the Court of Justice³⁷ as well as according to the referring Court³⁸, the basic source of the powers of the European Union; it is generally accepted that it is not possible to interpret the *acquis communautaire* in a way that is sensible to enlarge the powers conferred by the Treaties to the EU institutions³⁹. The real picture

³⁴ *Exempli gratia*, see the ordoliberal school, majoritarian in Germany, according to which the EU institutions should not promote the “moral hazard” of inflation through the endorsement of the debt of less-fiscally disciplined States.

³⁵ See the statistics of the European Central Bank for long-term (10 years) government bonds from February 2016 onwards. Available at https://www.ecb.europa.eu/stats/financial_markets_and_interest_rates/long_term_interest_rates/html/index.en.html (lastly visited 1 February 2018).

³⁶ Article 4.1 and 5.1-2 TFEU.

³⁷ CJEU, *Gauweiler*, para. 41.

³⁸ According to an established case law of the German Constitutional Court (GCC), the transfer of sovereign power to supranational organizations should be clearly limited. I.e. GCC, Judgment of the Second Senate of 30 June 2009 2 BvE 2/08 para. 233-234 [Lisbon Urteil]: “The Basic Law does not authorise the German state bodies to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*)”. See the comment by L.S. Rossi, *I principi enunciati dalla sentenza della Corte costituzionale tedesca sul Trattato di Lisbona: un'ipoteca sul futuro dell'integrazione europea?*, 92 Riv. Dir. Int. 4 (2009), at 454.

³⁹ The “quest for legitimacy” originated by the principle of conferral had a considerable impact on the development of the process of EU legal integration. It is enough to recall the provision of Article 51.2 of the Charter of Fundamental Rights of the EU, included in the text of the Charter in order to ensure that the latter “does not extend the field of application of Union law beyond the powers of the Union or establish any new power”. The Agreement on the Accession of the European Union to the European Convention of Human Rights incurred such a fate, where the Court of Justice gave a negative Opinion (CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014]) towards its compliance with the Treaties, *inter alia* on the ground that the powers of the EU institutions (and of the Court itself) were likely to be severely affected. Exploring a different field of

is, however, much more complicated. While it is true that the European Union and its Court of Justice have always strived to show deference towards the principle of conferred powers, the developments in the case law have showed at least a move towards an increasingly “functional” interpretation of the wording of the Treaties. The Court has relied on various instruments, as in the doctrine of *effet utile* and implied powers⁴⁰, in order to carve out of the literal meaning of the Treaties an interpretation that could be instrumental to the ultimate goal of the constitutional legal order of the European Union: the creation of an *ever-closer Union*. The *Gauweiler* case represents, to a certain extent, a reliable example of this functional interpretation. In order to pass the test of the principle of conferred powers, the institution involved should ensure that the act adopted falls within one of the different categories of competences that the States have conferred to the EU. In this case, being an act addressed to the acquisition of certain typologies of government bonds, the act should have been meant to fall within the exclusive competence of EU monetary policy⁴¹ and not, as claimed by the applicants in the national proceeding, within the scope of economic policy⁴². In order to realize this objective, the Court of Justice, while never denying the being subject to the principle of conferred powers, interprets⁴³ the extent of monetary policy in order to ensure the effective protection of the interests of the Member States more affected by the economic crisis. This

EU law, the conferral originated the famous *Meroni* doctrine (CJEU, case 9/56, *Meroni v High Authority* [1957]) according to which the EU institutions cannot delegate to other bodies powers that go beyond the ones which were conferred to them by the Treaties.

⁴⁰ V. Skouris, *Effet utile Versus Legal Certainty*, cit. at 24.

⁴¹ CJEU, *Gauweiler*, para. 42.

⁴² It is widely known that while having an exclusive competence in monetary policy (Article 3 TFEU), the EU has only the power to coordinate (Article 5 TFEU) national economic policies. The boundaries between these two policies are however extremely fuzzy. See in this regard M. Waibel, *Monetary policy: an exclusive competence only by name?*, in S. Garben & I. Govaere (eds.), *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future* (2017).

⁴³ In this sense, one could speculate that the Court of Justice has operated a balance between the principle of conferred power and the principle of solidarity and loyal cooperation, which informs the relationship between the EU and the Member States as well as the Member States themselves.

interpretation is enabled thanks to the “fuzzy boundary”⁴⁴ that separates economic and monetary policy, and of which the Court of Justice attempts to take advantage⁴⁵. The Court of Justice accordingly concluded that: “[A] monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area”⁴⁶. The last part of the decision, equally relevant from the point of view of the functional interpretation that ensures compliance with the principle of conferred powers, pertains to the evaluation of the compliance of the OMT programme with the provision of Article 123 TFEU⁴⁷. This article forbids the provision of credit facilities by the European Central Bank to Member States (in order to exclude the possibility of the creation of EU bonds). Once more, the Court of Justice makes sure that the compliance with the principle of conferred powers is respected by explaining the conditions under which the European System of Central Banks (ESCB) can uphold outright monetary transactions: first, the operation should be limited only to the purchase of bonds already present in the market⁴⁸; second, the ESCB should ensure that the measure does not have an “effect equivalent to that of a direct purchase of government bonds”⁴⁹; third, that “[T]he Governing Council is to be responsible for deciding on the scope, the start, the continuation and the suspension of the intervention on the secondary market envisaged by such a programme”⁵⁰. The Court of Justice’s interpretation leads to the conclusion that the overall measure is not capable of “[L]essen[ing] the impetus of the Member States concerned to follow a sound budgetary policy”⁵¹.

3.2. The OMT judgment: identity review, ultra vires review and “openness to European integration”

The judgement of the Court of Justice was welcomed with a certain degree of scepticism in Germany, and it was unsure⁵² if that

⁴⁴ M. Waibel, *Monetary policy*, cit. at 42, 8.

⁴⁵ CJEU, *Gauweiler*, paras 47-49.

⁴⁶ *Ibid.*, para. 52.

⁴⁷ Article 123 TFEU.

⁴⁸ CJEU, *Gauweiler*, para. 95.

⁴⁹ *Ibid.*, para. 97.

⁵⁰ *Ibid.*, para. 106.

⁵¹ *Ibid.*, para. 129.

⁵² See, specifically referring to the identity review, P. Faraguna, *Il Bundesverfassungsgericht e l'Unione Europea, tra principio di apertura e controlimiti*,

attitude would have led to an open rejection of the outright monetary transaction system. In any case, it appeared most likely that the German Constitutional Court would have chosen either to approve or to reject the OMT. The German Constitutional Court⁵³, however, made a third choice and decided not to declare the unconstitutionality of the OMT. The judgment of the German Constitutional Court represents a structured answer to the functional interpretation of the monetary policy, which belongs to what has been defined as the economic constitution⁵⁴ of the European Union and which in this capacity represents an important aspect of the constitutional legal order (and identity) of the EU⁵⁵. This is perhaps the reason why the German Constitutional Court decided to detail an explanation of the theoretical differences between the two concepts. According to the German Constitutional Court, it is not enough to recall the principle of *Kompetenz-Kompetenz*⁵⁶ in order to justify the necessity to deviate from the project of European integration⁵⁷, but it is necessary to make reference to the concept of the German constitutional identity and to the use of the powers that are associated to it. The Karlsruhe Court points out that the two concepts against which the EU measure shall be assessed are strictly linked, since in the opinion of

DPCE 2 (2016), at 454. See also L.F. Pace, *The OMT Case: Institution Building in the Union and a (Failed) Nullification Crisis in the Process of European Integration*, in L. Daniele, P. Simone & R. Cisotta (eds.), *Democracy in the EMU in the Aftermath of the Crisis* (2017).

⁵³ GCC, Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13 [OMT judgment].

⁵⁴ On this concept see e.g. K. Touri & K. Touri, *The Eurozone Crisis* (2014), C. Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 15 Ger. L.J. 5 (2015), at 987 and F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (2016). See also H. Hofmann, A. Pantazatou, *The transformation of the European Economic Constitution*, University of Luxembourg Law Working Paper Series, (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564156## (lastly visited 1 February 2018).

⁵⁵ The concept of economic constitution is controversial and openly debatable. It resorts to Karlo Tuori concept of the “multiple constitutions” of Europe, as detailed in K. Tuori, *Multi-Dimensionality of European Constitutionalism: The many constitutions of Europe*, in K. Tuori (ed.) *The Many Constitutions of Europe* (2010). For a useful literature review on the point, see also H. Hofmann & A. Pantazatou, *The transformation of the European Economic Constitution*, cit. at 54.

⁵⁶ GCC, *OMT Judgment*, para 130.

⁵⁷ *Ibid.*, para 141.

the German Constitutional Court, the *ultra vires* review is a particular case of the application of the general protection of the constitutional identity, but one that should be treated independently from another⁵⁸.

The German Constitutional Court then details further the difference, linking *ultra vires* review to the use of the principle of conferred powers, while referring to the identity review as the ultimate limit that cannot be trespassed by the EU institutions.⁵⁹

This latter sentence is of special value for the argument explained in this article, as it results that the protection of the national constitutional identity justifies an action against the European Union when it trespasses the competences conferred by the Member States; at the same time, the origin of the trespassing lies in the affirmation of the specific character of the EU legal order, as the German Constitutional Court also openly acknowledges⁶⁰. The reason of the “restraint” of the Karlsruhe Court from digging further into the use of the principle of conferred powers lies in the principle of “openness to European Integration”. This principle finds its roots in the more general principle of “openness to international law”⁶¹ that represents the most visible inheritance of the neo-functionalist approach that was (and still is) imbibing European Constitutions in the aftermath of the Second World War. This principle is also (with others) supporting the reasoning of the German Constitutional Court in its case law and in particular in the *Maastricht* and *Lisbon* decisions where this principle is further detailed. In the *Lisbon Urteil*, the GCC openly recognized that there is a functional link between the Basic Law and the process of EU integration, and that accordingly the conflict between a constitutional provision and EU law should be interpreted in the light of this favourable approach⁶². In the *OMT* judgment the GCC

⁵⁸*Ibid.*, para 153.

⁵⁹*Ibid.*, para 153.

⁶⁰ GCC, *OMT Judgment*, para 154: “Both the *ultra vires* and the identity review – each constituting independent instruments of review – must be exercised with restraint and in a manner open to European integration”.

⁶¹ C. Lebeck, *National Constitutionalism, Openness to International Law and the Pragmatic Limits of European Integration – European Law in the German Constitutional Court from EEC to the PJCC*, 7 Ger. L.J. 11 (2006), at 908-909.

⁶² GCC, *Lisbon Urteil*, para 225. “The Basic Law calls for European integration and an international peaceful order. Therefore, not only the principle of openness

confirms, in paragraph 154, the importance of the principle of “openness to European integration” and acknowledges that is part of the German constitutional identity in as much as the principle of conferred powers.

3.3 The (partial) acceptance of the functional interpretation of the Principle of conferral in the OMT judgment...

As has already been pointed out, the German Constitutional Court decided to uphold the decision of the Court of Justice in *Gauweiler*. This implied also the compliance of the judgment with the Basic Law and the acceptance of the conditions⁶³ underlined by the Court of Justice in order to ensure the compliance of the OMT programme with the Treaties. However, we should not think that this positive decision might represent, on the Karlsruhe side, a blank cheque acceptance of the system based on the “openness to European integration”. The German Constitutional Court based its review of the OMT programme on the principle of conferred powers, seen either from the German perspective (*Kompetenz-kompetenz*) as well as from the EU perspective (Article 5 TEU). The restating of such a traditional element of the identity review confirms that, at the present time, an extensive interpretation of the Treaties is only limitedly possible in as much as “[T]he finality of the European integration agenda may not lead to the *de facto* suspension of the principle of conferral”⁶⁴. This interpretation of the principle of conferral represents the most relevant challenge that the Court of Justice has to face in confronting the Karlsruhe review. Separately, it should be recognized that the German Constitutional Court acknowledges the jurisdiction of the Court of Justice and consequently accepts its interpretation⁶⁵, while at the same time highlighting that the German government and the *Bundestag* should ensure that the further implementation of the OMT programme complies with the conditions described by the CJEU.

towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies.”

⁶³ GCC, *OMT Judgment*, paras 199 and 206.

⁶⁴ *Ibid.*, para 185.

⁶⁵ *Ibid.*, para 156.

3.4 ...And in the new referral of the German Constitutional Court on the Public Sector Purchase Programme of the European Central Bank

A new chapter of this debate was inaugurated by the German Constitutional Court in mid-summer 2017. The Karlsruhe Court referred a question for preliminary ruling⁶⁶ to the Court of Justice of the European Union in order to ascertain if the Public Sector Purchase Programme (PSPP)⁶⁷ of the European Central Bank complies with the letter of the Treaties. The preliminary ruling, concerning the validity of the programme, asks the Court of Justice if the action of the European Central Bank complies with Article 5 TEU (principle of conferral) and Article 123 TFEU (prohibition of monetary financing). In essence, the German Constitutional Court asks if the purchase of public sector securities conducted by the European Central Bank is a turnaround to avoid the application of Article 123 TFEU prohibition and consequently goes beyond the powers conferred to the EU by the Member States. The German Constitutional Court has also asked to the Court of Justice to treat the matter according to the expedited preliminary ruling procedure⁶⁸. The Court of Justice, with an order of 18 October 2017⁶⁹, has refused the request, agreeing, however, to prioritize its treatment according to Article 50.3 of the Rule of Procedure. In its question for preliminary ruling, the German Constitutional Court expresses several doubts about the compatibility of the measure with the EU Treaty and affirms: “[T]he resulting risks for the profit and loss account of the national central banks would amount to a violation of

⁶⁶ GCC, order of 18 July 2017, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15. Translation in English not available. See the press release of 15 August 2017, available at <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html>

⁶⁷ The PSPP is a European Central Bank programme that is part of the larger Expanded Asset Purchase Programme (EAPP). Both programmes are ultimately part of the Quantitative Easing (QE). Through these various programmes, the European Central Bank is buying securities and bonds in the secondary market and is contributing to price stability in the Eurozone.

⁶⁸ Art. 105 of the Rule of Procedures of the Court of Justice of the European Union, OJ L 265 2012.

⁶⁹ CJEU, order of the president of the Court in case C-493/17, *Weiss* [2017].

*the constitutional identity within the meaning of Art. 79(3) GG*⁷⁰. The German Constitutional Court is, most likely, asking the Court of Justice to rule another OMT judgment, where the Luxembourg Court will detail the condition under which the purchases provided for by the PSPP are conducted according to the EU Treaties. In this case, it must be acknowledged, the German Constitutional Court accepts the dimension of the European dialogue between Constitutional Courts. At the same time, it does not withdraw from its identity review, making explicit that an answer different from a clear description of the conditions under which the European Central Bank can operate would not be deemed sufficient. The Court of Justice will surely need time to reflect on the correct way to address a similar challenge.

As a preliminary conclusion, it seems that the approach adopted by the German Constitutional Court in the *Gauweiler/OMT* judgment and in the reference for the preliminary ruling in the *Weiss/PSPP* judgment is similar: both judgments are expression of the *ultra vires* and identity review of the German Constitutional Court. However, contrary to the Danish Supreme Court judgment, they are not opposing to the coexistence of the pluralism of the national constitutions and of the attempt by the Court of Justice of the determination of the distinctive elements of the EU constitutional legal order. At the same time, the dimension of the challenge to the Court of Justice remains. The second judgment in particular requires a clear answer from the Court of Justice: an answer that can lead to the reinforcement of the functional interpretation of the principle of conferred powers as a distinctive element of the EU constitutional legal order that the Court of Justice has pronounced in *Gauweiler*.

4. The Italian Constitutional Court and the protection of the financial interests of the EU

Here, we move towards the analysis of the last decision: the request for preliminary ruling lodged by the Italian Constitutional Court on the interpretation of the seminal *Taricco* judgment. From an analysis of the question posed we can draw the conclusion that

⁷⁰ GCC, order of 18 July 2017, Para 131. Translation is courtesy of the press release of the German Constitutional Court.

the *Taricco II (M.A.S and M.B.)*⁷¹ decision represents another occasion where the Court of Justice has been asked to rule on the conflict between a national constitutional value (the principle of legality) and a distinctive element of the EU constitutional legal order (the primacy of EU law).

4.1. *Taricco* hits back: the decision of the Court of Justice and the second preliminary ruling

The decision of the Court of Justice in *Taricco*⁷² has raised a number of concerns and reactions although mainly within Italian legal scholarship.⁷³ The Court dealt with the criminal proceedings against an Italian national, who was held guilty, *inter alia*, for a fraud that was in principle likely to have an impact on the financial interests of the European Union. The field of the financial interests of the EU stands at a crossroads between European criminal, tax and constitutional law, and is a clear example of the trend of EU law towards an interdisciplinary approach. The importance of the case is linked to the fact that the Court of Justice decided, in order to ensure the effective protection⁷⁴ of the financial interests of the European Union, to interpret the national legislation about the limitation period associated to the conclusion of a criminal proceeding in order to avoid the crime being statutory-barred. In essence, what the Court of Justice has done is to affirm the procedural nature of the limitation period, rather than substantial as it is according to the case law of the Italian Constitutional Court⁷⁵, in order to confer on Article 325 TFEU direct effect and to disapply the national provision that was impeding the prosecution of the crime against the financial interests of the EU. The case eventually came to the attention of the Italian Constitutional

⁷¹ CJEU, Case C-42/17, *M.A.S. and M.B.* [2017].

⁷² CJEU, case C-105/14, *Taricco* [2015].

⁷³ See e.g. R. Mastroianni, *Supremazia del diritto dell'Unione e "controlimiti" costituzionali: alcune riflessioni a margine del caso Taricco*, *Diritto penale contemporaneo*, (2016); F. Viganò, *Il caso Taricco davanti alla Corte costituzionale: qualche riflessione sul merito delle questioni, e sulla reale posta in gioco*, in A. Bernardi (ed.), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali* (2017); E. Cannizzaro, *Sistemi concorrenti di tutela dei diritti fondamentali e controlimiti costituzionali*, in A. Bernardi (ed.), cit. at 61.

