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Fundamental Laws under the tutelage of the European Union

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Abstract

This article endeavours to briefly describe the enormous impact of the European Court of Justice (ECJ), which has managed to enhance the tutelage of the European Union over national legal orders. From the very beginning, the Treaties contained a mechanism for the interpretative assistance of our national courts: the preliminary ruling procedure. This proved to be the most important feature of the ECJ, a method by which it inserts itself into national debates and guarantees a degree of uniformity in the judicial application of the European law.

This mandatory affinity between national constitutions and the European law has led us astray from the sacred character of a Fundamental Law. More and more perforated in order to integrate, can we still claim that we are in the presence of a Constitution?

Furthermore, European and national laws are elements of this complex system, a structure with shared powers and responsibilities. A distinctive characteristic is given by the cooperation between authorities, both at European and national level, which also implies a transnational judicial dialogue, concept validated by the use of foreign judicial decisions as precedents.

Key words: Constitution, horizontal cooperation, judicial dialogue, preliminary ruling procedure, sovereignty.

Prior to World War II, only few high courts in the world had ever exercised the power of constitutional judicial review, which represents a court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional

principles. In the 1950s, Europe became the epicentre of a "new constitutionalism" (Stone Sweet, 2011: 122), a template of democracy diffused globally which rejects the idea of legislative sovereignty and defends the normative superiority of a Constitution in the form of review, by prioritizing fundamental rights. In this context and after more than 60 years of history, the European Union has managed to develop to a great extent and be involved in almost all domains.

Whereas the 1957 Rome Treaty had been praised for "its sober and precise legal wording" (Pescatore, 1987: 15), every treaty amendment since the Single European Act was criticized for the legal distortions it introduced into the constitutional order of the European Community. Treaty amendment followed Treaty amendment. The Lisbon Treaty is the most recent chapter in this constitutional chain novel, but not the last. For the evolution of the European Union will of course continue. Constitutional change will need to follow social change. The Union must recognize this; or else, it will be punished by life (Schütze, 2012: 45).

European constitutionalism has historically insisted on the indivisibility of sovereignty. The absolute idea of sovereignty operates as a prism that ignores all relative nuances within a mixt or dual legal structure. Where states form a union, but retain their sovereignty, the object there by created is an international organisation (confederation), regulated by international law. By contrast, where States transfer sovereignty to the center, a new State emerges. Within this State -a Federal State if powers are territorially divided- the center is solely sovereign and (potentially) omnicompetent (Schütze, 2012: 66).

But what is the nature of the European Union? Europe's demande for a new word to describe the middle ground between 'international' and 'national' law would, at first, be answered by a novel concept: *supranationalism*. Europe was said to be a *sui generis* legal phenomenon.

The *sui generis* thesis and the international law thesis had both caused the Union to disappear from the federal map. How did the federal idea return? Its revival in discussions of the structure of the

European Union was slow. As a first step, it was accepted that the Union had borrowed the federal principle from the public law of federal States. The European Union was said to be the classic case of "federalism without federation" (Burgess, 2000: 29). It had *federal* features, but it was not a *federation*. The word *federal was*, by contrast, attached to *a function* and not to the *essence* of the organization. The adjective was allowed -adjectives refer to *attributes,* not to *essences*- but the noun was not. In order for European constitutionalism to accept the idea of a "Federation of States" a second step was required. Europe needed to abandon its obsession with the idea of undivided sovereignty. It needed to accept that "[t]he law of integration rests on a premise quite unknown to so-called *classical* international law: that is the divisibility of sovereignty" (Pescatore, 1974: 30). The Union enjoys real powers stemming from a *limitation of sovereignty* or a transfer of powers from the States to the [Union] through which, in turn, "the Member States have *limited their sovereign rights,* albeit within limited fields"(Case Costa v. ENEL, 1964). The European Union is indeed based on a conception of divided sovereignty and in strictness neither international nor national, but a composition of both. It represents an (inter)national phenomenon that stands on -federal- middle ground. The best way to characterize the nature of the European Union is thus as a Federation of States (Schütze, 2012: 78-79).

