Special Issue – Preliminary References to the CJEU
Part One

The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law

By Giuseppe Martinico[*]

A. Introduction

Recently, scholars have argued of the necessity of going beyond "judicial dialogues" and "conflict-and-power" approaches to the analysis of the role of national Constitutional Courts in the Union.[1] On the one hand, there are risks connected to a "too welcoming an approach by national constitutional courts to EU law";[2] on the other hand, it is possible to criticize both the Court of Justice of the EU (CJEU) and some national Constitutional Courts for other, less cooperative, decisions. I share this cautious approach for many reasons, and primarily because the preliminary ruling mechanism does not exhaust all the possible means of communication between constitutional courts and the CJEU.[3] For instance, what Komárek calls "parallel references"[4] can serve, in some circumstances, as a technique of alternative (or hidden) dialogue,[5] that has favored a sort of "remote dialogue"[6] over the years. My sole point of disagreement with this scholarly position is over the role of conflicts in this scenario. Whilst Komárek seems to confine conflicts to phenomena of mere

[*] Article completed on 1 November 2014. Associate Professor of Comparative Public Law at the Scuola Superiore S.Anna, Pisa. Fellow at the Centre for Studies on Federalism, Turin. Many thanks to Samo Bardutzky, Marco Dani, Giacomo Delledonne, Victor Ferreres Comella, Luis Gordillo, Katarzyna Granat, Giulio Itzcovich, Nico Krisch, Leonardo Pierdominici, Marta Simoncini, Anna Margherita Russo, Aida Torres Pérez, Simon Toubeau, Sabrina Ragone, Evangelos Liaras, and Maria Caterina La Barbera for their comments.

[1] Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420 (2013).

[2] *Id*. at 449.

[3] *See* Giuseppe Martinico, *Judging in the Multilevel Legal Order: Exploring The Techniques Of 'Hidden Dialogue'*, 21 KING'S L. J. 257 (2010).

[4] Komárek, *supra* note 1, at 436.

[5] Martinico, *supra* note 3; Giuseppe Martinico, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, 10 INT'L J. CONST. L. 871 (2012).

[6] This is the formula ("dialogo a distanza") used by Gabriella Angiulli, *Il rinvio pregiudiziale alla Corte di giustizia dell'Unione europea da parte dei Giudici costituzionali degli Stati membri*, http://www.gruppodipisa.it/wp-content/uploads/2011/05/SIENA_Scuola_dottorale_in_-Diritto_-ed_-economia.pdf (2011).

resistance or to "'cold' strategic considerations,"[7] in this work I am going to adopt a much broader idea of conflict, which goes beyond mere "conflicts and power games."

My intuition is that the idea of judicial conflicts is, in a way, unavoidable, and always present even in those decisions which appear *prima facie* exquisitely cooperative. A good example of this is the reference raised by the German Constitutional Court to the CJEU and concerning the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (OMT).[8] As Gerstenberg has written, in this case "the deployment of the reference procedure is anything but an act of European-friendliness and judicial comity."[9]

B. The Topicality of Constitutional Conflicts: Why They Are Still There and Why We Need Them

On 26 February 2013, the CJEU decided *Melloni*,[10] a very important case triggered by a preliminary question raised by the Spanish Constitutional Court.

This preliminary question drew the attention of scholars for at least two reasons. First, the question was raised by the Spanish Constitutional Court, which, for the first time, had decided to use Article 267 TFEU. In this respect, at that time *Melloni* represented the latest

[7] Komárek, *supra* note 1, at 422. The author was referring to the view expressed by Arthur Dyevre, *European Integration and National Courts: Defending Sovereignty under Institutional Constraints?* 9 EURO. CONST. L. REV. 139 (2013).

[8] Orders of 17 December 2013 and of 14 January 2014, 2 Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] 1390/12; 2 BVERFGE 1421/12; 2 BVERFGE 1438/12; 2 BVERFGE 1439/12; 2 BVERFGE 1440/12; 2 BVERFGE 1824/12; 2 BvE 6/12, *available at* https://www.bundesverfassungsgericht.de.

[9] Oliver Gerstenberg, *An End to European Multilateralism: A Comment on the German Bundesverfassungsgericht's OMT decision*, *available at* http://eutopialaw.com/2014/02/19/an-end-to-european-multilateralism-a-comment-on-the-german-bundesverfassungsgerichts-omt-decision/ (2014); Giacomo Delledonne, *La 'prima volta' di Karlsruhe: il rinvio pregiudiziale relativo alle outright monetary transactions* (2014), *available at* http://http://www.csfederalismo.it/it/pubblicazioni/commenti/797-la-prima-volta-di-karlsruhe-il-rinvio-pregiudiziale-relativo-alle-outright-monetary-transactions.

[10] Case C–399/11, Stefano Melloni v. Ministerio Fiscal, *available at* http://curia.europa.eu/. Mr. Melloni, an Italian citizen living in Spain, was convicted in absentia for bankruptcy fraud by a sentence delivered by the Tribunale of Ferrara and arrested by the Spanish police. On the basis of the Council Framework Decision on the European Arrest Warrant (2002/584/JHA as amended by the Framework Decision 2009/299/JHA) the Italian authorities asked for the activation of the mechanism. Mr. Melloni opposed surrender to the Italian authorities, by arguing the violation of the right to defence. The Audiencia Nacional (a special Spanish high court) decided to surrender Mr. Melloni to Italy since it considered the right to defence was respected (Mr. Melloni, in fact, was aware of the trial, opted for the asbentia and appointed two lawyers to defend himself). Against the order of the Audiencia Nacional, Mr. Melloni opposed a recurso de amparo (a direct action for the protection of constitutional rights guaranteed by the Constitution) before the Spanish Constitutional Court.

link in a longer chain of preliminary questions raised by national Constitutional Courts.[11] Second, the CJEU was expected to say something important about Article 53 of the Charter of Fundamental Rights of the EU, concerning the burning issue of the relationship between the standard of protection accorded to the same right at different levels.

