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THE LESSON LEARNED FROM THE TARICCO SAGA: JUDICIAL NATIONALISM AND THE CONSTITUTIONAL REVIEW OF E.U. LAW

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I. INTRODUCTION

The *Taricco* saga, namely the latest resistance of the Italian Constitutional Court (ICC) in Rome to the adjudication of the European Court of Justice in Luxembourg (CJEU), has been deeply scrutinized by European and constitutional law scholars.[1] This paper does not retell the story, nor does it endorse or criticize the judgments of the two courts that are the main actors in the play. Yet, merely legal arguments may fall short in explaining the complex interplay between national and domestic courts in European constitutional law. Instead, I use the *Taricco* saga as a proxy for the structural problems flowing from the yet incomplete "constitutionalization" of the E.U. legal order and the revival of a particular kind of judicial nationalism.

1. *See* Chiara Amalfitano & Oreste Pollicino, *Two Courts, Two Languages? The Taricco Saga Ends on a Worrying Note*, VERFASSUNGSBLOG (June 5, 2018), https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/ (arguing that the ICC could have decided the case in a manner that guaranteed the principle of assimilation but did not and that the judgment of the ICC was outside of its competences).

The unwritten premise of my analysis is that constitutional and supranational courts are not technical agencies vested with neutral powers of law implementation, but rather they are real political actors that aim to expand (or at least not to lose) their influence when compared with their judicial, legislative, and executive (henceforth political) counterparts. The current clashes between the CJEU and the Constitutional Courts of the Member States (CCMS) are inevitable and likely to increase in number and quality due to systemic and contingent reasons, unveiled in Part II of this article. The main question is how to think about these clashes normatively and how to understand them not just as a sign of sovereigntist/populist resistance to E.U. law, but rather as an attempt to re-politicize it.

These three elements allow us to detect when judicial nationalism is at play:

> 1. Re-emerging conflicts as the incoming signs of a general tendency of the CCMS to claim a more intrusive review on E.U. Law (Parts I and II);[2]
>
> 2. Procedural strategies applied to place new constitutional boundaries on the primacy and direct applicability of E.U. Law (Part III.A);[3]
>
> 3. Hindering the direct effect of the Charter of Fundamental Rights of the European Union (Part III.B).[4]

Finally, in Parts III and IV of this article, I argue that the judicial nationalism we are witnessing all across Europe by means of seminal judgments of the CCMS cannot be superficially dismissed as a sign of crude populism but rather deserves to be understood in light of the taxonomy above.[5] Like political nationalism, in fact, judicial nationalism is a multifaceted phenomenon, which may assume two opposite forms: a destructive/sovereigntist and a constructive/constitutional one.[6] The former is aimed at sabotaging

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2. *See infra* Parts II–III.
3. *See infra* Part III.A.
4. *See infra* Part III.B.
5. *See infra* Part III–IV.
6. *See* Monica Claes, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, 16 GERMAN L.J. 1331, 1334–35 (2015) (arguing constitutional courts' constitutional mandate requires them to protect the values, rights of individuals, and the State under the *national* constitution, and not

E.U. integration and the oversight carried out by E.U. institutions over the respect of human rights and democracy by member states; the latter, quite the contrary, seeks new paths for cooperation between courts in order to address the problems left unresolved by the yet uncompleted process of constitutionalizing Europe.[7]

II. WHY CLASHES BETWEEN CJEU AND NATIONAL CONSTITUTIONAL COURTS ARE UNAVOIDABLE

I agree with the scholarly position which pointed out that a certain degree of friction and antagonism between the European courts, including the CJEU and the European Court of Human Rights (E.Ct.H.R.), and the CCMS is almost unavoidable.[8] A number of converging motives are indeed increasing the risk of clashes. It is a matter of principles, a matter of space and interfering jurisdiction, and a matter of time.[9]

A. A MATTER OF PRINCIPLES

Due to the structural "constitutional" principles of E.U. law (primacy over national law even at the constitutional level, with a direct effect), national judges and Constitutional Courts are called upon to apply a body of law that could potentially challenge the autonomy of their own constitutions. Judges, however, are in a much

under constitutionalism generally) (emphasis added); *Id.* at 1334 ("Constitutional Courts have also contributed constructively to the constitutionalization of Europe, by feeding the principles and values of constitutionalism into EU law, thus acting as catalysts for rather than as obstacles to European integration.").

7. *See id.* at 1334–35.

8. *See* Maria Dicosola et al., *Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*, 16 GERMAN L.J. 1317, 1319–20 (2015) (arguing that constitutional courts' roles as "guardians of the constitutional identity" of a state makes the CJEU as a potential threat to these courts of last resort, and thus conflicts are likely unavoidable).

9. See Dicosola et al., *supra* note 8, at 1319, 1321–25 (noting the relatively recent establishment of constitutional courts, constitutional courts' role in enforcing "new and rigid Constitutions," and the timing of E.U. integration which forced constitutional courts to apply a body of law that could be inconsistent with their own constitutions, are reasonable bases for these courts to limit engagement with the CJEU).

more favorable position than the Constitutional Courts. Indeed, they are in charge of the daily enforcement of E.U. law. Acting as national "agents" of the supranational European law, they can directly give full effect to fundamental rights envisaged in the European rules, thus increasing the national standard of protection for those rights. No matter what the systemic outcomes of their case-by-case decisions are, they are called upon to safeguard rights and to give them the best, most immediate enforcement possible, and they tend to do so even recognizing direct effect to E.U. legal rules lacking the requisites for having such an effect. It is always worthwhile to increase the national standard of protection of rights! Moreover, the Judiciary proved ready – unlike the Constitutional Courts – to walk the institutional path of dialogue with the CJEU and is now engaged in a fruitful confrontation with the Luxembourg Court.[10] As a result, ordinary courts have increased their power and political influence within their system of government.[11] Hence, their (generally) Europe-friendly interpretative attitude is not surprising.

On the other hand, Constitutional Courts have long been and are still marginal in the process of E.U. integration. Not surprisingly, indeed. In fact, they are deeply rooted in their national context due to their close relationship with the legislatures, the executive branch, popular opinion, and the national cultural heritage.[12] Moreover, they are vested with the power/duty to safeguard the constitutional identity of the state, meaning the protection of rights and the supreme institutional principles of the system of government.[13] It comes as no surprise that they have been reluctant to endorse the complete

10. Claes, *supra* note 6, at 1332 (arguing that applying EU law and engaging with the CJEU comes with a mandate to review national law, thus empowering ordinary courts to become review courts).

11. *See* Michal Bobek, *The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts*, *in* CONSTITUTIONAL CONVERSATIONS IN EUROPE (forthcoming) (following recent examples in which ordinary courts used the preliminary reference procedure to the CJEU to displace constitutional courts' decisions with which ordinary courts disagree).

12. *See, e.g.*, Dicosola et al., *supra* note 8, at 1319 (arguing the Constitutional courts' sensitivity to political issues are due in large part to their "close relationship" with the legislature).

13. *See* Dicosola et al., *supra* note 8, at 1319 (characterizing Constitutional courts as "guardians of the constitutional identity of a polity.").

"Europeanization" of the national legal order and to consider themselves as mere local "agents" of E.U. law.[14] Plain evidence for that is that the CCMS have long been loath to use the preliminary reference procedure and to engage in a formal dialogue with the CJEU.[15] From their establishment up to the end of 2018, the Italian Constitutional Court raised only three preliminary references (out of 1.513 in total); the German Constitutional Tribunal (GCT) raised two (out of 2.527), the French and Spanish Courts raised one (out of 1.020 and 527); and the Europe-friendly Belgian Court raised 38 (out of 881).[16] And still today only nine CCMS have engaged in a preliminary reference procedure.[17]

B. A MATTER OF SPACE AND INTERFERING JURISDICTION

Implementation of European human rights law is likely to become

14. *Cf.* Dicosola et al., *supra* note 8, at 1319 (noting constitutional courts' caution to involving themselves with the CJEU in part because the CJEU could "challenge the autonomy of their own Constitutions.").

15. *See* Dicosola et al., *supra* note 8, at 1318–19 (finding that only half of constitutional courts in the EU have utilized the preliminary reference mechanism and that many have "failed to engage in a 'structured' conversation with the CJEU.").

16. *See* Davide Paris, *Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco*, 37 QUESTIONS IN INT'L LAW 5, 5 (2017), http://www.qil-qdi.org/carrot-stick-italian-constitutional-courts-preliminary-reference-case-taricco/ (noting that Order 24/2017 was the Italian Constitutional Court's third request for a preliminary reference) [hereinafter *Carrot and Stick*]; *LLX Round Table on Recent Preliminary Reference by German Federal Constitutional Court*, UNIVERSITEIT LEIDEN (Sept. 27, 2017), https://www.universiteitleiden.nl/en/news/2017/09/llx-on-the-recent-preliminary-reference-by-the-german-federal-constitutional-court (noting the German Constitutional Court had only issued its second preliminary reference); François-Xavier Millet & Nicoletta Perlo *The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law?* 16 GERMAN L.J. 1471, 1472 (2015); Mario García, *Cautious Openness: The Spanish Constitutional Court's Approach to EU Law in Recent National Case Law*, EUROPEAN LAW BLOG (June 7, 2017), https://europeanlawblog.eu/2017/06/07/cautious-openness-the-spanish-constitutional-courts-approach-to-eu-law-in-recent-national-case-law/; Philippe Gérard & Willem Verrijdt, Note, *Belgian Constitutional Court Adopts National Identity Discourse*, 13 EUR. CONST. L.R. 182, 182 (2017) (characterizing the Belgian Constitutional Court as Europhilic).

17. *See* Dicosola et al., *supra* note 8, at 1318 ("Out of 18 Constitutional Courts in the EU, only 9 have resorted to preliminary reference.").

the main battlefield in the interplay between European and national courts, especially after the Charter of Fundamental Rights (hereinafter: the "Charter") was recognized by the Lisbon Treaty as having the same legal force of the treaties.[18] Indeed, the Charter – as I will clarify later on – is able to shift the balance between the European, Constitutional, and ordinary courts.[19] It has "typically constitutional nature"[20]– as expressly acknowledged in recent judgments of the Austrian and Italian Constitutional Courts – and protects rights very similar in content to those envisaged in national constitutions. However, the direct application by ordinary courts, even in relations between individuals (so called horizontal direct effect), is possible only for the Charter, not for constitutions of the member states.[21] This means that ordinary courts could potentially circumvent the

18. *See* Dicosola et al., *supra* note 8, at 1320–21 (noting that the legal force of treaties after the Treaty of Lisbon has raised significant debate relating to expansion or limitation in protection of rights).

19. *See* Amalfitano & Pollicino, *supra* note 1 (tracing a shift from "patriotic constitutional identity" to more pluralistic notions of constitutionalism following the *Taricco II* ruling).

20. *See* Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 14, 2012, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 19632/2011 (Austria) (finding that the Charter *is* the standard for its own constitutional review, as it would be inconsistent if the court that reviewed whether constitutional and ECHR rights were respected could not do so with respect to Charter rights).The ICC, also acknowledged the "constitutional nature" of the Charter and affirmed the priority of the issue of constitutionality over the preliminary reference procedure based on provisions of the Charter. *See* Corte Cost., 7 novembre 2017, n. 269, 5.2 (It.) ("the aforementioned Charter of Rights is a part of Union law that is endowed with particular characteristics due to the *typically constitutional stamp* of its contents.") (emphasis added). Before the entering into force of the Charter, fundamental rights within Europe were based on the general principles of EU Law. *See* Case 29/69, Stauder v. City of Ulm, Sozialamt, 1969 E.C.R. 419, 424–25 ("Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court."); Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel, 1970 E.C.R. 1126, 1134 ("In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.").

21. *See* Amalfitano & Pollicino, *supra* note 1 (noting that the ICC requires ordinary courts to raise the question of constitutionality only when the Charter and the Constitution both cover the right in question).

centralized review carried out by national Constitutional Courts.

C. A MATTER OF TIME

In the aftermath of World War II, the European building was inevitably erected upon decisions of enlightened *élites* and bureaucratic techno-structures, while the masses took the back seat. An oligarchic approach was essential in order to set out on a path that was remarkably ahead of the times. The wounds of the war were still "too fresh and too painful for the national communities to make the endeavor – of which only exceptional personalities are capable – of keeping their resentments at bay."[22] Step by step, the economic community turned into a union and the common market into a community of rights.[23] And the development of a "more perfect union" has ensured peace, extended individual liberties, and increased the wealth of the member states to the point that what was originally the intuition of a handful of pioneers has now been accepted as common sense. This slope's progression, until a few years ago, appeared to have the slow but relentless pace of historical evolution. The financial and migration crises then caused a rude awakening, an unexpected reckoning with reality. The former made it clear that the E.U. legal system was unable to address distributive concerns and that a community of rights-holders is far from being a "political community" permeated with solidarity.[24] The latter has fed views of the nation not as a defining factor of individual identity, but rather as a cause for exclusion and marginalization of the "Other."[25] The political and

22. ALBERT CAMUS, L'AVENIR DE LA CIVILIZATION EUROPEENNE: ENTRETIEN AVEC ALBERT CAMUS 27 (1956) (the translation is by the author).

23. Corte Cost., n. 269, 5.2 (recalling the formation of the European community through the Treaty of Lisbon, which modified previously existing treaties and gave legally binding effect to the Charter of Fundamental Rights of the European Union).

24. Aida Torres Pérez, *The Federalizing Force of the EU Charter of Fundamental Rights*, 15 INT'L J. CONST. L. 1080, 1084 (2017) (noting that during the economic crisis, the CJEU took a formalistic approach and refused to recognize its own jurisdiction to hear cases coming from Member States in which the Member States questioned whether their national legislation complied with the EU Charter because the link to EU law was not made explicit enough).

25. *See* Frank Schimmelfennig, *Theorising Crisis in European Integration*, *in* THE EUROPEAN UNION IN CRISIS 316, 316 (Desmond Dinan et al. eds., 2017) (characterizing the migration crisis as multi-dimensional and threatening EU integration in terms of level, scope, and membership).

social climate has changed quickly. History's harsh rebuttals are before us: the endless list of exceptions to the Schengen Treaty (France, Germany, Austria, Croatia, Czech Republic, Sweden, and Slovenia); the raising of new walls – *historia non docet* – in Hungary, Bulgaria, Estonia, Latvia, Lithuania, Calais, Ceuta and Melilla; at the top of the list, Brexit, which has changed the course of history, accelerating the European integration crisis.[26] The common ideal of blending national identities into the wider space of European law is at present confronted with the sharp call of localism and populism and, ultimately, with the political claim that national state is the highest seat for political action, democracy, and overall protection of fundamental rights.[27] A claim to which even Constitutional Courts have started to give voice.

