

GUEST EDITORIAL

CONSTITUTIONAL ADJUDICATION IN EUROPE BETWEEN UNITY AND PLURALISM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Structure of the Special Issue

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

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

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

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

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

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

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

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

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