In *Melloni*, the CJEU refused a minimalist interpretation of Article 53, saying that such an interpretation "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."[12] It added that:

> 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.[13]

This was seen as a return to an absolute conception of primacy,[14] and in general it sounded very tough. More recently, on 13 February 2014, the Spanish Constitutional Court, in its follow up to the *Melloni* decision of the Luxembourg Court, reversed its case law and abided by the indications of the CJEU.[15] The Spanish follow up to the *Melloni* case was a bit ambiguous because: "[W]hile the outcome does fulfil the mandates of EU law, the reasoning proves quite unsettling."[16]

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[11] After the delivery of this Article, two other Constitutional Courts raised preliminary questions ex Art. 267 TFEU to the CJEU: the Ustavno sodišče (Slovenian Constitutional Court), Order U-I-295/13) *available at* http://www.us-rs.si/aktualno/novice/sklep-ustavnega-sodisca-st-u-i-29513-z-dne-6-11-2014/ and the Trybunał Konstytucyjny (Polish Constitutional Court) decision K 61/13, *available at* http://otk.trybunal.gov.pl/OTK/otk_odp.asp?droga=%28otk_odp%29&sygnatura=K%2061/13.

[12] *Melloni*, Case C-399/11 at para.58.

[13] *Id.* at para.60.

[14] To quote the formula used, also recently, by some scholars: Armin von Bogdandy & Stephan Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

[15] Tribunal Constitucional (Spanish Constitutional Court), sentencia No. 26/2014 of 13 February 2014, *available at* http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCCJCC262014en.aspx.

[16] Aida Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, 10 EUR. CONST. L. REV. 308 (2014).

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More generally, this case gives an idea of the very difficult role played by national Constitutional Courts and of the part relativization, for certain aspects, of their mandate. This decision is in line with other recent rulings of the CJEU in which the Luxembourg Court has not shown great deference towards national Constitutional Courts; I am referring to the *Filipiak*[17] and the *Winner Wetten*[18] cases, for instance, which will be considered later in this article. This tendency does not seem to cohere with another recent trend which sees Constitutional Courts as being increasingly open to Article 267 TFEU, nor with another series of decisions which has been traced back to a sort of margin of appreciation doctrine of the CJEU.[19]

However, despite this new trend, conflicts are still at the heart of EU law. This Article is about these conflicts, and the role that they play as potential engines for the transformation of EU constitutional law.[20] This work aims to stress the origin, structure, and necessity of these conflicts in the current phase of EU constitutional law.

I am not going to deal with all the possible conflicts present in EU law. Rather, I shall focus on those conflicts that I call "conflicts by convergence": conflicts due to the (partial) convergence among levels. Then I shall turn to consider "constitutional conflicts": conflicts between the primacy of EU law and the supremacy of national constitutions.[21]

The Article is divided into three parts. In the first part, I shall briefly present my view on Article 4(2) TEU. This provision has been described as the codification of a new concept of primacy[22] and as a basis for a more cooperative phase among courts. I think this clause represents the apex of a broader process, but at the same time I do not perceive this process (of partial convergence) as one of a progressive route towards pacification in the

[17] Case C–314/08, Filipiak, 2009 E.C.R. I–11049.

[18] Case C–409/06, Winner Wetten, 2010 E.C.R. I–08015.

[19] "The ECtHR's margin of appreciation doctrine plays a role similar to that of the reverse Solange jurisprudence of Schmidberger and Omega—allowing the court to acknowledge and defer to national specificities in the understanding of common principles—while the BVG's Görgülü doctrine corresponds to Solange—allowing the national court to defer to judgments by the ECtHR, as long as the latter provides, in general, equivalent protection of fundamental rights." Charles F. Sabel & Oliver Gerstenberg *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 EUR. L. J. 511 (2010).

[20] On the importance of constitutional transformation in European constitutional law, *see* JOHN ERIK FOSSUM & AGUSTÍN JOSÉ MENÉNDEZ, THE CONSTITUTION'S GIFT. A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION 28 (2010). *See also* Joseph H. H. Weiler, *The transformation of Europe*, *in* THE CONSTITUTION OF EUROPE 10 (Joseph H. H. Weiler ed., 1999).

[21] Using the distinction employed by the Spanish Constitutional Court: Tribunal Constitucional, *declaración* 1/2004 of 13 December 2004, *available* at www.tribunalconstitucional.es.

[22] von Bogdandy & Stephan Schill, *supra* note 14.

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relationship between constitutional poles[23] (or levels, to employ another terminology).[24] On the contrary, in my view constitutional conflicts are and will remain central in the evolution of EU law. Starting from this premise, in the second part of this article I shall offer a classification of constitutional conflicts.

In the final part of the Article, I will present some concluding thoughts on the destiny of these conflicts.

C. Constitutional Conflicts and the Treaty of Lisbon

In 2011, von Bogdandy and Schill[25] described Article 4(2) TEU[26] as being one of the most important novelties of the Lisbon Treaty, reading this provision as being an exception to primacy provided for under EU law itself.[27] They suggested that this Article could "guide the way to a more nuanced understanding beyond the categorical positions of the CJEU on

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[23] On constitutional pluralism, see Neil MacCormick, *Beyond the sovereign state*, 56 MOD. L. REV. 1 (1993); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002); and Miguel P. Maduro, *Contrapuntal law: Europe's constitutional pluralism in action*, *in* SOVEREIGNTY IN TRANSITION 501 (Neil Walker ed., 2003).

