DEALING WITH EU LAW

THE ROLE OF THE NATIONAL COURTS IN INTERPRETATION AND APPLICATION OF EUROPEAN UNION LAW

MIHAI ȘANDRU
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(eds.)

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List of abbreviations and acronyms

AG	Advocate General
BVerfG	Federal Constitutional Court of Germany
CC	constitutional court
CEE	Central and Eastern Europe
CJEU	Court of Justice of the European Union
(the) Charter	Charter of Fundamental Rights of the European Union
CML Rev	Common Market Law Review
EC	Treaty establishing the European Community
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEC	Treaty establishing the European Economic Community
ELJ	European Law Journal
ELR	European Law Review
EU	Treaty on European Union (prior to the Lisbon Treaty)
EU-15	European Union (15 Members)
EU-27	European Union (27 Members)
EuConst	European Constitutional Law Review
ff	(and the) following (pages)
ibid	ibidem

MS	Member State(s)
nyr	not yet reported
OJ	Official Journal of the European Union
PR	preliminary reference
RCC	Romanian Constitutional Court
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union

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Introduction

1. Dealing with EU law or about meeting different legal orders

So much has been said (and written) about the role that judges play in the EU legal order. Suffice is to remember here certain appellations that national courts (or judges) have received during the years of EC/EU law: for Judge David Edward, the national courts are the "Powerhouse of Community Law";[1] for Professor Monica Claes, these courts have a mandate derived from the European Constitution;[2] or for Michal Bobek, the image created by the case law of the Court of Justice for the national judge is that of a "European judicial Hercules".[3]

This new book aims to provide some insights on recent trends and patters in judicial dialogue between the Court of Justice of the European Union (hereinafter "CJEU") and national courts (Constitutional Courts included).

2. Towards a turning point in the multilevel constitutional system of the EU?

It is possible to identify some new trends that might lead to a fundamental turning point in the multilevel constitutional system of the EU.

[1] The title of the Mackenzie Stuart Lecture for 2002-2003 delivered by David Edward on 18 October 2002 - *National Courts - the Powerhouse of Community Law, published in The Cambridge Yearbook of European Legal Studies*, Vol. 5, 2002-2003, John Bell, Alan Dashwood, John Spencer and Angela Ward (eds.), Oxford and Portland-Oregon: Hart Publishing, 2004, 1-13.

[2] Monica Claes, *The National Courts' Mandate in the European Constitution*, Oxford and Portland, Oregon: Hart Publishing, 2006.

[3] Michal Bobek, On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't Do as I Say'?, in C. Barnard (ed.), *Cambridge Yearbook of European of Legal Studies*, Vol. 10 (2007-2008), Oxford and Portland-Oregon: Hart Publishing, 2008, 1-34.

A first trend is represented by the contradictory developments in the relationship between national Constitutional Court and the CJEU.

On 26 February 2013 the CJEU decided *Melloni*,[4] a very important case triggered by a preliminary question raised by the Spanish Constitutional Court.

This preliminary question had gathered the attention of scholars for at least two reasons: first of all, it was raised by the Spanish Constitutional Court, which for the first time had decided to use Article 267 TFEU.

In this sense *Melloni* represented the latest link of a longer chain of preliminary questions raised by a national Constitutional Court (as we know, The Constitutional Courts of Belgium,[5] Austria,[6] Lithuania,[7] Italy[8] and Spain,[9] and lastly France,[10] have agreed to make a preliminary reference to the CJEU).

[4] Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, nyr, available at www.curia.europa.eu

[5] Among others see: *Cour d'Arbitrage*, 19 February 1997, no. 6/97, available at www.arbitrage.be/fr/common/home.html.

[6] Among others see: *VfGH*, 10 March 1999, B 2251/97, B 2594/97, available at www.vfgh.gv.at/cms/vfgh-site.

[7] *Lietuvos Respublikos Konstitucinis Teismas*, decision of 8 May 2007, available at www.lrkt.lt/dokumentai/2007/d070508.htm.

[8] *Corte Costituzionale*, sentenza no. 102/2008 and ordinanza no. 103/2008, available at www.cortecostituzionale.it. The preliminary reference was raised during *principaliter* proceedings.

[9] STC Auto 86/2011, http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=10386.

[10] Conseil Constitutionnel, Décision n° 2013-314P QPC of 4 April 2013, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2013/2013-314p-qpc/decision-n-2013-314p-qpc-du-04-avril-2013.136588.html.

As we know in that case CJEU refused a minimalist interpretation of Article 53 of the Charter of Fundamental Rights of the European Union (hereinafter "Charter"), by saying that the "*Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution*" (paragraph 56, emphasis added) and then added at paragraph 60: "*It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised*" (emphasis added).

This was seen as a return to an absolute conception of primacy[11] and in general it sounded very tough.

More in general, this case gives an idea of the very difficult role played by national Constitutional Courts and of the part relativisation, for certain aspects, of their mandate.

This decision is in fact in line with other recent rulings of the CJEU whereby the Luxembourg Court did not show great deference towards national Constitutional Courts; reference should be made to the *Filipiak*,[12] *Winner Wetten*[13] and *Kri□an*[14] Cases.

[11] To quote the formula used, also recently, by some scholars: A. von Bogdandy and S. Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty', CML Rev, Vol 48, No 5, 2011, pp. 1417-53.

[12] Case C-314/08, *Filipiak* [2009] ECR I-11049.

[13] Case C-409/06, *Winner Wetten* [2010] ECR I-8015.

[14] Case C-416/10, *Križan & Others v Slovenská inšpekcia životného prostredia*, nyr, available at www.curia.europa.eu.

Another tough case is *Landtovà*,[15] whereby the Luxembourg Court had challenged the case law of the Czech Constitutional Court (*Ústavní soud*) by concluding that "*the Ústavní soud judgment involves a direct discrimination based on nationality and indirect discrimination based on nationality, as a result of the residence test, against those who have made use of their freedom of movement"* (paragraph 49, emphasis added).

As we know the Czech Constitutional Court replied to this decision.[16] In this decision the Czech Constitutional Court surprisingly decided to apply the *ultra vires* control (devised by the German Constitutional Court) by declaring a previous decision of the CJEU *ultra vires* and going beyond the menace sent by the German Constitutional Court in the Lisbon decision[17] (and mitigated in the *Honeywell* Case[18]).

As said, we see a little contradiction here: while the CJEU is delivering "muscular" judgments (another tough judgment for Constitutional Courts is *Melki*[19]) a growing number of

[15] Case C-399/09, *Landtová*, [2011] ECR I-5573.

[16] Judgment of 31 January, Pl. ÚS 5/12, *Slovak Pensions XVII*. The English translation is available at the CCC's website, http://www.usoud.cz/view/6342.

[17] Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, available at www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

[18] Case 2 BvR 2261/06, Decision of 26 August 2010.

[19] "The Court has concluded therefrom that the existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice (see, to that effect, Rheinmühlen-Düsseldorf, paragraphs 4 and 5, and Cartesio, paragraph 94). The lower court must be free, in particular if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (Case C-378/08 ERG and Others [2010] ECR I-0000, paragraph 32)" (paragraph 42), Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, [2010] ECR I-5667.