⁷⁴ Art. 325 TFEU.

⁷⁵ M. Bassini, *Prescrizione e principio di legalità nell'ordine costituzionale europeo. Note critiche a Taricco*, *Consulta Online* 96 (2016).

Court⁷⁶, which was asked, by the *Corte di Cassazione*, to rule on the compliance of the interpretation of the Court of Justice with the Italian Constitution. This judgment is the expression of a specific kind of review that, to a certain extent, is analogous to the identity review and the *ultra vires* review of the German Constitutional Court: the doctrine of counterlimits, in the wording of the Italian Constitutional Court⁷⁷. In the case of the application of the counterlimits theory, the Italian Constitutional Court analyses either if the Court of Justice has exceeded the powers conferred by the Treaties and/or if the limit of the protection of the core of constitutional rights has been trespassed by the exercise of these powers.

4.2. The conditions for the application of direct effect to a Treaty provision

The question of the application of direct effect to Article 325 TFEU brings us to the core of EU law. According to a consistent case law of the Court of Justice⁷⁸, in order to be directly effective a provision of primary law should be sufficiently detailed, precise, and unconditional (not subjected to further implementation)⁷⁹. The Treaties provides the necessary coverage to justify the direct effect of primary EU law (in particular of directives, regulations and decisions)⁸⁰. There is, however, a lack of provisions regulating the direct effect of the articles of the Treaties themselves. This is partly linked with the specific character of the Treaties, which, being clearly addressed to the States, should not be able in principle to confer to an individual certain rights that can be relied on in front of the national courts. On the other side, since the *Defrenne* case law⁸¹, the Court of Justice has retained the right to determine if certain provisions of the Treaties meet the elements necessary to be

⁷⁶ Italian Constitutional Court (ICC), order n. 24/2017 of 23 November 2016.

⁷⁷ I.e. CJEU, case 183/73, *Frontini* [1973], para. 9.

⁷⁸ CJEU, case 26-62, *Van Gend en Loos* [1963].

⁷⁹ See P. Craig, *The Legal Effect of Directives: Policy Rules and Exceptions*, 34 Eur. L.R. 3 (2009), at 349.

⁸⁰ Art. 288 TFEU, paras 2-3-4.

⁸¹ Where it was recognized the direct effect of Article 118 TEC, regulating the right of women and men to be paid equally. CJEU, case 43-75, *Defrenne v Sabena (II)* [1976].

applied directly, either vertically or horizontally⁸². The circumstances of this case differ from the ones usually related to the application of direct effect. In general, vertical direct effect is associated with directives, and the rule behind this utilisation is that directives cannot be used in order to impose obligations on individuals. The factual circumstances of *Taricco*, however, go to the detriment of the individuals concerned, in the sense that they force the State to prosecute a crime that was not, according to national legislation, meant to be prosecuted. The Court of Justice, relying on its exclusive jurisdiction on the conferral of direct effect to Treaties provisions, decided to apply Art. 325 TFEU although the Treaty provision was not intended to place a burden on the citizen but rather on the Member State⁸³. It could be argued however that the primary concern of the Court of Justice is not simply the affirmation of direct effect, but rather an attempt to proceed towards the harmonisation of the general part of criminal law⁸⁴. In this case, the decision of the Court in *Taricco* gains a different relevance and importance, as the objective of the harmonization of criminal law is as important as the rights of the individuals involved in the same proceeding. Again, as has been pointed out⁸⁵, another explanation can be found in the specific character of the application of direct effect: it is true and noticeable that the literal provision of the Treaties lacks the conditions necessary to be applied. At the same time, it is equally true that the obligation in Article 352 is detailed, precise and unconditional enough: it imposes on the Member States a requirement to reach the objective of the “efficient protection” of the financial interests of the EU. In the present case it looked quite evident that the Italian authorities were not able to ensure this objective.

⁸² However, differently from *Dansk Industri*, the present case does not involve a controversy between two individuals. See *supra*, para. 2.

⁸³ Ensuring the “effective protection” of the financial interests of the European Union is, in fact, an obligation which should bear on the Member State. Otherwise, the principle of the legitimate expectations of the citizens of that Member State might be seriously undermined.

⁸⁴ See the comment of F. Rossi, *L'obbligo di disapplicazione in malam partem della normativa penale interna tra integrazione europea e controlimiti. La problematica sentenza Taricco della Corte di giustizia*, 17 *Rivista Italiana di Diritto e Procedura Penale* 1, (2016), at 373.

⁸⁵ See P. Faraguna, *Il caso Taricco, I controlimiti in tre dimensioni*, in A. Bernardi (ed.), *I controlimiti*, cit. at 72, 359.

4.3. Order n. 24/2017 and decision C-42/17: a particular case of dialogue between openness and resistance

In its question⁸⁶, the Italian Constitutional Court essentially asks the Court of Justice if the early decision of the Court of Justice in *Taricco* is to be applied as well if affects the constitutional identity⁸⁷ and the supreme principles of the Italian constitutional legal order⁸⁸. As some scholars have pointed out⁸⁹, the overall style of the question of the Italian Constitutional Court is drafted as a meta-dialogue: the Italian judge, adopting a rather conciliatory approach⁹⁰, describes the necessity of a dialogue through a legal instrument that is typical of the dialogue between the Constitutional Courts. The Italian Constitutional Court asks the Court of Justice to interpret *Taricco* in a way that is compatible with the Italian constitutional legal order. However, behind this formal openness, it is clear that the Italian Constitutional Court is threatening to declare a restatement of the first *Taricco* decision as trespassing the limits of the powers conferred by the Treaties to the Court, and ultimately violating an essential element of the Italian

⁸⁶ Two interesting contributions explain (in English) why the *Taricco* order is especially important for the Italian and European legal order. See P. Faraguna, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"*, *VerfBlog* (2017) available at <http://verfassungsblog.de/the-italian-constitutional-court-in-re-taricco-gauweiler-in-the-roman-campagna/> (lastly visited 1 February 2018). D. Tega, *Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds*, *ICONnect blog* (2017), available at <http://www.iconnectblog.com/2017/02/narrowing-the-dialogue-the-italian-constitutional-court-and-the-court-of-justice-on-the-prosecution-of-vat-frauds/> (lastly visited 1 February 2018).

⁸⁷ The Italian Constitutional Court uses the expression "constitutional identity" in as much as the German Constitutional Court uses the word "limits" to describe its identity review: this might be interpreted as a sign that the national Constitutional Courts are striving to find a consistent and uniform way to review the decisions of the Court of Justice. See para. 6 of the Order.

⁸⁸ Paras 10-11 of the Order.

⁸⁹ See L. Gradoni, *Il dialogo tra Corti, per finta*, *Sidiblog* (2017), available at <http://www.sidiblog.org/2017/02/08/il-dialogo-tra-corti-per-finta-4/> (lastly visited 1 February 2018) and D. Gallo, *La primazia del primato sull'efficacia (diretta?) del diritto UE nella vicenda Taricco*, *Sidiblog* (2017), available at <http://www.sidiblog.org/2017/02/25/la-primazia-del-primato-sullefficacia-diretta-del-diritto-ue-nella-vicenda-taricco/> (lastly visited 1 February 2018).

⁹⁰ It is worthy to recall that, contrary to what the German Constitutional Court and the Danish Court have done, the Italian Constitutional Court recognizes the primacy of EU law. See para. 6 of the Order.

constitutional identity. The Court of Justice, differently from the early Opinion of its Advocate General⁹¹, decided to answer to this question in a way that attempts to strike a balance between a constitutional right and the primacy of EU law⁹².

Instead of resorting to its case law on national constitutional identities (as in *Sayn Wittgenstein*⁹³ and in *Von Bogendorff*⁹⁴), the Court openly recognizes that the application of EU law over national law is not without limits⁹⁵. It does so through a twofold reference to EU and national law. In first place, the Court points out that the field of VAT fraud lies within the EU-Member States shared competences⁹⁶, and that, accordingly, the margin of discretion of the Member States depends on the level of harmonization at EU level⁹⁷. Given that the EU rules on harmonization of VAT fraud were not in force at the moment of the initiation of the criminal proceeding, “*The Italian Republic was thus, at that time, free to provide that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law*”⁹⁸. The Court also recalls that the principle of legality is equally important for EU as well as for national law, since it is enshrined in Art. 49 of the Charter of Fundamental Rights of the EU as well as being part of the constitutional traditions common to the Member States⁹⁹. With this sentence the Court avoids referring to the concept of constitutional “identity”, resorting to the more

⁹¹ The Opinion of AG Bot in *Taricco II*, released on 18 July 2017, takes a different stance. The Advocate General reaffirms the primacy of EU law, ultimately recalling the duty of the Italian Constitutional Court to answer to the national court in the sense of ordering to disapply the limitation period, thus violating the constitutional interpretation of the criminal law provision in Italian law. See Opinion of Advocate General Bot, case C-42/17, *M.A.S. and M.B.* [2017]. Since, however, Opinions of the Advocate Generals are not binding on the Court, this did not impede the different answer given by the Court of Justice.

⁹² CJEU, Case C-42/17, *M.A.S. and M.B.* [2017] [*Taricco II*].

⁹³ CJEU, case C-208/09, *Sayn-Wittgenstein* [2011]. On *Sayn Wittgenstein* and the case law of the CJEU on national constitutional identities see the clear description provided by G. Di Federico, *Identifying national identities in the case law of the Court of Justice of the European Union*, 4 *Dir. Un. Eur.* (2014), at 769.

⁹⁴ CJEU, case C-438/14, *Von Wolfersdorff* [2016].

⁹⁵ CJEU, *Taricco II*, para. 41.

⁹⁶ Art. 4 (2) TFEU.

⁹⁷ CJEU, *Taricco II*, para. 43.

⁹⁸ *Ibid.*, para. 45.

⁹⁹ CJEU, *Taricco II*, paras 53-54.

relational and plural concept of “common constitutional traditions”¹⁰⁰. Although the language of common constitutional traditions is less prone to conflict than the one of constitutional identity, it is undoubted that the Court of Justice is underlining the specific importance of the principle of legality in the EU and national legal orders. The Court of Justice, with this decision, tries to kill two birds with one stone. Instead of paving the way to a conflict between a constitutional right and a provision of the Treaties, the Court recognizes that, as a way of exception, the principle of legality, common to EU and Member States legal orders, might authorize the disapplication of a Treaty provision. Concurrently the Court of Justice demonstrates commitment to acknowledge the pluralism of the interpretations of rights and principles that are at the core of national constitutional identities.

5. Conclusion

Approaching the end of this work, a first conclusion might be that the different judgments analysed share a common approach: they are expression of the creative tension between the pluralism of the national constitutional identities and the emersion of an EU constitutional identity. In the end, the author resisted the temptation to label every single Constitutional Court with an adjective (“good”, “bad” or “ugly”), which would have been ultimately either simplistic or unjust. The Italian, German and Danish judgments are at the same time troublesome and challenging, as seen from the perspective of the Court of Justice. Certain approaches might raise more doubt than others in the mind of an EU law scholar (see i.e. the Danish judgement) but this does not mean that they cannot be the object of a contextual interpretation. The Danish judgement, while representing perhaps the strongest rejection of a distinctive element of the EU constitutional legal order, as the direct effect of general principles, will challenge the Court of Justice to explain in a more convincing way (at least from the perspective of the national courts) its doctrine of direct effect. A similar remark can be made with reference to the

¹⁰⁰ F. Fabbrini & O. Pollicino, *Constitutional identity in Italy: European integration as the fulfilment of the Constitution*, EUI Department of Law Working Papers n. 6, (2017). On this point see also M. Cartabia, *Of bridges and walls: the “Italian style” of constitutional adjudication*, 8 Italian J. of Pub. L. 1 (2016).

Taricco II judgment, where the Italian Constitutional Court asked the Court of Justice to clarify its previous *Taricco* case law. The tension occurring is accordingly a by-product of the process of constitutionalisation of the EU legal order. The good news is that no one among the different Courts is openly opposing the elements of the EU constitutional identity¹⁰¹. The bad news is that, as showed in the *Taricco II* decision, there might be little space for further clarification from the Court of Justice since concerns of another *ultra vires* declaration from another national constitutional court are high. In this sense, the solution might be threefold. First, the time is come for the Court of Justice to provide a stronger theoretical background on the value and the meaning of the distinctive elements of the EU constitutional legal order. A first occasion has been the *Taricco II* decision, where the Court of Justice, albeit not referring openly to Art. 4 (2) of the TEU¹⁰², has however recalled that the EU and Member States share common constitutional traditions that can ultimately cause the disapplication of a Treaty provision. Second, the Court of Justice might consider developing further the *Gauweiler* functional interpretation of the principle of conferred powers (and in this case the occasion might be provided for by the pending *PSPP* judgment), another distinctive element of the EU constitutional legal order. Third, the Court of Justice of the EU should recall that, contrary to the national constitutional courts, it does not enjoy the possibility of upholding a “reverse preliminary ruling”¹⁰³ and that its exposure to the review of its national counterparts is permanent. This should suggest that the Court of

¹⁰¹ It is also interesting to note that even the German Constitutional Court, which consistently stated in its case law that a further transfer of competences to the European Union is not admissible under the German Constitution (*Kompetenzkompetenz*) without a formal revision of the Treaties, has recognized in the *OMT* judgment that the “principle of the openness to European Integration” embodied in the German Constitution might, under certain conditions, allow also for the approval of a measure which reflects a functional interpretation of the principle of conferred powers.

¹⁰² As it was suggested by L.S. Rossi, *How Could the ECJ Escape from the Taricco Quagmire?*, *VerfBlog* (2017), available at <http://verfassungsblog.de/how-could-the-ecj-escape-from-the-taricco-quagmire/> (lastly visited 1 February 2018) where the author proposes an operative part for the judgment of the Court of Justice in *Taricco II*.

¹⁰³ This solution would require a modification of the Treaties. At the same time, it would not be welcomed by the Court itself as an acceptable solution, since it is likely to affect the autonomy of the institution.

Justice adopt the particularly cautious approach of the *Taricco II* decision, taking into account the fact that most of the national constitutional rights are also fundamental rights at EU level. While this does not go as far as to the Europeanisation of counterlimits suggested by certain authors¹⁰⁴, it is however the formal recognition that the Court of Justice can tolerate a violation of one of the elements on which the EU legal order is based if it is justified by the exigency to protect a fundamental right that belongs to the common constitutional traditions of the EU and its Member States. Overall, the tension between pluralism and unity described in these judgments leads the interpreter into an unknown dimension. Unless the Court of Justice further clarifies on the meaning of the distinctive elements of the EU constitutional legal order, the atmosphere will continue to recall the surrealist ambiance of Sergio Leone's cinema: the main characters will keep on staring at each other, waiting for the Court of Justice to make the first move.

¹⁰⁴ See A. Bernardi, *I controlimiti al diritto dell'Unione ed il loro discusso ruolo in ambito penale*, in A. Bernardi (ed.), cit. at 72.

CONSTITUTIONALISING THE EUROPEAN COURT OF JUSTICE? THE ROLE OF STRUCTURAL AND PROCEDURAL REFORMS

*Carlo Tovo**

Abstract

In the last five years, the Court of Justice of the European Union has undergone major developments, both in procedural and structural terms. This article seeks to demonstrate that the reforms undertaken by the CJEU will safeguard the exclusive jurisdiction of the Court on the interpretation of EU law and allow it to concentrate on the most relevant references for a preliminary ruling. In doing so, they will enable the Court to better fulfil its mandate as the final arbiter of EU law while continuing to ensure an effective judicial protection. It is argued that, together, the procedural and structural reforms, seen in the light of the recent case-law, represent long-overdue but positive steps in the direction of the implementation of the Nice reform, which can contribute to the emergence of the Court of Justice as the EU Constitutional Court.

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1. Towards the (vertical) constitutionalisation of the Court of Justice: the role of the preliminary ruling procedure

In the last five years, the Court of Justice of the European Union ('CJEU') has undergone major developments, both in terms of scope of jurisdiction and structure. The Court of Justice ('CJ', or 'the Court'), in particular, is increasingly emerging – and acting – as a supranational constitutional court.

On the one hand, after the entry into force of the Treaty of Lisbon and the assimilation of the legal value of the Charter of Fundamental Rights of the EU ('CFREU') to that of the Treaties, the Court is increasingly engaged in the protection of human rights, as they result from the CFREU. This case-law relates first and foremost to acts of EU institutions, but it also extends to the Member States, when acting within the scope of EU law¹. On the other hand, the CJ is more and more frequently seized to solve not only the horizontal conflicts of powers among the EU institutions but also the vertical conflicts of competences and powers arising between the EU and its Member states.

It is evident that the two tendencies are the two sides of the same coin, in so far as the protection of EU fundamental rights in national legal orders is ultimately aimed at ensuring the primacy of Union law and its consistent and uniform interpretation and application. Moreover, the two dimensions of the 'constitutionalisation' of the CJ are inextricably linked. The actual or potential conflicts of powers between the Union and its Member States have traditionally arisen and revolved around the issues of the level of protection of fundamental rights in the EU and national legal orders, to the extent to which those rights form part of the national constitutional identities.

The CJ jurisdiction over the horizontal conflicts of power within the EU institutional framework and the application of Union rights in national legal order is uncontested. This is also due to the settled case-law of the Court on the autonomy of the EU legal order in relation to national and international law and on the subsequent exclusive competence of the CJ to interpret and examine the

¹ See, for a review of the most relevant CJ case-law on arts 51-53 CFREU, L.S. Rossi, *'Stesso valore giuridico dei Trattati'? Rango, primato ed effetti diretti della Carta dei diritti fondamentali dell'Unione europea*, 21 Dir. Un. Eur. 329 (2016).

validity of an EU act². This case-law has in fact prevented the Union from acceding to alternative judicial control mechanisms, such as the ECHR or the European and Community Patents Courts³.