[24] Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?*, 36 COMMON MKT. L. REV. 703 (1999); Franz Mayer & Ingolf Pernice, *La costituzione integrata dell'Europa*, *in* DIRITTI E COSTITUZIONE NELL'UNIONE EUROPEA 49, 43 (Gustavo Zagrebelsky ed., 2005); Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511 (2002). On multilevel constitutionalism, see also LEONARD BESSELINK, A COMPOSITE EUROPEAN CONSTITUTION/EEN SAMENGESTELDE EUROPESE CONSTITUTIE (2007).

[25] von Bogdandy & Schill, *supra* note 14.

[26] Article 4 TEU states,

> 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 fulfilment 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 jeopardise the attainment of the Union's objectives.

[27] von Bogdandy & Schill, *supra* note 14, at 1,418.

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the one side … and that of most domestic constitutional courts."[28] Their argument is based on the pluralistic spirit of Article 4 TEU and on the importance of judicial cooperation and loyalty (principles recalled in Article 4).

Article 4(2) TEU represents the apex of a "crescendo" and is in natural continuity with the progressive "constitutionalization" of the EU that has occurred over the years. This constitutionalizing process is one in which the EU has gradually come to partly overcome its purely economic nature, becoming something more: a union based on fundamental rights as acknowledged in the national constitutions.[29] This provision should be read, therefore, as the confirmation of a long process which commenced after *Solange I*;[30] it should be read as a direct product of the dialectic which exists between the national Constitutional Courts and the CJEU. The rapprochement[31] between the national and the supranational legal orders which exists in this context has been extensively studied and I am not going to recall such a well-known story.

The important point for the purposes of this article is that this process of rapprochement has created a shared zone of principles between the national and supranational legal orders, and is also confirmed by the reference made in Article 6 TEU to the "constitutional traditions common to the Member States."[32] Further evidence of this is to be found in the clauses of the Charter of Fundamental Rights of the EU which refer to the "national laws and practices" that have been introduced in order to avoid a breach of the national constitutions.[33] However, on closer analysis one could argue that neither Article 4 TEU nor

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[28] *Id.*

[29] I developed this thesis in Giuseppe Martinico, *What lies behind Article 4.2 TEU?*, *in* NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 93 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

[30] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case 2 BvG 52/71 Bundesverfassungsgericht: Federal Constitutional Court [1974] 2 CMLR 540.

[31] On this process, *see* LUIS I. GORDILLO, INTERLOCKING CONSTITUTIONS TOWARDS AN INTERORDINAL THEORY OF NATIONAL, EUROPEAN AND UN LAW 66 (2012). The Author describes a process, consisting of two stages—"the establishment of the red lines" and "the rapprochement of positions."

[32] Alessandro Pizzorusso, *Common constitutional traditions as Constitutional Law of Europe?* SANT'ANNA LEGAL STUDIES (STALS) RESEARCH PAPER, 1/2008, http://stals.sssup.it/files/stals_Pizzorusso.pdf (2008).

[33] See, for instance, Articles 9 ("right to marry and right to found a family"), 10(2) ("freedom of thought, conscience and religion"), 14(3) ("right to education"), 27 ("workers' right to information and consultation within the undertaking"), 28 ("right of collective bargaining and action"), 30 ("protection in the event of unjustified dismissal", and 34–36 ("social security and social assistance", "health care" and "access to services of general economic interest"). A possible effect of such provisions might be to increase the reference to the national traditions of Member States, a sort of margin of appreciation doctrine spread at EU level—especially when the reference to national legislations and practices is not accompanied by that to EU law—but of course this also implies the risk of an erroneous reference to national legislations. Title IV, devoted to "Solidarity," is particularly rich in such references and perhaps it is not a coincidence, since in this field the EUCFR is more innovative than in

its predecessors or successors will (automatically, at least) lead to greater cooperation. Indeed, these open provisions could *increase* rather than *decrease* the risk of conflicts in the multilevel system.

My argument to this effect is that the progressive attention paid by the EU to fundamental rights[34] has created new causes of conflicts rather than extinguishing such conflicts entirely. In fact, the product of this convergence gave birth to new kinds of conflicts among interpreters—conflicts due to the existence of legal sources (the principles concerning the protection of fundamental rights) that are now shared by the CJEU and national Constitutional Courts. Such a scenario has produced dynamics of interpretive competition. It is sufficient to look at Article 4(2) TEU for confirmation of this. Who, for example, is in charge of defining what belongs to the idea of national identity or constitutional structure of Member States? National Constitutional Courts or the CJEU?[35] Similar considerations apply to other open provisions (i.e., provisions referring to national law in the interpretation of EU law)[36] present in recent EU constitutional politics. Here it suffices to recall the *Lissabon Urteil,*[37] where the German Constitutional Court specified the sensitive sectors that embody national constitutional identity. In so doing, the German

other cases (with the exceptions of the title devoted to "Citizens' rights", for obvious reasons) compared with the ECHR.

[34] After the delivery of this article, this attention paid to fundamental rights has been somehow questioned by Opinion 2/13 delivered by the CJEU and concerning the accession of the EU to the ECHR. CJEU, Opinion 2/13, pursuant to Article 218(11) TFEU, (Dec. 18, 2014), http://curia.europa.eu/. However, despite this Opinion, I still think that the EU has not abandoned its project to transform itself into a Europe of Rights.