Constitutional Courts have been progressively accepting the cooperative mechanism set up by Article 267 TFEU.

The reasons behind this *revirement* might be different: for instance, Constitutional Courts could have been influenced by what Ruggeri[20] called the "Europeanization of counter-limits" and the consequent post-*Omega*[21] phase, on the one hand, and by the sword represented by the *Köbler*[22] doctrine, on the other hand.

In any case, it seems that the progressive acceptance of Article 267 TFEU by Constitutional Courts cannot help - *per se* - in overcoming these tensions between national guardians and the CJEU but this conclusion is not necessarily pessimistic.

In fact constitutional conflicts have always been crucial in the history of EU law, as they have worked as an engine to produce fundamental transformations.

Look at the *Solange* Case[23] for instance: a potential crisis of the European process which actually served as a turning point, opening a new season in the case law of the CJEU and the Constitutional Courts.

[20] A Ruggeri, "'Tradizioni costituzionali comuni' e 'controlimiti', tra teoria delle fonti e teoria dell' interpretazione" [2003] *Diritto pubblico comparato ed Europeo* 102.

[21] Case C-36/02 *Omega* [2004] ECR I-9609, paras 34-35, 39-41. On *Omega*, see Alberto Alemanno, «A la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur. Quelques réflexions à propos des arrêts Schmidberger et Omega» [2004] *Revue du droit de l'Union européenne* 4, p. 709.

[22] Case C-224/01, *Köbler* [2003] ECR I-10239.

[23] BVerfG 37, 271 2 BvL 52/71 Solange I-Beschluß.BVerfG 73, 339, in http://www.bundesverfassungsgericht.de/en/index.html; BVerfG 89, 155, in http://www.bundesverfassungsgericht.de/en/index.html; BVerfG 102, 147, in http://www.bundesverfassungsgericht.de/en/index.html.

Another potential turning point is the future accession of the EU to the *European Convention on Human Rights* (hereinafter "ECHR").

The final draft of the agreement concerning the accession of the EU to the ECHR[24] is ready. This does not mean that the accession process has been concluded. There is still a long road ahead since some key players have to be involved, for instance the Court of Justice of the EU.[25]

The negotiation process started after the coming into force of the Reform Treaty of Lisbon, whose Article 6 TEU commands the accession of the EU to the system of the Convention. This provision is completed by Protocol no. 8 attached to the Lisbon Treaty and devoted to the accession of the EU to the ECHR.

Leaving more general questions aside, this event will have deep implications on the function of national courts as well.

Why does this matter? Because national courts are the real 'natural judges' of both EU law and the ECHR, for different reasons. They are at the same time the first guardians of the *Simmenthal* doctrine for EU law[26] and, at the same time, the first adjudicators of the ECHR in national systems, due to the principle of subsidiarity.

[24] On the accession see, among others, P. Gragl, The Accession of the European Union to the European Convention on Human Rights, Hart, Oxford, 2013, T. Lock, "Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order", CML Rev, Vol. 48, No 4, 2011, pp. 1025-1054, T. Lock, "EU Accession to the ECHR: Implications for Judicial Review in Strasbourg", EL Rev, 2010, pp. 777-798.

[25] C. Murphy, "On the Rocky Road to Accession: Final Draft of EU's Accession Agreement to ECHR Approved", 12 April 2013, available at http://europeanlawblog.eu/?p=1680.

[26] M. Claes, *The National Courts' Mandate in the European Constitution*, *supra*.

3. Brief sketch of the contributions included in this book

The book features seven contributions. Their order is not accidental: specific issues come after more general topics, these latter being dealt with within the first three chapters.

The first article included in this book and written by Giuseppe Martinico serves as a relevant introduction to the subject-matter of this book. It aims at exploring the interesting issue of judicial application of the ECHR and EU law, in order to elucidate the vertical relationship between national judges (constitutional and common law alike) and these external legal sources.

The second contribution is somehow related to the first one: Ioana Răducu discusses the dialogue between courts, and more precisely the way the former accept the decisions rendered by supranational courts and also the role played by the judicial dialogue in reducing the risk of conflicts between courts. Yet the emphasis placed by the author on this judicial dialogue is that of deference. The value of (judicial) dialogue in the EU, as discussed by the author, comes along with pragmatic advantages for both EU and domestic legal orders.

The third chapter, authored by Juan A. Mayoral, approaches the issue of the use of preliminary ruling procedure and tries to establish determinants liable to explain differences in its use between new and old Member States. The value of this contribution lies especially in presenting original and comprehensive data on the use of preliminary references (1961-2011) in all 27 Member States and also in identifying differences in institutional dynamics at the national level.

Giuseppe Bianco and Tatum Ragues present the interesting topic of balance between one fundamental freedom of the European Union (free movement of services) and fundamental rights, as it

comes out from the approaches followed by the Court of Justice of the European Union in its rich case law. The authors emphasize the constitutional dimension of the principle of proportionality in the approach taken by the Court of Justice.

Within the same preliminary ruling procedure, Ricardo García Antón approaches in the fifth chapter of this book the role played by the Court of Justice in the field of indirect taxation. Two fundamental questions are explained here: the judicial dialogue between the European court and national courts and the role adopted by the Court of Justice. According to the author, within this field, the Court adopts a more hierarchical role, rather than the traditional cooperative one: "the traditional functions of the CJEU within the preliminary reference system are being replaced by those which belong to a national Supreme Court" (p 116). This *paradigm shift* is explored at length.

The sixth contribution, written by Mihaela Vrabie, approaches the status of the Charter of Fundamental Rights of the European Union in the framework of the preliminary reference procedure, also concerning the much debated issue of the field of application of the Charter with regard to Member States.

The final chapter introduces the parallel application of the Charter of Fundamental Rights and the European Convention on Human Rights by Romanian courts, as pointed out by certain preliminary references to the Court of Justice made by the former, but also in certain decisions by which courts rejected requests of the parties to make references to the Court of Justice. Certain patterns in that regard are approached.

The editors

Between Rights and Charters: ECHR and EU law before national judges

Giuseppe MARTINICO*

Abstract

The goal of this chapter is to answer the question, "Are national judges extending the structural EU law principles (primacy and direct effect) to the European Convention on Human Rights"? This chapter does not intend to examine the broader issue of the convergence between the legal systems of the EU and the European Convention on Human Rights (ECHR) but it concentrates on how national judges treat the norms of the ECHR compared with their treatment of EU law.

Keywords: *Court of Justice of the European Union; EU law; European Court of Human Rights; European Convention of Human Rights; direct effect; primacy: counter-limits doctrine*

1. Goals of the research

Traditionally EU law has been described as different from public international law, thanks to its structural principles (primacy and direct effect).

* García Pelayo Fellow, Centro de Estudios Políticos y Constitucionales, Madrid; Lecturer (on leave), Scuola Superiore Sant'Anna, Pisa. Special acknowledgments go to Filippo Fontanelli and Juan Antonio Mayoral. This work builds on a previous article published in the European Journal of International Law: G.Martinico, "Is The European Convention Going To Be "Supreme"? A Comparative-Constitutional Overview of ECHR And EU Law Before National Courts", European Journal of International Law, 2012, 401-424.