III. THE RE-EMERGING CONFLICTS BETWEEN CJEU AND CONSTITUTIONAL COURTS AND THEIR SYSTEMIC REASONS

Taricco is not an isolated case but rather the tip of an iceberg, and Italy is no exception. In the last years, the German, Spanish, Danish, Czech, Hungarian, Portuguese, and Polish Constitutional Courts have also started to challenge the Luxembourg Court.[28] With the exception of the case of the Polish Court, which is more and more dominated by politics to the point of becoming an Executive-Court, this widespread resistance to E.U. law needs to be analyzed in depth.

Doreen Lustig and Joseph Weiler, in a very recent essay which is

26. *Id.* (arguing that feeding into the EU integration crisis is the notion that the EU is ill-equipped to effectuate sensible policies, and that populistic voices in Member States hamper that ability even further).

27. Gordon MacLeod & Martin Jones, *Explaining "Brexit Capital": Uneven Development and the Austerity State*, 22 SPACE & POLITY 111, 116–17 (2018) (tracing Brexit proponents' messaging that a vote to leave the EU would allow the UK to regain control over its legislature and that as a result the UK would be "freer, fairer, and better off outside the EU" by, for example, using part of the 350 million pounds paid to the EU weekly on increased funding to the NHS).

28. *See, e.g.*, Monica Claes & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, 16 GERMAN L.J. 917, 955–56 (2015) (describing the Italian Constitutional Court's challenge of the CJEU as the "ultimate protector of fundamental rights in EU law.").

likely to become influential, held the opinion that the time has come for a "third wave" of judicial review.[29] The first wave, in the authors' view, was characterized by foundation and spread of the domestic judicial review all over the world as a means to keep the legislature and the executive branch in check in the face of a possible illiberal drift of democratic regimes.[30] A second wave arose when the European and International Courts began to scrutinize national law, claiming the supremacy of international (and European) law over national legal rules.[31] The third is now taking its first steps towards submitting international and European Law to constitutional scrutiny.[32] The "third wave" thesis was conceived within the context of speculation on the common features of the judicial review of legislation in the global scenario; but even with more specific reference to the European arena, Giuseppe Martinico does not hesitate to say that Constitutional Courts are going after the CJEU in an attempt to thwart the European integration process.[33] More softly, Daniele Gallo prefers to point out that the courts are searching to strike a new balance between sovereignty and supranationalism.[34] Similarly, Simina Tănăsescu

29. *See* Doreen Lustig & Joseph H. H. Weiler, *Judicial Review in the Contemporary World-Retrospective and Prospective*, 16 INT'L J. CONST. L. 315, 315, 319 (2018) (arguing that a "third wave" is needed in examining constitutionalism as courts have wrestled with challenges to domestic constitutionalism as well as transnational constitutionalism).

30. *See id.* at 321–22 (noting that totalitarian regimes and unconstrained legislatures paved the way for judicial review as a system of checks and balances on elected officials).

31. *See id.* at 325 (noting a shift towards a more cosmopolitan view of international relations as an international community of people as a driving force for the second wave of judicial review).

32. *See id.* at 345 (characterizing the third wave of judicial review as a response to the challenges of the first and second waves of judicial review and accounting for political developments such as Brexit, Trump, and Marine La Pen).

33. *See* Giuseppe Martinico, *Chasing the European Court of Justice: On Some (Political) Attempts to Hijack the European Integration Process*, 14 INT'L COMM. L. REV. 243, 243–44 (2012) (arguing Member States are worried about their constitutional structure and sovereignty and, thus, are disrupting the CJEU's interpretative activity in order to preserve their autonomy).

34. *See* Daniele Gallo, *Challenging EU Constitutional Law: The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure*, 25 EUR. L.J. 434, 434–35 (2019) ("The question is whether and how a truly composite and pluralist system of fundamental rights protection can be put in place without undermining the need for uniformity, consistency and effectiveness of

believes these conflicts should be like an attempt pursued by CCMS to give priority to the domestic constitutional identity.[35] Instead, Daniel Sarmiento thinks CJEU and CCMS are currently "struggling to accommodate their respective claims of supremacy in a novel and more sophisticated framework in which all legal orders pursue a new role in a composite legal space."[36] Definitively, this is the so called "question of the final arbiter,"[37] which has been answered by the theory of constitutional pluralism that stated the question is immaterial because the basis of the relationship between CCMS and CJEU is "interactive rather than hierarchical,"[38] "heterarchical" rather than vertical.[39] Consequently, according to this theory, there is no space for a final arbiter.[40]

Reactions and comments are diverse and undisputed is the acknowledgment of the facts; conflicts between CJEU and Constitutional Courts are re-emerging in ways never experienced before. The possibility to submit European Law to constitutional review has been theoretically grounded since the 1970's thanks to the ICC and the German Constitutional Tribunal (GCT) especially.[41] The counter-limits doctrine designed by the ICC in judgment 183/1973

EU law.").

35. Simina Tănăsescu, *Le Corti Costituzionali Possono Diventare Populiste?*, 2019 QUESTIONE GIUSTIZIA 114, 117, http://questionegiustizia.it/rivista/2019-1.php (indicating that constitutional courts find themselves in a position to interpret their respective constitutions like a normative framework limiting political power).

36. Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MKT. L. REV. 1267, 1268 (2013).

37. *See* Ana Bobić, *Constitutional Pluralism is Not Dead: An Analysis of Interactions Between Constitutional Court of Member States and the European Court of Justice*, 18 GERMAN L.J. 1395, 1402 (2017).

38. *See* Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 259, 264 (1995) (arguing the proper manner of analyzing the relationship between C.C.M.S. and the CJEU is "interactive rather than hierarchical.")

39. Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN L. REV. 317, 336–39 (2002) (characterizing the relationship between C.C.M.S. and CJEU as "heterarchical" or horizontal rather than hierarchical or vertical).

40. *See* Bobić, *supra* note 37, at 1402.

41. *See id.* at 1396 (noting that the German Constitutional Tribunal "retained for itself the ultimate power to interpret the core of the German Basic Law" despite a "serious clash" with the CJEU and its position that EU law takes primacy).

(*Frontini* case),[42] the fundamental rights review shaped by the GCT in the judgments Solange I (1974) and Solange II (1986),[43] the *ultra vires* review dogmatically elaborated in the *Bundesverfassungsgericht*'s judgment on the Maastricht Treaty (1993)[44] and refined in Honeywell ruling (2010) [45] and in the European Central Bank's decision(2020),[46] and finally the identity review drafted in the famous Lissabon-Urteil (2009)[47] provided the courts with powerful weapons to declare "war" on the Luxembourg Court. Until recently, however, outright war has never been declared; to the point that the metaphor of the nuclear

42. *See* Gallo, *supra* note 34, at 435, 443 ("EU law could not apply where the risk of a possible breach of 'the fundamental principles of the constitutional order and the inalienable rights of the individual' arises, which is solely a matter for the ICC.") (citations omitted).

43. *See* Denis Preshova, On the Rise While Falling: The New Roles of Constitutional Courts in the Era of European Integration, 47, 72–73 (June 27, 2019) (Ph.D. dissertation, Universität zu Köln) (on file with Kölner Universitäts Publikations Server, Universität zu Köln), https://kups.ub.uni-koeln.de/9725/ (noting the constitutional court's establishment of constitutional limits on the primacy of EU law).

44. *See* BVerfG, 2 BvR 2134/92, 2 BvR 2159/92, ¶ B.2.c5, Oct. 12, 1993, https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf (holding that the implementation of the Maastricht Treaty cannot infringe on protected rights under the German Constitution).

45. *See* BVerfG, 2 BvR 2661/06, ¶¶ 57–58, July 6, 2010, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html (ruling that it would issue a preliminary reference before declaring a European act as *ultra vires*).

46. See 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, May 5, 2020, http://www.bverfg.de/e/rs20200505_2bvr085915en.html (ruling that the German Bundestag violated the complainants' rights by failing to take steps challenging that the European Central Bank, in its decisions on the adoption and implementation of the Public Sector Purchase Programme, neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality).

47. *See* BVerfG, 2 BvR 182/09, ¶¶ 239–42, June 30, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2009/06/es20090630_2bve000208en.pdf;jsessionid=27B8F7D50002826A9936C481EF8DD325.1_cid392?__blob=publicationFile&v=1 (ruling for identity and *ultra vires* review); *see also* Dieter Grimm, *Comments on the German Constitutional Court's Decision on the Lisbon Treaty: Defending Sovereign Statehood Against Transforming the Union into a State*, 5 EUR. CONST. L. REV. 353 (2009) (summarizing the German constitutional court's position that Germany merely ceded some of its sovereign powers; it did not transfer its sovereignty to the EU).

standoff seemed perfectly apt to the situation. Like nuclear weapons indeed, the different forms of counter-limits have been threatened, though never deployed.[48]

In the last fifteen years, however, they have been used to declare E.U. legal acts inapplicable or at least to place new limits on the primacy of E.U. law over domestic constitutional law.[49]

Reference is made, first of all, to the well-known rulings on European Arrest Warrant of the German,[50] the Polish,[51] and the Czech Constitutional Court;[52] the judgments of the same Czech Court on the Lisbon Treaty[53] and in case Republic Sugar Quota III (on the system

48. *See* Davide Paris, *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*, 10 IT. J. PUB. L. 205, 210–11, 222–23 (2018) (tracing German and Italian courts' use of identity review to determine whether EU law violates national constitutional principles, but noting that in each case each constitutional court found a mutually agreeable resolution of the issue).

49. *See id.* at 207 (noting a dramatic increase in the use of counter-limits by constitutional courts over the last fifteen years).

50. *Accord* BVerfGE, 2 BvR 2735/14, ¶¶ 36, 38, 40, Dec. 15, 2015, http://www.bverfg.de/e/rs20151215_2bvr273514en.html (holding EU law applies in Germany insofar as Germany has transferred sovereignty to the EU with respect to the matter at issue); BVerfGE, 2 BvR 2236/04, ¶¶ 74, 77–78, July 18, 2005, http://www.bverfg.de/e/rs20050718_2bvr223604en.html (cautioning that because EU citizenship is additive to country citizenship, the German legislature must be cognizant of the German constitutional principle banning extradition of German citizens and must ensure that any legislation restricting this principle is not inconsistent with other provisions of the German constitution and the rule of law).

51. *See* Wyrok [judgment] TK [Polish Constitutional Tribunal], z [of] Apr. 27, 2005, P 1/05, ¶ III.2.4 (OTK ZU 2005, z. 77, poz. 680) (finding that while Poland is obligated to implement EU framework decisions, the Constitutional Court still must ensure that the framework decisions are consistent with the Polish Constitution).

52. *See* Nález Ústavního soudu ze dne 05.03.2006 (ÚS) [Decision of the Constitutional Court of May 3, 2006], sp.zn Pl. ÚS 66/04, ¶¶ 53-54 (Czech) (reasoning that delegation of power to the EU is permissible to the extent that the EU exercises such power consistently with the national constitution, and that in areas where Member States have discretion to implement EU law, that discretionary exercise must also conform with the national constitution).

53. *See* Nález Ústavního soudu ze dne 11.03.2009 (ÚS) [Decision of the Constitutional Court of Nov. 3, 2009], sp.zn. Pl. ÚS 29/09, ¶¶ 108–09 (Czech) (noting there is some wide discretion to interpret EU Law as consistent with Czech constitutional law, but cautioning that in cases where exercise of discretion exceeds the scope of the Constitution, the Constitutional Court must interfere); Nález Ústavního soudu ze dne 26.11.2008 (ÚS) [Decision of the Constitutional Court of

of sugar production quotas);[54] the ruling of the Constitutional Court of Portugal no. 187/2013 on cuts of public salaries and pensions;[55] decision 28 April 2016 , no. 62/2016 of the Belgian Constitutional Court on the Treaty on the Stability Pact;[56] declaration no. 1/2004 of the Constitutional Tribunal of Spain on the Treaty establishing a Constitution for Europe and judgment no. 26/2014 of the same Tribunal;[57] and decision 30 November 2016, no. 22/2016 of the Hungarian CC on Refugee relocation policy;[58] finally, Judgment of the Second Senate of the GCT of 5 May 2020 on European Central Bank's Quantitative easing.[59]

Nov. 26, 2008], sp.zn. Pl. ÚS 19/08, ¶ 116 (Czech) (reaffirming the principle that EU law must comply with Czech constitutional mandates); *see also* Petra Nemeckova, *La Sentencia del Tribunal Constitucional Checo de 26.11.2008 sobre la Compatabilidad del Tradado de Lisboa con la Constitución de la República Checa*, 32 REVISTA DE DERECHO COMUNITARIO EUROPEO 239, 256 (2009) (noting that the Czech constitutional court does not "fully accept the primacy principle of EU law" in a similar manner to Germany).

54. *See* Nález Ústavního soudu ze dne 8.3.2006 (ÚS) [Decision of the Constitutional Court of Mar. 8, 2006], sp.zn. Pl. ÚS 50/04, ¶¶ 45, 47–48 (Czech) (finding that where EU law leaves the regulation of matters to the Member States, it is up to Member States to adopt their own regulations, and it is EU law that serves as a limiting principle on the discretion of Member States).

55. *See* A.T.C., Apr. 5, 2013 (No. 187/2013) ¶¶ 45, 47 (Port.) (invalidating austerity measures against public workers based on violations of the principle of proportional equality enshrined in the Portuguese Constitution).

56. *See* Cour Constitutionnelle [CC] [Constitutional Court] decision no 62/2016, Apr. 28, 2016, www.const-court.be (Belg.) (holding that the Stability pact "entrusts certain powers" to the EU, but that exercise of such powers cannot interfere with Belgium's national identity).

57. *Accord* S.T.C., Dec. 13, 2004 ¶ II.1 (No. 1/2004) (Spain) (reasoning that Spain's treaty obligations to the EU are blocked until a treaty comports with constitutional mandates); S.T.C., Feb. 13, 2014 (No. 26/2014) ¶ II.3 (Spain) (finding that "the Constitution is no longer the framework of validity of Community legislation" but requires that any legislation accepted "as a result of the transfer" comport with "its basic values and principles.").