[35] *See* Antonio Ruggeri, *Trattato costituzionale, europeizzazione dei 'controlimiti' e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, *available at* www.forumcostituzionale.it *(2005). See also*, Mattias Kumm, *The jurisprudence of constitutional conflict: Constitutional supremacy in Europe before and after the Constitutional Treaty*, 11 EUR. L. J. 262 (2005).

[36] For instance, the many provisions of the Charter of Fundamental Rights of the EU. I reflected on these clauses in another piece: Giuseppe Martinico, *Chasing the European Court of Justice: On Some (Political) Attempts to Hijack the European Integration Process*, 14 INT'L COMMUNITY L. REV. 243 (2012).

[37] "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 association and the dealing with the profession of faith or ideology." Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], cases 2 BvE 2/08 at para. 249.

Constitutional Court made an important contribution to the definition of Article 4 TEU, in its problematic concept of "national identity." However, one can see the risk of proceeding in this way. The risk is of interpretive anarchy—of a context in which each Constitutional Court can express its own view on the notion of constitutional identity while pretending to participate in a "pluralist" interpretation. This episode confirms the risks present in a clause like Article 4(2) TEU[38] and confirms also the impossibility of neutralizing conflicts in general by means of such clauses.

To summarize, norms like these are the outcome of a process of partial convergence which began in the aftermath of the early conflicts between national and supranational interpreters. These were conflicts which arose due to the absence, at supranational level, of provisions comparable to those aimed at protecting "fundamental rights" at national level. In other words, they were *conflicts by divergence* or *conflicts by absence* of a comparable discipline in EU law. The *new* conflicts—the conflicts characterizing the current phase—seem to be, on the contrary, conflicts due to the existence of an area of overlap between the national and supranational level. In other words, they are *conflicts by convergence* or *conflicts by presence* of an EU law discipline. I have elsewhere[39] described this overlap zone between legal orders as the core of the complex (*complexus* in Latin means "interlaced") structure of European law.[40] This structure favors the emergence of particular antinomies (conflicts), due to the consequent and inherent difficulty in distinguishing among the different legal levels.

In this sense, one could say that an antinomy is complex if it cannot be resolved by looking at the relations between legal orders: in other words, starting from the assumption of the

[38] More recently see a decision of the Czech Constitutional Court which did not have to do with constitutional identity but which demonstrates the permanent risks of conflicts even after the entry into force of Article 4(2) TEU. Ústavní soud (Czech Constitutional Court, judgment of 31 January, Pl. ÚS 5/12, Slovak Pensions XVII. The English translation is available at http:// http://www.usoud.cz/.

[39] GIUSEPPE MARTINICO, THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS: THE FRUSTRATING KNOT OF EUROPE (2012).

[40] The *mot-problème* (EDGAR MORIN, INTRODUZIONE AL PENSIERO COMPLESSO, 1993, and EDGAR MORIN, CONOSCENZA DELLA CONOSCENZA, 1989) complexity is polysemous. Millard, for instance, recalls at least four different meanings of the word 'complex' (Eric Millard, *Eléments pour une approche analytique de la complexité*, in DROIT ET COMPLEXITE POUR UNE NOUVELLE INTELLIGENCE DU DROIT VIVANT 141 (Mathieu Doat, Jacques Le Goff, & Philippe Pédrot eds., 2007). Complex, in fact, is often used as a synonym of "complicated" and in this sense an antinomy may be understood as complex given its difficulty in being solved because of the legal abundance caused by the coexistence of so many legislators in the EU and of the consequent difficult manageability of the several materials, languages and meanings present in the multilevel system. Secondly, complexity may refer "à la situation d'un objet fragmentée, découpée. L'ensemble social n'est pas simple, au sens d'une théorie des ensembles: il résulte de l'addition ou de l'interaction entre une pluralité d'ensembles partiels, eux- mêmes sans doute s'entremêles (Id. 143)." Thirdly, complex is understood as non-aprioristic/pragmatic; in this respect a reason is complex when it cannot infer choices and decisions from general, clear and abstract principles which were defined aprioristically. On Europe as a complex system, *see* EDGAR MORIN, PENSARE L'EUROPA (1988).

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prevalence of order A over order B, we cannot say that norm x always prevails over norm y because x belongs to order A while norm y succumbs because it belongs to order B. This occurs because in an integrated and interlaced system x and y could belong to both legal orders, A and B.

This situation is also characterized by the absence of a clear and univocal supremacy clause. The absence of univocal norms of collision influences the "reducibility" and the "resolvability" of the constitutional conflict in a multi-layered system. Looking at this scenario, multilevel constitutionalism in fact suffers from the absence of an unambiguous *primacy* clause.[41] The antinomies can only be resolved on a case-by-case basis, and not by an unequivocal solution offered by a precise rule for collision norms (such as a clear and undisputed supremacy clause), because in a context like this a provision which seems to belong to the national level could actually be the repetition of another norm existing at international or supranational level.

With these preliminary considerations in mind, I shall sketch a classification of different types of constitutional conflicts present in the European complex order. A *caveat* should, however, be introduced at this point. I am fully aware that the typology presented is not exhaustive of all the conflicts existing in the European legal arena. At the same time, I am also conscious of the fact that some *conflicts by divergence* are still present in EU law.[42] This is due to the fact that in spite of the aforementioned rapprochement, there is still a relevant "distance" (as so-called by Gabriella Angiulli[43]) between the positions of the different levels. However, in this piece I shall not be taking these kinds of conflicts into account.