A consequence of this is the "axiom" of the non-comparability of the EU with other legal experiences.

As Robert Schütze[1] said "European thought invented a new word - 'supranationalism' - and proudly announced the European Union to be sui generis... The sui generis idea is not a theory. It is an anti-theory, as it refuses to search for commonalities; yet, theory must search for what is generic… However, this conceptualization simply can no longer explain the social and legal reality inside Europe."

This piece is grounded on a similar criticism of the classic European thought and will try to explore the comparability between EU and other legal experiences, focusing on the national effects of the European Convention of Human Rights (hereinafter "ECHR") rather than insisting on the comparison between EU law and other (domestic) federal or quasi-federal dynamics.

Is EU law still as special as the inventors of supranationalism have traditionally argued over the years?

This chapter tries to provide this research question with an answer by focusing on the- still limited-extension of the structural EU law principles to the ECHR.

I am going to argue that we are already (without taking into account the future accession of the EU to the ECHR) dealing with an- at least partial- convergence in the application of EU law and of the ECHR's provisions.

In order to set out this argument, I will move to analyse the relevant case law of the domestic judges on two factors of

[1] R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford University Press, 2009, 3.

potential convergence: disapplication of national law conflicting with European provisions and emergence of a counter-limits doctrine.

As for the focus of this chapter, this investigation will concern some selected constitutional experiences. It will be ascertained whether national judges treat ECHR and EU law similarly, and to what extent they facilitate their convergence. In this respect, my purpose is to study the judicial application of the ECHR and EU law to analyse the vertical relationship between national judges (constitutional and ordinary alike) and these external legal sources. As such, I am not interested in the horizontal convergence between the European Court of Human Rights (hereinafter "ECtHR") and the Court of Justice of the European Union (hereinafter "CJEU").

2. Looking at law in action

Recent literature[2] underscored the variety of national constitutional provisions regarding the ECHR. Indeed, looking at these provisions (and those applicable to EU law) one easily appreciates the diversity of national approaches with respect to the domestic authority of European laws.[3]

Despite these differences, it has been noted[4] that European jurisdictions are progressively nearing on the "position" of the ECHR in the hierarchy of sources. This convergence is the

[2] G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, (2010); H. Keller and A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2009).

[3] For an overview see G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment* supra.

[4] H. Keller and A. Stone Sweet (eds.), *A Europe* supra, 677-711, at 683 ff.

final outcome of different national pathways; sometimes national legislators must be credited, in other circumstances it is rather Constitutional or Supreme Courts, or even common judges.

ECHR is generally acknowledged supra-legislative force, but its relationship with constitutional supremacy is more controversial, as discussed below.

A similar variety can also be found in the domestic treatment of EU law. One can identify several "strategies" used to ensure EU law's primacy.[5]

However (again), despite this variety and although there have been cases of judicial resistance[6], as it was noted,[7] EU law is applied in all jurisdictions uniformly, as primacy and direct effect are accepted by all national courts.[8]

As Keller and Stone Sweet argued[9], the situation is not much different for the ECHR from what just explained regarding EU law. This finding has been somehow confirmed by recent comparative investigations.[10]

To support this claim it is necessary to go beyond the wording of formal provisions and observe how national judges treat these European laws.

[5] M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing (2006).
[6] See the reaction to the *Mangold* case, for instance: R.Herzog- L.Gerken, '[Comment] Stop the European Court of Justice', http://euobserver.com/9/26714.
[7] M. Claes, *The National Courts' Mandate* supra.
[8] G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment* supra.
[9] H. Keller and A. Stone Sweet, 'Assessing' cit, at 685-686.
[10] G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment* supra.

The first element these two European laws share is thus the crucial role of national judges, who are the real "natural judges" of European Laws, for different reasons. They are the first guardians of the *Simmenthal* doctrine[11] as for EU law,[12] while they are the first adjudicators of the ECHR in national systems like the French and the Dutch ones and because of the principle of judicial subsidiarity.[13]

Even looking at the "indirect effects" it is possible to find another analogy, namely the interpretative superiority acknowledged to EU law and the EHCR.

There are different reasons for this: sometimes this interpretative favour is based on some constitutional provisions (Spain,[14] Romania[15]); in other cases on provisions provided with legislative force (UK[16]). There are also case where a

[11] Case 106/77 *Simmenthal* [1978] ECR 629.
[12] M. Claes, *The National Courts' Mandate* supra.
[13] P. Carozza, "Subsidiarity as a structural principle of international human rights law", *American Journal of International Law*, Vol. 97, 2003, 38 ff.
[14] Article 10 Constitution (Spain): "(1) The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace.
(2) The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain."
[15] Article 20(1) of the Romanian Constitution: "Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the convenants and other treaties Romania is a party to."
[16] Section 3 of the Human Rights Act "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2) This section –

similar favour was accorded by the national judges independently from what the national constitutions provide about their *status* in the hierarchy of domestic legal sources.[17]

Consistent interpretation is a very well known doctrine in EU law (see the *Von Colson*[18] and *Marleasing*[19] judgements). More generally, consistent interpretation is a widespread doctrine in multilevel systems[20] since it guarantees some flexibility in the relationship between laws of different orders and gives the role of gatekeeper to judges (see the *Hermés*[21] and *Dior*[22] judgments concerning the relationship between EU and WTO laws). Traditionally the literature conceives the obligation of consistent interpretation as a recognition of "indirect effect" to EU law since it confirms its primacy, giving a sort of interpretive priority to it, which is particularly convenient when the conflict between norms cannot be solved by using the *Simmenthal* doctrine because of the absence of the direct effect for the EU law provisions.

(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

[17] Among the others, see 2 BvR 1481/04 (in Germany) or *Corte Costituzionale*, Nos. 348 and 349/2007 (in Italy).

[18] Case 14/83 *Von Colson* [1985] ECR 1891.

[19] Case106/89 *Marleasing* [1990] ECR I 4345.

[20] Even in the US: Charming Betsy "canon", 6 U.S. (2 Cranch) 64 (1804).

[21] Case C-53/96 *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV* [1998] ECR I-3603.

[22] Joined Cases C-300/98 and C-302/98 *Dior and Others* [2000] ECR 11307.

Recent comparative works[23] demonstrate how in France, the Netherlands, Nordic countries and in many other European legal experiences the practice of consistent interpretation is widely used for both these laws (EU law and ECHR).

In all these constitutional experiences, the consistent interpretation was chosen as the way to solve the antinomies existing between national and both the ECHR and EU law.[24]

3. The direct effect of the ECHR

As already noted, national judges are considered the first guarantors of the principle of EU law primacy, thanks to the very well known *Simmenthal* judgment of the CJEU:

> "In accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member states – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the

[23] G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws* supra.