The originality of the unional legal system also lies in the existence of an european specificity, composed of a set of hierarchical rules, different from both the domestic law and the international law. It is the European Court of Justice which implemented the concept of an european legal order, fonded upon the peculiarity of the unifying processus. In a decision rendered on the 5th of february 1963 (Case Van Gend en Loos, 1963), the Court considered that "the Comunity is a new legal order of international law". In the Costa v. ENEL decision, it goes further and eliminates 'international' from that legal order saying: "unlike the ordinary international treaties, the EEC Treaty established its own legal order, integrated into the legal

system of the Member States from the entry into force of the Treaty and imposed to their jurisdictions".

Since the entry into force of the Lisbon Treaty, which introduces a number of EU law amendments of a constitutional nature and safeguards the participation of the Member States in EU decision - making processes, this field of EU law has been richly enhanced. EU constitutional law thus cannot be treated separately from the respective constitutional laws of the Member States, the latter being an imminent part of the first. Nevertheless, the European constitutional space is created not only by the EU legislator and its Court, but also by jurisprudence of the national constitutional courts, which play a major role in shaping the domestic constitutional legal framework and which should engage in a fruitful dialogue with the Court of Justice of the European Union (Menétrey & Hess, 2014: 179).

The Court's task is to "ensure that in the interpretation and the application of the Treaties the law is observed" (Article 19(1) TEU). But the European Court of Justice is not the only one to interpret and apply the European law. From the start, the European legal order intended to involve national courts in the interpretation and application of European law.

The Union is based on a system of cooperative federalism: *all* national courts are entitled and obliged to apply European law to disputes before them. The duty of national courts to apply European law derives from the general duty of loyal cooperation codified in Article 4(3) TEU. And this general duty is given a specific expression in the judicial sphere by Article 19 (1) TEU: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." This provision has been held to turn national courts into 'guardians' of the European legal order (Schütze, 2012: 289).

The autonomy of the EU legal order is of fundamental significance for the nature of the EU, for it is the only guarantee that Union law will not be watered down by interaction with national law and that it will apply uniformly throughout the Union. This is why the concepts of Union law are interpreted in the light of the aims of

the EU legal order and of the Union in general. This Union-specific interpretation is indispensable, since particular rights are secured by Union law and without it they would be endangered, for each Member State could then, by interpreting provisions in different ways, deciding individually on the substance of the freedoms that Union law is supposed to guarantee.

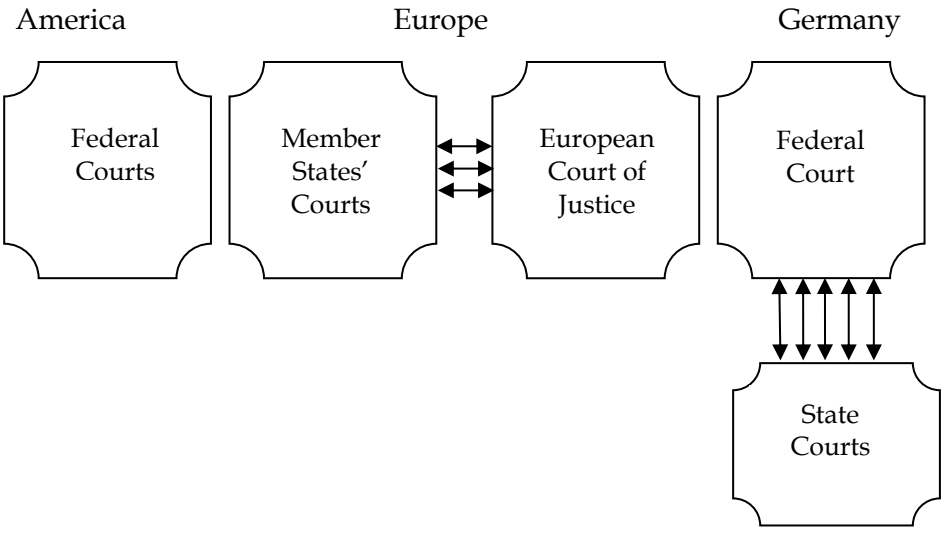
Even if Union law constitutes a legal order that is self-sufficient in relation to the legal orders of the Member States, this situation must not be regarded as one in which the EU legal order and the legal systems of the Member States are superimposed on one another like layers of bedrock. The fact that they are applicable to the same people, who thus simultaneously become citizens of a national State and of the EU, negates such a rigid demarcation of these legal orders. Secondly, such an approach disregards the fact that Union law can become operational only if it forms part of the legal orders of the Member States. The truth is that the EU legal order and the national legal orders are interlocked and interdependent (Borchardt, 2010: 113)