D. The Idea of Agonistic Pluralism

[41] Scholars have identified at least four different meanings of primacy/supremacy in CJEU case law. Moreover, the notion of primacy enshrined in Art I-6 of the Constitutional Treaty seems to be different from that used by the CJEU. *See, e.g.*, MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 100 (2006). In order to find a solution to this ambiguity, some scholars have devised a 'law of laws'; see Willem Tom Eijsbouts & Leonard Besselink, *Editorial: The Law of Laws—Overcoming Pluralism*, 4 EUR. CONST. L. REV. 395 (2008).

[42] See, for instance, the piece by Marco Dani, *Economic and Social Conflicts, Integration and Constitutionalism in Contemporary Europe*, LSE 'EUROPE IN QUESTION' DISCUSSION PAPER SERIES, 13/2009, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518629 (2009). See also the special issue of the *European Law Journal* (Volume 18, Issue 5) devoted to this subject and edited by Damian Chalmers and Marco Dani with contributions by Michelle Everson, Christian Joerges, Alexander Somek, and Floris de Witte. *See also* MARCO DANI, IL DIRITTO PUBBLICO EUROPEO NELLA PROSPETTIVA DEI CONFLITTI (2013).

[43] Angiulli, *supra* note 6.

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Traditionally, Constitutional Courts have been deemed "enemies"[44] of the CJEU. More recently, however, a growing number of Constitutional Courts have been progressively accepting the cooperative mechanism established by Article 267 TFEU.

The Constitutional Courts of Germany,[45] Belgium,[46] Austria,[47] Lithuania,[48] Italy,[49] Spain,[50] France,[51] Slovenia,[52] and Poland,[53] have made preliminary references to the CJEU. I shall try to capture the essence of the relationship between these Constitutional Courts and the CJEU by using Mouffe's idea of "agonistic pluralism."[54]

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[44] This was, for instance, the word used by Christian Tomuschat, *La Unión Europea en el marco constitucional de los Estados Miembros. El caso de Alemania*, at a conference given at the Complutense University on 17 April 2013. *See also* Sabrina Ragone, *Las relaciones de los Tribunales Constitucionales de los Estados miembros con el Tribunal de Justicia y con el Tribunal Europeo de Derechos Humanos: una propuesta de clasificación*, REVISTA DE DERECHO CONSTITUCIONAL EUROPEO, *available at* http://www.ugr.es/~redce/REDCE16/articulos/02SRagone.htm (2011).

[45] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], orders of 17 Dec. 2013 and of 14 Jan. 2014, 2 BvR 1390/12; 2 BvR 1421/12; 2 BvR 1438/12; 2 BvR 1439/12; 2 BvR 1440/12; 2 BvR 1824/12; 2 BvE 6/12, *available at* https://www.bundesverfassungsgericht.de.

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

[47] Among others, *see* Verfassungsgerichtshof VfGH [Austrian Constitutional Court], 10 March 1999, B 2251/97, B 2594/97, *available at* www.vfgh.gv.at/cms/vfgh-site

[48] Lietuvos Respublikos Konstitucinis Teismas [The Constitutional Court of the Republic of Lithuania], decision of 8 May 2007, *available at* www.lrkt.lt

[49] *Corte Costituzionale* [Italian Constitutonal Court], sentenza no. 102/2008 and ordinanza no. 103/2008, *available at* www.cortecostituzionale.it. The preliminary reference was raised during *principaliter* proceedings. More recently the Italian Constitutional Court extended its *revirement* to *incidenter* proceedings, see: ordinanza 207/2013,http://www.governo.it/Presidenza/CONTENZIOSO/comunicazione/allegati/ordinanza_207_2013_completa.pdf

[50] Tribunal Constitucional [Spanish Constitutional Court] Auto 86/2011, *available at* http://www.tribunalconstitucional.es/.

[51] Conseil Constitutionnel [French Constitutional Council], Décision n° 2013-314P QPC 4 April 2013, *available at* 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.

[52] Ustavno sodišče [Slovenian Constitutional Court], Order U–I–295/13) *available at* http://www.us-rs.si/aktualno/novice/sklep-ustavnega-sodisca-st-u-i-29513-z-dne-6-11-2014/.

[53] Trybunał Konstytucyjny [Polish Constitutional Court] decision K 61/13, *available at* http://otk.trybunal.gov.pl/OTK/otk_odp.asp?droga=%28otk_odp%29&sygnatura=K%2061/13.

[54] Among her works, *see* CHANTAL MOUFFE, THE RETURN OF THE POLITICAL (1993); CHANTAL MOUFFE, THE DEMOCRATIC PARADOX (2000); CHANTAL MOUFFE, ON THE POLITICAL (2005) ("I use the concept of agonistic pluralism to present a new way to think about democracy which is different from the traditional liberal conception of democracy as a negotiation among interests and is also different from the model which is currently being developed by people like Jürgen Habermas and John Rawls. While they have many differences, Rawls and Habermas have in common the idea that the aim of the democratic society is the creation of a consensus, and that consensus is possible if

Before doing that, it is necessary to recall the main features of Mouffe's thought. Her considerations start from the nexus existing between democracy and conflicts in the attempt to describe an "agonistic" public sphere conceived as the "sine qua non for an effective exercise of democracy."[55]

Another feature of her thought is the skepticism towards those reconstructions based on ideas of universal consensus that claim to "establish the privileged rational nature of liberal democracy and consequently its universal validity"[56] and which perceive conflicts as mere irrationalities.[57]

Conflict is crucial in democratic life and denying it, as Mouffe says, has dangerous consequences. Such denial can lead to authoritarian results, since it may be inspired by the belief in a universal and right order. Mouffe's criticism of what she defines as the "optimistic anthropology" is strong and leads her into a confrontation with the principal contemporary thinkers Habermas, Rawls, Giddens, Held, and Beck.