The CJ authority to judge over the vertical conflict of competences and powers is, on the other hand, much more disputed, especially by national supreme and constitutional courts. While it is widely known that ordinary judges make frequent use (and abuse) of the preliminary reference procedure provided for by art. 267 TFEU, supreme and constitutional courts have instead been traditionally reluctant to resort to it and to acknowledge the CJ interpretative monopoly over EU law. Whilst some of these constitutional courts are now “behav[ing] increasingly as courts or tribunals within the meaning of Article 267 TFEU”⁴, their references have been accompanied by the development of a common “narrative of constitutional reservations against EU law”⁵ and sometimes loaded with ultra vires and identity review warnings.

Against this background, it is clear that the preliminary ruling procedure is destined to play a crucial role in the process of (vertical) ‘constitutionalisation’ of the Court.

References for preliminary ruling represent the “keystone” of the EU judicial system⁶ and have gradually become the ‘core business’ of the CJ, both in numerical and legal terms. This has emphasised even more the ‘original sin’ of the EU judicial architecture: the fact that, as Weiler and Jacqu  have pointed out, the same Court (the CJ) exercises “the functions of a constitutional court of the [Union] whenever it is called upon to deal with a constitutional issue” but has also to deal with other ordinary or secondary issues which in national legal orders would only exceptionally reach the highest jurisdictions⁷. Whilst the Court is a

² See Opinion 2/13, EU:C:2014:2454, paras 170-176 and 181-183, Opinion 1/09, EU:C:2011:123, para 67, and Opinion 1/91, para 35.

³ See Opinion 2/13, paras 181-183 and Opinion 1/09, paras 78-89, respectively.

⁴ Opinion of Advocate General Cruz Villal n, Case C-62/14, *Gauweiler*, EU:C:2015:7, para 40.

⁵ M. Claes, *The Validity and Primacy of EU Law and the ‘Cooperative Relationship’ between National Constitutional Courts and the Court of Justice of the European Union*, 23 MJ 151 (2016), 156.

⁶ Opinion 2/13, para 176.

⁷ J.P. Jacqu  & J.H.H. Weiler, *On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, 27 CML Rev. 185 (1990), 190.

“victim of its own success” in its relations with lower courts⁸, and shall now cope with an ever-increasing workload as a result of it, as anticipated courts of last instances have resisted its authority.

To realise its ‘constitutional aspirations’, the Court is therefore required to “readjust [its] jurisdiction without limiting its ability to be a final arbiter of important points of Community law”⁹. More particularly, the CJ is called to give some form of precedence to the ‘constitutional adjudication’ activity (*ratione materiae* or *personae*) over the ‘ordinary’ interpretative jurisdiction, while continuing to ensure an effective judicial protection to private parties. The Court shall moreover reinforce its cooperative relation with national supreme and constitutional courts and safeguard its exclusive jurisdiction in preliminary ruling proceedings vis-à-vis the General Court (‘GC’).

To achieve this twofold objective, the CJ has initiated major structural and procedural reforms. In March 2011 and again, at the invitation of the Italian Council Presidency, in October 2014, the Court has requested the legislators to revise the Statute of the Court of Justice of the European Union (‘CJEU Statute’). The proposed amendments concerned to various degrees all the three existing courts composing the CJEU, but were mainly intended to increase the number of judges of the GC. Following long and difficult negotiations, the request was finally granted, by means of Regulations 2015/2422¹⁰ and 2016/1192¹¹. The two regulation have allegedly marked the “most radical transformation of the EU judicial architecture since the establishment of the General Court”¹², by doubling of the number of judges of the GC and dissolving the Civil Service Tribunal (‘CST’).

⁸ To quote the famous expression coined by T. Koopmans, *La procédure préjudicielle - victime de son succès?*, in F. Capotorti et al. (eds.), *Du droit international au droit de l’intégration: Liber Amicorum Pierre Pescatore* (1987).

⁹ J.P. Jacqué & J.H.H. Weiler, *On the Road to European Union*, cit. at 7, 190–191.

¹⁰ Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 341, 24.12.2015, pp. 14-17.

¹¹ Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, OJ L 200, 26.7.2016, pp. 137–139.

¹² A. Alemanno & L. Pech, *Thinking justice outside the docket: A critical assessment of the reform of the EU’s court system*, 54 CML Rev. 129 (2017), 129.

Furthermore, in November 2012, the Court has adopted its new Rules of Procedure ('RPCJ'), which are precisely intended "to ensure that the structure and content of the Rules of Procedure of the Court are adapted [...] to the increasing number of references for a preliminary ruling made by the courts and tribunals of the Member States"¹³.

This article argues that both reforms will play a major positive role in strengthening the constitutional adjudication dimension of the Court's activity.

First, the structural reform of the GC will be addressed, in connection with the actual and future delimitation of the preliminary ruling jurisdiction between the latter and the CJ (§ 2). The contribution shall then investigate the procedural reforms undertaken by the Court, underlying how they contribute to strengthening the constitutional character of the preliminary ruling procedure itself (§ 3). Last, the article will single out the main internal limits to the process of 'constitutionalisation' of the Court, stemming from the principles of effective judicial protection and loyal cooperation (§ 4).

2. Structural reforms: protecting the CJ monopoly over preliminary ruling proceedings

The Treaties provides that, in principle, both the CJ and GC shall have jurisdiction over preliminary ruling proceedings.

Unlike for direct actions, the CJ has general and original jurisdiction to hear and determine questions referred for a preliminary ruling. According to art. 256(3) TFEU, the GC's jurisdiction shall instead be expressly provided for by the CJEU Statute and shall cover only "specific areas".

As is well known, to date, no such provision has been inserted in the CJEU Statute. However, the CJ itself has referred to the possibility that the doubling of the number of judges of the GC

¹³ Rules of Procedure of the Court of Justice of 25 September 2012, OJ L 265, 29.9.2012, as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65) and on 19 July 2016 (OJ L 217, 12.8.2016, p. 69).

could lead to “some competences of the Court potentially to be transferred from the Court of Justice to the General Court”¹⁴.

The possible consequences of the 2015 reform on the division of competence in preliminary ruling proceedings among the two EU courts shall therefore be investigated. In particular, attention will be drawn to the main procedural and structural limits which arguably will impede the partial transfer of preliminary jurisdiction to the GC as a result of the reform.

2.1. Procedural obstacles on the road to shared interpretative jurisdiction

Following the entry into force of the Lisbon Treaty, the rules on the jurisdiction of the EU courts – set out in the Protocol (No 3) on the CJEU Statute – may be amended by the co-legislators pursuant to the ordinary legislative provision. The relevant Treaty norm (art. 281 TFEU) nonetheless provides that the Parliament and the Council shall act either “at the request of the Court of Justice” or after consulting the latter.

This power – along with the power to request the establishment of specialised courts attached to the GC, under art. 257 TFEU – is not attributed to the institution as a whole (the CJEU), but is the sole prerogative of the CJ.

From an administrative perspective, the Treaties and the CJEU Statute do not establish a clear hierarchical relationship between the various judicial bodies composing the CJEU. The centralization of legislative powers in the hand of the CJ and of its President can nevertheless be inferred from a literal interpretation of primary law¹⁵, and is reflected in the established practice of the CJEU¹⁶. This has also been confirmed on the occasion of the 2015 reform, as is apparent from the CJ Response to the Italian Council Presidency invitation. The document underlined that, after having

¹⁴ CJEU, Press release No 44/15, <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/cp150044en.pdf>>.

¹⁵ As is evident from art. 19 TEU, according to which “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts”; this is confirmed by the provisions of Part Six, Title I, Chapter 1, Section 5 TFEU and of the CJEU Statute, which consistently refer to the “Court of Justice” to indicate the body (CJ).

¹⁶ Cf. A. Alemanno & L. Pech, *Thinking justice outside the docket*, cit. at 12, 167–169.

been “discussed internally”, the proposal to double the number of GC judges has been “approved by the general meeting of the Court of Justice”; despite the plenary meeting of the GC “stated its preference for the establishment of a specialised trade mark court and for the status quo to be maintained as regards the CST”, the CJ proceeded nonetheless with the proposal¹⁷.

It is true that the European Parliament has secured inclusion in Regulation 2015/2422 of an obligation to draw up a report “on possible changes to the distribution of competence for preliminary rulings”, “accompanied, where appropriate, by legislative requests” to the co-legislators¹⁸. Interestingly enough, the drafting of the report – due by the end of 2017 but yet to be published – has been entrusted to the CJ itself, and not to the whole institution, nor to an external consultant, as foreseen for the parallel report to be produced on the functioning of the GC¹⁹.

Not only the CJ is in a position to influence the allocation of jurisdiction over preliminary ruling procedures among the various bodies composing the CJEU. It can also control what arguably constitute a relevant pre-condition for the attribution of preliminary jurisdiction to the GC, i.e. the revision of its structure and internal Rules of Procedure (‘RPGC’).

It is evident that the partial transfer of jurisdiction over preliminary ruling proceedings from the CJ to the GC is conditional upon the insertion, in the RPGC, of specific provisions dedicated to references for a preliminary ruling, similar to those contained in the Rules of Procedure of the CJ (‘RPCJ’). According to art. 254(5) TFEU, the establishment of the Rules of Procedure of the GC shall not only require the approval of the Council, but also the “agreement” of the Court of Justice. The latter has therefore a veto right over any amendment proposed by the GC, including those potentially aimed at introducing the requisite procedural provisions on references for a preliminary ruling.

¹⁷ See the ‘Reasoning’ accompanying the ‘Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court’, <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/8-en-argumentaire-270.pdf>>, at 3.

¹⁸ Art. 3(2) Regulation (EU, Euratom) 2015/2422.

¹⁹ *Ibid.*, art. 3(1).

Last, it could be argued that the jurisdiction to hear and determine indirect actions under art. 267 TFEU should probably be accompanied by a reform of the composition of the GC's chambers. Given the growing political relevance and sensitivity of references for preliminary ruling, they are currently largely determined by five-judge Chambers, and frequent recourse is made to the Grand Chamber²⁰. The overwhelming majority (85% in the last five years) of cases heard by the GC, on the contrary, are still referred to three-judge Chambers. Although the 2015 reform should increase the possibility of recurring to five-judge Chambers²¹, it is interesting to note that, the relevant criteria laid down by the Plenum of the GC in 2016 still provide otherwise²².

2.2. Toward an internal specialisation of the General Court

The 2015 reform has led to a structural rejection of the specialised courts model²³. Both the CJ and the co-legislators have ruled out the alternative option of establishing a new court competent for direct actions concerning intellectual property, repeatedly invoked by the GC²⁴. Moreover, to facilitate an agreement within the Council, they also dissolved the sole specialized court created since the Nice Treaty – the CST.

It is to be noted, in this respect, that the CJ never called into question the role and prerogative of the CST²⁵. As underlined by

²⁰ CJEU, *Annual Report 2016 - Judicial Activity*, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf>; in the last five years, cases heard and determined by the Grand Chamber accounted for more than 8% (8,42% in 2016), while, cases referred to five-judge Chambers represented at least the 54% of the total number of closed cases.

²¹ *Ibid.*, 212: the number of cases referred to five-judge Chambers – let alone the Grand Chamber – arose in 2016 as a reflection of the reorganization of the Court, but on average they still account for only 1,5% of the total actions determined by the GC.

²² See Decision of the General Court, on the Criteria for assignment of cases to Chambers, 2016/C 294/04, OJ 2016, C 296/2, adopted in accordance with art. 25 RPGC.

²³ Cf. 'Reasoning', cit. at 17, 2-3 and recital (4) Regulation (EU, Euratom) 2015/2422, respectively.

²⁴ Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto, 28 March 2011, 2011/0901 (COD), 6.

²⁵ *Ibid.*, 13, the Court even proposed to attach temporary judges to the EU specialised courts, implicitly supporting their continued existence.

Alemanno and Pech, the abolition of the CST shall therefore be regarded as a *quid pro quo* for the doubling of the number of judges of the GC, aimed at limiting the costs of the reform and ending the deadlock over the nomination of two judges of the CST²⁶.

On the contrary, in both its initial 2011 request and 2014 response to the Italian Council presidency, the CJ took a firm stand against the possibility to resort to art. 257 TFEU to establish a new specialised court. The alternative option of increasing the number of GC judges has consistently been regarded by the CJ – and by the Commission²⁷ – as “clearly preferable”, both for contingent reasons (the urgency of the situation, and the flexibility and reversibility of the proposed option, as compared to the establishment and dismantlement of a new body) and for more structural factors²⁸.

As for the latter factors, according to the CJ, the establishment of a trademark and design court would not have solved the backlog, since the majority of complex cases would have remained in the jurisdiction of the GC and the number of appeals to the latter Court would have increased²⁹. Moreover, in order to ensure the uniform interpretation of EU law, any transfer of direct actions relating to trademarks to a specialised court “ought to go hand in hand with a transfer to the General Court of preliminary ruling proceedings” relating to this field³⁰. In the view of the Court, this would, in turn, have posed a risk for the overall consistency of its case-law, given the interlinkages between intellectual property and other areas of EU law such as, in particular, the free movement of goods, which would have remained subject to the interpretative jurisdiction of the CJ³¹. What is more, the allocation of requests for a preliminary ruling to the GC could have caused “confusion among the Member States’ courts and discourage[d] them from referring such questions, particularly in view of the procedural delays involved in the event of a review”³².

²⁶ A. Alemanno & L. Pech, *Thinking justice outside the docket*, cit. at 12, 137.

²⁷ See Commission Opinion of 30.9.2011 on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM(2011) 596, para 29.

²⁸ Draft amendments, cit. at 24, 7-10; see also, ‘Reasoning’, cit. at 17, paras 2 and 4.

²⁹ Draft amendments, cit. at 24, 7.

³⁰ *Ibid.*, 8.

³¹ *Ibid.*, 9.

³² *Ibid.*, 9.

It is therefore evident that the rejection of the specialised court model can also be attributed to the CJ desire to preserve its monopoly over preliminary ruling jurisdiction.

From a strictly legal perspective, the course of action taken by the co-legislators is fully consistent with art. 257 TFEU. The latter provision empowers the Parliament and the Council to establish – and therefore to dissolve³³ – specialised courts attached to the GC, acting by means of Regulation in accordance with the ordinary legislative procedure. The 2015 reform will nonetheless require further organizational measures to cope with the challenges – above all, the increase in the volume and complexity of cases and in the number, variety and technical specificities of EU legal acts³⁴ – which were intended to be addressed through the establishment of specialised courts.

It could be argued, in this respect, that, rather than facilitating the attribution of jurisdiction over preliminary ruling proceedings to the GC, the structural reform has laid the foundations of a process of internal specialization within the General Court in respect of direct actions.

It was the CJ itself, in its 2011 request, to suggest this development and to invite the GC “to achieve the greater productivity sought by specialisation [...] at the level of chambers within the General Court”³⁵. The opinion the Commission on the initial CJ request was even more explicit as to the necessity and opportunity to introduce a form of “subject-matter specialisation by several General Court chambers”³⁶. The opinion went further, invoking an amendment to the CJEU Statute to enshrine the principle of specialisation “to guarantee permanence”, thus forcing the GC’s hand to “establish[h] an appropriate number of specialized chambers, and in any case at least two”³⁷.

³³ See, along this line, A. Alemanno & L. Pech, *Thinking justice outside the docket*, cit. at 12, 151.

³⁴ See Regulation (EU, Euratom) 2015/2422, cit., recital 2.

³⁵ Draft amendments, cit. at 24, 7; the ‘Reasoning’, cit. at 17, reaffirms this point of view, by stating that, with the proposed reform, “the General Court will be able, in the interest of the proper administration of justice [...] to make certain Chambers responsible for hearing and determining cases falling within certain subject areas”.

³⁶ Cf. Commission Opinion, cit. at 27, paras 29 and 33-36.

³⁷ *Ibid.*, para 37.

Although Regulation 2015/2422 makes no reference to any form of internal specialization of the GC, the suggestions made by the Commission and the Court have been accepted by the GC (and by the Council), on the occasion of the reform of the RPGC in 2015. According to art. 25 RPGC, the General Court may now “make one or more Chambers responsible for hearing and determining cases in specific matters”. To be sure the process of specialisation is still embryonic.

On the one hand, a certain tendency to an “informal occasional specialization in the attribution of cases” has been reported³⁸. Moreover, cases have been grouped into four classes for the purpose of their assignment to Chambers, corresponding to the principal areas of activity of the GC³⁹. On the other hand, all categories of cases are still automatically allocated to all Chambers, on the basis of an equal division of labour following separate rotas⁴⁰. In addition, there are a number of legal obstacles which militate against such process of specialization⁴¹, among which the present difficulties in taking technical and scientific competencies into account when appointing judges and selecting legal secretaries stands out⁴².

Notwithstanding the controversies and uncertainties surrounding the process of internal specialization of the GC, it seems clear that the structural reform undertaken by the CJEU will not radically change the division of competence between the CJ and the GC, nor will it result in the attribution of jurisdiction over preliminary ruling proceedings to the latter court in specific areas. The present analysis has also demonstrated that the CJ would, in

³⁸ F. Dehousse, *The reform of the EU courts. The need for a management approach*, Egmont Paper 53, March 2016, <http://www.egmontinstitute.be/publication_article/reform-of-eu-courts-2/>.

³⁹ The Decision of the General Court, on the Criteria for assignment of cases to Chambers, cit. at 22, para 2, distinguishes in particular three categories of cases concerning competition law and trade, IP rights and civil service, and a residual category of “other cases”.

⁴⁰ *Ibid.*, para 2.

⁴¹ See, in this respect, F. Dehousse, *The reform of the EU courts*, cit. at 38, 25–29.

⁴² The reference made in Regulation (EU, Euratom) 2015/2422, cit., recital (7), to the need to take into account not only the “professional and personal suitability”, the independence and the impartiality but also the “expertise” of potential candidates to the GC, is an initial step in this regard.

any case, have *de iure* or *de facto* the last word over these reforms, and could therefore protect its monopoly over art. 267 TFEU.

3. Procedural reforms: constitutionalising the preliminary ruling procedure

The widening and deepening of the Community and the establishment of the then Court of First Instance (now the GC) by the Single European Act, have led to an exponential increase, both in relative and absolute terms, of the importance of the preliminary ruling proceedings in the CJ caseload⁴³.