This general principle of sincere cooperation was inspired by an awareness that the EU legal order on its own is not able to fully achieve the objectives pursued by the establishment of the EU. Unlike a national legal order, the EU legal order is not a self-contained system, but relies on the support of the national systems for its operation. All three branches of government - legislature, executive and judiciary- therefore need to acknowledge that the EU legal order is not a *foreign* system and that the Member States and the Union institutions have established indissoluble links between themselves so as to achieve their common objectives. The EU is not just a community of interests; it is a community based on solidarity. It follows that national authorities are required not only to observe the Union Treaties and secondary legislation; they must also implement them and bring them to life (Borchardt, 2010: 115).

European and national law, therefore, coexist as formally autonomous bodies of law, they are components of the composed constitutional system of the EU, a system with shared powers and

responsibilities. The principle of primacy only applies in cases of conflict, with the result that the conflicting provision of national law is inapplicable in this case only, but not invalid. The impact of the European norm, thus, is reduced to the degree that is necessary to ensure its uniform application throughout the Union. The fact that it is ultimately the national authorities that apply the relevant provisions gives them a special responsibility and control.

This ultimate control is what distinguishes the Union from a hierarchical federal system: the cooperation between the authorities at the European and at the national level, which includes the co-responsibility for the safeguard of the common values and fundamental rights of the citizens as well as the limits of the EU competence and the principles of subsidiarity and proportionality. The mere fact that national Constitutional or Supreme Courts may refuse the application of a measure because of a clear and serious breach of such rights or principles will compel the European authorities to observe the limits of their powers. On the other hand, the respect of the law, including the values, rights and principles mentioned, as the fundamental condition of the functioning of the Union, will compel the national Courts not to abuse their prerogative in their own national interest (Pernice, 2010: 58-59).



Courts' federalism in comparative perspective

In Europe, the judge has never been merely "*the mouth of law"(Montesquieu's famous line "bouche de la loi").* This statement applies as well to European constitutional law, regardless of the distinct legal traditions of its Member States. Thus, the question of who has the final say in legal matters within the EU multilevel system of governance and hence in the relationship between the European Court of Justice (ECJ) and the highest courts of the Member States is twofold in nature. The interplay of the respective courts is not only the subject of the study of European constitutional law doctrine, but the courts themselves are also active participants in the shaping of this same European constitutional law (Mayer, 2003: 3).

We can identify as *interlocutors* of the ECJ, special constitutional courts, alongside specialised high courts in Germany *(BVerfG),* Austria *(Verfassungsgerichtshof),* Italy (*Corte Costituzionale),* Portugal (*Tribunal Constitucional),* Spain *(Tribunal Constitucional)* and since 1996 also in Luxembourg *(Cour Constitutionnelle).* Ireland (*Supreme Court*), Denmark *(Højesteret),* have supreme courts that are also constitutional courts. In Great Britain, it is the second chamber of Parliament, the House of Lords, that exercises the functions of a constitutional and a supreme court. In the Netherlands, we can find a number of specialised courts of equal rank, *inter alia* the *Raad van State* and the *Hoge Raad.* The situation is similar in Sweden, where the highest (specialised) courts are the Supreme Court *(Hogsta domstolen)* and the Supreme Administrative Court *(Regeringsratten),* as well as in Finland *(Korkein oikeus,* Supreme Court, and *Korkein hallinto-oikeus,* Supreme Administrative Court). Swedish judges of the two supreme courts also form a Council *(Lagrádet)* to exercise a non-binding review of draft legislation, whereas Finland has a Constitutional Committee of Parliament *(Perustuslakivalio-kunta),* to control its draft legislation *(Lagrádet).*