[24] On similarities and differences in the use of consistent interpretation see: G. Martinico, "Is The European Convention Going To Be "Supreme"? A Comparative-Constitutional Overview of ECHR And EU Law Before National Courts", *European Journal of International Law*, 2012, 401-424

> effectiveness of obligations undertaken unconditionally and irrevocably by member states pursuant to the treaty and would thus imperil the very foundations of the Community […] it follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it , whether prior or subsequent to the community rule.
>
> Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law".[25]

From these lines one can infer: (a) the connection between primacy/precedence of EU law and the duty to disapply national law conflicting with it; (b) the crucial role of domestic judges in the protection of the primacy principle.

In this section of the chapter I will show how a second similitude in the national judicial treatment of European laws rests in the solution devised in cases of conflict between domestic norms and EU/ECHR norms, which is the well-known *Simmenthal* doctrine, as applicable by analogy to ECHR law. Even in this case, we can find different reasons for this phenomenon (here again the variety of constitutional provisions demonstrates its importance): in some cases the extension of the disapplication practice can be explained on constitutional bases (France, the Netherlands), in other cases,

[25] Case 106/77 *Simmenthal*, supra. On the recent developments of the *Simmenthal* doctrine, see: S.Rodin, "Back to square one-the past, present and future of the Simmenthal mandate", http://www.ceuediciones.es/pages/ceu-ediciones-detalle.php?i=393.

instead, such an extension has been devised by the genius of domestic (common) judges (e.g. in Italy).

A first set of cases concerns countries with specific constitutional provisions empowering national judges to disapply national law that conflicts with international treaties. Beginning with the case of France (where the superiority of treaties is guaranteed by the Constitution), first of all we have to notice that there are no specific provisions devoted to human rights treaties and that all the provisions of Title VI of the Constitution – regarding the mechanism for the entry into force of the international treaties[26] – are applicable to the ECHR. The

[26] Constitution (France) "Article 52
The President of the Republic shall negotiate and ratify treaties.
He shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification.
Article 53
Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament.
They shall not take effect until such ratification or approval has been secured.
No ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned.
Article 53-1
The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum submitted to them.
However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his

super-primary ranking of international treaties in the domestic system can be inferred from Article 55[27] which provides the superiority of the ratified treaties over domestic legislation. The review of conformity of national law with international treaties (control of "*conventionnalité*") is instead entrusted to the national judges.

Unlike France, many Eastern European Countries have entrusted the control of the compatibility between international treaties and national legislation to Constitutional Courts, causing a certain degree of convergence between the control of constitutionality and that of "*conventionnalité*".[28] A similar mechanism – with the important variable of the absence of the judicial review of legislation – is the Dutch case. The Dutch

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action in pursuit of freedom or who seeks the protection of France on other grounds.
Article 53-2
The Republic may recognize the jurisdiction of the International Criminal Court as provided for by the Treaty signed on 18 July 1998.
Article 54
If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution."

[27] Article 55 Constitution (France)
"Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party."

[28] About the jurisdiction of the national constitutional courts in this field, see: Bulgaria Article 149(4); Poland Article 188; Czech Republic Article 87; Slovenia Article 160. See L. Montanari, *I diritti dell'uomo nell'area europea tra fonti internazionali e fonti interne*, G. Giappichelli, 2002, 99.

model[29] is based on Articles 91 and 93 of the *Grondwet* (the Basic Law).[30]

The most evident signal of the incredible openness of the domestic order to the international law is Article 90, according to which: "The Government shall promote the development of the international rule of law". Starting from this, Grewe[31] argued that the Dutch system is the only really monist one in Europe, since it would recognize the prevalence of the international legal order over the national one. Another confirmation of that is Article 94 of the Basic Law, according to which: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions".

[29] On this see de Wet, "The Reception Process in the Netherlands and Belgium", in Helen Keller and Alec Stone Sweet (eds.), A Europe of Rights: the Impact of the ECHR on National Legal Systems, Oxford: Oxford University Press, 2008, pp. 229-310.

[30] Article 91 Basic Law (the Netherlands): "The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the Parliament. The cases in which approval is not required shall be specified by Act of Parliament. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the Parliament only if at least two-thirds of the votes cast are in favour."

Article 93 Basic Law (the Netherlands): "Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published."

[31] Grewe, "La question de l'effet direct de la Convention et les résistences nationales", in P. Tavernier, *Quelle Europe pour les droits de l'homme?* (1996) 157.

According to some authors[32] the original Dutch formulation[33] should be understood as referable to constitutional provisions as well.[34] In any case, thanks to Article 94 national judges are empowered to control the consistency between domestic law and ECHR and it is very interesting to notice that in the Netherlands the judges are not allowed to review the constitutionality of the statutory norms, under Article 120 of the Basic Law.[35]

As we can see, in both France and the Netherlands the convergence between EU law and the ECHR is actually due to a constitutional set of norms which seem not to distinguish between public international law and EU law. That is why a few years ago two scholars concluded their comparative piece arguing that in those contexts "there is no fundamental divide between the application of public international law and EC law".[36]

The second case of extension of the *Simmenthal* doctrine to the ECHR is completely different in terms of scope and reasons: it

[32] Van Dijk, "Dutch experience" *supra*, at 137; Montantari, *I diritti* supra, 65.

[33] Article 94 Basic Law (the Netherlands) "*Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties*."

[34] See Van Dijk, "Dutch experience" supra, at 137; Montanari, *I diritti* supra, at. 65.

[35] Article 120 Basic Law (the Netherlands): "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts".

[36] G. Betlem and A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation', 3 *European Journal of International Law* (2003) 569 ff.

is the Italian case. As the literature has already stressed,[37] the Italian common (*comuni*) judges started disapplying domestic norms conflicting with the ECHR.[38]

In 2007, the Italian Constitutional Court decided to tackle this practice, which represented an extension of an important "constitutional exception" to the constitutional supremacy and a derogation from the regime of centralized control of constitutionality. Moreover, in order to challenge such a trend by ensuring, at the same time, the super-primary nature of the ECHR, the Italian Constitutional Court agreed, for the first time in its history, to assess the validity of national provisions using the ECHR as the standard. Thus the Court extended the doctrine of the "interposed norm" ("*norma interposta*").[39] The

[37] F. Biondi Dal Monte and F. Fontanelli, "The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System", in 9 German Law Journal 889-932 (2008); O. Pollicino, "*The Italian Constitutional Court and the European Court of Justice: a Progressive Overlapping between the Supranational and the Domestic Dimensions*", in M. Claes, M. de Visser, P. Popelier and C Van de Heyning (eds.), *Constitutional Conversations in Europe. Actors, Topics and Procedures*, Intersentia, Cambridge, 2012, 101-129.

[38] See: Court of Pistoia on 23 March 2007: Court of Genoa, decision of 23 November, 2000; Court of Appeal of Florence decisions No. 570 of 2005 and No. 1403 of 2006, and the State Council (*Consiglio di Stato*), I Section, decision No. 1926 of 2002: "Some judges had already started applying this method, which comes from the judicial practice of disapplying the internal statutory norm conflicting with Community law. In some recent occasions, even the Supreme Court of Cassation (*Corte di Cassazione*) and the Supreme Administrative Court (*Consiglio di Stato*) had endorsed the use of disapplication in cases of conflict with ECvHR law", Biondi Dal Monte and Fontanelli, 'The Decisions No. 348 and 349/2007' *supra*, at 891.