58. *See* Alkotmánybíróság (AB) [Constitutional Court], Nov. 30, 2016, AK.22/2016, ¶¶ 58–60, 63 (Hung.) (holding that Hungary has not surrendered its sovereignty and thus Hungary's sovereignty must be maintained when there is joint competency to hear a case concerning rights under EU law).

59. See 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, May 5, 2020, http://www.bverfg.de/e/rs20200505_2bvr085915en.html (ruling that the review undertaken by the CJEU with regard to whether the ECB's decisions on the Public Sector Purchase Programme - as a part of the quantitative easing - satisfy the principle of proportionality is not comprehensible and that the judgment was thus

In all of these cases, the courts have followed the experimented patterns of the constitutional scrutiny of E.U. law based on the Italian-German counter-limits doctrines: the fundamental rights review, intended to ascertain whether E.U. law overrides the supreme principles of the constitutional order and the inalienable human rights; the *ultra vires* review, aimed at assessing whether E.U. institutions are exceeding their jurisdiction, as encompassed in the principle of referral provided for by the Treaties; and the identity review, designed to verify whether the powers conferred on the union respect the constitutional identity of the member states.[60]

A. THE PROCEDURAL STRATEGIES APPLIED TO PUT NEW BOUNDARIES TO E.U. LAW

More interesting are other recent cases where the CCMS have applied new procedural strategies aimed at curbing primacy and direct applicability of E.U. law and especially at hindering the direct horizontal effect of the Charter.[61]

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rendered ultra vires).

60. *See, e.g.*, Nález Ústavního soudu ze dne 11.03.2009 (ÚS) [Decision of the Constitutional Court of Nov. 3, 2009], sp.zn. Pl. ÚS 29/09, ¶¶ 215–16 (Czech) (Reviewing whether EU law was consistent with the Czech Constitution, whether the Czech Republic had ceded such power to the EU, and whether the acts of the EU were actually within its powers).

61. *See* Case C-62/14, Gauweiler et al. v. Deutscher Bundestag, 2015 EUR-Lex CELEX LEXIS 400, ¶ 24 (June 16, 2015) (holding that the national court has both the power to submit a preliminary reference to the CJEU and to decide which questions are relevant for resolution by the CJEU); Case C-105/14, Italy v. Ivo Taricco et al., 2015 EUR-Lex CELEX LEXIS 555, ¶¶ 53, 56 (Sept. 8, 2015) (providing that EU Law cannot subject citizens to retroactive criminal liability where national law at the time the crime was committed did not penalize such action); H*øjester*et Dom [HD] [Supreme Court] 2016-12-6 15/2014, ¶¶ 30–32 (Den.), http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Documents/15-2014.pdf (holding that the obligation to ensure that an EU directive is complied with cannot contravene general principles of law or lead to an interpretation of the national law in question that is against the constitution); Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 14, 2012, U466/11-18 U1836/11-13, ¶¶ 5.1, 5.5–5.6, 5.9, https://www.vfgh.gv.at/downloads/VfGH_U_688_690-12_AsylGH_Besetzung.pdf (Austria) (applying the equivalence doctrine and holding that EU law is the standard of review only when the EU law covers the same rights as domestic constitutional law); *see also* Corte Cost., 7 novembre 2017, n. 269, 5.2 (It.) (holding that where a constitutional right is in dispute, the ordinary court must raise a question of constitutionality, but still retains the ability to ask for

These strategies can be classified as follows:

1. The unconventional use of the preliminary reference procedure as a tool to "warn" or "threaten" the CJEU rather than as a means to seek an interpretative clarification.[62]

2. The refusal to recognize direct effect to E.U. Law, arguing that this effect was not foreseeable in the law of accession (i.e. the law allowing a treaty to be applicable in a member state's legal order);[63]

3. The assessment of the priority of constitutional issue over the preliminary ruling procedure so as to hinder the horizontal direct effect of the Charter.[64]

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a preliminary ruling from the CJEU); *accord* Corte Cost., 23 gennaio 2019, n. 20, 2.1 (It.) (holding that the Italian Constitutional Court must decide issues of fundamental rights by internal constitutional principles rather than by EU law where both EU law and Italian law provide for the same fundamental right); Corte Cost., 20 febbraio 2019, n. 63, 4.3 (It.) (explaining its choice to analyze constitutional issues of law before referring the matter to the CJEU); Corte Cost., 6 marzo 2019, n. 112, 7 (It.) (holding that questions of constitutionality raised in reference to both EU law and Italian law are for the Italian Constitutional Court to adjudicate); Corte Cost., 6 maggio 2019, n. 117, 10.1–10.2 (It.) (ordering a preliminary reference to the CJEU to resolve certain questions of fundamental rights for which Italy has a higher level of protection than offered by EU law).

62. This is the case for the German Court in OMT/Gauweiler case and for the Italian Court in Taricco case. Here the Court made it downright clear that the application of the 'Taricco rule' set down by the CJEU within the national legal order would have triggered the constitutional counter-limits and seemed to say to the Court of Luxembourg: either you change your interpretation of art. 325 TFEU or we will be forced to apply counter-limits and to declare the EU Law inapplicable. *See* Case C-62/14, Gauweiler et al. v. Deutscher Bundestag, 2015 EUR-Lex CELEX LEXIS 400, ¶ 24 (June 16, 2015) (warning that it is the German Constitutional Court that has the competency to both determine whether to submit a question for a preliminary ruling and the relevance of the questions which it submits to the CJEU); *accord* Case C-105/14, Italy v. Ivo Taricco et al., 2015 EUR-Lex CELEX LEXIS 555, ¶¶ 29–33 (Sept. 8, 2015) (reaffirming the Gauweiler judgment but submitting the question to the CJEU after considering the relevance of the question for resolution by the CJEU).

63. *See* H*øjester*et Dom [HD] [Supreme Court] 2016-12-6 15/2014 at 45–46.

64. *See* 1958 CONST. arts. 61, 62 (Fr.) (designated the Constitutional Council as the entity to which laws may be referred and placing the power to repeal unconstitutional laws in the Constitutional Council); H*øjester*et Dom [HD] [Supreme Court] 2016-12-6 15/2014 at 11–13 (holding there is no duty to use preliminary reference procedures where the issue is not relevant and that where EU and international law have the same scope of application as to a particular right, the Austrian Constitutional Court will base its decision on the Austrian Constitution

1. The strategy of unconventional use of the preliminary reference procedure was applied at its finest in the Taricco case.

With Order no. 24/2017, the ICC threatened to apply a counter-limit in order to force the CJEU to overrule the "*Taricco* rule" drawn by the Grand Chamber of the Luxembourg Court in its September 8, 2015 judgment.[65] According to that rule, if a national legal act concerning limitation periods for criminal offences prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the Union, national courts must give full effect to Article 325(1) TFEU[66] if need be by disapplying those domestic provisions which have an adverse effect on the fulfilment of the member states' obligations under that same article.[67] Before the ICC was raised the question whether the *Taricco* rule contrasted with the principle of legality in criminal law, it was

without using preliminary reference procedures); Corte Cost., n. 269, 5.1 (holding ordinary courts must raise an issue of constitutionality in cases in which EU law has an indirect effect and thus must refer those cases to the constitutional court); *accord* Corte Cost., n. 20, 2.1 (holding that in cases in which EU law and domestic constitutional law may be incompatible, the constitutional court's judgment should be based on domestic constitutional law as appropriate); Corte Cost., n. 63, 4.3 (recalling judgments 269/2017 and 20/2019 and holding that where EU law and Italian constitutional law protect the same rights, the court's judgment will rest on internal constitutional law without prejudice to an ordinary court's ability to reference a case to the CJEU); Corte Cost., n. 112, 1.1, 10 (bifurcating the review of a law by separating constitutional review of the law from preliminary reference of the law to the CJEU and declaring the law unconstitutional under the Italian constitution); Corte Cost., n. 117, 2 (reaffirming judgment 20/2019 and holding that where EU law and Italian law cover the same fundamental right, EU law should be interpreted in harmony with the Italian constitution).

65. *See* Corte Cost., 23 novembre 2016, n. 24, 7 (It.) (cautioning that the "conviction of this Court" is "that the rule inferred from Article 325 TFEU is only applicable if it is compatible with the constitutional identity of the Member State, and that it falls to the competent authorities of that State to carry out such an assessment.").

66. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 325, § 1, Oct. 26, 2012, 2012 O.J. (C 326) 47, 188 ("The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.").

67. *See* Corte Cost., n. 24/2017, 1.

acknowledged as a supreme principle of the Italian constitutional order.[68] The principle: *i*) requires that criminal rules must be precise, while the notions of "serious fraud" and "significant number of cases," upon which the "*Taricco* rule" is based, are too vague and not sufficiently precise; *ii*) prohibits the retroactive application of criminal law *in malam partem* while, before the *Taricco* judgment, no offender (not even *Taricco*) could reasonably have expected that Article 325 TFEU would require a longer statute of limitations than that provided for by the national rule at issue.[69]

In Order no. 24/2017, the ICC recognized that the application of the "*Taricco* rule" "would violate supreme principles of the Constitution (Arts. 25 and 101) and could not be allowed," and stated that should the clash between the obligations flowing from Article 325 TFEU and supreme principles of the Italian constitutional order be inescapable, the ICC "would be under a duty to prevent" the application of E.U. law.[70] This was a clear message to the CJEU that the application of the "*Taricco* rule" within the national legal order would trigger the constitutional counter-limits.

2. The refusal to recognize horizontal direct effect to E.U. Law arguing that this effect was not foreseeable in the law of accession.

A paradigmatic example for this argumentative strategy is the judgment of the Danish Supreme Court (SCDK) in the Dansk Industri/Ajos case, concerning the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[71] The judgment follows the CJEU's April 19, 2016

68. *See id.* 4–6.

69. *See id.* 1–2; *see also* Codice di procedura penale (C.p.p.) (It.); art. 25 Costituzione [Cost.] (It.) ("No punishment may be inflicted except by virtue of a law in force at the time the offence was committed.").

70. Corte Cost., 23 novembre 2016, n. 24, 1–2; *see also* Corte Cost., 19 dicembre 2012, n. 264, 4.0, 4.1 (It.) (declaring inapplicable international provisions grounded, respectively, in the ECHR as interpreted by the Court of Strasbourg); Corte Cost., 22 ottobre 2014, n. 238, conclusions 1.1, 1.3 (It.) (concerning the principle of the functional immunity of the organs of foreign States for war crimes committed *iure imperii* in generally recognized principles of international customary Law).

71. H*øjester*et Dom [HD] [Supreme Court] 2016-12-6 15/2014, 45–46 (Den.), http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Documents/15-2014.pdf (holding that EU law cannot be given direct effect in Danish law where the principle

decision in a preliminary ruling procedure issued by the SCDK itself.[72] The referring court was uncertain whether the general E.U. law principle prohibiting discrimination on grounds of age "may be relied on by an employee against his private-sector employer in order to compel the employer to pay a severance allowance provided for under Danish law even when, under national law, the employer is not required to make any such payment."[73] Danish legislation on salaried employees deprived an employee, entitled to claim an old-age pension under a pension plan which he joined before reaching the age of 50, of entitlement to a severance allowance.[74] The CJEU had already recognized that such a rule was contrary to Directive 2000/78 and inconsistent with the general principle of non-discrimination on grounds of age, which had been recognized as having horizontal direct effect, starting from the landmark *Mangold* and *Kücükdeveci* decisions.[75] Since the Directive at play had no direct effect, the Luxembourg Court suggested the referring court either to interpret domestic legislation in light of the Directive or to disapply "any provision of national law which is contrary to the E.U. law."[76]

The SCDK did not follow the CJEU's instruction. It neither found it possible to interpret the national legislation so as to make it consistent with the Directive,[77] nor to set aside that legislation so

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of the EU law was not foreseen in the law of Accession).

72. *See* Case C-441/14, Dansk Industri v. Boet efter Karsten Eigil Rasmussen, 2016 EUR-Lex CELEX LEXIS 278, ¶ 22 (Apr. 19, 2016) ("[T]he general principle prohibiting discrimination on grounds of age . . . must be regarded as a general principle of EU law.").

73. *Id.* ¶ 15.

74. *Id.* ¶ 6.3 (describing the Danish law under judgment).

75. *See* Case C-499/08, Ingeniørforeningen i Danmark v. Region Syddanmark, 2010 E.C.R. I-9371, I-9388-89 (explaining that Directive 200/78 precludes Danish legislation excluding the elderly from collecting both old-age pension and severance pay); Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-10013 (holding that a European Council directive establishing a general framework for equal treatment in employment precluded a domestic law); Case C-555/07, Kücükdeveci v. Swedex GmbH & Co. KG, 2010 E.C.R. I-393 (holding that European Council directive 200/78/EC establishing a general framework for equal treatment in employment and occupation precluded national legislation).

76. Dansk Industri, 2016 EUR-Lex CELEX LEXIS 278, ¶ 43.

77. The SCDK held an interpretation in the light of the Directive was *contra legem*, since national Parliament, when transposing the Directive, deliberately did not amend the national rule allegedly contrary to the Directive itself.

denying the employee the claimed severance allowance, equivalent to three months' salary.[78] The basis for the decision was that the unwritten principle of non-discrimination on grounds of age cannot take precedence over conflicting national law.[79] The Danish Court ruled that "there is no basis for holding that the E.U. law principle prohibiting non-discrimination on grounds of age, which according to the E.U. Court of Justice is to be found in various international instruments and in the constitutional traditions common to the Member States (. . .) have been made directly applicable in Denmark by the Law on accession."[80] In SCDK's view, the fact that the Danish Parliament, when transposing the Directive, had not mentioned the CJEU's judgments *Mangold* and *Kücükdeveci* is enough to prove that "the ECJ did not have the competence or legal basis to give precedence to the unwritten principle prohibiting discrimination on ground of age" over the conflicting national law.[81] As a result, the SCDK did not allow the E.U. law principle at issue to take precedence over domestic law, even though this general principle has consistently been interpreted as having horizontal direct effect.[82]

3. The assessment of priority of constitutional issue over the preliminary ruling procedure so to hinder the direct horizontal effect of the Charter.

It may well occur that a judge, while ruling a case, should apply a provision which appears to him as incompatible with the constitution and, at the same time, with the European Law. He cannot go ahead without solving the problem of this double non-compliance. In procedural terms, there are two connected, though separate, issues to be assessed by different judges. The question arises indeed, which issue should be addressed first. As a general rule, in almost all the

78. H*øjester*et Dom [HD] [Supreme Court] 2016-12-6 15/2014, 48 (Den.), http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Documents/15-2014.pdf (holding that disapplying the provision would be outside the scope of the Danish Supreme Court).