The newest member, the Republic of Croatia, has a Constitutional Court (*Ustavni sud Republike Hrvatske*) which is the interpreter and guardian of the Croatian Constitution and is considered the highest judicial authority *de facto*, because it can overturn Supreme Court decisions on the basis of constitutional breaches. It is not

considered as part of the judicial branch, but a court *sui generis*. In a similar situation is considered to be the Constitutional Court of Romania (*Curtea Constituțională a României*), the Bulgarian Constitutional Court (*българският Конституционният съд*), the Constitutional Court of the Czech Republic (Ústavní soud České republiky), the Constitutional Court of Hungary (*Magyarország Alkotmánybírósága*), the Constitutional Court of the Republic of Latvia (*Latvijas Republikas Satversmes tiesa*), the Constitutional Court of the Republic of Lithuania (*Lietuvos Respublikos Konstitucinis Teismas*), the Maltese Constitutional Court, the *Trybunał Konstytucyjny* (English: Constitutional Tribunal) of the Republic of Poland, the Constitutional Court of the Slovak Republic (*Ústavný súd Slovenskej republiky*) and the Constitutional Court of Slovenia (*Ustavno sodišče Republike Slovenije*).

In France, there is no formal constitutional court aside from the highest courts for administrative law *(Conseil d'Etat*) and for civil and criminal law *(Cour de cassation).* The *Conseil Constitutionnel,* originally limited to the review of draft legislation, does increasingly exercise the role of a constitutional court.

Finally, Belgium has specialised supreme courts *(Conseil d'Etat* and *Cour de Cassation)* and since 1983 a constitutional court that specialises in, but is also limited to controlling the exercise of competencies, the *Cour d'arbitrage*. In Greece, there are several supreme specialised courts, the *Symvoulio Epikrateias* (Council of State), the *Elegktiko Synedrio* (Court of auditors) and the *Areios Pagos* (Supreme Court). Beyond that, there is a Special Supreme Court, the *Anotato Eidiko Dikastirio,* which is composed of judges from the highest specialised courts. Cyprus also has a Supreme Court (*AnΩtato ΔikaΣthpio KyΠpoy*). The Supreme Court of Estonia (*Riigikohus*) is the court of last resort. It is also both a court of cassation and a constitutional court.

To solve conflicts and contradictions between these courts, similar institutions can typically be found in other systems with specialised high courts of equal rank. In France, there is a *Tribunal des Conflits* between *Cour de cassation* and *Conseil d'État,* and in Germany,

there is a *Gemeinsamer Senat der obersten Bundesgerichte* (Joint Chamber of the Highest Federal Courts).

This summary of the highest courts of the Member States leaves us with a rather heterogeneous picture. Of course, this heterogeneity extends to the role of the judge in the different legal cultures. On one side, there are some parallels and similarities, sometimes even amounting to familial relationships. Consider the Austrian Constitutional Court, the *Verfassungsgerichtshof (oVfGH),* to some extent 'the mother' of all constitutional courts in Europe, as it served as a model for the German, Italian and the Spanish Constitutional Courts. Likewise, the French model of supervising the use of administrative law in the form of a Council of State may also be found in Belgium, the Netherlands, Greece and Luxembourg. But contrasts prevail: traditional and venerable institutions (such as the House of Lords in Great Britain or the *Conseil d'État* in France) may be found alongside newly created institutions (the *Cour d'arbitrage* in Belgium or the *Cour Constitutionelle* in Luxembourg).

Courts with comprehensive powers (*BVerfG*, *oVfGH)* operate side by side with less powerful tribunals. Sometimes, there are no specific constitutional courts at all (Denmark, Ireland). Many national Supreme or Constitutional Courts were reluctant to unconditionally accept the primacy of European Law. While the principle has not yet been violated in practice, these national Constitutional and Supreme Courts have made clear that from a Member States' point of view the national constitutions are and ultimately remain the highest mandatory reference.

It was the German Federal Constitution Court which took the lead as early as in its *Solange* jurisprudence of 1974 and 1986, confirmed by the *Maastricht* decision in 1993. On the basis of cooperation among the European and national courts it reserves itself the right to judge upon the applicability of European provisions in Germany if evidence is given for a substantial and general disregard, by the European institutions, of the minimum requirements for the protection of fundamental rights or of a clear *ultra vires* act. The

Danish Højesteret and the Czech Constitutional Court basically followed this line.

In 2004, the French *Conseil Constitutionnel* acknowledged, in particular with a view to Article 1-5 of the Constitutional Treaty, that the French Constitution remains at the top of the French Internal legal system, even if the Treaty is named 'Constitution' (Decision no 2004-505, 2004). Thus, also the transposition into national law of a Community directive is seen as a requirement of the national Constitution and, as long as this Constitution does not expressly provide otherwise, it remains the exclusive competence of the ECJ to judge upon the validity of a Community directive (Decision no 2004-496, 2004).