In the last five years preliminary ruling proceedings accounted for almost two thirds of the new cases (as compared to 37% in 1990), with a record high in the history of the Court in 2016 (470 new cases, representing the 67.92% of the total number of actions)⁴⁴. This has been reflected in the number of preliminary rulings delivered by the Court, which has reached a record high of 476 cases in 2014 (two-thirds of the overall CJ case-law, a figure which remained broadly stable in 2016)⁴⁵.

The increase of both new and completed preliminary ruling proceedings has been accompanied by an “unremitting upward trend in the number of cases” brought before the CJ⁴⁶. The strong downward trend observed in the number of direct actions has in fact been compensated not only by the references for preliminary rulings but also by the significant increase of appeals lodged against GC decisions (215 cases in 2015, the highest figure in the Court’s history)⁴⁷.

Together, these two tendencies bring about some practical challenges for the ‘constitutional aspirations’ of the Court. How to give some form of precedence to the adjudication of conflicts of powers and competences among EU institutions and between them

⁴³ See, in this respect, P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, 18 Dir. Un. Eur. 107 (2013), 108-109.

⁴⁴ CJEU, *Annual Report 2016*, cit. at 20, 88.

⁴⁵ See *ibid.*, 91.

⁴⁶ Cf. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-03/cp160034en.pdf>.

⁴⁷ CJEU, *Annual Report 2015 – Judicial Activity*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf>, at 9.

and the Member States? How to continue to ensure an effective judicial review, given the difficulties in reducing the backlog of pending cases⁴⁸?

To be sure, these challenges are not new⁴⁹. They are nonetheless of particular significance today that national constitutional courts are increasingly resorting to the preliminary ruling procedure and the Court is being called upon to explore the uncharted territory of high politics, through references concerning the EU migration, citizenship and economic policies.

To respond to these challenges, in November 2012 the Court of Justice has adopted its new Rules of Procedures⁵⁰. Contrary to the previous 1974 and 1991 recasts, the new RPCJ constitutes a real innovation⁵¹, especially in relation to the preliminary ruling procedure. It has been the CJ itself, in its revised Practice directions to parties⁵², to underline that it was precisely the “increasing number of references for a preliminary ruling” which largely inspired the reform, aimed at “ensur[ing] that the structure and content of the Rules of Procedure of the Court are adapted” to this emerging trend⁵³.

The centrality of preliminary ruling proceedings in the CJ jurisdiction is, first of all, reflected in the very structure of the RPCJ. Whereas previously indirect actions were treated as special procedures, they now feature immediately after the common procedural provisions, in a separate and dedicated title. This is not only illustrative of the importance attributed to the art. 267 TFEU procedure, but it also signals a discontinuity in their qualification. Indeed, it could be argued that the “special function of the Court when it is called upon to give a preliminary ruling”⁵⁴ is no longer

⁴⁸ According to the CJEU, *Annual Report 2016*, cit. at 20, 87, the total number of pending cases on 31 December 2016 was 872, which is a broadly constant number as compared to December 2015 (884 pending cases) and December 2012 (886 pending cases).

⁴⁹ See, among others, J.P. Jacqué & J.H.H. Weiler, *On the Road to European Union*, cit. at 7, 187–189.

⁵⁰ Rules of Procedure of the Court of Justice, cit. at 13.

⁵¹ See, in the same vein, P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 108.

⁵² Practice directions to parties concerning cases brought before the Court, OJ L 31, 31.1.2014, 1–13.

⁵³ *Ibid.*, recital 1.

⁵⁴ *Ibid.*, para 33.

regarded as a derogation from the general rules and structure laid down by the RPCJ, but rather as a concurrent procedure.

Along with these “cosmetic” changes, the new RPCJ have brought forward significant innovations. They have strengthened the procedural tools at the CJ disposal to filter the referrals from ordinary judges (§ 3.1) while centralising to a certain extent the application of the *CILFIT* case-law concerning the derogations to the obligation to refer by courts of last instance (§ 3.2).

3.1. Enhancing the admissibility threshold for “ordinary” references preliminary rulings

The CJ has only limited discretion to decide whether to hear a case brought before it. This flows from the absence of legal tools enabling the Court to select the cases on the basis of their systemic or legal relevance, such as the *certiorari* mechanism employed by the US Supreme Court. For references for a preliminary ruling, the limited margin of appreciation in deciding on their admissibility also reflects the letter and the spirit of art. 267 TFEU.

Under art. 267(2) TFEU, any ordinary national judge “may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.” National courts *a quo* have therefore the “widest discretion” in determining the need for a preliminary ruling and the relevance of the questions submitted to the CJ⁵⁵. The Court, in turn, is “in principle bound to give a ruling” on the referred questions accordingly⁵⁶.

As is well known, the “presumption of relevance”⁵⁷ enjoyed by the referred questions can only be rebutted where one of the following conditions are met: (i) “it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object”, (ii) “the problem is hypothetical”, or (iii) “the Court does not have before it the factual or legal material necessary to give a useful answer”⁵⁸.

⁵⁵ Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Mascolo*, EU:C:2014:2401, paras 47-48.

⁵⁶ Case C-571/10, *Kamberaj*, EU:C:2012:233, para 40.

⁵⁷ Case C-94/04 and 202/04, *Cipolla*, EU:C:2006:758, para 25.

⁵⁸ The test was first laid down in the case C-314/08, *Filipiak*, EU:C:2009:719, paras 43 and 45, and recently reaffirmed in case C-182/15, *Petruhhin*, EU:C:2016:630, para 20.

The Court has traditionally exercised some sort of self-restraint in examining whether one of these conditions were met. Only where the questions referred were manifestly falling within the latter conditions, or their relevance was disputed in the written observations submitted either by the parties or by the Member States, the Commission or the institutions which adopted the act at issue, the CJ has proceeded in this way⁵⁹.

The lenient approach adopted by the Court has already resulted in a constant increase in the workload of the Court (and in the average length of proceedings) but could also hamper the “constitutional authority” of the CJ vis-à-vis national supreme and constitutional courts. The latter, in particular, have long suffered the special relationship between the ordinary judges and the CJ. When confronted with the unremitting rise in the number of questions referred for a preliminary ruling by lower courts – and in light of the constraints posed by the CJ case-law on the parallel or prior recourse to the interlocutory procedure of review of constitutionality (see *infra*) – some courts of last instance could be tempted to perceive and treat the CJ as a competitor, rather than as a complementary forum of adjudication.

Against this background, it is easy to grasp the importance of the revised art. 94 RPCJ.

The provision lays down the (minimum) content of the request for a preliminary ruling. This include the following cumulative elements, which are aimed at assessing the relevance of the referred questions for the main action and to rule out its artificial nature: a summary of the subject-matter of the dispute and the findings of fact (art. 94(a) RPCJ); the tenor of the applicable national law and the relevant case-law (art. 94(b) RPCJ); a statement of the reasons, justifying the reference and explaining the relations between the provisions of EU law at issue and the national legislation applicable to the main proceedings (art. 94(c) RPCJ).

Before the entry into force of the new RPCJ, this minimum content was defined by the sole Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (hereinafter the ‘Recommendations’)⁶⁰. The

⁵⁹ L. Daniele, *Art. 267 TFEU*, in A. Tizzano (ed.) *Trattati dell’Unione europea* (2014), 2108.

⁶⁰ CJEU, Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, OJ C 439, 25.11.2016, p. 1, para 15.

Recommendations constitute a soft law instrument designed to provide the referring court “with all the practical information required in order for the Court to be in a position to give a useful reply”⁶¹. They were therefore an inadequate tool for filtering the abusive requests for a preliminary ruling.

As highlighted by some Authors, the insertion of a “minimum content” of the references for a preliminary ruling in a binding Union act, such as the RPCJ, and its formulation as a mandatory legal requirement, seems to have marked a “change of attitude by the Court in its relations with national courts”⁶².

On the one hand, the new art. 94 RPCJ, which the national Courts are “bound to observe scrupulously” as a reflection of the “requirement of cooperation that is inherent in the preliminary reference mechanism”⁶³, has called on the national courts to show greater responsibility in making use of the art. 267 TFEU procedure. On the other hand, art. 94 RPCJ has provided the opportunity for the CJ to give a more restrictive interpretation of its previous case-law. Based on the new provision, the Court may now, on a more stable and continuous basis⁶⁴, decline its jurisdiction and dismiss the request as inadmissible⁶⁵ – in full or, at least, partially, in relation to some of the referred questions⁶⁶.

The practice seems to confirm the theory: five years after its introduction, the CJ has made extensive recourse to art. 94 RPCJ. This applies in particular to the third limb of the test under art. 94(c) RPCJ – i.e. the existence of a factor linking national and Union law.

⁶¹ Ibid., presentation and para 2.

⁶² Cf. P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 120–121.

⁶³ See, among others, Case C-614/14, *Ognyanov*, EU:C:2016:514, paras 19 and 23.

⁶⁴ See, as to the previous CJ case-law declaring manifestly inadmissible requests for preliminary ruling for failure to comply with the abovementioned minimum content, K. Lenaerts, I. Maselis & K. Gutman, *EU procedural law* (2014), 75–76.

⁶⁵ Along this line P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 121 as suggested by the Recommendations to national courts and tribunals, cit. At 60, para 15, and K. Lenaerts, I. Maselis & K. Gutman, *EU procedural law*, cit. at 64, 75, according to whom, although art. 94 RPCJ “is not intended to serve as a benchmark for a stricter admissibility test [...] the Court will not refrain from declaring an order for reference inadmissible when drawn up in complete disregard of the requirements”.

⁶⁶ See, among the most recent ruling, Case C-156/15, *Private Equity Insurance Group*, EU:C:2016:851, paras 60–67.

A first relevant example in this respect concerns the CJ case-law on the connecting factors between purely internal situation and EU law provisions, with a view to determining the scope of CJ interpretative jurisdiction. The wide-ranging types of cases in which requests submitted in purely domestic cases are deemed admissible remained the same⁶⁷. After the recent *Ullens de Schooten* ruling the Court seems nonetheless inclined to verify their existence in a more accurate way, and, to this effect, to allocate the burden of proof entirely on the referring courts⁶⁸.

Another good illustration of the abovementioned restrictive trend is the case-law on the scope of the CJ jurisdiction over preliminary ruling concerning the interpretation of the Charter of Fundamental Rights. According to art. 51(1) CFREU the provisions of the Charter are addressed to the Member States “only when they are implementing EU law”. The Recommendations therefore require the national courts to make “clearly and unequivocally apparent from the request for a preliminary ruling that a rule of EU law other than the Charter is applicable to the case in the main proceedings”⁶⁹. It follows that the sole provisions of the Charter “cannot, of themselves, form the basis for such jurisdiction”⁷⁰ and that, in this case, the Court may systematically refuse to give rulings on the referred questions⁷¹.

Admittedly, the requirements in art. 94 RPCJ are largely formal ones, the compliance with which is moreover still interpreted widely by the Court⁷². As anticipated, the new provision nonetheless signals the CJ intention to prevent the submission of inadmissible preliminary proceedings.

In so doing, the Court is not refusing the dialogue with lower courts, with a view to protecting national judicial hierarchies. Rather, the CJ appear to be aiming at avoiding exceeding its jurisdiction and giving private parties unrealistic hope about the

⁶⁷ See Case C-268/15, *Ullens de Schooten*, EU:C:2016:874, paras 50-53, as to the situations in which references (concerning the interpretation of the fundamental freedom’s provisions) “confined in all respect within a single Member State” can be regarded as admissible.

⁶⁸ *Ibid.*, paras 54-55.

⁶⁹ Recommendations to national courts and tribunals, cit. at 60, para 10.

⁷⁰ *Ibid.*, para 10.

⁷¹ See, among others, Case C-498/12, *Pedone*, EU:C:2013:76, paras 14-15 and case C-282/14, *Stylinart*, EU:C:2014:2486, paras 18-22.

⁷² Cf., for example, Case C-265/13, *Torralbo Marcos*, EU:C:2014:187, para 38.

enforcement of the EU rights and obligations against national authorities. This ultimately reinforces the authority of the Court, which, like any other tribunal, is dependent on the responsiveness and effectiveness, as well as on the coherence of its case-law⁷³.

It is worth noting, in this respect, that the efforts to introduce some form of procedural filters of admissibility for ‘ordinary’ references have not overshadowed the continued relevance of the Court’s case-law precluding any legal obstacles limiting the national courts’ discretion to refer preliminary rulings to the CJ⁷⁴.

Since *Simmenthal*, the Court has repeatedly stated that the national courts are under a “duty to give full effect” to the provisions of EU law, “if necessary refusing of its own motion to apply any conflicting provision of national legislation”, without “request[ing] or await[ing] the prior setting aside of such provision by legislative or other constitutional means”⁷⁵. Any national provision or practice which may withhold from national courts the “power [...] to set aside” conflicting national legislation – even if only temporarily – is “incompatible” with “the very essence of EU law”⁷⁶.

This applies also when the provision of national law is both contrary to EU law and unconstitutional, and the national court is under an obligation to refer the matter to the constitutional court. The existence of such an obligation cannot “prevent a national court [...] from exercising the right conferred on it by Article 267 TFEU”⁷⁷, and the national courts remain therefore “free to refer to the Court

⁷³ See, in the same vein, J. Komárek, *In the Court (s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, 32 EL Rev. 467 (2007), 490: “narrowing down the possibility of lower courts to send preliminary references reflects the philosophy of the Court of Justice’s role as a veritable Supreme Court for the Union”, in that it contributes to the enhance the “authoritative guidance” of the CJ, without “pulveris[ing] its authority into hundreds of (sometimes) contradictory and (often) insufficiently reasoned answers”.

⁷⁴ Cf., among the most recent rulings delivered by the Court, the case C-689/13, *PFE*, EU:C:2016:199, paras 31-36; on this issue cf. also C. Lacchi, *Multilevel judicial protection in the EU and preliminary references*, 53 CML Rev. (2016), 679–707, 682–684.

⁷⁵ Cf. Case 106/77, *Simmenthal*, EU:C:1978:49, paras 21 and 24, and, more recently, case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para 45.)

⁷⁶ Case 106/77, *Simmenthal*, para 22 and case C-112/13, *A*, EU:C:2014:2195, para 37.

⁷⁷ See case C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:363, para 45.

for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate"⁷⁸. According to the *Melki and Abdeli* case⁷⁹, provided that the lower courts had the possibility to disapply national law, to adopt interim measure and to submit a reference to the CJ, they could nonetheless be deemed to be obliged to await the outcome of the interlocutory procedure⁸⁰.

However, this position seems to have been somehow hardened by the Court in the recent *Kernkraftwerke Lippe-Ems* case⁸¹. The Court has held that, pending an interlocutory procedure of review of constitutionality in a parallel proceeding, lower courts cannot be "precluded from referring questions to the Court for a preliminary ruling" but also from "immediately applying EU law in a manner consistent with the Court's decision or case-law"⁸². This implies that not only lower courts may disregard national procedural rules imposing an obligation to stay proceedings pending the interlocutory procedure before the constitutional court⁸³. In order to immediately apply EU law, they could also disapply conflicting national law, regardless of their constitutional legitimacy.

The added value of such refinement of the previous CJ case-law can be better understood in the light of the considerations made by the referring court in *Kernkraftwerke Lippe-Ems*. It is true that, if the constitutional courts were to find that the applicable national law was invalid, the interpretation of EU law would no longer be needed⁸⁴. This notwithstanding, the constitutional courts could declare the invalidity of national law only with future effects, and

⁷⁸ Case C-112/13, A, para 39.

⁷⁹ Joined cases C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:363, paras 52-57.

⁸⁰ Along this line K. Lenaerts, I. Maselis and K. Gutman, *EU procedural law*, cit. at 64,75

⁸¹ Case C-5/14, *Kernkraftwerke Lippe-Ems*, EU:C:2015:354, para 36; see, for a similar assessment of the case at issues, R. García & E. Ferreiro Serret, *Hardening the preliminary reference procedure in a Union in crisis: Kernkraftwerke Lippe-Ems*, 53 CML Rev. 819 (2016), 828-833.

⁸² Case C-5/14, *Kernkraftwerke Lippe-Ems*, para 36.

⁸³ *Ibid.*, para 37.

⁸⁴ *Ibid.*, para 25.

if the reference could be submitted only after the interlocutory procedure, the case could not be dealt within a reasonable time⁸⁵.

The importance of the *Kernkraftwerke Lippe-Ems* case becomes even more evident at a time where some constitutional courts are trying to regain their monopoly over the resolution of conflicts between national legislation and EU law provisions which are not directly applicable nor having direct effect or concern fundamental rights protected by both the CFREU and the national constitution⁸⁶, thus overtly challenging the authority of the CJ and undermining the foundations of the *Simmenthal* case law.

In this respect, the recent CJ case-law safeguarding the national courts' discretion to refer questions to the Court can be regarded as the other side of the coin of the restrictive trend concerning the minimum content of the request for a preliminary ruling under art. 94 RPCJ. Indeed, both case-law are serving the same purpose: that of safeguarding the effectiveness of art. 267 TFEU proceedings, and thus the effectiveness, coherence and primacy of EU law⁸⁷.

3.2. Towards a centralised enforcement of the CILFIT case-law?

Unlike ordinary judges, the national courts “against whose decisions there is no judicial remedy under national law” are in principle obliged to refer the questions of validity and interpretation of EU law to the CJ, provided that the question is necessary to enable them to give judgment.

According to the *CILFIT* jurisprudence, the courts of last instance within the meaning of art. 267(3) TFEU are exempted from the obligation to refer only where: (i) the (interpretative⁸⁸) reference is “materially identical” with or concerns the “same point of law” of a question which has already been dealt with by the Court (*acte éclairé*) or (ii) the “correct application of [Union] law is so obvious

⁸⁵ Ibid., para 27.

⁸⁶ See, as a recent example, *Corte cost.*, judgment of 14 December 2017, No 269/2017, paras 5.1. and 5.2.