79. *Id.* at 48 (citing the law of accession for the decision).

80. *Id.* at 47.

81. *Id.* at 48.

82. *Id.* at 45 (explaining that an EU law having direct effect on domestic legislation creates obligations).

member states of the Union, the "European issue" takes precedent.[83] This means, procedurally, that the ordinary courts must suspend the judgment and submit a preliminary reference procedure to the CJEU.[84] Only after the CJEU has ruled, the ordinary court can raise a question of constitutionality before the national Constitutional Court.[85]

France, Austria, and more recently Italy have introduced an opposite general rule: the priority of the constitutional issue over the preliminary reference procedure.[86] In France, the *priorité constitutionnelle* is directly provided for in Articles 61 and 62 of the Constitution.[87] It has a written basis. In Austria and Italy, the "priority rule" was created by judgments of the Constitutional Courts.[88]

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83. *See* Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 587, 594, 599 (holding that unilateral domestic measures cannot take precedence over E.U. law); *Precedence of European Law*, EUR-LEX (last updated Jan. 10, 2010), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14548 (explaining that the reference procedure is a task of national judges to ensure that the precedence principle is adhered to).

84. *See, e.g.*, Case 6/64, 1964 E.C.R. at 587 (referring a case for a preliminary ruling on a conflict between an Italian decree and an article of the EEC Treaty); *Precedence of European Law*, *supra* note 83 (stating that national courts must suspend the application of a potentially-conflicting national law until after the ECJ has given its ruling).

85. Case 6/64, 1964 E.C.R. at 592-594 (explaining the application of the precedence rule); *Precedence of European Law*, *supra* note 83.

86. *See* 1958 CONST. arts. 61, 62 (prioritizing constitutional issues); VfGH, U466/11-18 U1836/11-13, ¶ 5.9 (stating that the Austrian Constitutional Court will base its decision on the Austrian Constitution instead of on a preliminary ruling if the issue has the same scope of application in both community and Austrian law); Corte Cost., n. 269, 5.2–5.3 (It.) (prioritizing Italian Constitutional issues over E.U. community issues); Corte Cost., 23 gennaio 2019, n. 20, 2.1 (It.) (preserving the court's opportunity to intervene with *erga omnes* effect by virtue of constitutional review); Corte Cost., 20 febbraio 2019, n. 63, 4.3 (It.) (reiterating that the examination of constitutional legitimacy cannot be precluded by the Charter); Corte Cost., 6 marzo 2019, n. 112, 1.5 (It.) (proceeding first with the issues of constitutionality before offering the case for preliminary reference); Corte Cost., 6 maggio 2019, n. 117, 2 (It.) (stating that a court or tribunal of a Member State may assess the constitutionality of a provision before referring it to the E.C.J. for a preliminary ruling).

87. 1958 CONST. arts. 61, 62 (stating that any legislation held to be unconstitutional, as decided by the Constitutional Council, cannot be applied).

88. *See* VfGH, U466/11-18 U1836/11-13 at 5.9 (stating that the Constitutional Court will base its decision on the Austrian Constitution without a need for a preliminary reference to the E.C.J.).

Namely, the Austrian *Verfassungsgerichthof,* with Judgments no. U 466/1-18; U 1836/11-13, from one side, recognized the Charter as a standard for constitutional review of legislation, and from the other, ruled that the national constitution should be applied first when the rights in play have the same scope of application and are envisaged both in the Charter and in the domestic constitution.[89]

Similarly, in Judgments no. 269/2017; 20, 63, 112, 117/2019, the ICC overruled its opposite previous decisions favorable to the priority of the Luxembourg Court's adjudication[90] and assessed that in case of

89. *Id.* at 5.6 (concluding that the rights of the Charter may be invoked as a standard of Constitutionality, while reserving the rights guaranteed in the Austrian Constitution).

90. The question raised to the ICC before issuing a preliminary reference procedure to the CJEU has been declared inadmissible. Corte Cost., n. 269, 5.1 (holding that the question of constitutionality must be raised, while leaving the possibility of referral available); Corte Cost., n. 20, 1.12 (giving priority to the question of constitutionality); Corte Cost., n. 63, 4.3 (refusing to exempt itself from giving judgment on the constitutionality of the issue); Corte Cost., n. 112, 1.5 (making clear that the case was to be referred to the CJEU, with the exception of the constitutional issues); Corte Cost., n. 117, 2 (highlighting the ability of national courts to rule on issues of constitutionality); Corte Cost., 4 luglio 2007, n. 284, 3 (It.) (finding the question raised before the court regarding the constitutionality of illegal gambling and protection of fair sporting events legislation to be inadmissible); Corte Cost., 18 luglio 1996, n. 319 (It.) (finding the question raised before the court regarding the constitutionality of the approval and establishment of certain tax structures to be inadmissible); Corte Cost., 15 dicembre 1995, n. 536 (It.) (finding the question raised before the court regarding the constitutionality of certain property tax legislation to be inadmissible); Corte Cost., 6 febbraio 1995, n. 38 (It.) (finding the question raised before the court regarding the constitutionality of dentistry registration options to be inadmissible); Corte Cost., 4 luglio 1994, n. 294 (It.) (finding the question raised before the court regarding the constitutionality of discipline of urban property leases to be inadmissible); Corte Cost., 8 gennaio 1991, n. 8 (It.) (finding the question raised before the court regarding the constitutionality of article 423 of the navigation code to be inadmissible); Corte Cost., 28 gennaio 1991, n. 79, (It.) (finding the question raised before the court regarding the constitutionality of portions of articles 438 and 442 of the code of criminal procedure code to be inadmissible); Corte Cost., 23 maggio 1991, n. 269 (It.) (finding the question raised before the court regarding the constitutionality of article 35 of legislation regarding the discipline of urban property leases to be inadmissible); Corte Cost., 20 febbraio 1990, n. 78 (It.) (finding the question raised before the court regarding the constitutionality of rules for residential construction and provisions on evictions to be inadmissible); Corte Cost., 12 luglio 1990, n. 389 (It.) (finding the question raised before the court regarding the constitutionality of certain income tax legislation to be inadmissible); Corte Cost., 26 settembre 1990, n. 450 (It.) (finding

double non-compliance, the ordinary courts should raise the question to the Constitutional Court first before declaring a national act inapplicable due to the contrast with the Charter or before referring to the CJEU for a preliminary ruling.[91]

Why do so many courts react to E.U. Law in so many ways? How can we explain this converging, simultaneous activism of the CCMS? Is it by chance or is it an expression of a more general tendency to start a more pervasive and strict constitutional scrutiny of international and European law?

If we look at the process of E.U. integration without being dazzled by the unquestionable, huge successes it has gained for the continent, it is not hard to conclude that the clashes between the courts we have experienced over the last years are anything but unexpected. They are indeed the outcome of structural problems left unresolved by the growing expansion of E.U. law within the national legal systems.

The first issue, debated by the most enlightened philosophers and jurists,[92] is that of the "democratic deficit." I prefer to call it the

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the question raised before the court regarding the constitutionality of articles 70 and 422 of the code of criminal procedure to be inadmissible); Corte Cost., 10 aprile 1987, n. 152, (It.) (finding the question raised before the court regarding the constitutionality legislation regarding hygienic discipline for the production and sale of food and beverages to be inadmissible).

91. Corte Cost., 10 aprile 1987, n. 152, (It.) (finding the question raised before the court regarding the constitutionality legislation regarding hygienic discipline for the production and sale of food and beverages to be inadmissible). On Corte Cost., n. 269/2017, *see* Gino Scaccia, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte constituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, FORUM DI QUADERNI COSTITUZIONALI RASSEGNA (Jan. 25, 2018), http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2018/01/nota_269_2017_scaccia.pdf; Gino Scaccia, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, 2 OSSERVATORIO AIC 15 (May 7, 2018), https://www.osservatorioaic.it/images/fascicoli/Osservatorio_AIC_Fascicolo_02_2018.pdf (answering the questions left open by Judgment no. 269/2017. Three of which are key. First: whether the "constitutional priority" is applicable when national rules violate the Charter or even when a conflict with the European Treaties is at issue. Second: whether the duty to refer first to the Constitutional Court could eventually discourage ordinary courts from issuing a preliminary reference to the CJEU. Third: whether ordinary courts are obliged or at least discouraged from directly dis-applying Italian rules conflicting with the Charter).

92. Dieter Grimm, *The Democratic Costs of Constitutionalisation: The*

"constitutional" issue to prevent misunderstandings. It is in fact meaningless to look for a common, political, socially homogeneous, and culturally consistent European people, because this homogeneity (which is impossible in a short-term perspective and would require centuries to be achieved), is not even strictly necessary.[93] European citizenship, indeed, cannot be conceived as the result of the ideology of the Nation-State being applied to a higher level. It is rather the product of the philosophical ideology of universalism of human rights. Within this new intercultural paradigm, European citizenship – unlike the national one – is based on the acknowledgment and protection of liberties in a shared space.[94] Therefore, it is perfectly apt to include and harmonically integrate different identities – local, regional, and national – without contrasting them, but enriching them by creating different and fertile blends.

Hence, the democratic problem of the European Union has nothing to do with the lack of a proper European people. It has to be referred, rather, to the same European institutional architecture.[95] Indeed, the enforcement of the principles that shape the domestic Rule of Law ("parliamentary" legality and separation of powers) is predominantly entrusted to legislature and government.[96] The basic values and the

European Case, 21 EUR. L.J. 460, 460–73 (2015) (discussing the overconstitutionalization of the E.U. as a cause for the E.U.'s legitimacy deficit); ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, NATION, EUROPA (1999); Jürgen Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible*, 21 EUR. L.J. 546, 546–57 (2015) (discussing the necessity of eliminating legitimation deficits of the E.U. to better democratize it).

93. Wolfgang Merkel & Brigitte Weiffen, *Does Heterogeneity Hinder Democracy?*, 11 COMP. SOC., 387, 395–96 (2012) (discussing how homogeneity complicates democratization).

94. *See* Dominique Leydet, *Citizenship*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jul. 17, 2017), § 3, https://plato.stanford.edu/entries/citizenship/#ChalGlob (defining citizenship in terms of globalization as "a formal expression of membership in a polity that has definite territorial boundaries within which citizens enjoy equal right and exercise their political agency.").

95. Eur. Parl. Res. Serv., Petra Bárd et al. (Research Fellows), An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, PE 579.328, at 79 (April 2016) (illustrating deep-seated tensions within the E.U.'s architecture as a source of the democratic problem and labeling the structure as "atypical").

96. Oliver Mader, *Enforcement of EU Values as a Political Endeavour:*

organizational principles of multilevel constitutionalism (proportionality, subsidiarity, and human dignity as the axiological cornerstone of fundamental rights) seem, instead, to predominantly empower courts and high bureaucracy to implement them, thereby prompting a more direct involvement of non-elected agencies in law-making.[97] It is therefore not surprising that judges and lawyers, rather than political institutions or the European Parliament, have so far proven to be indispensable for smoothing the complex European legal infrastructure.

In this specific meaning, the common European space is not a fully democratic, hence constitutional, space. Rather, it is a space in which a minimum level of liberal constitutionalism has been imposed, consisting in the protection of human rights (a fact whose historical relevance is paramount and should not be discounted).[98] The misalignment between the domestic models of democratic participation and the European system, which is designed along the lines of a constitutionalism that is only partly democratic (if not downright post-democratic), explains the miscommunication between those who search in vain for European democratic institutions with forms and models similar to their national parallels,[99] and those who, in their optimistic trust to move "beyond the State," leave the constitutional problem of the European institutions in the twilight

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Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law, 11 HAGUE J. ON RULE OF L. 133, 141 (2018) ("The eminence of the *rule of law* in the discussion on enforcement of values against member states is also due to the fact that the Commission cannot reasonably take the position of *guardian of democracy* against EU Member States, despite the formal obligation endowed to it in Art. 17(1) TEU . . . .").

97. *See* Ingolf Pernice, *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, 11 EUR. CONST. L. REV. 541, 544–46 (2015) (discussing the constitutional architecture of the E.U. and how it empowers the citizenry to become involve).

98. *See* INGOLF PERNICE & RALF KANITZ, FUNDAMENTAL RIGHTS AND MULTILEVEL CONSTITUTIONALISM IN EUROPE (2004), http://www.whi-berlin.eu/documents/whi-paper0704.pdf (discussing the debate of Europe's multilevel constitutionalism which resulted in a catalogue of fundamental human rights extending beyond mere protection of individual rights and freedoms).

99. *See* Alexander Somek, *Delegation and Authority: Authoritarian Liberalism Today*, 21 EUR. L.J. 340, 342 (2015) (observing the risk that technocratic liberalism growing within European institutions might be the carrier of a soft authoritarianism).

zone.[100] The theme is too complex to be fully addressed in a few words. Yet, what has been just briefly pointed out allows us to conclude that the claimed and consistently applied supremacy of E.U. law over national rules has weak "democratic credentials."[101] It might not come as a surprise that the CCMS occasionally remind us of that detail.

The second main issue is a value issue and refers to the common reading of human rights by the European Courts. CJEU and E.Ct.H.R. have been endorsing an individualistic, libertarian reading of fundamental rights.[102] Indeed, universal human rights as signs of a new cosmopolitan legality are attributed to an individual unbound by social ties or attachments and by the responsibility to participate actively in a political community.[103] By those elements, in short, which placed the systemic limits to individual interests and allowed for a reasonable balance between individual rights and social duties. The apparently boundless expansion of the rights sphere and the marginalization in public European discourse of a profound speculation on the duties to share triggers the risk of alienating the citizen from the community he lives in and reducing him to the "atomized", apolitical plaintiff.[104]

Therefore, the judicial resistance to E.U. law and the CJEU we have witnessed in the last few years can be explained as a double form of

100. This is a problem that many scholars find overrated. *See, e.g.*, Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599, 599–625 (1998) (explaining that it is unlikely for the E.U. to displace sovereignty and multi-level governance due to the structural equilibrium); SABINO CASSESE, OLTRE LO STATO 29 (2006).

101. *See* Lustig & Weiler, *supra* note 29, at 346 (attributing the third wave of judicial review, in which domestic courts attempt to make up for the rule of law, in part to the claim that international law represents a higher law within national jurisdiction and simultaneously demonstrated weak democratic credentials).