In Spain, the Tribunal Constitucional distinguishes between two categories, 'primacía', which is attributed to European law under Article 93 of the Spanish Constitution, and 'supremacía', which is reserved to the Constitution. The first regards the application of European law within the national system, both seen as coexisting and complementing each other. The second focuses on the position of the Constitution at the top of the system of law applicable in Spain. Having confirmed that supremacy of the Spanish Constitution is not questioned by the primacy so recognized, the Tribunal Constitucional nevertheless relies, in the exceptional case of a conflict, upon the exit clause of Article 50 of the Lisbon Treaty (Pernice, 2010: 55-56).

While the Constitutional Review Chamber of the Estonian Supreme Court established that it had no jurisdiction to verify compliance of secondary legislation with the Estonian Constitution and explicitly held that EU law should be supreme over national constitutional provisions, thus constitutional provisions that were not compatible with EU law were not applicable and therefore suspended, the Polish Constitutional Tribunal (PCT) has approached the supremacy issue in more restrictive terms. Like its Western European colleagues, it set the limits on the supremacy of EU law in its jurisprudence. One of the very first judgments on EU issues, granted by the PCT only one year after the Enlargement, regarding Accession Treaty (Case K 18/04, 2005), *i.e.* primary EU law as well as

the most recent judgment, regarding EU secondary legislation (Case SK 45/09, 2011), could serve as an illustrative example for both the Polish approach to the doctrine of supremacy and the approach of dialogue with the Court of Justice (Menétrey & Hess, 2014: 184-186). In case of potential conflicts between these two coexisting legal orders, the Constitution remains the supreme law of the country and it is thus the sovereign decision of the Polish legislator whether to introduce an appropriate constitutional amendment or to initiate amending of the EU legal regulations or, ultimately, to withdraw from the European Union (Case K 18/04, 2005).

The United Kingdom joined the European Community in 1973, after the ECJ's *Costa* ruling. The UK embraces a *dualist* system. The European Communities Act that incorporated Community law into English law was passed in 1972. Nonetheless, the reception of the doctrine of supremacy was rather difficult to accept. Parliamentary sovereignty is the sacred cow of the British constitutional system. It implies that the Parliament has the power to do everything but to bind itself for the future. The principal case that concerned the relationship between the Community and the UK was the *Factortame* case from 1991. In response to the ECJ's preliminary ruling the House of Lords reevaluated its position. The novel position of the Court stated that, in matters covered by Community law, interim relief could in fact be granted against the British Government. It has been heavily debated if this stance represented a loss of sovereignty (Breitholtz, 2003: 31).

Romania's Constitutional Court has been more cautious, in line with the trend of the former communist states of Central and Eastern Europe which became EU members, showing that it is neither positive legislator, nor a court having jurisdiction to interpret and apply European law in disputes which concerns citizens' subjective rights. In principle, the Romanian Constitutional Court does not reject the possibility of referral to the Court of Justice, but in the interpretation and application of the European law, the powers are divided between the national courts (and administrative authorities) and the ECJ, thereby the Constitutional Court does not interpret EU

law. For the Constitutional Court, the standard reference is the Constitution and the preliminary ruling mechanism could be considered if the European norm to interpret has constitutional relevance, direct effect or represents a clarified act.

Constitutional or Supreme Courts see the basis for the application of European law within the national constitution and obviously do not feel preempted from taking position upon answering, in cases of doubt, questions of applicability of European provisions to national cases. Yet, none of the courts claims such competence as a matter of frequent use, but clearly as an exceptional device in extremely serious cases.

From the beginning, the European Court of Justice opposed to the national jurisdictions which insisted in affirming and guaranteeing the superiority of constitutional law upon the international law. In the ECJ's opinion, every time a Constitutional Court puts aside an European rule in favor of constitutional fundamental rights, the main principles of the European treaties are being infringed, especially those contained by articles 220 and 234 from TEU. As a consequence, the State must be kept liable of breaching the European regulations.