[39] "Scholars have minted the wording 'interposed provision' to individualize the cases in which a constitutional standard can be invoked only indirectly in a constitutional judicial proceeding, because different primary provisions are inserted between the constitutional standard and the reported provisions

message sent by the Constitutional Court to the common judges was, in its essence: "Don't disapply, rather refer the preliminary question of constitutionality to the Constitutional Court!".

The reasoning of the Italian Constitutional Court was based on the distinction between the ECHR and EU law:

> "This is because, according to the constitutional judges, the ECHR legal system has distinct structural and functional legal features as compared to the European legal order. According to the Italian Constitutional Court, the EHCR is a multilateral international public law Treaty which does not entail and cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution".[40]

This explains the different treatment reserved to the ECHR both in terms of disapplication and in terms of necessity to be consistent with all the Constitution rather with counter-limits alone (i.e. with some fundamental principles which represent a sort of untouchable constitutional core), as we will see in the next section.

Quite surprisingly, after the intervention of the Italian Constitutional Court[41], some domestic common judges

(suspected of being unconstitutional)". Biondi Dal Monte and Fontanelli, 'The Decisions No. 348 and 349/2007', at 897. See: C. Lavagna, *Problemi di giustizia costituzionale sotto il profilo della "manifesta infondatezza"*, (1957), at 28; M.Siclari, *Le norme interposte nel giudizio di costituzionalità* (1992). Giuffrè, Milan for Lavagna and CEDAM, Padua for Siclari.

[40] O. Pollicino, "The Italian Constitutional Court" *supra*.

[41] I. Carlotto, 'I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un'analisi sul seguito giurisprudenziale', available at www.associazionedeicostituzionalisti. it. E. Lamarque, "Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune" (2010), available at www.associazionedeicostituzionalisti.it.

continued to disapply national provisions conflicting with the ECHR. One can identify different reasons for that:

1. Sometimes the judges demonstrated that they had not understood the position of the Italian Constitutional Court or did not know the difference between the ECHR and EU law;[42]

2. In other cases, the judges demonstrated that they knew the position of the Italian Constitutional Court but misunderstood the meaning of the new Article 6 TEU that, after the coming into force of the Lisbon Treaty, paves the way for the EU to the ECHR. In other words, this second group of national judges think that *ipso iure* after the coming into force of the Lisbon Treaty the ECHR has to be considered as (already) part of EU law and, because of that, provided with direct effect and primacy. This is perhaps the case of the judgment given in March 2010 by the *Consiglio di Stato* (State Council);[43]

3. Finally, there are cases of open civil disobedience of common judges who demonstrate that they know but do not share the conclusions of the Italian Constitutional Court.[44]

Without going into detail and referring to recent well documented works on the subject,[45] one can conceive the Italian case as a case-study demonstrating how a problem of application of "external" law in the multilevel legal system

[42] Tribunale di Livorno, Sez. Lav., ordinanza del 28 ottobre 2008. See I. Carlotto, "I giudici comuni" supra.

[43] Consiglio di Stato, sent. 2 marzo 2010, n. 1220. On this decision see: Colavitti and Pagotto, 'Il Consiglio di Stato applica direttamente le norme CEDU grazie al Trattato di Lisbona: l'inizio di un nuovo percorso?' (2010), http://www.associazionedeicostituzionalisti.it/rivista/2010/00/Colavitti-Pagotto01.pdf.

[44] Tribunale di Ravenna, 16 January 2008. On this see I. Carlotto, "I giudici comuni" supra.

[45] Carlotto, 'I giudici comuni' *supra*: Lamarque, 'Il vincolo' supra.

results in a domestic conflict among national judges (Constitutional Court versus national common judges).

It is also possible to find other interesting (but more ambiguous) cases in this field: in Bulgaria, for instance, national judges are considered the first defenders of the precedence of ECHR law pursuant to Article 5(4) of the Constitution. Both common judges and the Constitutional Court are seemingly entitled to carry out the *contrôle de conventionnalité*,[46] at least on paper, since scholars[47] have noticed a certain hesitation of the common judges to perform it:

[46] See Article 149(2) and (4) of the Constitution (Bulgaria) : "(1) The Constitutional Court shall:
1. provide binding interpretations of the Constitution;
2. rule on constitutionality of the laws and other acts passed by the National Assembly and the acts of the President;
3. rule on competence suits between the National Assembly, the President and the Council of Ministers, and between the bodies of local self-government and the central executive branch of government;
4. rule on the compatibility between the Constitution and the international treaties concluded by the Republic of Bulgaria prior to their ratification, and on the compatibility of domestic laws with the universally recognized norms of international law and the international treaties to which Bulgaria is a party;
5. rule on challenges to the constitutionality of political parties and associations;
6. rule on challenges to the legality of the election of the President and Vice President;
7. rule on challenges to the legality of an election of a Member of the National Assembly;
8. rule on impeachments by the National Assembly against the President or the Vice President.
(2) No authority of the Constitutional Court shall be vested or suspended by law."

[47] M. Fartunova, 'Report on Bulgaria', in G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A*

> "The national courts prefer to decide that the case pending before them doesn't fall into a field of these two international instruments. Nevertheless, two comments should be made. First, this position does reveal a certain difficulty to solve potential conflicts between the domestic law and European instruments. Second, the national courts do still prefer to apply the relevant domestic law instead of the relevant international clauses. One of the reasons is that the judges' knowledge of these instruments is still insufficient".[48]

As some scholars pointed out, the Bulgarian Constitutional Court has recognized the priority of the Constitution over these two European laws, but also admitted that the national Constitution shall be interpreted as far as possible in light of the provisions of the ECHR. This solution has been described as the paradoxical consequence[49] of the wording of Article 149 of the Constitution (namely, of the combination between paras. (2) and (4)), which governs both the control of constitutionality (para. (2)) and of *conventionnalité* (para. (4)). These kinds of review, indeed, were deemed to be different in purpose and scope from each other.[50]

In Portugal, from a theoretical point of view, it might be argued that the combination of Articles 204[51] and 8[52] of the

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Comparative Constitutional Perspective, Groningen: Europa Law Publishing, 2010, at 109.

[48] *Ibid*., 108-109.

[49] *Ibid*.

[50] *Ibid*.

[51] Article 204 Constitution (Portugal): "In matters that are brought to trial, the courts shall not apply rules that contravene the provisions of this Constitution or the principles enshrined therein."

[52] Devoted to the relation between international and national laws, Article 8 Constitution (Portugal): "1. The rules and principles of general or common international law shall form an integral part of Portuguese law.

2. The rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially

Constitution would permit national judges to disapply national law conflicting with constitutional and international law, but scholars seem to describe such an option as a sort of "sleeping giant" that has never been applied.[53]

Further, on the domestic effects of the ECHR, another interesting provision of the Constitution of Spain – Article 96 – is worth of study, the effects and scope of which are debated among the scholars: does it empower judges to disapply national legislation in conflict with provisions of the ECHR?