102. *See* Marta Cartabia, *The Age of "New Rights"* 4 (Straus Institute, Working Paper No. 03/10, 2010), http://www.law.nyu.edu/sites/default/files/siwp/Cartabia.pdf (discussing the creation of new rights as a libertarian interpretation of individual rights pervading Europe).

103. *See* David Chandler, *Democracy Unbound? Non-Linear Politics and the Politicization of Everyday Life*, 17 EUR. J. SOC. THEORY 42, 43–44, 56 (2014) (discussing today's democracy as being brought down to the everyday level through an active citizenry).

104. *See, generally*, Regina Queiroz, *Individual Liberty and the Importance of the Concept of the People*, 4 PALGRAVE COMM. 1 (2018) (theorizing that the expansion of individual liberties leads to an apolitical and servile citizenry).

reaction.

Firstly, it is a reaction to the top-down encroachment of E.U. law upon the core of state sovereignty, which takes place predominantly by means of judge-made decisions having "constitutional" tone;[105] to which the CCMS reply by creating new limits that challenge the constitutional principles of E.U. law: primacy and direct effect.[106]

Secondly, it is a reaction to a theoretical (philosophical) understanding of fundamental rights based on the idea of a self-centered man, unbound from duties and responsibilities which gave content and flavor to national citizenship.[107]

The reactions (or resistances) of the courts are likely to increase in number and quality since the Lisbon Treaty has recognized the Charter of Fundamental Rights as having the same legal value than the European Treaties (art. 6 TEU).[108] Indeed, the Charter is really a game-changer for the risk it carries of displacing national, centralized judicial review of legislation: a risk worthy of analysis in the following paragraph.

B. THE CHARTER OF FUNDAMENTAL RIGHTS AS A GAME-CHANGER

It is undisputable that the Charter cannot be described as a real federal constitution. It does not show the legal, formal value of a "total

105. *See* Vivien A. Schmidt, Boston University, Revised paper prepared for presentation at the UACES Conference: *The EU and Its Member-States: From Bottom Up To Top Down*, 10 (March 23-24, 2007) (explaining that the ECJ encroaches on the powers of domestic legal systems, while also emancipating them from hierarchies).

106. *See* Jan Komárek, *National Constitutional Courts in the European Constitutional Democracy*, 12 INT'L J. OF CONST. L. 525, 538 (2014) (positing that national courts pressing the ECJ to adopt fundamental rights jurisdiction limits the court).

107. *See* Martijn van den Brink, *EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems*, 25 EUROPEAN L.J. 21, 27 (2019) ("That fundamental rights have become detached, not only as an ideal but also in practice, from notions of citizenship and nationality becomes evident upon examination of the international human rights regime that emerged over the last decades.").

108. *See, e.g.*, Karina Kim Egholm Elgaard, *The Impact of the Charter of Fundamental Rights of the European Union on VAT Law*, 5 WORLD J. OF VAT/GST L. 63, 77–78 (2016) (explaining that the Charter will became increasingly relevant since its entry into force).

constitution," encompassing the "partial constitutions" of the single member states of the European Union.[109] However, with regard to the principles and rights it envisages, it is fair to say – and has been expressly acknowledged in recent judgments of the Austrian and the Italian Constitutional Courts – that the Charter has a "typically constitutional nature."[110] In particular, the rights recognized by the Charter are very similar in their content to those provided for by national constitutions.[111] It is well known that rights and provisions of the Charter – according to its Art. 51 – may be implemented by acts of the member state "only when they are implementing Union law."[112] Since the Charter can be applied only to acts and facts included in the scope of application of the European law, an entanglement between rights protected by national constitutions and rights envisaged by the Charter can arise in those cases only.[113]

Yet, the field of application of the Charter has been considerably

109. *But see* Elgaard, *supra* note 108, at 67 (describing the Charter as an aggregate of EU Member States' fundamental rights guarantees).

110. *See* Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 14, 2012, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTS-HOFES [VFSLG] No. 19632/2011 (Austria) (finding that the Charter *is* the standard for its own constitutional review, as it would be inconsistent if the court that reviewed whether constitutional and ECHR rights were respected could not do so with respect to Charter rights); Corte Cost., 7 novembre 2017, n. 269, 5.2 (It.) (acknowledging the "constitutional nature" of the Charter and affirming the priority of the issue of constitutionality over the preliminary reference procedure based on provisions of the Charter); Case 29/69, Stauder v. City of Ulm, Sozialamt, 1969 E.C.R. 419, 424 (ruling that fundamental rights within Europe are based on the general principle of EU law); Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel, 1970 E.C.R. 1126, 1133 (explaining that respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice).

111. *See* Elgaard, *supra* note 108, at 67 (explaining that the Charter was intended to be a guide to all of the general principles of fundamental rights of E.U. Member States into one document).

112. Specifically, the case must fall within the competence of the Union, meaning that it must refer to acts taken by institutions, offices, agencies of the Union, or national acts which implement EU Law. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 21.

113. *See* Elgaard, *supra* note 108, at 70 ("The broad interpretation seems to be supported by other CJEU decisions which use the formulation 'in all situations governed by EU law'" which is defined as "fundamental rights, as guaranteed by the HR Convention and as they result from the constitutional traditions common to the Member States . . . .").

expanded thanks to important (and contested) rulings of the CJEU. Judgment Åkerberg Fransson, in particular, ruled that the applicability of Union law entails the application of the Charter and encompasses procedural rules and even sanctioning measures aimed at giving full effectiveness to the substantial rules of E.U. law.[114] As the GCT pointed out, the human rights laid down in the Charter are addressed to the member states "in situations of an open-ended linkage between national rules and the scope of Union law with the latter being defined in an abstract manner."[115]

As a result, where a violation of fundamental rights is in play, it is very common that the Charter and national constitutions cover quite the same legal space. It is then true that since the Charter entered into force, it acted as a federalizing factor.[116]

The problem is that these "twin constitutions," which share similar content and a largely common scope of competence, require different and even opposite ways of being implemented. The provisions of the Charter, when recognized as having direct horizontal effect, can be immediately enforced by each ordinary court, making the conflicting

114. Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, 2013 EUR-Lex CELEX LEXIS 105, ¶¶ 16–29 (Feb. 26, 2013); s*ee also* Case C-682/15, Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes, 2017 EUR-Lex CELEX LEXIS 373, ¶¶ 38, 42 (May 16, 2017) (explaining that Charter is applicable when a Member State imposes a pecuniary penalty on persons who refuse to supply information in the context of an exchange between tax authorities); Case C-466/11, Gennaro Currà and Others v. Bundesrepublik Deutschland, 2012 EUR-Lex CELEX LEXIS 465, ¶ 14 (July 12, 2012) (recalling that the E.U. may act only within its limits and competences conferred upon it by Member States in the Treaties); Case C-206/13, Cruciano Siragusa v. Regione Sicilia, 2014 EUR-Lex CELEX LEXIS 126, ¶ 19 (Mar. 6, 2014) (bearing in mind that as a procedural matter, a request for a preliminary ruling requires a statement of referral that which calls into question the validity of E.U. law and the connection with national legislation); Case C-14/13, Gena Ivanova Cholakova v. Osmo Rayonno Upravlienie pri Stolichna direktsia na vatreshnite raboti, 2013 EUR-Lex CELEX LEXIS 374 (June 6, 2013) (denying a request for a preliminary ruling due to a lack of jurisdiction).

115. BVerfG, 1 BvR 1215/07, Apr. 24, 2013, ¶ 91 (holding that the judgment Åkerberg Fransson might have been *ultra vires*); Daniel Thym, *Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter?*, 9 EUR. CONST. L. REV. 391, 397 (2013) (discussing the aforementioned judgment).

116. *See* Pérez, *The Federalizing Force of the EU Charter of Fundamental Rights*, *supra* note 24, at 1080.

national rule inapplicable to the case;[117] the constitutional rules – excluding very rare exceptions – cannot be directly applied by ordinary courts, which have the duty to raise a question to the Constitutional Court each time they deem a legal rule incompatible with the constitution.[118] Within this context, it is hard to harmonize the decentralized enforcement of the European Bill of Rights (i.e. the Charter) by ordinary judges with the *centralized* enforcement of the national Bill of Rights (i.e. the Constitution) by the Constitutional Courts.[119] Why should ordinary courts refer a constitutional issue and wait for a year or more to have the infringement of protected rights declared by the CCMS since the same violation can be immediately acknowledged and repaired by directly applying the Charter and denying application to the conflicting national rule? There seems to be no reasonable motive to delay the full effectiveness of human rights. Nor would anybody doubt that the protection of rights over the years by the European courts has reached a comparable, and often higher,

117. The CJEU has recently acknowledged the direct horizontal effect of arts. 21, 31 §2 and 47 of the Charter: *See* Case C-414/16, Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V., 2018 EUR-Lex CELEX LEXIS 257, ¶ 76-82; Case C-68/17, IR v. JQ, 2019 EUR-Lex CELEX LEXIS 696, ¶¶ 69–71 (describing the self-sufficiency of Art. 21 in its ability to confer rights on individuals); Joined Cases C-569 & 570/16, Stadt Wuppertal v. Maria Elisabeth Bauer, 2018 EUR-Lex CELEX LEXIS 871, ¶ 89 (holding that article 31(2) of the Charter precluded national legislation regarding a deceased worker's unused paid annual leave being transferred to the worker's estate); Case C-684/16, Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v. Tetsuji Shimizu, 2018 EUR-Lex CELEX LEXIS 874, ¶ 29 (affording art. 31(2) of the Charter the same legal value as domestic treaties); *see also* A. Colombi Ciacchi, *The Direct Horizontal Effect of EU Fundamental Rights*, 15 EUR. CONST. L. REV. 294, 294 (2019) (commenting on recent CJEU judgments acknowledging the direct horizontal effect of articles 21, 31(2), and 47 of the Charter).

118. *See* Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 INT'L J. CONST. L. 461, 465 (2004) (finding that in every constitutional court except for Portugal, only the constitutional court can invalidate a law that contradicts the constitution, and that ordinary courts instead act as "policeman" using the reference procedure to address issues of constitutional law).

119. *See* Maartje de Visser, Note, *Juggling Centralized Constitutional Review and EU Primacy in the Domestic Enforcement of the Charter:* A. v. B., 52 COMMON MKT. L. REV. 1309, 1320 (2015) (discussing how the binding authority of constitutional decisions can create tensions in the preliminary reference process for ordinary courts where domestic law is inconsistent with EU law).

standard than the national courts.[120]

Against this background, it is easy to understand that the direct effect of the Charter is a potential threat for the legitimacy of the national constitutions and the centralized review carried out by the domestic Constitutional Courts.[121] Because of the more and more frequent interference and intersection of the "twins Bill of Rights" (European and national), the constitutions and the CCMS are at risk of being displaced if not totally dethroned.[122]

The prominent scholar Jan Komárek made it crystal clear. His take is that the CJEU has been elaborating a proper "doctrine of displacement" of the Constitutional Courts[123] to sideline them in the process of implementing human rights. Within the Union, the Luxembourg Court should become the highest, centralized jurisdiction for the protection of human rights, while the national Constitutional Courts would be confined to the function of safeguarding the procedural rules of the constitution and resolving conflicts of competence among the government branches and between central state and territorial autonomies.

Maybe Komárek's statement is an overstatement. However, if we look at the Italian legal order, this risk of displacement does not seem too unrealistic or exaggerated.

The figures concerning the issues of constitutionality addressed by the Court in the last two decades are impressive and give food for thought. In the year 2000, ordinary courts raised roughly 1,000 constitutional issues, with around 80% of them concerning

120. Since Solange II Judgment in 1986 the German Court recognized that at EU level the standard of protection of fundamental rights was equivalent to the national one. *See* E R. Lanier, *Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge*, 11 B.C. INT'L & COMP. L. REV. 4, 20–21 (1988) (noting that the German Constitutional Court declared the EU as the "lawful judge" because it was convinced that the EU could protect fundamental human rights to an adequate level).

121. *See generally supra* notes 114–117.

122. *See generally supra* notes 114–117.

123. *See* Jan Komárek, *The Place of Constitutional Courts in the E.U.*, 9 EUR. CONST. L. REV. 526, 529 (2013) (defining the "displacement doctrine" as the phenomenon in which national constitutional courts are removed from their pedestal through cooperation with the CJEU); *see also* Komárek, *National Constitutional Courts in the European Constitutional Democracy*, *supra* note 106, at 527.

fundamental rights. The Court handed down 592 judgments in total.[124] Ten years later, the questions of constitutionality raised had fallen to 700, 60% of them with fundamental rights at stake, and the Court ruled 376 judgments.[125] In the year 2018, the questions proposed went further down to around 400, 55% of them concerning liberties and rights and the Court issued 250 judgments in total.[126]

Quantity has nothing to do with quality, of course. Yet, it would be wrong to underestimate or neglect such a significant decrease. Equally wrong would be to disregard the fact that the direct applicability of the Charter is a turning point that has already stimulated and will probably further prompt the reaction of Constitutional Courts all across Europe. This is particularly true for Italy, where the vast majority of the constitutional issues raised before the ICC has to do with the prohibition of discrimination envisaged in Article 3 of the Constitution.[127] It is there up to the Constitutional Court only to declare that a national legal act is at odds with that principle and to eventually extend the same treatment of the preferred group to the disadvantaged group, by means of a judgment having general effect.[128] However, the CJEU has recognized direct horizontal effect to Article 21 of the Charter, which similarly, and indeed in a more comprehensive way than Article 3 of the Italian Constitution, codified the prohibition of discrimination.[129] As a consequence of this direct effect "a national

124. *See generally* Pietro Faraguna, *Report on the Italian Constitutional Court's Case Law*, 16 REVUS J. FOR CONST. THEORY AND PHIL. OF L. 127, 127 (2011) (discussing the recent developments in the I.C.C.'s case law).

125. *See generally id*.

126. Corte Cost., *Giurisprudenza costituzionale dell'Anno 2018 Dati Quantitativi di Analisi* [Report of the Constitutional Court - 2018] 1 (Mar. 21, 2019) (analyzing the quantitative data of the I.C.C. in 2018).

127. *See generally* CHIARA FAVILLI, REPORT ON MEASURES TO COMBAT DISCRIMINATION, EUROPEAN NETWORK OF LEGAL EXPERTS IN THE NON-DISCRIMINATION FIELD 5, (2014) (discussing how scholars are increasingly faced with discrimination cases).

128. *Cf. id.* ("case law is therefore made by decisions of the Constitutional Court . . . ").