⁸⁷ See, as to the causal link between the effectiveness of art. 267 TFEU and that of EU law, the case C-5/14, *Kernkraftwerke Lippe-Ems*, para 36.

⁸⁸ In case C-461/03, *Gaston Schul Douane-expediteur*, EU:C:2005:742, para 19, the Court has held that “the interpretation adopted in the *Cilfit* judgment [...] cannot be extended to questions relating to the validity of Community acts”.

as to leave no scope for any reasonable doubt” (*acte clair*)⁸⁹. The applicability of the latter condition, in particular, is dependent upon the fact that the “matter [shall be] equally obvious to the Courts of the other Member States”⁹⁰. This in turn must be assessed on the basis of a systematic interpretation of Union law and comparing its different language versions, “in the light of the specific characteristics of [EU] law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the [European Union]”⁹¹.

The *CILFIT* test, and notably its second limb, has attracted criticism. The *acte clair* doctrine has proven both too difficult to comply to assist some national courts in limiting the request for reference by the parties to the main proceedings, and too loose and vague to prevent other supreme and constitutional Courts to improperly circumvent the obligation to refer.

To review or to clarify the CJ settled case-law, as suggested by some Authors⁹², appears politically unfeasible at present. Nevertheless, the new RPCJ are now offering an indirect procedural avenue to address the first critique, by facilitating the adoption of decisions by reasoned orders on the questions that manifestly fall within the *CILFIT* criteria. As for the second criticism, if not to revise it in a more stringent way, it appears that the Court is now prepared to put the *acte clair* doctrine to work.

Under art. 99 RPCJ, the Court may “at any time” and “on a proposal from the Judge-Rapporteur and after hearing the Advocate General” decide to reply to a preliminary ruling by reasoned order, without taking further procedural steps. This applies “where a question referred [...] is identical to a question on which the Court has already ruled”, “where the reply [...] may be clearly deduced from existing case-law” or “where the answer [...]

⁸⁹ Case 283/81, *CILFIT and Lanificio di Gavardo*, EU:C:1982:335, paras 13, 14, 16 and 21.

⁹⁰ *Ibid.*, para 16.

⁹¹ *Ibid.*, paras 16-21.

⁹² See, among others, A. Ruggeri, *Il rinvio pregiudiziale alla Corte dell'Unione: risorsa o problema? (Nota minima su una questione controversa)*, 17 *Dir. Un. Eur.* 95 (2012), 100 and 104 and G. Rugge, *Bundesverfassungsgericht e Corte di giustizia dell'UE: quale futuro per il dialogo sul rispetto dell'identità nazionale?*, 21 *Dir. Un. Eur.* 789 (2016), 808-809.

admits of no reasonable doubt”, that is, when one of the *CILFIT* conditions is met⁹³.

The RPCJ does not prescribe the content of the reasoned order. So far, the Court has made use of this instrument as a procedural shortcut to considerably reduce the length of proceedings⁹⁴. Art. 99 RPCJ shall therefore primarily be understood against the background of a more general trend towards the speeding up of the CJ decision-making process, which is also reflected in a number of procedural revisions easing the recourse to the expedited preliminary ruling procedure⁹⁵.

In this context, it is doubtful whether the Court can make use of art. 99 RPCJ to declare the inadmissibility of the referred questions⁹⁶, by analogy with the corresponding provision laid down in art. 181 RPCJ for manifestly inadmissible appeals. While the CJ has so far excluded this possibility⁹⁷, the recourse to reasoned orders to declare the inadmissibility of preliminary questions could nonetheless be deduced from a systematic interpretation of the Rules of Procedures. The specific provision applicable to preliminary rulings is to be read in conjunction with the relevant common procedural provision (art. 53(2) RPCJ)⁹⁸. It follows from the latter that the fulfilment of one of the *CILFIT* conditions may in principle determine either the lack of jurisdiction of the Court or the manifest inadmissibility of the request⁹⁹.

⁹³ Along this line L. Daniele, *Art. 267 TFEU*, cit. at 59, 2119.

⁹⁴ See, among the most recent, the Orders delivered in Case C-497/16, *Sokáč*, EU:C:2017:171, paras 22-24, Case C-443/16, *Rodrigo Sanz*, EU:C:2017:109, paras 24-25, Case C-28/16, *MVM*, EU:C:2017:7, paras 21-22 and Case C-511/15, *Horžić*, EU:C:2016:787, paras 24-25.

⁹⁵ Cf., in this respect, P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 109, 111, 114, 122-123.

⁹⁶ L. Daniele, *Art. 267 TFEU*, cit. at 59, 2119.

⁹⁷ See, in this regard, the Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Mascolo*, EU:C:2014:2401, para 49, and, in the same vein, K. Lenaerts, I. Maselis & K. Gutman, *EU procedural law*, cit. at 64, 85.

⁹⁸ According to art 53(2) RP, a decision by reasoned order can be adopted only “where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible”.

⁹⁹ The general rule (art. 53(2) RPCJ) can be deemed to be applicable since the relation of speciality between arts 99 and 53(2) RPCJ does not extend to the legal qualification of the three concurrent conditions of applicability of art 99 RPCJ, to the extent to which the latter, more specific, rule is silent on this issue; see, in this

Irrespective of that, it is clear from the foregoing that the jurisdiction over the applicability of the *CILFIT* case-law does no longer lie exclusively within national jurisdiction. Its enforcement has been partially centralised in the hand of the CJ – either for the purpose of easing its decision-making process or, should the abovementioned systematic interpretation of the new RPCJ be accepted, for dismissing the requests as inadmissible. This is all the more so taking into account that, with the entry into force of the new RPCJ, the Court is no longer subject to the obligation to inform the referring national court and hear the parties before resorting to art. 99 RPCJ, which had until then prevented the Court from ruling by reasoned order¹⁰⁰.

Along with some sort of indirect centralized enforcement of the *CILFIT* case-law by way of substitution for some supreme courts, the CJ has put the same case-law to work against other, more recalcitrant, courts of last instance.

For the first time in the history of the preliminary ruling, in the recent case *Ferreira da Silva e Brito*¹⁰¹, the Court has found that a national supreme court had infringed its obligation to refer a question to the CJ.

As anticipated, according to the CJ settled case-law, the national courts of last instance are precluded from invoking the *acte clair* doctrine when they consider that the matter is not “equally obvious” to the other Member States courts. In *Ferreira da Silva e Brito*, instead, the CJ has valued the existence of “conflicting lines of case-law at national level”¹⁰², that is, within the same Member State (Portugal). Although the fact that lower courts in the same Member State have given conflicting decisions “in itself [...] is not a conclusive factor capable of triggering the obligation” to refer¹⁰³, if combined with “difficulties of interpretation in the various Member States”¹⁰⁴ – demonstrated by the existence of references already

respect, on a more general note, the Opinion of Advocate General Mengozzi in Case C-490/10, *Parliament v Council*, EU:C:2012:209, paras 35-36.

¹⁰⁰ See P. Iannuccelli, *La réforme des règles de procédure de la Court de justice*, cit. at 43, 116-117.

¹⁰¹ Case C-160/14, *Ferreira da Silva e Brito*, EU:C:2015:565.

¹⁰² *Ibid.*, para 44.

¹⁰³ *Ibid.*, para 41.

¹⁰⁴ *Ibid.*, para 43-44.

made by national courts to the CJ – it is such as to oblige the courts of last instance to make a reference to the Court¹⁰⁵.

In *CILFIT* the pre-condition for applying the *acte clair* exception – i.e. that the matter is equally obvious to the other Member States’ courts – was based on a subjective judgment. On the contrary, in *Ferreira da Silva e Brito* the aforementioned condition is rather dependent on objective factors (i.e. the conflicting case-law at national level and the references submitted to the CJ on similar points of law), the existence of which could more easily be assessed and enforced by the ECJ¹⁰⁶.

It could therefore be argued that by analogy with what has been observed in relation to art. 99 RPCJ – and in line with the original rationale behind *CILFIT*¹⁰⁷ – the Court appears now willing to scrutinise more carefully the existence of the conditions to invoke the *acte clair* doctrine and, in exceptional cases, to consider assessing itself the respect of the ‘counterlimits’ to the *CILFIT* derogations¹⁰⁸.

The position taken by the CJ shall also be seen against the background of the recent developments in its relationship with national constitutional courts.

As is well known, the objective of establishing a continuous and structured dialogue between the CJ and national constitutional courts has until recently proved very difficult to achieve. This was due not only to a certain political resistance on the part of constitutional courts to engage in such a dialogue but also to exogenous factors, related to the specificities of the national systems of constitutional justice¹⁰⁹.

¹⁰⁵ Ibid., para 45.

¹⁰⁶ A. Kornezov, *The new format of the acte clair doctrine and its consequences*, 53 CML Rev. 1317 (2016), 1320 and 1326-1327.

¹⁰⁷ As underlined by H. Rasmussen, *The European Court’s acte clair strategy in CILFIT*, 9 EL Rev. 242 (1984), the goal pursued by the Court was “a curtailment of the spread of national interpretative judicial independence [aiming] at ensuring the advent of a larger measure of European Court judicial control over what happens in the national courts, even those of last-resort.”

¹⁰⁸ See, for a (partially) different reading, A. Kornezov, *The new format of the acte clair doctrine and its consequences*, cit. at 106, 1325-1326 and 1328, and A. Limante, *Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach*, 54 JCMS 1384 (2016), 1393-1395.

¹⁰⁹ See, in this respect, P. Mengozzi, *A European partnership of Courts. Judicial dialogue between the EU Court of Justice and National Constitutional Courts*, 20 Dir. Un. Eur. 701 (2015), 707-709 and M. Claes, *The Validity and Primacy of EU Law*, cit. at 5, 163-164.

More recently, as observed by the Advocate General Cruz Villalón in *Gauweiler*, national constitutional courts are instead “behav[ing] increasingly as courts or tribunals within the meaning of Article 267 TFEU”¹¹⁰. Indeed, in the last ten years, we have witnessed a gradual but constant recourse to the preliminary ruling procedure by constitutional courts, amongst which stand out the Italian, German, French, Spanish and Polish courts¹¹¹.

The increase in the number of references has been accompanied by – and, in certain cases, has been a direct consequence of – the development of a common “narrative of constitutional reservations [...] to the absolute and unconditional primacy of EU law”¹¹². Regardless of the kind of potential conflicts between EU and constitutional law and the respective type of review of constitutionality, which varies significantly across Member States¹¹³, this narrative also encompasses a certain openness to European law, which translates into a form of loyal cooperation towards the CJ¹¹⁴. On that basis, several constitutional tribunals have requested, or committed themselves to request, a preliminary ruling from the CJ before exercising their review of constitutionality¹¹⁵.

Whilst the vast majority of Member States’ constitutional courts seem to have entered an era of constructive (although sometimes confrontational) dialogue with the CJ, others still refuse

¹¹⁰ Opinion of AG Cruz Villalón, Case C-62/14, *Gauweiler*, para 40.

¹¹¹ Cf. G. Ruge, *Bundesverfassungsgericht e Corte di giustizia dell’UE*, cit. at 92, 792–793 and P. Mengozzi, *A European partnership of Courts*, cit. at 109, 706–707; in this respect see also, with particular reference to the evolution of the French *Conseil d’Etat* and *Cour de cassation* case-law, R. Mehdi, *French supreme courts and European Union law: Between historical compromise and accepted loyalty*, 48 CML Rev. 439 (2011), and, with regard to the Italian Constitutional Court, S. Sciarra & G. Nicastro, *A New Conversation: Preliminary References from the Italian Constitutional Court*, 23 MJ 195 (2016), 198–202; for a general overview of the use of the preliminary ruling procedure in the various Member States cf. M. Broberg & N. Fenger, *Le renvoi préjudiciel à la Cour de justice de l’Union européenne* 53 (2013).

¹¹² M. Claes, *The Validity and Primacy of EU Law*, cit. at 5, 156 and 159.

¹¹³ *Ibid.*, 156–162.

¹¹⁴ See BVerfG, Order of 14 January 2014 - 2 BvR 2728/13, para 24 and, in the same vein, Trybunal Konstytucyjny, Judgment of 16 November 2011 – SK 45/09, para 2.5

¹¹⁵ Cf., among others, BVerfG, Order of 6 July 2010 - 2 BvR 2661/06, para 60, Trybunal Konstytucyjny, Judgment of 16 November 2011 – SK 45/09, para 2.6 and Corte cost., Order of 26 January 2017, n. 24/2017, paras 6-7.

to engage in such a dialogue, by avoiding making a prior reference for a preliminary ruling to the Court before declaring the inapplicability of EU law. This has been the case, in particular, of the Czech constitutional court in the *Slovak pensions* case¹¹⁶, and more recently of the Danish supreme court, in the *Ajos* case¹¹⁷.

Ferreira da Silva e Brito in this respect could also be seen as a response to those constitutional tribunals that, by asserting their competence without recognizing the CJ's jurisdiction, violate the principle of loyal cooperation underlying the preliminary ruling procedure.

It is true that the Court has restated in *X and van Dijk* that it is for national courts of last instance alone "to take upon themselves independently the responsibility for determining whether the case before them involves an 'acte clair'"¹¹⁸, also distancing themselves from the interpretation espoused by lower courts¹¹⁹. Nonetheless, the CJ, in cooperation with a 'coalition of the willing' ordinary judges, has now the procedural means for circumventing the risks for the primacy, coherence and uniformity of EU law represented by some 'recalcitrant' supreme courts' abusive interpretation of the *CILFIT* case-law, although within the limits of the enforcement tools made available by the EU legal order¹²⁰.

¹¹⁶ Ústavní Soud, Judgment of 31 January 2012, 2012/01/31, Pl. ÚS 5/12 and Hojesteret, Judgment of 6 December 2016, 15/2014.

¹¹⁷ Ústavní Soud, Judgment of 31 January 2012, 2012/01/31, Pl. ÚS 5/12 and Hojesteret, Judgment of 6 December 2016, 15/2014; these cases shall be distinguished from the so-called Solange III decision rendered by the BVerfG on the European Arrest Warrant (Order of 15 December 2015 - 2 BvR 2735/14, paras 46, 50 and 105-125), in that, while the BVerfG has refused to submit a reference to the CJ applying the *acte clair* doctrine, it has nonetheless found the relevant EU law provision compatible with the Constitution and has restated its obligation to refer the question to the CJ before exercising its (identity) review of constitutionality in cases of real conflicts of norms.

¹¹⁸ Joined Cases C-72/14 and C-197/14, *X and van Dijk*, EU:C:2015:564, para 59.

¹¹⁹ Case C-160/14, *Ferreira da Silva e Brito*, paras 40-42.

¹²⁰ Cf., as to the current limits to the enforcement of the obligation under art. 267(3) TFEU by means of actions for damages and infringement proceedings and the possible ways forward, A. Kornezov, *The new format of the acte clair doctrine and its consequences*, cit. at 106, 1331-1341, P. Mengozzi, *The Liability of the State for Acts of the Judiciary: from the Köbler Ruling to the Ferreira da Silva e Brito Ruling*, 21 Dir. Un. Eur. 401 (2016), L. Coutron & J.-C. Bonichot (eds.), *L'obligation de renvoi préjudiciel à la Cour de justice: Une obligation sanctionnée?* (2013) and C. Lacchi, *Multilevel judicial protection in the EU and preliminary references*, cit. at 74, 688-691

4. Concluding remarks: a reasonable balance between effective judicial protection and constitutional authority?

From the perspective of EU law, there are two potential limits to the ‘constitutionalisation’ of the Court of Justice by means of structural and procedural reforms. They stem from the right to an effective judicial protection enshrined in art. 47 CFREU and the principle of loyal cooperation under art. 4(3) TEU respectively, read in conjunction with art. 267 TFEU.

At first glance, the revised RPCJ and the recent CJ case-law does not appear entirely consistent with the letter and the spirit of art. 267 TFEU and with the principle of loyal cooperation, which shall underlie the judicial dialogue between the CJ and the Member States’ courts¹²¹.

The preliminary ruling procedure, as the “keystone” of the EU judicial system, is primarily “an instrument of cooperation” between the national and Union jurisdictions, which share the competence to “ensure the full application of EU law in all Member States and to ensure judicial protection of an individual’s rights under that law”¹²². It follows that in contrast with direct actions, the jurisdiction of the Court under art. 267 TFEU is preliminary both under a temporal and a functional perspective, in that it precedes and is instrumental to the adoption of the national judgment¹²³. The Court would therefore appear to be under an obligation to give rulings and to avoid the establishment of any form of filter to the requests for a preliminary ruling submitted by the national courts.

The CJ settled case-law has nonetheless consistently underlined that the aim pursued by art. 267 TFEU is to provide national courts “with the points of interpretation of EU law which they need in order to decide the disputes before them”¹²⁴ and to deliver “an interpretation of EU law which will be of use to the national court”¹²⁵. The procedural reforms undertaken in the last years appear to go precisely in this direction, by preventing the

and 704-707, who goes so far as to theorise a justiciable “right of access to preliminary references upon individuals”.

¹²¹ See, to this effect, Opinion 2/13, EU:C:2014:2454, para 176 and Case C-614/14, *Ognyanov*, EU:C:2016:514, para 16.

¹²² Opinion 2/13, EU:C:2014:2454, paras 175-176.

¹²³ L. Daniele, *Art. 267 TFEU*, cit. at 59, 2104.

¹²⁴ Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:936, para 23.

¹²⁵ Case C-614/14, *Ognyanov*, para 16.

submission of – or facilitating the adoption of a decision on – preliminary ruling proceedings which ultimately are not necessary and useful to solve the dispute in the main proceedings.

It remains to be seen to what extent the possible limitations to the references from lower courts and the concentration of the preliminary jurisdiction in the hand of the CJ are instead consistent with the right to an effective judicial protection. The answer depends very much on the content of such right in the framework of the preliminary ruling procedure.