Granted, according to the Constitutional Tribunal, Spanish judges may disapply national laws conflicting with international treaties,[54] although the possible disapplication of national law for conflict with provisions included in human rights treaties like the ECHR appears to be more problematic.

published, and shall remain so for as long as they are internationally binding on the Portuguese state.

3. Rules issued by the competent bodies of international organisations to which Portugal belongs shall come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.

4. The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law".

[53] "Although authorized by the Portuguese Constitution, I could not find cases where Portuguese judges had directly invoked the ECHR to put aside conflicting national law", F. Coutinho, 'Report on Portugal', in G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, supra 364. See Report of the Portuguese Constitutional Court to the XII Congress of the European Constitutional Courts, 14-16 May 2002, at 53, cited by Coutinho, 'Report on Portugal' supra.

[54] Tribunal Constitucional, 49/1988, FJ 14; Tribunal Constitucional 180/1993.

On this specific issue, the Constitutional Tribunal has never issued a decision. Since the Constitutional Tribunal has demonstrated its willingness to take the ECHR into account – via Article 10(2) of the Constitution – scholars have suggested that common judges should refer a question to the Constitutional Tribunal when confronted with these conflicts, rather than disapplying national law.[55] This view also hinges upon the distinction between normal international treaties (Article 96) and human rights treaties (Article 10).

Finally, there are also jurisdictions where the instrument of disapplication is forbidden: in the UK, for instance, in case of contrast between the primary legislation and the Convention rights, the judges are not allowed to disapply national provisions, but they shall adopt a 'declaration of incompatibility',[56] which does not influence the validity and the efficacy of the law. After such a declaration "if a Minister of the Crown considers that there are compelling reasons for proceeding […] he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility" (Section 10).[57]

Although disapplication does not occur in the jurisdictions just mentioned, both in these countries and in those where disapplication is widely used to tackle the inconsistency between national norms and the ECHR, the provisions of the

[55] V. Ferreres Comella, 'El juez nacional ante los derechos fundamentales europeos. Algunas reflexiones en torno a la idea de diálogo', in A. Saiz Arnaiz and M. Zelaia Garagarza (eds.), *Integración Europea y Poder Judicial Instituto Vasco Administraciones Públicas, Bilbao* (2006), 231.

[56] On this declaration see K, D, Ewing and J. C. Tham 'The Continuing Futility of the Human Rights Act' *Public Law* (2008) 668.

[57] A. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (2007), at 436.

Convention are apparently provided, at least, with a sort of "direct effect" (i.e. the other structural principle of EU law).

In this respect, the Austrian case is significant, as Keller and Stone Sweet pointed out: "In 1964, the political parties revised the Constitution, to confer upon the Convention constitutional status and direct effect. Today, conflicts between the Austrian Constitution and the ECHR are governed by the *lex posteriori derogat legi priori* rule, an apparently unique situation".[58]

It is interesting in this case to notice that even before the 1964 amendment[59] a *de facto* constitutional character had been

[58] H. Keller and A. Stone Sweet, 'Assessing' supra, at 684.

[59] As seen above, Austria is a case of constitutional incorporation of the ECHR, as the Convention there has "the status of a provision of the national Constitution" (M. Janis, R. Kay and A. Bradley (eds.), *European Human Rights Law* (1996), at 448). Article 50(3) of the Austrian Constitution distinguishes between the international treaties having a constitutional relevance and those presenting a legislative relevance. Should these treaties modify or complement the Constitution they may only be concluded following the procedure set up by Article 50(3). Moreover "in a vote of sanction adopted pursuant to Paragraph (1)", such treaties or such provisions as are contained in treaties shall be explicitly specified as 'constitutionally modifying', this way this system creates a connection between the content of the Treaty and the form chosen to give it effect. The ECHR was concluded by the procedure established under Article 50 but without such a declaration: as a consequence, the Austrian Constitutional Court originally argued that the ECHR did not have constitutional status. Soon afterwards, a constitutional Act was passed modifying the Constitution and acknowledging the constitutional value of the ECHR (Article II BvG (BGBl 1964/59). Later, the Constitutional Court acknowledged the interpretative value of such clause, giving it a retroactive effect ('The ECHR has a double status in Austria. In addition to its character as an international treaty, it has been transformed, on the domestic level, into a law with the rank of a constitutional act. This has a twofold implication. First, the ECHR grants individual rights that are directly actionable before all courts and authorities. Given their status as

acknowledged to the ECHR, which confirms the necessity to go beyond the wording of the constitutional texts in the present investigation.

One could conclude that, in this regard, the situation has not changed since the '80s, when Neville Brown and McBride argued that the attribution of the direct effect to the provisions of the ECHR is a matter for the national constitutions to decide on.[60]

At the same time, as we saw, there are cases in which, notwithstanding the ambiguity of the national constitutions, a direct effect is recognized to the ECHR provisions: the Belgian case is emblematic, as the *Franco Suisse Le Ski* judgment[61]

constitutional law, these rights may be relied upon before the CC', P. Cede, 'Report on Austria and Germany', in G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, supra, at 63.). As a consequence, today it is possible to say that the ECHR 'has the rank of directly applicable federal constitutional law'. Confirmation of the constitutional status of the ECHR is derived from the complementary nature of this document (with regard to the constitutional text). This is the real criterion to evaluate its ranking in the legal sources of the national system despite the procedure followed to incorporate them, and that explains why the ECHR had, de facto, a constitutional rank even before 1964.

[60] "An individual could not however rely upon any provisions of the ECHR in a national court unless it was 'capable of conferring rights on citizens of the Community which they can invoke before the courts'. This requirement raises the question whether the ECHR's provisions are of direct effect. The only guide to this is to be found in the decisions of the courts of countries whose constitutions accord the ECHR legal effect". L. Neville Brown- J. McBride, 'Observations on the Proposed Accession by the European Community to the European Convention on Human Rights', *American Journal of Comparative Law*, (1981) 691, at 695. See, also, A. Drzemczewski, 'The Domestic Status of the European Convention on Human Rights: New Dimensions',1 *Legal Issues of European Integration* (1977) 1.

[61] Cass. 27 May 1971, *Pas.* 1971, I, 886.

shows. That is why, today, despite the literal wording of the Constitution, some scholars consider both the European laws (i.e. the ECHR and EU law) as "supranational".[62]

Even in Luxembourg, over the years, courts have confirmed the "the directly self-executing character of many of the Convention's provisions.[63] Hence, the ECHR and its Protocols are considered to be directly applicable in the Luxembourg legal order".[64]

4. The limits to primacy: the counter-limits doctrine

As Maduro pointed out: "The acceptance of the supremacy of EU rules over national constitutional rules has not been unconditional, if not even, at times, resisted by national constitutional courts. This confers to EU law a kind of contested or negotiated normative authority"[65] and reveals the existence of a never-ending process of judicial bargaining between domestic courts (especially Constitutional and Supreme Courts) and the CJEU. The conditions posed by the Constitutional Courts and mentioned by Maduro are

[62] For instance, see P. Popelier, 'Report on Belgium', in G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, supra, at 84.