129. *See* Case C-193/17, Cresco Investigation GmbH v. Markus Achatzi, 2019 EUR-Lex CELEX LEXIS 43, ¶ 76 (citing Egenberger, 2018 EUR-Lex CELEX LEXIS 257, ¶ 76) ("The prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law."). Worth being noticed is that in the Italian system – and generally in all legal systems conferring to

court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category."[130] All domestic courts are, therefore, allowed to both disapply the national rule conflicting with the prohibition of discrimination and to apply to the disadvantaged group the same treatment of the preferred group. Indeed, the Court pointed out that "disadvantaged persons must [. . .] be placed in the same positions as persons enjoying the advantage concerned," and "that obligation persists regardless of whether or not the national court has been granted competence under national law to do so."[131] Once ordinary courts are allowed by the CJEU to directly remove the alleged discrimination even if national law does not give them competence to do so, which ordinary court will not be tempted to skip the referral to the Constitutional Court?

In the light of what we have been discussing so far, one could be tempted to say that Constitutional Courts wanting to remain loyal to their role, meaning to preserve the centralized constitutional review of legislation, cannot avoid being enemies of E.U. law and of the Luxembourg Court; they are bound to be structurally Union-hostile. This would be a huge mistake, a rough explanation of a multifaceted, complex problem. Quite on the contrary, Constitutional Courts have played a key role in designing the European legal space. If we look at the past, at the history of the unprecedented European federalizing process, the CCMS have regulated the relations between the national and the European legal orders, and addressed the more systemic legal issues of European integration, to make it possible for their domestic systems to receive a body of law grounded on legal categories quite different from those forged, pursuant to the traditional paradigm of state sovereignty.[132]

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centralized constitutional Courts the scrutiny over violations of the principle of equality by legislative acts – such an extension of the scope of the national rule is forbidden to ordinary courts and must be ruled by the Constitutional Courts only. This is likely to cause new reasons for conflicts with the CJEU.

130. *Id.* ¶ 79.

131. Cresco, 2019 E.C.R. at ¶ 79 (quoting Case C-406/15, Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control, 2017 EUR-Lex CELEX LEXIS 198, ¶ 67).

132. *See generally* Ioannis Dimitrakopoulos, *Conflicts between EU Law and*

Moreover, they have significantly contributed to integration by injecting principles and values deeply rooted in the national traditions into E.U. law. In short, they have laid a cornerstone in the building of the common constitutional heritage of Europe.[133] It follows from the foregoing that the relationship between E.U. and national courts neither can be simply understood as a matter for cold or warm wars, as a tug-of-war, nor can be grasped in the coarse-grained contraposition: pro- or anti-Europe. If we put the recent decisions of the ICC (*Taricco* judgment but also the recent assessment of the priority of constitutional issue over the preliminary reference procedure)[134] within this general framework, we could cast doubt on the opinion that they show hostility towards Europe and determination to challenge the CJEU,[135] and we could consider (if not buy) the idea that the Italian Court was forced to enter the arena in order to avoid

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National Constitutional Law in the Field of Fundamental Rights, EUR. JUDICIAL TRAINING NETWORK, http://www.ejtn.eu/PageFiles/17318/DIMITRAKOPOULOS%20Conflicts%20between%20EU%20law%20and%20National%20Constitutional%20Law.pdf (last visited Apr. 20, 2020) (" . . . constitutional courts act in a double capacity, namely both as national and European judges, since they have to interpret and apply, at the same time, EU law and national constitutional law.").

133. This is evidently the case for the principles of subsidiarity and proportionality, which stem from the German legal tradition.

134. *See* Corte Cost., 7 novembre 2017, n. 269, 4 (It.) (ruling that when ruling on a case, courts are to apply a provision which they deem incompatible with rights enshrined both in the Constitution and in the Charter, the question of constitutionality must be raised first). The Judgment left many problems open, specifically whether the priority of the judicial review could curb the power for ordinary Courts to refer to the CJEU for a preliminary ruling. Following judgments have addressed the issue.); Corte. Cost., no. 20, at 8 (ruling that ordinary Courts are free to propose "any question they deem necessary"); Corte Cost., no. 63, at 4.3 (adding that the ordinary courts can propose questions even "at the end of the constitutional review carried out by the Court") (author's translation); Corte. Cost., n. 117, 2 (stating that the concurrence of different forms of judicial protection enhances the protection of fundamental rights and "by definition, excludes any foreclosure").

135. Lucia Serena Rossi, currently Judge of the European Court of Justice, raises the doubt that the ICC's judgment 269/2017 can be destructive. *See* Lucia Serena Rossi, La sentenza 269/2017 della Corte costituzionale italiana: *obiter* "creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea, FEDERALISMI.IT (Jan. 31, 2018), https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=35670 (suggesting that the Italian Court wanted to limit the inadmissible widespread control of a law's constitutionality).

being sidelined in implementing European human rights law.

C. DESTRUCTIVE AND CONSTRUCTIVE "JUDICIAL NATIONALISM"

Is it appropriate to see a reflection of the surge of political nationalism we are experiencing all across Europe in the above described general judicial tendency? And as it is often the case for political nationalism, would it be fair to speak of "judicial populism?"[136]

For sure, populism is nowadays the most synthetic formula to express the political *Zeitgeist*.[137] It is comforting– and it dispenses us from having to embark upon a subtler analysis– to discount this phenomenon as the by-product of a warmongering culture that seeks to reinstate ancient barriers and to label them as the loutish expressions of irrational fans of an already dispersed Sovereignty.[138] Yet, it is more productive to ask ourselves whether the re-localization of law and rights, which is a common feature of nationalism, can be interpreted also as a desperate attempt at "humanizing" globalization by bringing its social and environmental effects under closer democratic control.[139] And it would be more useful to try to understand if – in the European context – the return to national sovereignties can be read also as the resistance to a body of law, which affects growing areas of our lives without ensuring the social and political integration that is typical of national law, without a similar relation between power and accountability, and with political decisions being veiled in a mist of general opacity.

Before being disqualified, nationalism, even in its populist *nuance*,

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136. *See* Tănăsescu, *supra* note 35, § 3 (explaining that the relationship between populism and the judiciary can be explained as courts following populist models).

137. Matthijs Rooduijn, A Populist Zeitgeist? The Impact of Populism on Parties, Media and the Public in Western Europe (Mar. 21, 2013) (unpublished Ph.D. dissertation, University of Amsterdam) (on file at https://dare.uva.nl/search?identifier=2c94685c-b123-4326-a8a9-05574ce9d0a5).

138. *Cf.* Carlo Bastasin, *Secular Divergence: Explaining Nationalism in Europe*, BROOKINGS 9 (2019), https://www.brookings.edu/wp-content/uploads/2019/05/FP_20190516_secular_divergence_bastasin.pdf ("It was only when national divergence became visible, as a consequence of the mismanaged eurozone crisis between 2013 and 2014, that the pent up local frustration turned into a misleadingly sudden and brutal burst of nationalism.").

139. *See* Bastasin, *supra* note 138, at 9.

must be understood. The concepts are, indeed, multifaceted; they can convey differing content and be functional for conflicting purposes. Quoting Bojan Bugaric, populism is a Janus-faced phenomenon.[140]

In its illiberal face, it is rudely antithetical to constitutionalism. It constantly tends to push the unrestrained, unfettered "popular will" above all constitutional powers.[141] The counter-majoritarian checks of the system of government (the Judiciary, Independent Authorities, and the Constitutional Court) are under attack, and the separation of powers is affected, while the power to interpret the authentic popular will tends to be concentrated in the executive branch, if not in a single man.[142]

Populism displays, however, even a progressive, democratic face to the extent that it represents the underdogs of the political struggle; gives voice to the voiceless; tackles environmental and social externalities of globalization in the name of the "losers" of the global market; and expresses the popular needs so to strike a fair balance with the self-represented power of the economic-financial establishment.[143] Populism is not necessarily a bad word, then.

The same can be said for judicial nationalism (or, provocatively, "judicial populism") of the Constitutional Courts. I am perfectly aware that the term populism could sound rude or cacophonous when referred to the judicial function, as it is supposed to be neutral and

140. Bojan Bugaric, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 GER. L.J. 1, 1 (2019) (explaining that populism comes in many forms, from authoritarian populism to Democratic populism and anti-establishment populism). See also Mark V. Tushnet & Bojan Bugaric, Populism and Constitutionalism: An Essay on Definitions and Their Implications (April 21, 2020). Available at SSRN: https://ssrn.com/abstract=3581660 or http://dx.doi.org/10.2139/ssrn.3581660 (arguing that that the tension between populism as such and constitutionalism as such, though real, is significantly narrower than much commentary suggests).

141. *See* Bart Bonikowski, *Populism and Nationalism in a Comparative Perspective: A Scholarly Exchange*, 25 NATIONS & NATIONALISM 58, 64 (2019) (explaining that populism undermines constitutionalism by representing the popular will of the people, resulting in legitimacy as per the tenets of democracy).

142. *See* Joseph H.H. Weiler, *European Constitutionalism and Its Discontents*, 17 NW. J. OF INT'L L. & BUS. 354, 374 (1997).

143. *See* Anna M. Olsson, *Theorizing Regional Minority Nationalism*, *in* MULTIPLICITY OF NATIONALISM IN CONTEMPORARY EUROPE 115 (Ireneusz Pawel Karolewski & Andrzej Marcin Suszycki eds., 2009).

impermeable to politics and to external pressures. One is tempted to ask: how could judges be populist? How could they represent the current popular will or convey in their acts the popular needs since they have the duty to apply legal rules which display the deliberative outcomes of the only true representatives of the popular will?

At first sight, judicial populism would appear to be an oxymoron in literary terms. Yet, my view is that judicial function always encompasses a certain degree of discretion and a "political choice" between equally plausible interpretations. When it comes to interpretation and enforcement of the constitutional rules, this discretion increases, and the legal reasoning leaves room for moral and ideological pre-understandings.[144] Constitutional rules, especially when describing values and fundamental rights, are open-ended and permeable to cultural environment and emotional perceptions,[145] so their interpretation is naturally "political." Being political, it can be influenced by feelings and cultural trends prevailing in a given community in a given time. Hence, it may well be influenced by a populist "wave."

Having explained what I mean with judicial nationalism in its possible populism *nuance*, my take is that, like political nationalism, judicial nationalism can also convey two different forces: a sovereigntist, anti-pluralistic, and destructive force, and a progressive, constitutional, and conflictual but constructive one.[146]

Destructive nationalism seeks to return to the unconstrained state sovereignty, demands the restoration of the free and arbitrary use of the *Reason d'Etat*, unrestrained by legal controls, and rejects the

144. JOSEF ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG: RATIONALITÄTSGRUNDLAGEN RICHTERLICHER ENTSCHEIDUNGSPRAXIS (Athenäum Verlag, 1970).

145. NIKOLAI HARTMANN, INTRODUZIONE ALL'ONTOLOGIA CRITICA 149 (1972) ("the activity of "weighing" the values "is neither a 'knowledge' in the proper sense, nor an objective grasping where the grasped object remains far-away from the grasper. It is more like to be grasped. The approach is not contemplative, it is emotional, and what comes from the contact has an emotional explanation. It is to take a stand on something through an emotional move") (the translation is by the author).

146. Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must be Reversed*, 45 CORNELL INT'L L.J. 77, 106 (2012) (addressing nationality-based recusals).

judicial and institutional European oversight over the respect of the fundamental requirements of the *Rechtsstaatlichkeit* (or as it is meant to be for the E.Ct.H.R's case-law, the basic conditions of a "democratic society").[147] With more specific regard to the interplays between courts, judicial nationalism is destructive as far as it questions or threatens the doctrine of the primacy of E.U. law, casts into doubt power and competence of the CJEU, and does not go the way of loyal cooperation but rather that of disobedience.[148]

Somewhat differently, constructive judicial nationalism does not question the principle of primacy or the binding effect of Luxembourg Court's adjudication.[149] Even when expressed in judgments that stop the application of E.U. law within a national system, it is based on legal constraints that only Constitutional Courts are entitled to recognize and apply, without hindering or disregarding the jurisdiction of the European Court.[150] Hence, it is not aimed at delegitimizing the Luxembourg Court but rather at engaging it in a fruitful confrontation, inspired by loyal cooperation and Euro-friendliness (*Europafreundlichkeit*).[151]

How can we classify the above procedural strategies that the Constitutional Courts are putting in place to resist E.U. law? Are they

147. *See* J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107, 111 (1994) (emphasizing state sovereignty).

148. Gundega Mikelsone, *The Binding Force of the Case Law of the Court of Justice of the European Union*, 20 JURISPRUDENCE 470, 471–72 (2013) (asserting that CJEU judges have been criticized for judicial activism by creating judge-made laws).

149. Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MARKET L. REV. 629, 634 (2006) (presenting CJEU's implementation of EU law in deciding Member States' cases as constructive nationalism).

150. Ton van den Brink, *The Impact of E.U. Legislation on National Legal Systems: Towards a New Approach to EU – Member State Relations*, CAMBRIDGE Y.B. OF EUR. LEGAL STUD., 9, 11–12 (2017) (emphasizing the importance of mutual recognition).

151. The German Constitutional Court made reference to the notion of *Europafreundlichkeit*. *See* BVerfG, 2 BvR 2661/06, ¶¶ 98–100, July 6, 2010, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html; BVerfG, 2 BvR 2728/13, June 21, 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html.

signs of a destructive or rather of a constructive judicial nationalism?

1. The "unconventional" use of the preliminary ruling.

As for the "unconventional" use of the preliminary ruling in the *Taricco* case, it appears at first glance as destructive. More than a request for a preliminary reference, it seems a "threatening reference of appeal."[152] It sounds, indeed, like an ultimatum for the CJEU: "either you change your interpretation, or we will apply counter-limits and declare E.U. law inapplicable."[153] There is no way out. My view is slightly different. I do not think it would have been possible (or proper) for the ICC to identify within the constitutional principle of legality a more limited "supreme" core, which excludes the rules governing limitation periods. This would have been at odds with previous solid judgments of the Court itself and of the Supreme Cassation Court.[154] The ICC was, therefore, "bound" to assess that the application of the "*Taricco* rule" would have violated supreme principles of the constitution. Once declared, the Court could have directly triggered counter-limits and declared the CJEU's adjudication inapplicable. After all, since counter-limits have been qualified in the landmark decision no. 183/1973 as the ultimate external boundary to supremacy of E.U. law over all national rules (even constitutional rules), they have never been applied.[155] If *Taricco* had been the first case, no one would have said that the Italian Court was questioning or threatening the primacy of European law. Commentators would have

152. *Carrot and Stick*, *supra* note 16, at 5 (explaining the questions the ICC presented to the CJEU in the Taricco case and their difficulties).