The right to an effective judicial protection, as codified by art. 47 CFREU, comprises the “right to an effective remedy before a tribunal”, and the “right to a fair and public hearing within a reasonable time”. For the purpose of the preliminary ruling proceedings, the balance between these two rights differs from that established under direct actions. Indeed, as the Court has consistently held, the preliminary ruling procedure has “the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy”¹²⁶. It follows that art. 267 TFEU procedure is not primarily aimed at ensuring an effective remedy to private parties, as is evident from its “non-adversarial nature”¹²⁷.

On a more general note, it is true that where the effectiveness of judicial protection and of EU law collide, the latter may take precedence only insofar as the “essence of the right to effective judicial protection is preserved”¹²⁸. Nonetheless, as Safjan and Düsterhaus have demonstrated, this “essence” varies “according to the type and nature of procedures”¹²⁹, and shall be determined by the CJ itself, precisely in view of the need to uphold the primacy, uniformity and effectiveness of EU law.

In light of the foregoing, it could be argued that, particularly in the framework of interpretative preliminary ruling proceedings, the legitimate public interest in the reasonable length¹³⁰, coherence

¹²⁶ See Opinion 2/13, EU:C:2014:2454, para 176.

¹²⁷ Practice directions to parties, cit. *supra* note 69, para 33.

¹²⁸ See M. Safjan & D. Düsterhaus, *A Union of effective judicial protection: addressing a multi-level challenge through the lens of Article 47 CFREU*, 33 YEL 3 (2014), 37-38.

¹²⁹ *Ibid.*, 38.

¹³⁰ As the CJEU, *Annual Report 2016*, cit. at 20, 14 and 81-82 have shown, the RPCJ revision has brought forward a significant reduction of the average length of preliminary ruling proceedings.

and effectiveness of these proceedings could prevail over the expectation of the private parties in the main proceedings to have the EU law provision interpreted or declared invalid by the Court¹³¹. To the extent to which they respond to the former interest – by entrusting the uniform and coherent interpretation of EU law to a single Court¹³² and enabling that Court to concentrate on the most relevant references – the abovementioned structural and procedural reforms seem therefore in line with art. 47 CFREU.

The effects of the reforms undertaken by the CJEU on the effective judicial protection shall also be assessed in the light of its recent case-law concerning the material scope of its preliminary jurisdiction. Reference is made to the case *Rosneft*, in which the CJ has accepted jurisdiction to give a preliminary ruling on the validity of CFSP acts concerning the compliance with the so-called non-affectation clause (art. 40 TEU) and the legality of restrictive measures against natural or legal persons¹³³. In so doing, the CJ has defended the “scope of the general jurisdiction that Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed”¹³⁴, precisely with a view to enforcing the principle of effective judicial protection as essential to the rule of law¹³⁵. The progressive universalisation of the CJEU jurisdiction and the restrictive interpretation of the exceptions to the obligation to refer under art. 267(3) TFEU, on the one hand, and the tendencies to reinforce the CJ’s monopoly over preliminary ruling proceedings and to introduce a form of prioritisation of cases on the basis of their relevance (by the deployment of reasoned orders and as an effect of the enhancement of the admissibility threshold for ‘ordinary’

¹³¹ See in the same vein, A. Kornezov, *The new format of the acte clair doctrine and its consequences*, cit. at 106, 1340; *contra*, partially, A. Ruggeri, *Il rinvio pregiudiziale alla Corte dell’Unione: risorsa o problema?*, cit. at 92, 97–98, according to whom any form of filter to the requests for a preliminary ruling could constitute a violation of art.6 ECHR.

¹³² G. Vandersanden, *La procédure préjudicielle devant la Cour de justice de l’Union européenne* (2011), 10 rightly pointed out in this regard that “une procédure préjudicielle à deux étages, plutôt que de renforcer la confiance du justiciable dans la bonne administration du droit de l’Union, risquerait de le conduire à douter de la “parole du juge” s’il devait s’avérer qu’une décision rendue devait, par l’effet du réexamen, faire l’objet d’une évaluation différente”.

¹³³ Case C-72/15, *Rosneft*, EU:C:2017:236, para 81.

¹³⁴ *Ibid.*, para 62.

¹³⁵ *Ibid.*, paras 71-73.

references for preliminary rulings) should be regarded as the two sides of the same coin. Together they represent long-overdue but positive steps in the direction of the implementation of the Nice reform, which “contained a fundamental reallocation of jurisdiction in embryo as between the Union courts”, aiming at attributing to the CJ the sole “examination of questions that were of essential importance for the Union legal order”¹³⁶, like a true EU Constitutional Court.

¹³⁶ In this sense K. Lenaerts, I. Maselis & K. Gutman, *EU procedural law*, cit. at 64, 38.

CONCLUSIVE REMARKS

*Gábor Halmai**

According to the European discourse about primacy of EU law and pluralism, the concept of national constitutional identity in Article 4(2) TEU means that the member states can define its own national identity, but the decision about the compatibility of the national identity with EU obligations since the Treaty of Lisbon is always vested in the European Court of Justice, which makes the ultimate decision on Kompetenz-Kompetenz. Under the revised identity clause of Article 4(2) TEU member state constitutions can specify matters of constitutional identity, and constitutional courts can apply identity control tests to EU acts. Under certain limited circumstances, member states are even permitted to invoke constitutional limits on the primacy of EU law. The boundaries of these constitutional limits are embedded in the principle of sincere cooperation contained in Article 4(3) TEU.

This understanding of the relationship between EU law and the constitutional laws of the member states complements concepts such as constitutional pluralism¹, the network concept², multilevel constitutionalism³, and composite constitutionalism (*Verfassungsverbund*)⁴, all of which aim to resist the absolute primacy of EU law⁵. The joint characteristic of these scholars' arguments is that rather than seeking to definitely resolve the

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¹ N. MacCormick, *The Maastricht Urteil: Sovereignty Now*, 1 Eur. L.J. 3 (1995), at 259; N. Walker, *The Idea of Constitutional Pluralism*, 65 Modern L.R. 3 (2002), at 317.; M. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. Walker (Ed.), *Sovereignty in Transition* (2003), at 501.; for a representative collection of essays on constitutional pluralism pro and con, see M. Avbelj and J. Komárek (Eds.), *Constitutional Pluralism* (2012).

² See A. Peters, *Elemente einer Theorie der Verfassung*, Duncker & Humblot, 2001.

³ See I. Pernice, *Multilevel Constitutionalism in the European Union*, 5 Eur. L.R. (2002), at 511.

⁴ I. Pernice, 'Theorie und Praxis des Europäischen Verfassungsbundes, in Callies (Ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, (2007).

⁵ A. v. Bogdandy and S. Schill, *Overcoming Absolute Primacy under the Lisbon Treaty*, 48 Comm. Mkt. L.R. 1 (2011).

standoff between the ECJ and national constitutional courts through any ‘all-purpose superiority of one system over another’ (McCormick), they propose to leave the questions of *Kompetenz-Kompetenz* unsettled, and try to avoid conflicts through mutual accommodation between constitutional courts (Maduro). Critics of constitutional pluralism, like Martin Loughlin, argue that it is oxymoronic⁶. Others, like Daniel Kelemen, even go so far as to claim that the concept is not only untenable, but also immoral, and that the scholarly community that supports it should end its ‘dangerous dalliance’ with constitutional pluralism⁷. Nevertheless, Kelemen admits that the threat to the EU legal order comes not from the national constitutional courts claims of *Kompetenz-Kompetenz* as such, but from the remedy they propose for violations, namely the inapplicability of unconstitutional EU law. He takes the position that the only appropriate and feasible remedies are (1) an amendment to the national constitution, (2) a secure an opt-out, or if necessary, (3) withdrawal from the EU altogether⁸. Hence Kelemen concludes that the supremacy of EU law and deference to the ECJ on questions of *Kompetenz-Kompetenz* does not threaten the constitutional identity of the Member states because they remain free to leave the Union⁹. In other words, even the most inexorable critic of constitutional pluralism accepts that national constitutional courts must retain responsibility for – as the German Federal Constitutional Court puts it – ‘safeguarding the inviolable constitutional identity’ of their states, as long as they reconsider the appropriate remedies for its violations¹⁰.

⁶ M. Loughlin, *Constitutional Pluralism: An Oxymoron?*, 3 *Global Constitutionalism* (2014). It isn’t clear, whether Loughlin rejects constitutional pluralism because the ultimate legal authority is vested uniquely in the ECJ, or because political authority remains uniquely vested in the member states.

⁷ D. Kelemen, *On the Unsustainability of Constitutional Pluralism. European Supremacy and the Survival of the Eurozone*, 23 *Maastricht J. 1* (2016), at 139. Despite these harsh words, Kelemen admits that there was a period of constitutional pluralism, when it may have served as a useful developmental stage for the EU legal order.

⁸ *Ibid.* 149.

⁹ *Ibid.* 140. Here he does not mention the possibility of opting out, whatever it means.

¹⁰ *Ibid.* 147.

Ever since its seminal judgment in *International Handelsgesellschaft*¹¹, the ECJ has confirmed that national constitutional norms in conflict with secondary legislation should be inapplicable. This means that EU law always takes precedence over national constitutional law, while EU law must respect the national identities of the member states. As the ECJ has stressed in its case law, EU laws have to be interpreted strictly so as to be applicable only when the case at hand entails a 'genuine and sufficiently serious threat to a fundamental interest of society'¹². There is no strict and exhaustive list of constitutional identity-sensitive matters accepted by the ECJ, but taking into account the jurisprudence of the ECJ, there are some more frequently acknowledged issues, such as decisions on family law, the form of the State, foreign and military policy, and protection of the national language.¹³

In recent years, several national constitutional courts have openly challenged the primacy of EU law and the authority of the Court of Justice of the EU in their judgments. The attitude of these courts varies from constructive dialogue to explicit defiance. At times, national constitutional courts have invoked Article 4(2) TEU and their national constitutional identity to justify the violation of the common values set out in Article 2 TEU. These two core provisions of the Treaty have a difficult relationship with each other, and it is also not easy to evaluate the effectiveness of EU instruments to defend and enforce common values. A specific focus

¹¹ Case C-11/70, *International Handelsgesellschaft mbH* [1970] ECR 01125.

¹² Case C-208/09, *Sayn-Wittgenstein*, para 86.

¹³ See these matters mentioned in P. Faraguna, *Taking Constitutional Identities Away from the Courts*, 41 *Brook. J. Int'l L.* 2 (2016), at 506-508. In addition, Sayn-Wittgenstein, Faraguna mentions the Groener judgment (Case C-379/87) from 1989, and the more recent Runevi judgment (Case C-208/09). Barbara Guastafarro discusses also the Omega and Dynamic Medien Cases (Case C-391/09), the Spain v. Eurojust Case (Case 160/03), as well as the Affatato Case (Case 3/10). See B. Guastafarro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', *Yearbook of European Law*, Vol. 31. No. 1 (2012), 263-318. Besides these cases, Monica Claes also mentions from the pre-Lisbon case-law the Michaniki case (Case 213/07) and Adria Energia AG (Case 205/08), where the reference was to the protection of the national cultural identity of the relevant member states rather than to the more political form of it. See M. Claes, *National Identity: Trump Card or Up for Negotiation?*, in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, (2013), at 131-32.

should rest on the principle of the rule of law. As is demonstrated by the essays in this special issue, national constitutional courts have developed specific review mechanisms (fundamental rights, ultra vires and identity reviews) to deny, in exceptional cases, the applicability of EU law within their domestic legal orders.

The approaches of national constitutional courts are different. They allow for the primacy of EU law over national law (including constitutional law) in general, but not over the core of the constitution, which they specify as matters of constitutional identity. These constitutional courts, as the German Federal Constitutional Court puts it – retain the authority for ‘safeguarding the inviolable constitutional identity’ of their states. This means that they all reserve the right to review EU law, but only in exceptional cases, and will involve the ECJ via the preliminary reference procedure. So far, they have been reluctant to actually exercise the review powers that they have claimed for themselves. This is demonstrated e.g. in the jurisprudence of the German Federal Constitutional Court, which refers to its co-operative relationship with the European Court of Justice, emphasizing its ‘Europe-friendliness’¹⁴, and aims to increase the level of protection offered by the EU¹⁵. In the case of the European Central Bank’s Outright Monetary Transaction (OMT) programme, the German Court, in its first preliminary reference ever, de facto declared the OMT programme illegal, and called on the Court of Justice to strike it down¹⁶. But after the ECJ’s ruling delivered on 16 June 2015 reaffirmed the rule that a judgment of the Court of Justice “is binding on the national courts, as regards the interpretation or the validity of the acts of the EU institutions in question, for the

¹⁴ See for instance the judgement of the German Federal Constitutional Court of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07. This judgment was referred to by the Supreme Court of the United Kingdom in *State v. Secretary of State for Transport*, 22 January 2014.

¹⁵ Order of 15 December 2015, 2 BvR 2735/14. This decision of the German Federal Constitutional Court on the European Arrest Warrant led to the Judgment of the Grand Chamber of the European Court of Justice of 5 April 2016 in the case of *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*. C-404/15.

¹⁶ BVerfG, Case No. 2 BvR 2728/13, order of 7 February 2014.

purposes of the decision to be given in the main proceedings”,¹⁷ the German Court complied with the answer given by the ECJ¹⁸.

In its 2015 *Taricco* judgment¹⁹, the Grand Chamber of the ECJ held that the Italian legislation concerning the limitation period for VAT fraud was too lenient to ensure the protection of EU financial interests, as required by Art. 325 TFEU, and had to be disapplied. The Italian Constitutional Court, in its preliminary reference in *Taricco*²⁰, explained to the ECJ the reasons why the Italian justices thought that the ECJ Grand Chamber judgment infringed upon the Italian constitution’s principle not to be prosecuted beyond the statute of limitation period that was applicable at the time the criminal offence was committed, and invited the ECJ to correct or qualify its decision. As Davide Paris rightly observes, even though the ECJ might well be unhappy with this development of ‘threatening references of appeal’, it is better than a situation in which national constitutional courts unilaterally invoke constitutional identity to decide whether and to what extent the member states shall comply with EU law, without the ECJ having the opportunity to express its opinion²¹.

In the framework of a dialogue between national constitutional courts and the ECJ, the Spanish Tribunal Constitucional also emphasized the harmony between European and Spanish basic values, and read into the identity clause a confirmation that an infringement of the core principles of the Spanish Constitution would also violate the European Treaty.²² The Czech Constitutional Court similarly reserved its review powers for exceptional cases, such as the ‘abandoning the identity of values’ or exceeding the scope of conferred powers, albeit without making a reference to the ECJ²³. Even though the Czech Court did

¹⁷ Case C-62/14 *Gauweiler*, para 16.

¹⁸ BVerfG, 34/2016. Judgment of 21 June 2016.

¹⁹ Judgement of 8 September 2015 in case C-105/14.

²⁰ Order 24/2017

²¹ D. Paris, *Carrot and Stick. The Italian Constitutional Court’s Preliminary Reference in the Case Taricco*, 37 *QIL*, *Zoom-in* (2017), at 5-20.

²² Tribunal Constitucional 13.12.2004, Declaration (DTC) 1/2004. Quoted by M. Claes, ‘National Identity: Trump Card or Up for Negotiation?’, in A. S. Arnaiz and C. Alcobarro Llivina (eds.), *National Constitutional Identity and European Integration*, (2013), at 128.

²³ Decision 2611.2008, Lisbon I, Pl. ÚS 19/08. Quoted by J. Rideau, *The Case Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the*

not frame the decision as an identity case, the reasoning contained in the Czech decision, which argues that the ECJ did not understand the particular historical context of the case, makes clear that the Court considered the case to be an identity issue. The Czech constitutional court's famous judgment of 2012 for the first time made a finding that an ECJ's decision was *ultra vires*²⁴. But the Court seems to adhere to a euro-friendly interpretation of the Czech constitutional order and it has even interpreted the Eternity Clause itself – especially concepts like democracy or sovereignty – with respect to the logic and nature of European integration. The Czech Constitutional Court's Europe-friendliness is further complemented by the respect that EU law pays to the national – especially constitutional – identities of the member states.

In 2015, the Supreme Court of Denmark requested a preliminary ruling in the case of *Dansk Industry, acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* concerning the interpretation of the principles of non-discrimination on grounds of age, legal certainty and the protection of legitimate expectations. The dispute concerned Ajos' refusal to pay Mr. Rasmussen a severance allowance. In December 2016, the Supreme Court of Denmark, in its decision in the Ajos case disregarded the guidelines of the Court of Justice of the European Union. It used the occasion to set new boundaries to the applicability of the ECJ's rulings in Denmark. It did so in two steps: first, the highest Danish court delimited the competences of the EU through the lens of its interpretation of the Danish Accession Act. Second, the Supreme Court delimited its own power within the Danish Constitution²⁵.

After a failed referendum and constitutional amendment, in December 2016, in a judgment on the immigrants' quota system, the Hungarian Constitutional Court endorsed in the abstract the possibility to refuse compliance with EU law in the name of a Member State's sovereignty and constitutional identity, based on

'German Model'', in in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, (2013), at 255-256.

²⁴ 'Slovak pensions' case, no. PI ÚS 5/12.

²⁵ Judgement of the Supreme Court, Delivered Thursday 6 December 2016, Case 15/2014. See M. R. Madsen, H. P. Olsen and U. Sadl, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation*, 85 iCourts Working Paper Series, (2017).

the historical constitution of the country²⁶. According to this populist agenda, immigrants, refugees and minorities are perceived as threats to the constitutional identity of the people, a danger to 'political unity' in the sense that Carl Schmitt uses the term. Constitutional populists rely on Carl Schmitt's understanding of constitutional identity, which posits that it holds a position above the written constitution and based on the will of the people as a constituent power. This concept of constitutional identity means also that it can change from moment to moment as the will of the people changes. In a constitutionalist sense, in contrast, constitutional identity goes beyond the uncontained constituent power of people, which - following Kelsen's critique - is always fictional, and is tied to a constitutional text, even though it "only makes sense under conditions of pluralism"²⁷, and emerges "dialogically from the disharmony between the constitution and the social order"²⁸.