[63] For instance: Cour supérieure de justice (chambre des mises en accusation), 2 April 1980, and Cour de cassation, 17 January 1985, No. 2/85.

[64] E. Mak, 'Report on the Netherlands and Luxembourg', in G. Martinico and O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, supra, at 314.

[65] M. Poiares Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", 2 *European Journal of Legal Studies* (2007), available at http://ejls.eu/index.php?mode=htmlarticle&filename=./issues/2007-12/MaduroUK.htm.

represented by doctrines such as the "counter-limits" and the *Solange* doctrines.

By the formula "counter-limits" (*controlimiti*[66]) I mean those national fundamental principles which have been raised – like impenetrable barriers – against the infiltration of EU law by the national Constitutional Courts. The counter-limits are conceived as a form of "*contrepoids au pouvoir communautaire*",[67] an ultimate wall to the full application of EU law, an intangible core of national constitutional sovereignty.[68] The counter-limits doctrine was *de facto* conceived by the German *Bundesverfassungsgericht* in *Solange I*,[69] and by the Italian Constitutional Court in case no. 183/73. However, many Constitutional Courts accepted it in the following years: the

[66] This formula has been introduced in the Italian scholarly debate by Paolo Barile: Barile, 'Ancora su diritto comunitario e diritto interno', in *Studi per il XX anniversario dell'Assemblea costituente*, VI, (1969), 49.

[67] About the notion of *contrepoids au pouvoir*, see: B. Manin, "Frontières, freins et contrepoids – La séparation des pouvoirs dans le débat constitutionnel américain de 1787", 2 *Revue française de sciences politiques* (1994) 257; T. Georgopoulos, "The checks and balances doctrine in Member States as a rule of EC law: the cases of France and Germany", 9 *ELJ* (2003) 530.

[68] It is very interesting to notice that the notion of counter-limits implies a sort of constitutional and moral superiority of the national legal orders with regard to the supranational level. This form of constitutional superiority is usually justified by the existence of the democratic deficit that characterizes the EU. See, for example, *Solange I* (*BVerfG* 37, S. 271 ff.): "the Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level."

[69] *BVerfG* 37, S. 271 ff., available at http://www.bundesverfassungsgericht.de/en/index.html.

French *Conseil Constitutionnel* in 2004[70] and the *Tribunal Constitucional* in Spain,[71] but before them[72] the English High Court had made the primacy of EU law contingent on the preservation of an untouchable core of principles. One of the most interesting cases is the Danish *Carlsen*,[73] where the Supreme Court specified the possible dynamics of such a confrontation.[74] More recently the decisions of the Polish[75] and

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[70] But see also *Conseil d'Etat, dec. Sarran*, 30 October 1998; *Cour de Cassation, dec. Fraisse*, 2 June 2000; *Conseil d'Etat, dec. SNIP*, 3 December 2001. In addition see: *Conseil Constitutionel* 2004-496-497-498-499 DC 2004-505 DC.

[71] *Tribunal Constitucional*, *declaracìon* 1/2004. On this point, see V. Ferreres Comella, "La Constitución española ante la clausola de primacia del Derecho de la Unión europea. Un comentario a la Declaración 1/2004 del Tribunal Constitucional 1/2004", in A. Lopez Castillo - A. Saiz Arnaiz – Ferreres Comella, *Constitución española y constitución europea* (2005): CEPC, Madrid 77, at 80-89, and Saiz Arnaiz, "De primacia, supremazia y derechos fundamentales en la Europa integrada: la Declaración del Tribunal Constitucional de 13 diciembre de 2004 y el Tratado por el que establece una Constitución para Europa", in A. Lopez Castillo - A. Saiz Arnaiz - V. Ferreres Comella, *Constitución española* supra, 51-75.

[72] *McWhirter and Gouriet v Secretary of State for Foreign Affairs*, [2003], EWCA civ 384. On this point, see Biondi, "Principio di supremazia e 'Costituzione' inglese. I due casi "Martiri del sistema metrico" e "Mc Whirter and Gouriet"" , in 4 *Quaderni Costituzionali* (2003), 847

[73] *Højesteret*, *Carlsen v Rasmussen* [1999] 3 CMLR 854.

[74] According to the *Carlsen* doctrine, if there is a doubt about the consistency of the EC act with the Constitution, the Constitutional Court could raise the question by asking the CJEU to clarify the exact meaning of the norm. If the CJEU does not convince them of the compatibility, they can "apply" the counter-limits theory. Such a vision demonstrates that the Constitutional Courts have the last word even though they have accepted the preliminary ruling.

[75] *Trybunał konstytucyjny*, P 1/05, available at http://www.trybunal.gov.pl/eng/index.htm.

German Constitutional Courts[76] (but see also the decisions of the Cypriot[77] and Czech[78] judges) have recalled the question of the ultimate barriers in the field of the European arrest warrant.[79]

According to Panunzio[80], the counter-limits (even in the *Solange* doctrine) represent an instrument to force the courts to communicate, they are like a "gun on the table" which induces the jurisdictional actors to interact and compare their visions. What was the essence of the German Constitutional *diktat* in *Solange*? As everybody knows, in *Solange* – a judgment delivered a few years after the ambivalent judgment in *Internationale Handelsgesellschaft*[81] – the German Constitutional Court said that "as long as [German: *Solange*] the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained

[76] *BVerfG, 2 BvR* 2236/04, available at http://www.bundesverfassungsgericht.de/en/index.html.

[77] *Ανώτατο Δικαστήριο*, 294/2005, available at www.cylaw.org.

[78] *Ústavní Soud*, Pl. ÚS 66/04, available at http://test.concourt.cz/angl_verze/cases.html.

[79] As for the role of the CJEU in this ambit see: J. Komárek, "European Constitutionalism and the European Arrest Warrant: In search of the limits of contrapunctual principles", *Jean Monnet Working paper* (2005), http://www.jeanmonnetprogram.org/papers/05/051001.html.

[80] S. Panunzio, "I diritti fondamentali e le Corti in Europa", in S. Panunzio (ed.), *I diritti fondamentali e le Corti in Europa* (2005) 3, at 17 ff.

[81] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125. I am referring to the very famous point in which the Court argued that: "The validity of a Community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure."

in the Basic Law, a reference by a court in the Federal Republic of Germany to the *Bundesverfassungsgericht* in judicial review proceedings [...] is admissible and necessary."[82] In other words, the German Court asked for a Bill of Rights and a strong Parliament in a context of separation of powers, the two main ingredients of the most famous definition of Constitution present in the history of European constitutionalism: that of Article 16 of the Declaration of the Rights of Man and of the Citizen (1789).[83] Such a chemistry was conceived as the right mix to overcome the democratic deficit characterizing the European Communities.