Fundamental in this respect is the legacy of Carl Schmitt, whose thought has been "domesticated" by Mouffe, who tries to extract from his conception of the political (his contraposition friend/enemy) a version of this thought which might be compatible with democratic premises.[58] Mouffe is clear in shutting the door of her pluralism to all those positions that deny democratic premises: "A democratic society cannot treat those who put basic institutions into question as legitimate adversaries."[59]

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people are only able to leave aside their particular interests and think as rational beings. However, while we desire an end to conflict, if we want people to be free we must always allow for the possibility that conflict may appear and to provide an arena where differences can be confronted. The democratic process should supply that arena."); CHANTAL MOUFFE, HEARTS, MINDS AND RADICAL DEMOCRACY, *available at* http://www.redpepper.org.uk/hearts-minds-and-radical-democracy/ (1998).

[55] CHANTAL MOUFFE, ON THE POLITICAL 3 (2005).

[56] CHANTAL MOUFFE, ON THE POLITICAL 84 (2005).

[57] "Because for me that is what politics is about. If there is politics in society it is because there is conflict [...] I started to look at Freud. He does not really develop this idea from the perspective of the collective subject; he develops it more in terms of the individual. I consider the idea of the division of the subject—Eros and Thanatos—and the way the concept of the drive is linked to conflict, very important for politics. I have also been interested in the work of Elias Canetti, in 'Masse und Macht', when he insists that there is a tension between the individuality and the drive to be part of the mass. Again, the idea that we are divided is predominant." Chantal Mouffe, *Hegemony, Democracy, Agonism and Journalism: An Interview with Chantal Mouffe*, 7 JOURNALISM STUD. 964 (2006), http://eprints.lse.ac.uk/3020/1/Hegemony,_democracy,_agonism_and_journalism_%28LSERO%29.pdf.

[58] JEFF NOONAN, DEMOCRATIC SOCIETY AND HUMAN NEEDS 193 (2006).

[59] CHANTAL MOUFFE, ON THE POLITICAL 120 (2005).

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Although the concept of agonistic pluralism was conceived of for social conflicts in general, and not specifically for constitutional conflicts, the concept may explain cases in which the CJEU has reached conclusions that one could define as "aggressive" (perhaps especially if compared to the solution reached in *Omega*[60]). I am referring here to such cases as *Michaniki,*[61] *Zambrano,*[62] and *Elchinov.*[63]

Mouffe's theory, and her notion of "conflictual consensus," can explain the CJEU's judicial schizophrenia here.[64] In other words, the partial convergence in the field of fundamental rights has favored the emergence of a context characterized by the sharing of some fundamental rules between supranational and national actors. Such fundamental rules work as the natural premise of every form of interaction between the actors of the multilevel legal order, but their existence does not preclude the presence of different interpretations or other forms of disagreement. Thus there may be consensus on some basic premises but disagreement on interpretations.

To explain this situation, Mouffe uses the notion of "agonism." This is to be distinguished from "antagonism"; the difference is based on the transformation of the Schmittian figure of the "enemy" into that of "adversary", who is to be conceived as "somebody whose ideas we combat but whose right to defend those ideas we do not put into question."[65]

According to this construction, many of the clashes occurring between Constitutional Courts and the CJEU should be understood as an example of conflict in these terms, produced by one of these interpretative disagreements described by Mouffe.

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[60] Case C–36/02, Omega, 2004 E.C.R. I–9609.

[61] Case C–213/07, Michaniki, 2008 E.C.R. I–9999.

[62] Case C–34/09, Gerardo Ruiz Zambrano v. Office National de l'emploi, 2011 E.C.R. I–01177.

[63] Case C–173/09, Elchinov, 2010 E.C.R. I–08889.

[64] "It needs what I call a 'conflictual consensus.' We need to accept a common symbolic framework, but within this symbolic framework, of course, there is room for disagreement. Let me give you an example of what I mean by that. The common symbolic framework of modern pluralist democracy is the expression of 'liberty and equality for all'. Those are its 'ethico-political principles'. Citizens in a pluralist democracy need to agree that those are the principles that are going to inform their coexistence. But, of course, those shared principles can be interpreted in many different ways. After all, what is liberty? What is equality? And who belongs to this 'all'? There are many different interpretations of this last term alone, and we should accept the legitimacy of those different interpretations." Chantal Mouffe, *Which Public Space for Critical Artistic Practices?*, http:// https://readingpublicimage.files.wordpress.com/2012/04/chantal_mouffe_cork_caucus.pdf (2005).

[65] CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 102 (2000). On the Schmittian influence, see Onur Ulas Ince, *The Return Of The Schmittian: Radical Democratic Theory At Its Limits*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675583 (2009).

In fact, following initial collisions with national Constitutional Courts, the CJEU seemed to gradually get the point, by incorporating the concept of fundamental rights as a premise of the primacy of EU law. New and important provisions were, in addition, introduced into the Treaties, namely former Articles 6 and 7 of the TEU. Despite this convergence, the progressive expansion of CJEU activity into national fields has meant that tension between the CJEU and the Constitutional Courts has not been lacking. Moreover, convergence has given birth to new kinds of conflicts among interpreters—conflicts due to the existence of legal sources (the principles concerning the protection of fundamental rights) that are now shared by the CJEU and the national constitutional Courts. This has produced dynamics of interpretive competition.