The abuse of constitutional identity and constitutional pluralism by the Hungarian, the Polish or any other constitutional court is nothing but national constitutional parochialism²⁹, which attempts to abandon the common European constitutional whole, and is inconsistent with the requirement of sincere cooperation of Article 4(3) TEU. This misuse of constitutional identity for merely nationalistic purposes discredits every genuine and legitimate reference to national constitutional identity claims, and strengthens the calls for the end of constitutional pluralism in the EU

²⁶ For a detailed analysis of the decision see G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law*, 43 *Review of Central and East European Law* (2018), at 23-42.

²⁷ See M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*, (2010), at 21.

²⁸ Cf. G. Jacobsohn, *Constitutional Identity* (2010), at 7.

²⁹ See the term used M. Kumm, *Rethinking Constitutional Authority: On Structure and Limits of Constitutional Pluralism*, in M. Avbelj and J. Komárek, *Constitutional Pluralism in the European Union and Beyond* (2012), at 51.

altogether³⁰. It is a call for unlimited hierarchy³¹ in order to avoid the disintegration of the EU as a value community³².

The more general experience of the national constitutional courts' case law is that the reference to national constitutional identity of Article 4(2) is legitimate only if the Member State refuses to apply EU law in a situation where a fundamental national constitutional commitment is in play³³. Adopting Matej Avbelj's term for the relationship between EU law and transnational law³⁴, for the role of national constitutional courts and the European Court of Justice, this approach can be characterised as 'principled legal pluralism'.

³⁰ The White Paper on the Polish Judiciary published on 7 March 2018 by The Chancellery of the Prime Minister as reaction of the European Commission's move to trigger Article 7 (1) regarding the independence of the judiciary refers to Neil MacCormick's seminal work on the Maastricht Urteil of the German Federal Constitutional Court to explain the reform as based on the theory of constitutional pluralism.

³¹ See Joseph Weiler arguing that as a check on the hubris of unbound liberty, both of the collective and the individual, the European as any other constitutional order besides pluralism needs hierarchy as well. J. H. H. Weiler, *Prologue: Global and Pluralist Constitutionalism – Some Doubts*, in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism* (2012), at 17.

³² In a recent article, Viktor Orbán warned the 'unionist' of the EU, who call for a United States of Europe and mandatory quotas, if they refuse to accept the 'sovereignists' desire for a Europe of free and sovereign nations, who will not hear of quotas of any kind, the mainstream will follow precisely the course that Hungary has set forth to affirm its constitutional affirmation of Christian roots, its demographic policy, and its effort to unify the nation scattered across borders. See V. Orbán, *Hungary and the Crisis of Europe: Unelected Elites versus People*, *National Review*, January 26, 2017.

³³ See M. Kumm and V. Ferreres Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union*, 3 *ICON* 1-2 (2005), at 473, 491 and 492.

³⁴ See M. Avbelj, *The European Union Under Transnational Law* (2018).

SPECIAL SECTION - INTERVIEWS

CONSTITUTIONAL ADJUDICATION WITHIN A EUROPEAN COMPOSITE CONSTITUTION – A VIEW FROM THE BENCH

*Giuliano Amato, Marta Cartabia, Daria de Pretis, Silvana Sciarra**

1. What role did international and European law play in your legal education? Is the impact on each judge's legal education a meaningful variable in the Court's position towards European and international law?

Giuliano Amato: A major role in my education was played by comparative law and the study of US constitutional law. The experience of the Master at Columbia University was a turning point in my education. I was in the first years of my academic career, I had just published my first monograph on the relationship between legislative and governmental sources of law. While attending the course of constitutional law in New York, the instructor stimulated me and the other students to propose an alternative solution to a case at that time just decided by the US Supreme Court. Some days after the class, I prepared a paper with a very elegant thesis, in which I applied the traditional categories that I had been introduced to in my previous legal education, with the typical attitude of the civil law jurist to objectivize law and find systematic solution in the comprehensive body of the law in force. The professor said that I was totally wrong. I completely underestimated the role acknowledged in common law countries to the intent of the legislator, which can be (and often is) completely independent from the law already in force, making it impossible to sort out any systematic interpretation whatsoever.

Comparative law has been a fundamental training also for approaching European Law, showing me how different cultural paradigms can be referred to the same substantive issues.

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Marta Cartabia: In a recent conference I was introduced to the audience as a “rooted cosmopolitan scholar”, borrowing from Bruce Ackerman. I was flattered by that introduction, that in fact captures the very nature of my profile: I feel firmly and proudly rooted in the Italian community of constitutional scholars, and at the same time I have always been nurtured by mutual exchanges with colleagues from all over the world. My legal education has been oriented to a supranational perspective since the discussion of my bachelor thesis on “does a European constitutional law exist?”. It was 1987 and back then it was quite hard to imagine what happened a few years later, with the drafting of the ill-fated constitutional treaty, the approval of the Charter of fundamental rights and many other developments of the European legal system. Working on these issues has been a great challenge that brought me to look for unpublished sources, to do field research in Bruxelles, to share ideas with scholars and professors with different disciplinary backgrounds. As a postgraduate, I was admitted to the European University Institute, where I have pursued my PhD studies. At EUI, I have dug deeper into European studies, and the research path I have inaugurated at that time always remained in the core of my research and teaching activities. In those years I have been part of a great community of students coming from many different European countries. The overwhelming majority of the teaching staff, including my own supervisors, were not Italians. My very first publications were published on international journals. It is in those years that I have developed a European and international legal mindset: since then my approach to any legal problem – connected to any field of public law, such as democratic institutions, justice, rights, sources... - takes into account how the same problem is regulated in other jurisdictions, starting from European and ECHR member states’ jurisdictions. This mindset certainly affects also my work as a constitutional judge. Every single judge’s approach to his or her office is affected by his or her professional background and legal education and this is one of the Court’s most precious richness.

Daria de Pretis: I was trained in the line of the tradition of my particular academic discipline, which is administrative law. European and transnational law was not at the core in the very first years of my legal education and academic career. Indeed, back then

administrative law scholars were primarily focused on domestic law. However, I have had the great chance to meet academic mentors who have soon urged me to deal with comparative law and, hence, with European law. Those latter studies have been crucial for my legal training.

Being trained in comparative, European and supranational law is a very significant, if not decisive, feature in the approach followed by a constitutional judge. This is such not only where, obviously, constitutional judges are called upon to decide on issues involving the application of European legal sources or sources of supranational reach; a situation that, by the way, has become more and more frequent. A specific training in comparative, European and supranational law is rather important, more generally, in the ordinary way to tackle constitutional problems and, thus, also for addressing purely “domestic” issues. From what I see, being accustomed to use a comparative approach and to pay attention to supranational legal elements lead to greater flexibility, to develop the ability to catch multiple aspects of the same problem, and to favor an imaginative attitude towards the adoption of new and inedited solutions.

Silvana Sciarra: In my years as a student in the Law School I have been able to explore comparative law and to get acquainted to pluralism of legal sources in labour law, the legal discipline I chose for my dissertation, which then became the field of my professional specialization. International law has been important in my training, for the impact of ILO and Council of Europe sources on the Italian legal system and for the close interrelation of those standards with the evolution of constitutional values. European law became my elective field of research a few years later, despite the slow movement of Italian legal education towards this approach. I was able to develop an interest in European law travelling to other countries and appreciating the way in which academic curricula included the study of supranational sources and in particular of the case law of European courts. I was also very lucky in holding the chair of European labour and social law for eight years at the European University Institute. That experience opened up completely new worlds to me. From my supervisees, coming from different parts of Europe, I have learnt immensely and developed

new energies. I shall never be able to fully express my gratitude to them.

The multifaceted training I was lucky to acquire and to cultivate in academia has become an invaluable support in my new commitment as a constitutional judge. I believe in developing close links between national and EU sources and in ascertaining that constitutional adjudication encourages the integration of national and supranational legal systems. In my experience as a constitutional judge I am equally inspired by references to the ECHR as interpreted by the Strasbourg Court. The cautious approach followed by the Italian Constitutional Court (ICC) implies that references to that rich and diversified case law be made in ways that should be mediated by constitutional standards. Enhancing the protection of fundamental human rights requires a special effort in safeguarding an overall consistency of constitutional adjudication. Constitutional courts, as final adjudicators on rights, are responsible for a combined interpretation of sources – national and supranational – coming together in congruent approaches, so that fundamental rights may emerge in their unitary legal nature and be interdependently protected.

In my early attempts to deal as a judge rapporteur with the case law of the ECtHR, memories from research in comparative law have come back and have fortified my conviction that diversities in national legal traditions should never be mechanically transposed to different legal contexts. This implies that references to the ECtHR's specific case law must be read with special attention, in order to integrate them into the arguments developed by the ICC in its own rulings. They provide further guide in setting up a specific legal reasoning within a concrete and well-defined case of constitutional relevance. Filtering such references through the lenses of constitutional judges is, at the same time, a sign of deference towards a supranational court and a search for coherence inside a national legal system.

2. What role did the transnational scholarly debate play in your professional career as a legal scholar? Did this play any role on everyday challenges that you are called to face from the bench?

Giuliano Amato: There is an intrinsic connection between institutional experience, research and teaching activity. One of the most influential meeting I had was with Claus-Dieter Ehlermann, at that time Director-General of the Legal Service of the European Commission. We were both teaching at the EUI and there were many occasions to exchange opinions just between the two of us and with the students.

Furthermore, I consider that among the most thought-provoking authors or speakers in scholarly debates are of course Joseph Weiler, Paul Craig and Dieter Grimm, even though I often disagree with them.

Marta Cartabia: I have never lost contact with the transnational scholarly debate, both for the literature I follow and for the audience that I target through my publications. I feel myself embedded within the Italian academic community, but at the same time I am tied to academic and intellectual relationships beyond the national boundaries, in particular in Europe and North America. At the beginning of my career, I had been often asked whether I was part of the community of constitutional lawyers, of comparative lawyers or of European lawyers. The truth is that I struggle to really understand those differences. How could a legal problem, for example linked to fundamental rights, be faced without resorting simultaneously to domestic, European, international and transnational sources? How poor our academic thought would be without these openings beyond each own backyard!

These considerations on my work as a legal scholar also apply to my activity as constitutional court's judge. At the Italian Constitutional Court there is a valuable team working within the research office with experts able to carry out study in the field of European and comparative law and with whom we speak with regard to the most significant issues we have to address. From time to time, in the judgments a gaunt reference to "foreign law" does appear, while most often the Court cites the case law of the European Courts. However, this is just the tip of the iceberg: those few lines appearing in the judgment are in fact symptom of a

broader and in-depth knowledge that judges have developed in a transnational setting. Last but not least, during these years at the Constitutional Court, I have had the opportunity to participate in a number of judicial networks where to exchange experiences, ideas, solutions and working methods. The Court itself maintains stable relationships with some Constitutional Courts and is a member of the Conference of European Constitutional Courts and of the World Conference on Constitutional Justice. I have greatly benefited from these relationships and especially from the participation in the Global Constitutionalism Seminar that takes place every year at Yale (USA), where a group of judges and scholars from all over the world discuss, reflect, elaborate for days on different current common problems, from a judicial perspective.

Daria de Pretis: I have started my activity as an academic by comparing Italian administrative law with that of other countries. I have studied in particular the German legal system, but I have focused as well on other systems, especially for what concerns administrative justice. For the sake of my research activity, I have always been in touch and cooperated with foreign colleagues. Some, in turn, have become a judge and this allows to be engaged in an even more fruitful conversation. The constant dialogue, essential in the framework of the research activity, is very important also in my work as a judge. The knowledge and the understanding of what happens elsewhere is nourished by reading foreign scholarship and case law as well as by means of meetings and dialogues, more or less formal, with foreign experts and judges. More and more often as judges of the Constitutional Court we are compelled to weigh the decisions of other courts that may have a direct influence on our case law. Take as a paramount example the judgments of the European Court of Human Rights that we must take into consideration when assessing the compliance of Italian legislation with the standards offered by the Convention. It is not infrequent to deal with issues that other courts, or scholars in other countries, have already addressed or are in the process to address. Moreover, it also happens that the coexistence of different legal systems causes overlaps with the jurisdiction of other courts and, with them, it could threaten tensions and conflicts.

Silvana Sciarra: The academic circle in which I discovered my vocation as a young labour lawyer was very open to transnational exchanges. A two years US fellowship, early on in my academic career, exposed me to the challenges of a legal system distant from the civil law tradition and, precisely for this reason, incredibly useful in displaying new research paths. I became aware of 'uses and abuses' in comparative law, following Otto Kahn-Freund's scholarship.

This awareness has been with me over the years and is combined with a sense of humbleness, whenever I come into contact with new developments in foreign law, as well as in EU law. I am convinced that a humble approach allows to ask oneself new questions about the legal system in which one operates. This is very similar to what a constitutional judge must do in facing everyday challenges and in building consensus within a collegial body. Every new case is a new discovery leading to new questions. The composite structure of the ICC and the lack of dissenting opinions magnify the search for collegiality.

My experience from the bench, so far, brought back memories of travelling to new countries and discovering new legal arguments. I am convinced that transnational experiences in legal scholarship encourage curiosities and enhance respect for those who think differently. So, I find myself now, as I did as a young scholar, eager to learn and even impatient for new ideas, the same way I felt embracing transnational legal discussions. Although this analogy may sound extravagant, I like to think that the exercise of exploring comparative and transnational legal developments is as challenging as entering the courtroom and engaging in collegial meetings. In both cases – I like to think – curiosity leads the way and reveals possible solutions, which then become the creation of a composite judicial body.

3. Did your experience in the Constitutional Court modify your attitude towards the openness of the legal order to international and supranational law?

Giuliano Amato: After several years in national institutions (as a member of the Parliament, of the Government, and in the Antitrust authority) and European institutions (as vice-President of the

Convention on the Future of Europe), I am having the opportunity to experience the inner dynamics of the legal system and its “external relations” from a further point of observation, and a very peculiar one: Constitutional Courts may be considered the less Europeanized national institutions, especially if compared to governments, ordinary judges, independent authorities and now even parliaments. But their role is extraordinary, as they have to be the guarantors both of the domestic Constitution and of its openness.

I find it fascinating that courts (and even Constitutional Courts) can come to a clash in a pluralistic system such as the European one, as they testify the different sensitivities and the different legal cultures that live together in the continent. Much more difficult is when we face political clashes that are riskier and potentially far more dangerous for the European integration. It is not a case that many decisions of Constitutional Courts related to the expansion of EU competences were actually postponing a final word on the case: this is the Solange rationale, and – in the end of the day – also of the counterlimits’ doctrine: we are gatekeepers, we are entitled to define the framework, but the concrete actions have to be pursued by democratically legitimate bodies.

Marta Cartabia: As a member of the Court I have had the opportunity to test in practice what I previously studied as an academic. I am referring to the fruitful mutual influences among legal systems. Let me stress the concept: “mutual” influences, because it is not only domestic law to become more dynamic due to European and international law, but also the latter are increasingly enriched in this process. For instance, the dramatic problem of prison overcrowding has been tackled with important results by Italian institutions also thanks to the pushing decisions by the European Court of Human Rights (e.g. in the case *Torreggiani*).

Another example may help: in the saga of the “Swiss pensions”, some privileged retirement treatments had been retroactively repealed by the legislature as an austerity measure during the economic crisis, when a comprehensive package of cuts was approved within the framework of general reconsideration of unjustified expenses. Whereas the European Court of Human Rights considers such retroactive abolition of pensions’ regime as a violation of fundamental rights of their owners, the Italian

Constitutional Court did not annul that austerity measures, giving precedence to the solidarity among generations and affirming that the abolition of such privileges is instrumental for the equality of chances for future generations.

Divergences among courts may depend on the different points of view from which they approach the problem and not necessarily on a disagreement on the legal principles behind. However, the most important thing is to preserve legal pluralism in Europe, and continue the dialogue.

Daria de Pretis: I do not think so. During my experience at the Constitutional Court I found the confirmation, if anything, of the importance of international and transnational law. Little wonder: This is exactly what I was expecting. Though, I found remarkable the diffused awareness of my colleagues on this. All constitutional judges, even those apparently with a background less used to the openness of the legal order, proved to be very sensitive to the transnational dimension and are committed to take it into account. I had occasion to measure my expectations in the concreteness of the decisions and sometimes in their dramatic nature.

Silvana Sciarra: Delivering the presentation of a case in front of 14 judges, in secret close-doors sessions, can be quite a challenging experience. Challenges increase when supranational sources are at stake. This is so because there can be different points of view regarding the level of openness of the national legal system that courts should encourage. An academic – as I am – carries with her the attitude to expand the spectrum of analysis and to broaden the approach. I have tried, so far, not to modify this predisposition and, in agreement with my colleagues, to widen the angle of interpretation, whenever appropriate, so to include international and EU law.

Apart from cases in which parties involved in the legal proceedings which gave rise to the issue refer to such fonts in their papers and even in oral hearings, I am in favour of quoting sources and rulings of supranational courts *ad adiuvandum*, with a view to strengthening the leading arguments supporting constitutional adjudication. My preference goes into the direction of merging standards, whenever they serve the purpose of enhancing fundamental rights and clarifying the scope of constitutional arguments.

Such an approach is reflected into the – in my view evergreen – theory of integration through law, which must be read as a constant commitment for interpreters to build on common grounds. Integration is still a valid metaphor for setting common constitutional standards within the EU. In this perspective it is important to broaden all networks of constitutional courts, as well as of supreme and supranational courts. Judicial activism in such open spaces is a form of transnational communication, which contributes to exchanges of practices and helps developing theories of justice. This is, among others, the message one can read in ‘Between facts and norms’, when Habermas discusses the enactment of constitutional rights within a given legal community and, at the same time, their relevance for ‘persons’, as holders of human rights residing in a territory. The ICC has adopted this approach in extending to third country nationals access to essential social benefits, in particular with regard to the right to health. ‘Communicative’ actors keep all such concurrent sources within their angle of observation.