In the European constructions' perspective, the Constitution become the adhesion act. By accepting to obey the Unional rules, the Member State produces a legal text which is in the same time a "democratic showcase", a "catalog of fundamental rights" and mostly an "entry ticket" into the Council of Europe and the European Union. We are led astray from the Constitution as a sacred act, so are we still in the presence of one? (Torcol, 2000: 21-22)

The national identities of the Member States are respected. The idea is not for the Member States to be *dissolved* into the EU, but rather for them to contribute their own particular qualities. It is precisely this variety of national characteristics and identities that lends the EU its moral authority, which in turn is used for the benefit of the EU as a whole (Borchardt, 2010: 26).

But how has the European legal order guaranteed a degree of uniformity in the judicial application of European law, in the absence

of an institutional hierarchy? From the very beginning, the Treaties contained a mechanism for the interpretative assistance of national courts, which was proven to be the most important feature of the ECJ.

The objective is to secure a uniform interpretation of Union law and hence the unity of the EU legal order. Alongside the latter function, the procedure is also of importance in protecting individual rights. The national courts can only assess the compatibility of national and Union law and, in the event of any incompatibility, enforce Union law -which takes precedence and is directly applicable- if the content and scope of Union provisions are clearly set out. This clarity can normally only be brought about by a preliminary ruling from the Court of Justice, which means that proceedings for such a ruling offer Union citizens an opportunity to challenge actions of their own Member State which are in contravention of EU law and ensure enforcement of Union law before the national courts. This dual function of preliminary ruling proceedings compensates to a certain extent for the restrictions on individuals directly filing actions before the Court of Justice and is thus crucial for the legal protection of the individual. However, success in these proceedings depends ultimately on how keen national judges and courts are to refer cases to a higher authority (Borchardt, 2010: 108).

This mechanism was intended to provide national courts with technical support in interpreting complex European law. In practice, preliminary ruling references provided a means for the ECJ to insert itself into national debates regarding the relationship of European law to national law and to harness national courts as enforcers of the ECJ's decisions**.** The "Transformation of the Europe" began in 1962 when a Dutch Tariff Commission sent a preliminary ruling reference to the ECJ, asking if the article of the Treaty of Rome in question could be seen as self-executing. The Dutch government argued that the reference should be rejected as inadmissible, because it concerned a question of domestic law. The ECJ disagreed, issuing a provocative ruling that turned traditional legal reasoning on its head and argued that provisions reasonably capable of having direct internal effects should be presumed to have it (Alter, 2013: 210).

It fell to the European Court of Justice to establish a principle in applying European law by the Member States, starting from these two questions:

1. Does Article 12 of the EEC Treaty have direct application within the territory of a Member State's, or, put differently, can nationals of such a State, on the basis of the article in question, lay claim to individual rights which the courts must protect?
2. In the event of an affirmative reply, does the application of a charge of 8 per cent constitutes a prohibited increase in the sense of Article 12 of the EEC Treaty or not? (Case *Costa v. ENEL,* 1964).

The Court has firmly refused to interpret dirrectly the Member States' law so that, if necessary, the ECJ rephrases the references in a more abstract manner, just the way it did in the Van Gend en Loos.

Van Gend reads the Treaty as recognizing the individual, along with the Member States, as the immediate subject of rights and responsibilities. The transfer of "sovereign rights" from the Member States to the Community is matched by the idea that "the nationals of the states [are] brought together in the Community (and) called upon to cooperate in the functioning of the Community".

Decided in a time when the EEC had just six Member States and just four official languages, *Van Gend en Loos* still is one of the most important decisions of EU law becouse ot its assessment of the nature of European integration law. Toghether with the decision in the case of Costa v. ENEL one year later, which established the principle of primacy of European law, Van Gend en Loos initiated the departure from a classical public international law reading of the founding treaties, towards a constitutional law undestanding. The ECJ achieved this shift of paradigms by asserting the special nature of European law (Meyer, 2010: 19).

With the *Costa v. ENEL* ruling, the European Court of Justice completed what can only be termed a revolution in European law. By establishing the supremacy of European law inside the legal systems of the Member States, albeit in the areas in which the latter had granted the European Communities (EC) competences, the European Court of Justice (ECJ) secured the effectiveness of the legal

mechanism established with the *Van Gend en Loos* ruling a year earlier. In the latter case the ECJ not only assumed authority to rule on what part of the Treaties of Rome -and later secondary legislation- had direct effect but also chose a very broad reading of Article 177 allowing preliminary references from national courts that dealt explicitly with the junction between national and European law. As a consequence, the ECJ turned treaty obligations directed towards Member States into rights for Member State citizens. The rest is history. National courts would over time embrace these fundamental principles, thus allowing the ECJ to develop a comprehensive and strong case law and binding their respective governments to respect it. A European rule of law had been established (Rasmussen, 2010: 69).