153. *See id.* at 10 (outlining the procedural process).

154. Marco Bassini & Oreste Pollicino, *The Taricco Decision: A Last Attempt to Avoid a Clash Between EU Law and the Italian Constitution* 1–2 (Center for Global Constitutionalism, 2017), https://verfassungsblog.de/the-taricco-decision-a-last-attempt-to-avoid-a-clash-between-eu-law-and-the-italian-constitution/ ("The ICC is aware that the conflict between Article 325 TFEU and the principle of legality stems from the different understanding of the latter. Even if most of the Member States treat statute of limitation as a purely procedural matter not affecting the principle of legality, the existence of a pretty common view in this regard is binding neither on Italy nor on the European Union. In fact, the statute of limitation is completely unrelated to the scope of application of EU law. Accordingly, no harmonization of the relevant provisions is required and Member States are free to consider statute of limitation as a matter of procedure or substantive criminal law.").

155. *See Carrot and Stick*, *supra* note 16, at 13.

reasonably noted that the ICC for the first time in more than 60 years (since the 1957 Treaty of Rome establishing the European Economic Community) had considered a European rule inapplicable because it was in contrast with principles inherent in the very core of the Italian Constitution.[156] Without questioning the competence of the Luxembourg Court to interpret E.U. law (namely: Art. 325 TFEU), the ICC could have decided not to consider this interpretation binding in Italy, exercising its own undisputed competence in interpreting the constitution.[157]

Nevertheless, the Court chose to refer to the CJEU for a preliminary ruling.[158] Why? It was likely keen to show that it was (and is) interested in engaging in a constant dialogue with the Luxembourg Court so to help it build a common understanding on institutional principles, which Constitutional Courts have the duty to balance with fundamental rights when adjudicating. Even if by means of a "threat," the ICC sought, at last, to emphasize the fact that judicial review carried out at a national level is not completely devoted to protect the subjective interests of the applicant but has to safeguard institutional principles: sometimes at the expense of the rights at play[159] and sometimes – like in the *Taricco* case – at the expense of economic interests of the Union.[160] Is that destructive nationalism?

156. *See Carrot and Stick*, *supra* note 16, at 18 (asserting how the ICC would have had to "[go] back on its own word").

157. *See Carrot and Stick*, *supra* note 16, at 14–17 (outlining how ICC's argument, in an effort to temper the conflict, goes too far and seems "far-fetched").

158. *Carrot and Stick*, *supra* note 16, at 8.

159. *See, e.g.*, Corte Cost., 8 ottobre 2012, n. 230 (It.) (stating the conflict between the protection of rights and the need to respect institutional principles of the Constitution has been resolved with the sacrifice of the rights at issue). The claim of the applicant to benefit of a judge-made abolition of the crime for which he was convicted, was denied in order to preserve the principle of legality in criminal matters, which requires that the abolition of a crime (*abolitio criminis*) is referred to legislator, not to the Judiciary.

160. Case C-105/14, Italy v. Ivo Taricco et al., 2015 EUR-Lex CELEX LEXIS 555, ¶¶ 53, 63 (Sept. 8, 2015).

2. The refusal to give effect to decisions of the CJEU and the interpretation of the law of accession to limit the direct effect of E.U. law.

The statement of the Danish Court in the *Ajos* case, that direct effect was not to be recognized by E.U. law because it was not foreseeable when the law of accession was enacted, looks like a tough legal argument: a sign of destructive judicial nationalism.[161] Contrary to the preliminary ruling of the Luxembourg Court, the SCDK could have said that the horizontal application of the principle of age non-discrimination affects the principles of legal certainty and protection of legitimate expectations.[162] Therefore, it had to be balanced with those principles. It could have stated even that the latter principles had to take precedence, in the case at play, over the former, as a result of the balancing test among constitutional principles which is up to the national courts to strike.[163] No one could have challenged the power of the SCDK to weigh the conflicting constitutional principles at issue differently. This would have been a fair stance, respectful of the role and jurisdiction of the CJEU.

But the Danish Court did not decide to go this way.[164] On the contrary, it denied the possibility for the unwritten general principle of non-discrimination on grounds of age to be directly applicable, deliberately neglecting the fact that the CJEU had consistently held this principle as having horizontal direct effect and that the same principle – whose source the CJEU has found in international instruments and in the constitutional traditions common to the

161. Mikael Rask Madsen et al., *Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS*, VERFASSUNGSBLOG (Jan. 30, 2017), https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/ (addressing "disintegration").

162. *See* Madsen et al., at 3. (discussing the views of the SCDK).

163. *See generally id.* at 1 (outlining the two boundaries that the SCDK used on the applicability of the CJEU rulings in Denmark).

164. Helle Krunke & Sune Klinge, *The Danish AJOS Case: The Missing Case from Maastricht and Lisbon*, 3 EUR. PAPERS 157, 161 (2018), http://www.europeanpapers.eu/en/e-journal/danish-ajos-case-missing-case-from-maastricht-and-lisbon ("Consequently, the DSC stated that it is for the Court of Justice to rule on whether Union law had direct effect, and takes precedence over a conflicting national provision, including in disputes between individuals, but the effect of this decision is for the national courts to decide.").

Member States – is now explicitly enshrined in Article 21 of the Charter, which also has horizontal direct effect.[165] According to the SCDK, the crucial factor for hindering the direct application of the principle of non-discrimination in Denmark is the fact that the national Parliament made no reference to CJEU's *Mangold* and *Kücükdeveci* judgments when transposing the Directive.[166] Such an extremely "political" legal argument (the investigation of the subjective "Will of Parliament" is open to broad manipulation), displays the ruling of the SCDK as a deliberate challenge to the consistent adjudication of the Luxembourg Court and allows us even to depict it as a proper act of disobedience.[167] Indeed, the Danish Court declined to give effect to a preliminary ruling which it asked for as referring court.[168] Thus, doubt was cast on the exclusive power of the CJEU to interpret E.U. law, which implies declaring what is the source of the general principles of E.U. law and which E.U. legal acts have to be given direct applicability.

3. The priority of the constitutional issue over the preliminary ruling procedure.

The purposes of the courts, which assessed the constitutional priority, are quite clear. They want to speak first and have the "first word" in dialogues with the CJEU with regard to interpretation and enforcement of fundamental rights.[169] At the same time, they seek to centralize the preliminary rulings issued by ordinary courts in order to engage more frequently in a direct interplay with the European Court and avoid being bypassed by ordinary judges when cases of high constitutional interest are at stake.[170] This strategy is difficult to

165. *See id.* at 162 (explaining the DSC's judgment which noted that the provisions in the Charter could not be horizontally invoked).

166. *See id.* at 161–62 (analyzing the court's reasoning).

167. *See id.* at 179 (stating "the DSC chose a path that could be interpreted as disobedient").

168. *See id.* at 161.

169. Tatiana Guarnier & Elisabetta Lamarque, *Interpretation in Conformity with E.U. Law in the Italian Legal System*, *in* THE EFFECTIVENESS AND APPLICATION OF EU AND EEA LAW IN NATIONAL COURT: PRINCIPLES OF CONSISTENT INTERPRETATION 177, 178 (Christian N.K. Franklin ed., 2018) (explaining the map the ItCC created for decisions of national proceeding involving fundamental rights).

170. *See* Guarnier & Lamarque, *supra* note 169, at 185 (comparing the

classify.

From an optimistic-constructive perspective, while claiming for itself the "right to speak first," the courts may seek to fuel and enhance the dialogue with the Luxembourg Court, even centralizing the referrals for preliminary rulings.[171] More frequent appeals to the CJEU by the CCMS could help meld and preemptively solve potential conflicts and truly may limit the application of the counter-limits doctrine to very exceptional cases. The *Taricco* case provides a good example for that.[172]

However, under a different, less optimistic point of view, the practical effects of the constitutional priority cannot be welcomed by the CJEU (and indeed they have not been!).[173] In fact, the *priorité constitutionnelle* delays and reduces the referrals of ordinary courts to the CJEU, since some of them end up being absorbed by the previous constitutional judicial review, and hampers the direct effect of the Charter, discouraging ordinary courts from directly dis-applying national rules conflicting with the Charter, thus delaying the effectiveness of human rights' protection.[174]

4. The overlap of the notion of national identity with that of constitutional identity.

The most deceitful legal argument of destructive judicial nationalism is the overlap of the notion of national identity with that of constitutional identity with the aim of resisting E.U. law and the CJEU's rulings.

National identity, to which reference is made in section 2 of TEU Article 4, is meant to prevent E.U. legal acts from going beyond their scope, pursuant to principles of conferral, subsidiarity, and

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interactions of the court to a good cop/bad cop scheme).

171. Guarnier & Lamarque, *supra* note 169, at 190 (explaining the right to speak first concept).

172. Case C-105/14, Italy v. Ivo Taricco et al., 2015 EUR-Lex CELEX LEXIS 555, ¶ 52 (Sept. 8, 2015).

173. *See* Case C-322/16, Global Starnet Ltd. v. Ministero dell'Economia e delle Finanze, 2017 EUR-Lex CELEX LEXIS 985 (Dec. 20, 2017) (noting the CJEU immediately replying to the ICC's judgment on constitutional priority).

174. *See id.* ¶ 21.

proportionality, per section 1 of TEU Article 5.[175] The limit to the integration process is viewed as being internal to the E.U. legal system;[176] it is therefore up to the CJEU in interpreting E.U. law to say what can be included in the legal concept and what cannot, having regard to constitutional traditions common to the member states.[177]

Constitutional identity should be intended as a more limited concept. In the words of the German *Bundesverfassungsgericht*,

175. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union arts. 4 § 2, 5 § 1, 2012 O.J. (C326) [hereinafter TEU].

176. *See* Meinhard Hilf, *Europäische Union und Nationale*, *in* GRABITZ: GEDÄCHTNISSCHRIFT FÜR EBERHARD GRABITZ 157, 162, 170 (Albrecht Randelzhofer et al., eds., 1995) (elaborating upon the thesis of the internal limit). *But see* Albert Bleckmann, *Die Wahrung der "nationalen Identitat" im Unions-Vertrag*, 52 JURISTENZEITUNG 265, 267 (1997) (holding the opposite view that the national identity acts as an external limit to the integration). *But see also* Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1436–37 (2011) (holding an intermediate thesis on the aforementioned topic).

177. In the case law of the CJEU, the national identity clause has been made reference to as encompassing the following notions: the principle of impartiality of the public administration (Case C-3/10, Franco Affatato v. Azienda Sanitaria Provinciale di Cosenza, 2010 EUR-Lex CELEX LEXIS 574, ¶ 46 (Oct. 1, 2010)); the republican form state (Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, 2010 E.C.R. I-13718, I-13742); the principle of independence and impartiality of the judiciary (Case C-393/10, Dermod Patrick O'Brien v. Ministry of Justice, 2012 EUR-Lex CELEX LEXIS 110, ¶¶ 20–21); the safeguard of the national language (Case C-391/09, Malgozata Runevic-Vardyn and Lukasz Pawel Wardyn v. Vilniaus miesto savivaldybes admnistracija, 2011 E.C.R. I-3818, I-3830, I-3843, I-3846); the protection of history, culture and traditions of a Member State (Case C-51/08, European Commission v. Grand Duchy of Luxembourg, 2011 E.C.R. I-4235, I-4255); the division of competences between either federal and national or state and regional level (Case C-156/13, Digibet Ltd. and Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG, 2014 EUR-Lex CELEX LEXIS 1756, ¶ 34 (June 12, 2014)); the way to recognize the capacity for legal carreer (Joined Cases C-58 & 59/13, Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell'Ordine degli Avvocati di Macerata, 2014 EUR-Lex CELEX LEXIS 2088, ¶ 19 (July 17, 2014)); the choices concerning same-sex marriage (Case C-673/16, Relu Adrian Coman et al v. Inspectoratul General pentru Imigrari et al, 2018 EUR-Lex CELEX LEXIS 385, ¶ 35 (June 5, 2018)). *E.g.*, Michele Graziadei & Riccardo De Caria, *The "Constitutional Traditions Common to the Member States" in the Case-Law of the European Court of Justice: Judicial Dialogue at Its Finest*, 4 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 949, 951, 962–63 (2017) (showing the different ways that the Luxembourg Court references the CCTS).

constitutional identity protects "the ability of a constitutional state to democratically shape itself."[178] It has to do with democratic institutions and processes; it is not to refer to legally un-seizable notions like culture, traditions, and attitudes.[179] Instead, it should be designed, having regard to long standing values and principles deeply rooted in constitutional history and legal culture, and possibly drafted in written constitutional rules. To be part of the constitutional identity in the proper sense of the word, a legal rule or principle should be broadly recognized by the different actors of what the prominent German legal scholar Peter Häberle calls "open society of interpreters of the Constitution:" administrative bodies and independent agencies, scholarly literature, and the highest courts.[180] At the top of them is the Constitutional Court.

As a result, the notion should leave less room for discretionary or bizarre interpretation. When Constitutional Courts equate national and "constitutional" identity, they seem to claim the power to define the boundaries of E.U. legal acts for themselves, without referring to the CJEU for a preliminary ruling as it would be appropriate, if not due.[181] They seem to claim the review of E.U. law in the light of domestic "constitutional" identities, this way making the applicability of E.U. rules conditional upon their judgments.[182] If the notion of identity was found in traditions, customs, and ethno-cultural attitudes, this would

178. BVerfG, 2 BvR 182/09, June 30, 2009, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

179. *See id.* ¶ 251.

180. Peter Haberle, *Die offene Gesellschaft der Verfassunsinterpreten: Ein Beitrag zur pluralistischen und "prozessualen" Verfassungsinterpretation*, 30 JURISTENZEITUNG 297, 297, 299 (1975).

181. *See* BVerfG, 2 BvR 182/09, June 30, 2009 (the German Court stating that national identity, protected by art. 4, § 2 TEU is 'external' to the EU integration process, hence it falls on the member states to define its contents and preserve it). *But see* Sayn-Wittgenstein, 2010 E.C.R. at I-13745 (the Luxembourg Court stating that identity poses an 'internal' limitation to the integration process, and its contents should be defined by the community's institutions, and ultimately by the European Court itself).