All this is consistent with Mouffe's theory. Although the actors of this complex legal system now share the need to respect those constitutional goods conceived as fundamental rights according to the multilevel case law, the possibility of interpretative disagreements remains. This description arguably best explains the current state of the relationship between Constitutional Courts and the CJEU. They are competitors and antagonists, but this is not pathological, as it also occurs in other contexts.[66]

The clearest confirmation of this is the *Solange* saga.[67] With this saga, what was potentially a crisis of the European process came to serve as a turning point, marking the beginning of a new period in the case law of the CJEU and the Constitutional Courts.

The *Solange* decision paved the way for a long-lasting confrontation between the CJEU and national Constitutional Courts. Over the years, the CJEU seemed to take the point by incorporating the concept of fundamental rights as a premise of the primacy of EU law. It is too early to foresee what will happen next and nobody has a crystal ball; but in this respect it is worth mentioning how the *Melki* case,[68] which could, on first glance, be described as having been inspired by a generosity of spirit on the part of the CJEU towards the national courts, actually represents a reaffirmation (although in a "milder" version) of the

[66] Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, *in* IN RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 326 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) ("In one important sense, however, the relationship between the European Union and its Member States is, of course, different from that between the United States and the several states. In the United States, the relationship between federal and state law, and, in particular, between the federal Supreme Court and the state judiciary, are fully ordered…In the European Union, by contrast, the relationship between the central and component state legal orders is fundamentally unsettled.")

[67] Started with the famous *Solange I*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvG 52/71 Bundesverfassungsgericht: Federal Constitutional Court [1974] 2 CMLR 540.

[68] Joined Cases C–188/10 and C–189/10, Melki and Abdeli, 2010 E.C.R. I–05667.

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Simmenthal doctrine,[69] and how the CJEU probably declined to go a step further since the corresponding constitutional interlocutors had already solved the issue. At the same time, as Millet pointed out, the CJEU took the chance to point out and strengthen the *Foto Frost* doctrine.[70]

On the other side, Constitutional Courts have not entirely given up their original position, as is demonstrated by ambivalent decisions like *Honeywell*[71] and the OMT reference. For instance, although in *Honeywell*, the German Court acknowledged the possibility of margin of error to the CJEU, at the same time, it has not renounced its role of counter-power to the Luxembourg Court in the process of European integration, even in extraordinary circumstances, and perhaps only after having "consulted" with the CJEU.[72] This indeed occurred in the OMT decision case, where, as we saw earlier on in this article, the German Constitutional Court referred a preliminary question to the CJEU for the first time in its history.

Even, then, in national decisions that seem "friendly" at first glance, one can find the "germ" of new constitutional conflicts. This will not, however, necessarily lead to the disintegration of the Union. On the contrary, my idea is that constitutional conflicts (or, rather, *some* constitutional conflicts) may sometimes play a systemic role in the changing nature of the EU legal order.

In other words, constitutional conflicts are functional to the transformation of EU law. This is consistent with the idea of "disorder" present in complexity studies,[73] where disorder and conflict are not seen as a disturbing element but rather as an element of dynamism,

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[69] François-Xavier Millet, *La 'question prioritaire de constitutionnalité' e il dialogo a singhiozzo tra giudici in Europa (Unione europea, Corte di giustizia dell'Unione europea, grande sezione, sentenza 22 giugno 2010, cause C–188/10 e C–189/10)*, 17 GIORNALE DI DIRITTO AMMINISTRATIVO 139 (2011).

[70] Case C–314/85, Foto-Frost, 1987 E.C.R. 4199.

[71] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 26 Aug. 2010, Case No. 2 BvR 2261/06.

[72] As Mayer pointed out: "[A]n ultra vires-control of European acts by the German Constitutional Court would only occur in extraordinary circumstances and obvious cases, and apparently a preliminary reference to the ECJ would have to take place first." Franz Mayer, *Rashomon in Karlsruhe—A Reflection on Democracy and Identity in the European Union*, JEAN MONNET WORKING PAPER, 5/10, *available at* http:// http://jeanmonnetprogram.org/paper/rashomon-in-karlsruhe-a-reflection-on-democracy-and-identity-in-the-european-union/ (2010).

[73] As Le Goff put it when writing about the relation between complexity and labour law: "Comme si s'on optait pour la technique homéopathique de lutte contre le mal par le mal lui-même, le désordre devenant paradoxalement vecteur d'ordre", Jacques Le Goff, *Le droit du travail, terre d'élection de la complexité*, in DROIT ET COMPLEXITE POUR UNE NOUVELLE INTELLIGENCE DU DROIT VIVANT 106 (Mathieu Doat, Jacques Le Goff & Philippe Pédrot eds., 2007).

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which allows the system to transform its main features.[74] Order and disorder thus interact, favoring the emergence of social changes and the renewal of the organization.

In this sense "order" should be understood as the whole of the interactions and intersections among "ensembles juridiques."[75] Order is, above, all the process triggered by these interactions (that may be competitive, cooperative, or conflictual) between interdependent legal systems.[76]

It is important to clarify that for the purposes of this article conflicts are understood as disorder, but that not all the differences among levels (or constitutional poles) lead to conflictual relations. This is because there are times when EU law may tolerate different standards of protection (in cases different from *Melloni*, for instance). In these cases, variety in standards does not undermine the primacy of EU law, and an example of such a case would be *Omega*.[77]

E. Back to the Case Law: A Possible Typology of Constitutional Conflicts

In the light of this theoretical framework, I shall move back to the cases.