Having recalled this, it is interesting to see how a similar doctrine has been devised also with regard to the ECHR's penetration into the domestic legal order. The most evident confirmation of such a trend is found in the German case law and in the already mentioned order no. 1481/04,[84] where the Constitutional Court pointed out how, in case of unsolvable conflict between ECHR and domestic law, the latter should prevail. For the first time in its history, the BvG specified the sensitive areas, the off-limits zone, for the primacy of EU law: the areas of family law, immigration law, and the law on protection of personality".[85] The reasoning of the BvG stressed the particularities of the proceeding before the ECHR Court, particularities which might lead to a different outcome in the balancing before the two Courts.

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[82] BVerfG 37, 271 2 BvL 52/71 *Solange I*-Beschluß.

[83] Declaration of the Rights of Man and of the Citizen (1789), Article 16: "A society in which the guarantee of the rights is not secured, or the separation of powers not determined, has no constitution at all."

[84] 2 BvR 1481/04.

[85] On this see: F. Hoffmeister, "Germany: Status of European Convention on Human Rights in Domestic Law", *International Journal of Constitutional Law*, 2006, 722-731.

The most interesting element of this decision is that the BvG made use of the selective approach also used in the *Lissabon Urteil*[86] with respect to EU law.[87] In this decision the BvG listed some "areas which shape the citizens' circumstances of life"[88] and that may not be touched by the European integration.

In that decision the BvG again specified the sensitive sectors that embody the national constitutional identity:

> "European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of

[86] *BVerfG*, cases 2 BvE 2/08 and Others, 30 June 2009, available at: http://www.BVerfG.de/entscheidungen/es20090630_2bve000208.html.
[87] On this see: E. Lanza, "Core of State Sovereignty and Boundaries of European Union's Identity in the Lissabon–Urteil", *German Law Journal*, 2010, 399-418.
[88] *BVerfG*, cases 2 BvE 2/08 *supra*, at par. 249.

association and the dealing with the profession of faith or ideology".[89]

In doing so, the BvG made an important contribution to the definition of Article 4 TEU,[90] in its problematic concept of "national identity" (already provided in Article 6(3) EU).

Even in legal orders that do not possess a fully fledged constitutional text, like the UK[91], judges limited the openness granted to the ECHR. Emblematically, in *Horncastle*, the Supreme Court[92] said that: "[t]he requirement to 'take into account' the Strasbourg jurisprudence will normally result in

[89] *Ibid.*

[90] Article 4 TEU: "1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.
3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.".

[91] See: C. Murphy, "Human Rights Law and the Perils of Explicit Judicial Dialogue", working paper, 2011. N. Bratza, "The relationship between the UK courts and Strasbourg", *European Human Rights Law Review*, 2011, 505 ff.

[92] On the impact of the ECHR on the activity of some national Supreme Courts see: E. Bjorge, "National supreme courts and the development of ECHR rights", *International Journal of Constitutional Law*, 2011, 5-31.

this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case."[93]

Even more clearly - and using a rhetoric that recalls that of continental Constitutional Courts - the same court said, in another decision (*Manchester City Council v Pinnock*):

> "This Court is not bound to follow every decision of the [ECtHR]. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue […] which is of value to the development of Convention law. Of course, we should usually follow a clear and constant line of decisions [...] But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber […] Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with *some fundamental substantive or procedural aspect of our law*, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line."[94]

Furthermore, in Austria, where the ECHR enjoys a constitutional status, the openness shown to the Convention

[93] *R v Horncastle and Others* [2009] UKSC 14, para 11.
[94] *Manchester City Council v Pinnock* [2010] UKSC 45, para 48 (emphasis added).

cannot justify a violation of the Constitution.[95] In this sense, some authors[96] have compared the German follow up after the *Görgülü* judgment to the *Miltner* case,[97] whereby the Austrian Constitutional Court has pointed out the possibility of departing from the case law of the ECtHR, if adherence thereto would entail a violation of the Constitution.

The Italian Constitutional Court came to a similar conclusion in the decisions of 2007 (Nos. 348 and 349), where the Italian *Consulta* clarified that the favour accorded to the ECHR does not provide it with a sort of "constitutional immunity." Quite to the contrary, the ECHR has to respect the Italian Constitution.

In those decisions, the Italian Constitutional Court specified how the ECHR is considered a particular form of public international law and from this it inferred that the "constitutional tolerance" shown by the Italian legal order towards the ECHR is inferior to that shown towards EU law. While the "counter-limits" represent, in the Italian Constitu

tional Court's case law, a selected version of the domestic constitutional materials (this implies the possibility to decide the constitutional conflicts in favour of the EU law provisions in some cases), in the case of the ECHR the Italian Court seems to be less generous, since it seems to ask the ECHR to respect of all the Constitution as such: "the need for a constitutionality test on the Convention norm excludes the

[95] 'In this case, even though the Convention has constitutional rank, the contrary rule of constitutional law would have to prevail by virtue of its *lex specialis* character', Cede, 'Report on Austria and Germany' supra, at 70.

[96] As Krisch noticed in N. Krisch, 'The Open Architecture of European Human Rights Law' 2 *Modern Law Review* (2003) 183.

[97] Austrian Constitutional Court, Judgment of 14 October 1987, Miltner, VfSlg 11500/1987, available at http://www.ris.bka.gv.at/vfgh/.

possibility of having a limited set of fundamental rights that could serve as a counter-limit; indeed, every norm of the Constitution shall be respected by the international norm challenged."[98]

5. Final remarks

In conclusion, despite the variety of the national constitutional provisions about the status of EU and ECHR norms, some Member States' judges began extending the structural principles of EU law (primacy and direct effect) to the ECHR. At the same time, the favour accorded to ECHR law is limited by national constitutional principles which can be named "counter-limits" (quoting the Italian Constitutional language, see case nos. 183/73 and 170/84) and represent the intangible nucleus of national constitutional sovereignty.

Does this mean the end of the EU speciality? It is (still) difficult to find a conclusive answer to the question formulated at the beginning of this chapter. However, if one compares the current scenario with that studied by Neville, McBride and Drzemczewski in the late '70s-'80s, it is immediately clear that, today, the issue of primacy and direct effect of the ECHR does not depend (at least, not entirely) on the sole national constitutional provisions. It is something that seems to go beyond the full control of national constitutions, and that is why we have been assisting to tensions occurring between national laws and the ECHR (and the case-law of the ECtHR).

[98] F. Biondi Dal Monte and F. Fontanelli, 'The Decisions No. 348 and 349/2007" supra, at 915.

In this scenario, EU law has also given national judges (the Italian case is very clear on this) arguments for reconsidering the force of the ECHR, as Keller and Stone Sweet, for instance, noticed.[99]

[99] "European integration – the evolution of the EU's legal system, in particular – has shaped reception in a number of crucial ways. First, the ECJ's commitment to the doctrines of the supremacy and direct effect of Community law provoked processes that, ultimately, transformed national law and practice. Supremacy required national courts to review the legality of statutes with respect to EC law, and to give primacy to EC norms in any conflict with national norms. For judges in many EU States, the reception of supremacy meant overcoming a host of constitutional orthodoxies, including the prohibition of judicial review of statute, the *lex posteriori derogat legi priori*, and separation of powers notions. These same structural issues arose anew under the Convention", H. Keller-A. Stone Sweet, 'Assessing', *supra*, at 681.