182. Sayn-Wittgenstein, 2010 E.C.R. at I-13721, I-13729-30 (noting that the court considered, in the main proceeding, the German applicant could rely on Article 21 of the TFEU).

be a highly discretionary and disruptive power.[183] Indeed, the judgments of the CCMS would rely upon elusive and vague notions that are open to political understandings, rather than on written constitutional rules, as interpreted and filled with content by previous consistent judgments of the highest courts.[184]

Examples of that dangerous use of the national identity argument can be found in the current Polish illiberal drift.[185] The Polish Constitutional Tribunal (PCT) first used the concept in its 2010 decision on the Treaty of Lisbon.[186] In that case the Court, while affirming the limit for state institutions on conferral of competences to the Union, showed also a cooperative posture, "sending smoke

183. Kriszta Kovacs, *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*, 18 GERMAN L.J. 1703, 1709–10, 1719 (2017) (addressing risks stemming from an ethno-cultural view of the notion).

184. *See* Aida Torres Pérez, *Constitutional Identity and Fundamental Rights: The Intersection Between Articles 4(2) TEU and 53 Charter*, *in* NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 141, 145–46 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013) (outlining a complete overview of the concept of national identity within the context of European integration); *see also* Federico Fabbrini & András Sajó, *The Dangers of Constitutional Identity*, 25 EUR. L.J. 457, 468–69 (2019) (stating "too many things of a restricted text may be turned into constitutional identity"); Pietro Faraguna, *Constitutional Identity in the EU – A Shield or a Sword?*, 18 GERMAN L.J. 1617, 1619–20 (2017) (introducing the identity clause); Lustig & Weiler, *supra* note 29, at 358 (providing a general criticism to reference of the Constitutional Court to the underspecified notion of "identity" and asserting that it "in some ways detaches protection of human rights from its classical liberal moorings (individual versus state/nation/public/authority) and reconfigures it, at one ant the same time, as an expression of the identity of state and nation producing a complicated tension not easily resolved.").

185. *See, e.g.*, Anna Sledzinska-Simon & Michal Ziolkowski, *Constitutional Identity of Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?* 12 (July 5, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997407 (explaining the PCT's review of the compatibility of secondary EU law with the standard of protection under the Polish Constitution); Michal Ziolkowski & Barbara Grabowska-Moroz, *Enforcement of EU Values and the Tyranny of National Identity – Polish Examples and Excuses*, VERFASSUNGSBLOG (Nov. 26, 2019), https://verfassungsblog.de/enforcement-of-eu-values-and-the-tyranny-of-national-identity-polish-examples-and-excuses/ (asserting how the Polish cannot use the national identity argument without seeming hypocritical).

186. *See* Wyrok [judgment] TK [Polish Constitutional Tribunal], z [of] Nov. 24, 2010, K 32/09 (OTK ZU 2010, z. 9A, poz. 108).

signals" to the CJEU.[187] Indeed, the limit for conferral of competences at a national level, stemming from the constitution (and from constitutional identity), did not affect the power of the Luxembourg Court to guarantee and implement the primacy of E.U. law, limiting the E.U. legislator to the extent that its acts are not compatible with national identity.[188]

Tone and posture of the PCT began to change in the decision regarding the compatibility of secondary E.U. law with the constitutional right to a fair trial.[189] The expression "axiological identity" between European and Polish system used in the Treaty of Lisbon judgment was replaced by that of "axiological convergence of Polish and E.U. law."[190] Constitutional identity and national identity were no longer seen as two points on the same straight line but as two distinct lines, albeit converging.[191] As a result, in PCT's view, there is no need for "equivalence of legal solutions in the two legal systems."[192]

This misalignment has been promptly recognized in following more recent judgments on same-sex marriage[193] and implementation of E.U Directives,[194] in which a vision of national identity rooted on the traditional idea of sovereignty as separateness and self-reference put the basis for affirming that the issues at play did not require cooperating on the E.U. level, nor asking the Luxembourg Court for its opinion.[195] So national identity "has turned out to be a device of

187. *See* Krystyna Kowalik-Banczyk, *Sending Smoke Signals to Luxembourg – the Polish Constitutional Tribunal in a Dialogue with the ECJ*, *in* CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS AND PROCEDURE 267, 275 (Monica Claes et al. eds., 2012) ("The motion of the Senators questioned, in essence, the powers of the EU organs to extend *in blanco* the competences of the EU.").

188. *See* Kowalik-Banczyk, supra note 187, at 274–75 (drawing from the analysis of the Lisbon judgment).

189. *See* Wyrok [judgment] TK [Polish Constitutional Tribunal], z [of] Nov. 16, 2011, SK 45/09 (OTK ZU 2011, z. 9A, poz. 93).

190. *Id.* ¶ 2.10.

191. *Id.* ¶ 2.5.

192. *Id.* ¶ 6.2.

193. *See* Wyrok [judgment] TK [Polish Constitutional Tribunal], z [of] Apr. 12, 2011, SK 62/08 (OTK ZU 2011, nr 3/A/2011, poz. 22).

194. *See* Wyrok [judgment] TK [Polish Constitutional Tribunal], z [of] Mar. 11, 2015, P 4/14 (OTK ZU 2015, nr 3A, poz. 30).

195. *See id.*

resistance rather than cooperation between the Polish and E.U. legal orders."[196]

IV. CONCLUSION

Judicial nationalism can represent a positive stimulus when it is utilized to spot out the inadequacies of the European legal framework to help save it, rather than to push back against it or sink it.

In that case, it aims, on one hand, at restoring the connection between rights and political process to endorse a bottom-up creation of E.U. law and overcoming the democratic deficit of the Union; while on the other, it seeks to use the constitutional traditions as building blocks of a new understanding of E.U. human rights that allows for a better balance between libertarian and communitarian readings.[197] In fact, in the caselaw of the European courts (CJEU and E.Ct.H.R.), fundamental rights appear sometimes to refer to a virtual, not real political community.[198] They are reduced to the individual dimension of the applicant, taken out of his social context, his belongings, his responsibility towards an active partaking to a political community.[199] This vision irreparably severs rights from the deliberative process of democracy and from their historical, concrete, and hence political dimension. Constructive judicial review of E.U. law, when aimed at protecting the legal values of democratic territoriality, could ensure the political dimension of fundamental rights, for which what Takis Tridimas noted for E.U. general principles should hold true; they are like "*enfant terrible*s" who "are children of national law but are brought up by the Court" since they "are extended, narrowed, restated,

196. Sledzinska-Simon & Ziolkowski, *supra* note 185, at 21.

197. *See How to Strengthen Democracy, the Rule of Law and Fundamental Rights – Tools Discussed in a Presidency Conference*, EUROPEAN UNION MINISTRY OF JUSTICE, ¶ 4 (Sept. 11, 2019), https://eu2019.fi/en/article/-/asset_publisher/how-to-strengthen-democracy-the-rule-of-law-and-fundamental-rights-ideas-emerging-from-a-presidency- . . . 2/5 (emphasizing the need for respecting legal principles in ensuring effective judicial protection).

198. *See id.* ¶¶ 1, 5–6 ("Democracy, the rule of law and fundamental rights are interlinked, interdependent and mutually reinforcing. One cannot exist without the others.").

199. *See id.* ¶¶ 3, 8 (emphasizing the importance of countering disinformation without endangering the freedoms and rights of citizens).

and transformed by a creative and eclectic judicial process."[200]

Against the above background, the current resistances to Luxembourg rulings, which are at present perceived as a blunt halt to the E.U. integration process, could deserve a more balanced assessment in the long run. If intended to stimulate and sometimes force the CJEU not to disregard the political roots and the multifaceted dimension of fundamental rights in their balance with social values, they could help enhance – not jeopardize – the legitimacy of the CJEU's judgments. Hence, the apparent paradox that the constitutional review of E.U. law is experiencing is considered in the historical perspective of the more than sixty-year long history of human rights protection in Europe: a paradox to which is worth devoting a final remark.

Although it refers to a completely different topic, a well-known page from Carl Schmitt's *Begriff des Politischen* appears to match perfectly to the parabola of human rights in Europe.[201] Quoting it *in extenso*, "European humanity is constantly migrating from a battlefield to a neutral terrain, and the neutral terrain, as soon as it is conquered, is immediately transformed, once again, into a battlefield, and it becomes necessary to seek new neutral grounds."[202] Over the 20th century, European public law scholars have found the most refined institutional form for neutralizing the political struggle in the centralized review of legislation by Constitutional Courts.[203] After the enactment of the two converging European Bills of Rights (the ECHR and the CFREU), this "neutralizing function" started to be shifted, at first in a feeble way, but more thoroughly recently in the supranational Courts of Rights.[204] These courts deliver the function of creating and protecting rights without acting "under political constraints" to the

200. TAKIS TRIDIMAS, GENERAL PRINCIPLES OF LAW 1, 6 (2006).

201. *See* CARL SCHMITT, DER BEGRIFF DES POLITISCHEN 22, 34 (1933).

202. SCHMITT, *supra* note 201, at 22, 34.

203. *See* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y REV. 117, 147, 150–51 (2001) (explaining how the counter actions of the upper chamber effectively neutralized the efforts of the State Duma).

204. *See* Epstein et al., *supra* note 203, at 142, 147 (referring to the shift as "tolerance intervals").

same extent of national courts.[205] In effect, the steady, fruitful dialogue with political actors, which is so important for the Constitutional Courts at the national level, appears quite absent or anyway less intense at the European level.

The European Courts, therefore, can really be "isles of reason" because they are not constrained by any political reasons.[206] From this point of view, they seem to truly represent, in its pure form, the ideal archetype of a neutral jurisdiction, unbound from any systemic or political restraints: a very attractive and fascinating perspective, apparently. Only a few seem to draw attention to the risk that the weakness of a real dialogue with political actors and democratic deliberative processes makes the rights live in a too abstract dimension, without the systemic restraints which enable a more reasonable balance between individual rights and social duties. Within the changed context of the supranational jurisdiction of human rights, it is up to the domestic Constitutional Courts to advocate before the European courts' expectations of national political process and institutional constraints stemming from it.

In the larger scenario of the multilevel system of human rights protection, Constitutional Courts, originally conceived as a-political institutions designed for "neutralizing" the outcomes of the political struggle and curbing the majority principle, seem called upon to re-politicize judge-made European Law. Sometimes, it appears indeed detached from a productive dialogue with political actors and a real public opinion and consequently "depoliticized."[207] Ultimately, the a-political Constitutional Courts, keepers of the rights linked to territories where they are placed, with their specific historical and cultural identity, could end up acting as agents of the political nature of E.U. law and help constitutionalize E.U. legal order.[208]

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205. Epstein et al., *supra* note 203, at 125–26 (comparing courts in evolved democracies to courts in new democracies).

206. *See* FRANCO MODUGNO, L'INVALIDITA DELLA LEGGE 1, 11 (1970) (utilizing the expression "isle of reason" ("isola della ragione")).

207. *See, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM, 171 (2004).

208. *See* Martin Belov, *The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the E.U. Order and Europeanization of the Legal Orders of E.U. Member States*, 9 PERSPECTIVES ON FEDERALISM 72, 76, 80, 82

V. POST SCRIPTUM

On May 5, 2020, the German Constitutional Tribunal ruled a landmark decision concerning the legitimacy of the Public Sector Purchase Programme (PSPP), implemented by the European Central Bank (ECB) as a part of the quantitative easing aimed at stabilizing the Euro currency. The CJEU— to which the GCT had lodged a preliminary reference in case OMT/*Gauweiler* [209]— stated that this program did not violate the prohibition of monetary financing (Art. 123, TFEU).[210] Despite that, the GCT held that the Luxembourg Court exercised too soft a proportionality review on the ECB's decisions at stake, and gave an "arbitrary" interpretation of the Treaties.[211] As a result, the judgment was found as "rendered ultra vires," and declared as non-binding in Germany.

What worries this author most is the constitutional review over E.U. law carried out by the GCT. In all the variations of this review, compliance with Rule of Law, and respect for the corresponding areas of jurisdictions of the conflicting courts had always remained firm. Even as Constitutional Courts triggered a counter-limit, the inefficacy of E.U. legal acts did not derive from their intrinsic defect, but stemmed from a contrast with principles enshrined in the national constitution, which falls to the domestic courts to ultimately interpret. *Rex in regno suo est imperator* (the king in his Kingdom is emperor) was the unwritten, yet commonly accepted rule in the interplay between Courts, so far.

With the ECB's ruling, the GCT now holds that the CJEU exceeds its mandate when the interpretation of the Treaties "is not comprehensible"[212] and should therefore "be considered arbitrary from

(2017) (focusing on the contribution of constitutional identity for the further constitutionalization of the Union).

209. See Case C-62/14, Gauweiler et al. v. Deutscher Bundestag, 2015 EUR-Lex CELEX LEXIS 400, (June 16, 2015).

210. See Case C-493/17, Weiss et al., 2018 EUR-Lex CELEX LEXIS 264 (Dec. 11, 2018).

211. See BVerfG, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, ¶¶ 112-118, May 5, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html.

212. BVerfG, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16,

an objective perspective,"[213] concluding that in these cases the decisions of the CJEU are no longer covered in Article 19 TEU and therefore "lacks the minimum democratic legitimacy necessary"[214] to be effective in the Germany. The GCT checks the reasonableness and internal consistency of the rulings of the Luxembourg Court, claiming the last word on the same interpretation of the Treaties, which it can assess as arbitrary "from an objective perspective. . ."[215]

In short, it represents itself as a jurisdiction of appeal with respect to the CJEU. It does not dispute the power of the Luxembourg Court to judge on E.U. law, but believes that it could censure the way in which this power is exercised, denouncing the faulty logic of reasoning and the wrong interpretation of E.U. law. Thereby deducing, with more than dubious circular logic, the defect of the power to judge, consequential to having acted ultra vires (beyond the scope). The attack on the CJEU, on the principle of referral in whose name the GCT claims to act, and ultimately on the primacy of E.U. law, could not be harsher, or more worrying. In all likelihood it marks a new, more advanced challenge to the CJEU, fueling the above described trend among the Constitutional Courts to tighten the scrutiny over E.U. law, up to compromising primacy and direct effect— but only time will tell.

¶ 118, May 5, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html (quoting from the English version of the Decision).

213. BVerfG, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, ¶ 112, May 5, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html (quoting from the English version of the Decision).

214. BVerfG, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, ¶ 113, May 5, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html (quoting from the English version of the Decision).

215. BVerfG, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, ¶ 113, May 5, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html (quoting from the English version of the Decision).