‘Space’ is a recurring metaphor, whenever it disguises tensions among legal orders and questions their connections to specific territories. The proposal, as Armin von Bogdandy cleverly suggests, to discuss current developments in terms of a common European legal space – in which Constitutional Courts act dynamically, adding their activism to diplomacy carried on by departments of foreign affairs in national administrations – is evocative of a changing scenario, running in parallel to theories on integration through law.

4. Which are, in your view, the most significant decisions of the Constitutional Court – recent as well as of past times – which have contributed to the “Europeanisation” of the Italian system of constitutional adjudication? Could you please provide some examples?

Giuliano Amato: The decision to submit a preliminary reference to the CJEU in the case known as “*Taricco*” was a success in itself and also a starting point for further evolution. The insertion of article 4(2) in the TEU means a lot more than just giving a European dimension to the counterlimits’ doctrine. This is the kind of

provision that gives courts the power to set their decisions at the crossroads of different legal systems, functioning like an accordion in order to adjust the primacy of either level of government, depending on the individual case. Order no. 24/2017 in the “*Taricco saga*” confirmed this reconstruction. There is no exclusive primacy in the interplay between national and European levels. We are living in times of “constitutional duplicity” and the specific task of each constitutional judge is to contribute to the dialogue among legal culture and legal charters.

A different trend in the case-law of the Italian Constitutional Court is to narrow the distance in the interpretation of fundamental rights with the Strasbourg Court. When there is an overlap between the fundamental rights of the Italian Constitution and those of the ECHR it is natural to converge, explicitly or – if the case allows – implicitly. Last year we took a significant decision on the surname, declaring as unconstitutional the default attribution of only the father’s surname even before a different agreement of both the parents had been reached. In doing this we had well in mind the robust case-law of the European Court of Human Rights (and in particular the case *Cusan and Fazzo v. Italy*), but we decided to base the declaration of unconstitutionality only on domestic constitutional parameters (in particular, with regard to personal identity, principle of equality and safeguard of the unity of the family). It was not (only) made for a mere institutional pride that does not allow to abdicate the protection of fundamental rights in favor of the supranational level. There was also the will of affirming that the domestic constitution (and its guarantor) are well equipped on their own to face contemporary challenges to fundamental rights.

Marta Cartabia: In the Constitutional Court’s case law there are many topical cases that are related with the development of European law (*Costa* in 1964, *Frontini* in 1973, *Granital* in 1984) and with the relationship with the ECHR legal system (the “twin decisions” 348-349 in 2007). These historical decisions aside, more recently the most remarkable interactions with the European legal order passed through two important references for preliminary ruling that were submitted by the Italian Constitutional Court to the Court of Justice of the European Union in the framework of the incidentaliter proceeding. The first preliminary reference

concerned the use and abuse of fixed term work in public schools and was submitted by the Constitutional Court with its order no. 207 of 2013; the second one – the so-called *Taricco* case – concerned the regulation of statute of limitations and the principle of legality in criminal matters and was submitted by the Italian Constitutional Court with its order no. 24 of 2017. In past times, the Court refused to make direct use of the reference for preliminary ruling, assuming that the latter was not in line with the Constitutional Court's prestige, authority and position within the constitutional system. Therefore, I hold these decisions as crucial: they provide for a constructive methodology. When disagreements arise, dialogue should be the first strategy to adopt as to clarify which justifications supports a certain stance. In the same way as it happens in personal relationships, also in institutional ones, I hold as essentially important to pursue the path of dialogue, explanation, elucidation with honesty and truthfulness (at the end of the day, institutions consist of persons...). This method is a constructive one, while institutional clashes are in general detrimental for all.

Daria de Pretis: It is not easy to pick and choose. A first (and very rich) group of decisions is related to the ECHR. Among them, it is obvious to underline the so called “twin” judgments no. 348 and 349/2007. Since then, the number of decisions in which the Convention and its interpretation by the Strasbourg Court has been used as an interposed norm in the judicial review of legislation has grown exponentially. This is also due to the fact that ordinary courts increasingly raise questions of constitutionality referring to the violation of the Convention and so of Article 117 of Italian Constitution.

A second group concerns the relationship with EU law. First and foremost, I would like to stress the importance of the three preliminary references issued by the Italian Constitutional Court: the first preliminary reference in a *principaliter* judgment (order 103/2008); the first also in an *incidenter* proceeding (order 207/2013); and, finally, the most recent one (order 24/2017). This last reference related to the so called “*Taricco* saga” deserves specific attention, as it implied a possible contrast with a decision of the CJEU. By issuing the preliminary reference, the Italian Constitutional Court opted not to come to a final confrontation with the Luxembourg Court, and preferred to establish a dialogue, by

asking for a new decision. The latter answered in turn with a very open and communicative decisions, so joining the judicial dialogue. A further decision related to EU law that I find worth mentioning is no. 187/2016, on the use and abuse of fixed term work in public school, which represents the follow-up to its second preliminary reference. The Italian Constitutional Court acknowledged the interpretation of the CJEU (according to which the continuous renewal of fix term contracts infringed EU law) but had the occasion to redefine its own remaining margin of maneuver. Finally, in the third group there are decisions in which the Court makes reference to comparison with foreign case-law and legislation related to the issue involved in the case. Sometimes there is no express mention of such tools in the final text of the decisions, but they often play a significant role. A recent example is in the judgment no. 5/2018 on vaccination (at § 8.2.2), where the Court offers a summary of the legislation on force in other countries on the compulsory vaccinations.

Silvana Sciarra: To answer this question I shall start mentioning the three preliminary references lodged by the ICC to the CJEU (103/2008; 207/2013; 24/2017). Although originated within very different contexts, they show an equally relevant – and increasingly strong – trust of the Court in its own prerogatives. They prove what Judge Pescatore once said, namely that within the Community, and now the Union, judges are never alone, since they are kept together by common aims and bound by the same law. However, these recent developments are the aftermath of a long and often controversial progress of the Constitutional Court's case law dealing with European matters.

In looking backwards to this long epiphany, I have in mind the ruling delivered by the ICC in *Costa v Enel* (14/1964). A case, which now appears completely out of touch with the evolution of the European legal order as a whole, can be seen as the symptom of a national legal system eager to build its own rudimentary instruments of analysis and to establish its own place within a newly born supranational order. Arguing on the principle '*lex posterior derogat priori*', the Court refrained from lodging a preliminary reference. The disagreement expressed soon after by the Court of Justice (C-6/64) was an opportunity for the latter to clarify the principle of supremacy, based on the unique nature of

the (then) EEC Treaty, compared with other international treaties and to its binding nature as an 'integral part of the legal systems of the Member states'. The 1963 leading decision in *Van Gend en Loos*, establishing the principle of direct effect and arguing for the uniform and effective enforcement of European law, was further specified with regard to the principle of supremacy. The combined impact of these two principles requires coherence in constitutional adjudication, particularly in current discussions characterized by fears that the rule of law could be shaken, if not infringed.

Hence, the urgency to provide coherent – albeit at times critical – support to membership of the Union is of primary importance and should be balanced against expressions of self-esteem, which go beyond national constitutional pride. The theory of counter-limits, crucial in establishing the borders of fundamental values and intangible rights within each national legal system, needs to be re-contextualized if the urgency to support democracy throughout the Union becomes a priority. Constitutional Courts must be independent – but not totally detached – from the perseverance of other institutions in bringing forward reforms. In fact, they may send – as they often do – meaningful and authoritative messages to national legislatures and even to EU institutions.

Preliminary references are segments of more diversified institutional balances, which should be carefully preserved, trusting the empowerment of ordinary EU judges in enforcing all principles of EU law. Such trust, by now a patrimony of the European community of judges, is the outcome of a long history, in which Italian judges played their own role, referring to the Court in Luxembourg, having in mind compliance with the principle of uniform interpretation of EU law.

In a famous decision (170/1984) the ICC, confirming a dualist approach, specified that the immediate enforceability of a Regulation 'as it is' within national legal systems is an undisputable sign of its origins within a separate legal order, nevertheless capable to impede that contrasting national norms display any relevance. This sophisticated legal construction was formulated in such a way that no derogatory effect could be attributed to an external and separate source, such as a Regulation.

Two more rulings are worth mentioning, dating back to the late Nineteen Eighties and early Nineteen Nineties, because they insist on the delicate point of how to solve discrepancies between national

and European norms. When a directly applicable principle of European law is at stake – in this case non-discrimination on grounds of nationality – it is the task of the legislature to guarantee legal certainty and to eliminate contrasting norms, since the mere non-enforcement of the latter does not produce their eradication from the system (389/1989). On a different ground, art. 11 of the Italian Constitution indicates limits to national sovereignty, up to the point of implying ‘non-enforcement’ of national law in contrast with what was then EC law (168/1991). Notions of pluralism of legal orders permeate the latter ruling, with an emphasis on ‘dualist’ theories, which might now require closer attention.

I believe the ICC should favour forward looking interpretations, whereby the unity of the European legal order is supported by a combined effort of all actors involved in the institutional game, including ordinary judges required, in the first place, by the CJEU to interpret national law in conformity with EU law. The common ground in which all European judges operate is the one intended by art. 2 TEU, where the fundamental values supporting the Union are clearly put forward. This unity of intents establishes linkages among Member States, and demands a proactive role of European institutions. Disillusion for what Europe has not done – or has done not so efficiently – should not go as far as breaking those linkages.

5. Which is ultimately the role of a constitutional judge in reconciling pluralism and unity in the European context? Which tools/techniques can be used and what developments can be foreseen?

Giuliano Amato: In general, and with specific regard to the European pluralism, the role of the constitutional judge is to find solutions to huge challenges, finding a way that is procedurally acceptable, legally sustainable and practically viable (meaning also, up to some extent, in financial and political terms). We are bound by multiple limitations, first of all we cannot select our cases and we can decide only on cases that have been correctly introduced by other subjects. Thus, we have to perform our role if and within the terms of the questions that we receive, and it is not easy to find the right case to say the right thing.

For sure, Constitutional Courts as institutions are subject to a sort of learning process themselves: it is not a case that the early case-law of the Polish Constitutional Court with regard to EU law resembles the first decisions of the Italian Constitutional Court, although taken some fifty years before. In other words: the individual judge learns a lot in participating in the discussion, in proposing solutions and in receiving feedbacks from colleagues. But even the institution improves and advances after each case, enriching its experience and the awareness of its role in an increasingly complex European constitutional framework.

Marta Cartabia: As already pointed out, dialogue is crucial. From a methodological point of view, an attitude inclined towards openness, to develop relationships and to interact with other colleagues in different legal systems is decisive. A wonderful article by Sabino Cassese is titled "*Fine della solitudine delle corti costituzionali, ovvero il dilemma del porcospino*" [The end of the Constitutional Courts' loneliness, or rather the dilemma of the porcupine]. That's it. In a context that is constitutionally interconnected it is no longer possible to play any game alone. Indeed, Courts operate in legal systems populated by several other actors from whom Courts must take advantage. Together with some colleagues we have written a book on the Italian Constitutional Court in English and we have asked ourselves what is the Italian style in constitutional adjudication. The Italian contribution can be condensed precisely in the ability to build up relationships, with other judges, national and international, with other institutional actors, with the Legislature and the Government. However, in order to enter in a peaceful relation with the other institutions one has to be very confident about its own identity: an identity that, in fact, requires more to be promoted than protected, as a contribute to the common enterprise of constitutionalism, which is shared life.

Daria de Pretis: In the current state of the integration process, with a remarkable and inescapable overlap of regulatory provisions in many fields, occasions for conflicts between national Constitutional Courts and supranational Courts are increasingly frequent. A top-down solution of these conflicts does not exist at the moment, and it is moreover very tough to imagine in the future. Means and

techniques of coexistence and conflict rules may only be developed by the praxis of involved courts. Therefore, courts play a crucial role in this process. Within this picture, a cautious and dialogical approach is certainly the wisest one. And, in my opinion, this is the approach that is emerging in the relation between the Italian Constitutional Court, the Court of Justice of the European Union, and the Strasbourg Court.

European Law remains an extraordinary example of integration process in respect of diversities. The European Court of Justice has been the main force of this integration process. However, the success of its story is indebted with the accurate respect that the Court always devoted to national diversities. On the national front, many supreme and Constitutional Courts (the Italian Constitutional Court being certainly among these) have shown an increasingly open approach toward European law. Also for them, it is important to highlight their good will to keep the reasons for unity into account, beside the steady claim to safeguard national constitutional identities.

In other words, Constitutional Courts should take into account two important and complementary approaches: on the one hand their claim of being guardians of the national constitution, on the other hand the need to take into account the unity of European law. Seminal examples of the effort of the Constitutional Court to take both these approaches into account are two decisions that I have already mentioned.

The first paradigmatic example is the judgment n. 187 of 2016 on the use and abuse of fixed term work in public schools. As previously mentioned, the Constitutional Court submitted a reference for preliminary ruling to the European Court of Justice on the compatibility of an Italian piece of legislation providing a legal regulation for the fixed term work in the schools with the European framework agreement on fixed-term work. The European Court of Justice found the national legislation to be incompatible with European law (*Mascolo* Judgment of 2014). The Italian Constitutional Court acknowledged the judgment of the European Court of Justice but claimed an autonomous space for interpretation of the impact of the latter judgment on the Italian legal system, further observing that the relevant legal framework had been amended in the meanwhile. Thus, the Italian Constitutional Court affirmed that the object of the reference for

preliminary ruling and the object of the question of constitutionality were not identical: the latter was not entirely part of the former, but on the contrary, in light of the *jus superveniens* “completing the European Court’s pronouncement is a necessary exercise of the aforementioned national discretion, and it is a task which falls to this Court”. The intention of the Court to strike a balance between unity and diversity emerges clearly in the judgment. In fact, on the one hand the primacy of EU law remains untouched, and the national piece of legislation is therefore struck down as unconstitutional. On the other hand, the Court claims for itself the evaluation regarding the appropriateness of new measures introduced by the Italian legislator with the aim of removing the consequences of the breach of EU law. It is also clear that the Italian Constitutional Court put a remarkable effort in finding in the EU legal system support for its claim of protection of diversities. In this framework, the Italian Constitutional Court relied on the European Court of Justice case law affirming that it falls within the Member States’ discretionary power to resort to measures for purposes of preventing abusive use of fixed-term employment contracts.

The second seminal example consists of the already famous so-called “*Taricco*” order (ord. 24/2017). The main focus of the decision is put on the relation between European law and fundamental principles of the national constitutional order. The Constitutional Court approached the case through the angle of the protection of national constitutional identity, affirming that the Court would disapply European law where in conflict with national constitutional identity; at the same time, the Court took up the angle of unity, and preferred to submit a reference for preliminary ruling to the European Court of Justice. Additionally, a further aspect is worth of attention: in fact, the Italian Constitutional Court asked the European Court of Justice to consider an issue that had been overlooked in the first *Taricco* judgment of the European Court. The reference notes that in the first *Taricco* Judgment the European Court of Justice failed to examine the issue of the sufficient determinacy of European law in light of the constitutional traditions of the Member States, of the ECHR and of the European Court of Justice case law. By doing so, the Italian Constitutional Court shed light on an issue of compatibility of the European decision with EU primary law, triggering a dialogue with its

counterparts that is entirely comprised in the European legal system and, once again, is fully inspired by a collaborative logic serving the principle of unity.

Silvana Sciarra: I believe constitutional adjudication is a medium in communication among national and supranational courts. This exchange of messages occupies a place of its own, since the origins of the European Community. The EU legal system provides a privileged field for exercises of mutual learning and for enhancing mutual deference. Pluralism is inherent in European constitutional traditions, and is a rich heritage of European legal culture, emerged from the dark history of the war and the tragedy of oppressive regimes. Respect for the rule of law includes respect for diversities, within a clear-cut notion of democracy and of separation of powers. Hence, I am in favour of heightening reconciliation of pluralism within the leading and unitary principles of EU law. This statement does not imply a hierarchical structure, whereby European law impinges upon national legal systems. On the contrary, courts are part of a dynamic evolution of the system as a whole, which reflects the original choices of Member States in signing the Treaties and, when so required, changing them. A defensive attitude of national courts, in particular with regard to the adjudication of fundamental rights, does not serve the purpose of strengthening national constitutional traditions. It may, on the contrary, favour the weakening of the EU system as a whole, which should constantly be nourished by pluralism, in order not to loosen sight of its mission. Furthermore, constitutional judges cannot ignore that fundamental rights have been strengthened in national constitutions through the circulation of standards, which are the outcome of evolving principles in international law.

The Charter of fundamental rights of the European Union is the emblem of a virtuous circle, within which national constitutional traditions and fundamental rights enshrined in the ECHR should find a terrain for coherent interpretations. The unitary structure of the Charter is inclusive of last generation rights and was conceived as an instrument of coordination – rather than marginalization – of national courts. The CJEU has not, so far, fully clarified the direct effect of the Charter, but constantly recalls the direct enforceability of general principles of EU law. One can hear this voice from

Luxembourg as an incitement for national judges to operate in this field.

Constitutional Courts in the EU have, over the years, increased their trust in preliminary rulings and have opened up new communications with the CJEU, proving that they do not feel marginalized, neither disempowered. This technique, not to be considered an *ultima ratio*, is an instrument to be handled with care, paying equal respect to constitutional prerogatives and to supranational competences. The – by now too traditional – metaphor of ‘dialogue’ has been supplanted by complex exchanges of messages, due to the increased legal technicalities involved, as well as to the preoccupations that some courts display for an excessive interference of the CJEU in national parliamentary prerogatives.

A similar trust to the one shown in preliminary references is, in my view, developed whenever Constitutional Courts devote attention to the case law of the CJEU. First of all, constitutional judges should feel entitled to monitor the appropriateness of references to CJEU’s rulings made by the parties raising issues of constitutionality. They can also go as far as quoting developments in the CJEU’s case law, which may enhance the overall coherence of constitutional courts rulings. In other words, there should be no hidden strategy in integrating the Luxembourg Court’s case law in the legal reasoning of Constitutional Courts. The techniques to be privileged are those enabling direct exchanges among courts, based on transparent arguments and on mutual respect.