Still, the decision in *Costa v. ENEL* did not persuade the Italian government or at least some Italian courts that, in the event of conflict with national law, immediate precedence had to be accorded to Community law. The imposition of charges at point of import for veterinary and public health inspection of meat products was contested by the importer, Simmenthal, as being incompatible with Treaty provisions on the free movement of goods. These questions were referred to the Court of Justice pursuant to Article 177 of the Treaty, resulting in a decision favorable to Simmenthal (Case Simmenthal SpA v Italian Minister for Finance, 1978). The referring court, the Pretore di Susa, in application of the answers provided by the Luxembourg Court, made an order for repayment of the charges.

The Italian fiscal authorities objected that the Pretore did not have the power simply to refuse to apply a national law because it appeared to conflict with Community law. The law would either have to be changed by the legislature or declared unconstitutional by the Italian Constitutional Court. The Pretore thus made a second reference to the Court of Justice (Fennely, 2010: 43-44).

The judgment of the Court was even more emphatic. It insisted that direct applicability meant that: "Rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force"; they "render automatically inapplicable any

conflicting provisions of current national law"; "every national court must ... apply Community law in its entirety ... and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule" (Paras. 13-21 of the judgement).

The treaties did not provide for direct effect, still less for supremacy. They established the Court of Justice, which filled the gap. The Member States had previously proceeded on the assumption that they had bound themselves by classical international agreements: these were binding in international law; they had no implications for their domestic legal systems or for individuals. The decisions in *Van Gend en Loos* and *Costa v. ENEL* radically affected the essential character of the Community and its relations with its Member States. The constitutional systems of the Member States were fundamentally and permanently altered.

Van Gend en Loos established the principle that treaty provisions are capable of having direct effect and of being relied upon by individuals in national law. It requires very little reflection to conclude that such provisions must necessarily be accorded primacy over conflicting provisions of national law. The special contribution of Costa v. ENEL was precisely that. It established the principle of primacy (Fennely, 2010: 39).

The decision in *Simmenthal (2)* does not so much break new ground as draw the inevitable conclusions from the first two. It is legitimate to ask whether the Member States who have joined the Community and now the Union can convincingly complain that they are bound by these decisions. Those states which have subsequently joined have done so with their eyes open. They have accepted the *acquis communautaire*. In particular, they must be deemed to have been fully aware of these historic cases (Fennely: 44-45).

In the evolution of the European Community, *Internationale Handelsgesellschaft* occupies a distinct position. In earlier cases, fearful of subordinating the EC Treaty to the laws of Member States, the ECJ had refused to accept that the Community was bound by the fundamental rights guaranteed by the national constitutions. It is, in

fact, ironic that an early, almost primitive, form of constitutional assertion by the ECJ was the denial of fundamental constitutional values. *Internationale Handelsgesellschaft* marked the rights of passage. In its judgment, the Court made pronouncements of profound constitutional importance. On the one hand, it reiterated the supremacy of Community law and took the principle of primacy to its outmost limits: Community law takes precedence even over the most revered provisions of the national constitutions. On the other hand, the Court reassured the Member States that the Treaty shares their constitutional values and ensures ideological continuity. At the same time, the Court took care to safeguard the autonomy of Community law. The national constitutional traditions provide "inspiration" for respect of human rights in the Community legal order. There their function ends. The balance to be struck where fundamental rights conflict with each other and the application of general principles borrowed from the national constitutions to specific cases is a matter for the Court, since the protection of human rights must be secured "within the framework of the structure and the objectives of the Community" (Case Internationale Handelsgesellschaft, 1970).

The main reason offered by the Court was that the unity and efficacity of Community law would be gravely affected if one allowed a review of its validity on the basis of particular national legal standards. In several latter cases, the Court of Justice, confirmed that EU law had to be given precedence over national law even where the relevant national norm had a constitutional character. Primacy attaches to both primary and secondary EU law. For the latter category, an obvious condition for primacy is that the acts should be validly adopted as a matter of EU law (Witte, 2011: 342).

If the Constitution is seen as the basis for recognising the primacy of Union law, then absolute primacy of the type postulated by the European Court in *Internationale Handelsgessellschaft* is only possible by way of an 'auto-limitation' clause in the Constitution. The Netherlands offers a good exemple of this. Article 120 of the Dutch Constitution expressly prohibits national courts from reviewing the constitutionality of Treaty provisions and of decisions of international

organizations and thereby ensures the absolute supremacy of Treaties once they have been properly ratified (Witte: 355)

With *Nold* (Case Nold, 1974), the Court based its jurisprudence on a second authority: international human rights treaties and especially the European Convention of Human Rights. The protection of fundamental rights through unwritten case law is not impossible, but at least continental jurists very much prefer to work with texts they can expound and instead of inventing law, judges prefer to invoke precedents.

This is an important task. At least at first glance, the human rights situation in Europe looks very complex, if not confusing. All European countries have their own national catalogue of rights, today regularly protected by national courts. With the adoption of the Charter of Fundamental Rights (CFR), the European bill of rights acquired a written form. The Constitution would have made the situation even more complex becouse both the Charter and the European Convention of Human Rights [ECHR] would have become binding instruments conjointly with the unwritten fundamental rights. An outside observer might be forgiven if he suspected that such a number of human rights catalogues was less a wealth, but rather a source of conflicts. However, in practice there, is very little. National courts, Strasbourg and Luxembourg have managed to develop a very harmonious concert in the protection of human rights. One reason is the close substantial similarity of the rights systems. In adition, the courts try to avoid conflicts by harmonizing their jurisprudence. In this development, the European Court of Justice has played a major role. With its acceptance of the ECHR as a source for developing its own fundamental rights jurisprudence it very much contributed to the convention's central role in the harmonization process (Bryde, 2010: 125-126).

Conclusion

The principle of supremacy of European law over national law, including national constitutional law, has been restated and elaborated by the European Court of Justice in numerous decisions.

The Member States have tacitly accepted the legal doctrines developed by the Court. In concrete terms, the ECJ developed a cooperative relationship with its national counterparts. This balance has contributed in ameliorating certain deficiencies in the legal system of the Union, the best example being the codification which took the form of the Union's Charter of Fundamental Rights. The ECJ was pushed in this position by the *Bundesverfassungsgericht,* so it had to take rights more seriously in order to retain legitimacy for the principle of supremacy (Cramér, 2009: 47-48)

Mutual constitutional trust between the Member States and the ECJ is upheld by a balance of constitutional power. In the same time, it can never be absolute so, in order to sustain it, there has to be a continous process of bargaining over the limits of such trust, at any moment. A situation in which tensions between the Union and its Member States appear is eased through horizontal negotiations, rather than vertical adjudication. Even if the Union lacks the administrative structure for the general enforcement of its legislation, Member States usually comply with the Treaty obligations and apply secondary law with a high degree of efficiency and loyalty. All in all, it is probably a little premature to regard the relationship between the ECJ and the highest national courts and tribunals to be a consolidated relationship, but it is on the right path, heading towards a complementary structure of European constitutional law adjudication. This path is characterised by embracing cooperation instead of collision and by elements of a constitutional conversation between the courts, sometimes quite indirect and variant in its characteristics, depending on the Member State in question (Cramér: 59-60)

Over the last few decades, judges and courts have had an important role in global governance. They also now communicate with each other more than they used to. Scholars have named this phenomenon "the transnational judicial dialogue". The use of this concept usually refers to two things: direct interaction between judges and citation of foreign opinions in national courts decisions (Frishman, 2015: 60), translated in using foreign decision as precedents. Courts are exposed to a significantly amount of relevant

information which needs to be taken into consideration, task which makes rendering a decision more difficult and encourages courts to act together.

After a brief analysis, it is clear that the European Union could not have functioned if its treaties had not trancended the laws and constitutions of the Member States. We have assisted to a redevelopment of the traditional cathegories, with a mutual influence in both the assimilation and internationalisation of the constitutional dispositions. In this way, no one can contest the existence of a common cultural heritage of the European states. But another explanation can be issued concerning the homogenization of the legal orders: the infiltration of the supranational rules in the states' legal order, infiltration which alters and relativize the normative character of the Constitution. From the transfer of sovereignty in favor of the European Union, an inversion in the pyramidal structure of norms took place and the national Constitution was no longer the supreme law.

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