As was earlier stated, the kinds of conflicts in question can be traced back to the structure of the European legal order. They are due to the constitutionalization of the EU understood as a complex order—that is, as an order characterized by a sort of constitutive interlacement of norms.

Applying the scheme laid out by Chantal Mouffe, one can identify some examples of "disagreement over interpretations":

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[74] This is also consistent with a certain branch of political science scholars: JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT (1992). See also the importance of the relationship between conflicts and order in MACHIAVELLI, especially in the DISCOURSES ON THE TEN BOOKS OF TITUS LIVY. On this see: ALBERTO GIACOMIN, *La 'roba' e gli 'onori': conflitto distributivo e ordine politico nel pensiero di Machiavelli*, NOTE DI LAVORO, http://www.unive.it/media/allegato/DIP/Economia/Note_di_lavoro_sc_economiche/NL2007/NL_DSE_Giacomin_11_07.pdf (2007).

[75] MIREILLE DELMAS MARTY, LE PLURALISME ORDONNE ET LES INTERACTIONS ENTRE ENSEMBLES JURIDIQUES, RECUEIL DALLOZ 951 (2006).

[76] For a different but very convincing idea of order, see Giulio Itzcovich, *Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts*, 18 EUR. L. J. 358 (2012). For a stimulating reading on the relation between order and disorder see: Neil Walker, *Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders*, 6 INT'L J. CONST. L., 373 (2008).

[77] *Omega,* Case C–36/02.

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(1) Conflicts over the interpretation *stricto sensu* understood and concerning the interpretation of the same and shared principle (*Rodriguez Caballero*, *Cordero Alonso*).

(2) Conflicts due to the dual role played by national common judges (*Winner Wetten*, *Filipiak*, *Križan*).

(3) Conflicts over the interpretative monopoly caused by an 'octroyée' interpretation of the national constitutional materials (*Mangold, Kücükdeveci*).

(4) Constitutional conflicts concerning the contrast between EU law as interpreted by the CJEU and provisions in national constitutions (*Kreil, Michanicki*).

Whilst this classification is not exhaustive, and some of these cases could be placed in more than one category, the classification itself is useful in analyzing what is going on after the partial convergence described above.

I. Conflicts over the Interpretation Stricto Sensu *Understood and Concerning the Interpretation of the Same and Shared Principle* (Rodriguez Caballero, Cordero Alonso)

The *Cordero Alonso* case is emblematic of the disagreement caused by the different interpretations given to a shared principle by two different interpreters. It confirms that the mere sharing of principles that are, from a literal point of view, common, does not mean that the interpreters will agree on the interpretation to accord it.

In *Cordero Alonso,*[78] the Spanish judge referring the question to the CJEU asked about the necessity of disapplying a national provision (Article 33 of the Workers' Statute). This provision had already been acknowledged as inconsistent with the EU principle of non-discrimination by the CJEU in a previous judgment,[79] but it had also (and following the first CJEU judgment on this matter) been interpreted in a way consistent with the constitutional principle of non-discrimination by the Spanish Constitutional Court.[80]

Since the general principle of equality and non-discrimination is a principle of Community law, Member States are bound by the Court's interpretation of that principle. This "applies

[78] Case C–81/05, Cordero Alonso, 2006 E.C.R. I–7569.

[79] Case C–442/00, Rodríguez Caballero, 2002 E.C.R. I–11915.

[80] Tribunal Constitucional [Spanish Constitutional Court], decision No. 306/1993 of 25 October 1993, *available at* www.tribunalconstitucional.es

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even when the national rules at issue are, according to the constitutional case law of the Member State concerned, consistent with an equivalent fundamental right recognised by the national legal system."[81]

In this case, the national judge was unable to decide which court to follow and, in order to avoid a decision which would have been seen as challenging the case law of the Spanish Constitutional Court, decided to refer an interpretive question to the CJEU about the meaning and scope of the principle of non-discrimination in EU law. The CJEU confirmed its previous interpretation, recalling how the *Simmenthal* doctrine and the principle of the autonomy of EU law required the disapplication of national law conflicting with European legislation. In this manner, the CJEU offered an interpretation of the principle which was very different to that provided by the Spanish Constitutional Court: although a provision is consistent with the national Constitution it has to be disapplied if it contrasts with the EU law as interpreted by the CJEU.

Such kinds of conflicts, exemplified in *Cordero Alonso* and caused by the dual loyalty of national judges to the CJEU and to their own Constitutional Courts, have been nourished over the years by the progressive constitutionalization of the EU. In this sense, the referring judge in the *Cordero Alonso* case was merely a collateral victim of the interpretive competition between Constitutional Courts and the CJEU—an interpretive competition that paradoxically increased with the progressive constitutionalization of the EU. The CJEU began to increasingly grant an important role to national constitutional materials in its decisions, leading to a "partial" appropriation of the fundamental rights discourse by the CJEU which emerges in a long series of judgments, and is most evident in cases such as *Omega*[82] and *Dynamic Medien*.[83] As some authors have pointed out, it is possible, in these cases, to perceive a certain concern over the "*octroyée* methodology of construing common constitutional traditions."[84] The *Cordero Alonso* case, however, is simply one example of a case in which the CJEU has challenged judgments given by national Constitutional Courts. In the following pages I shall move to other examples of constitutional conflicts.

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[81] *Cordero Alonso*, Case C–81/05 at para. 41.

[82] *Omega,* Case C–36/02.

[83] Case C–244/06, Dynamic Medien, 2008 E.C.R. I–505.

[84] Marco Dani, *Tracking Judicial Dialogue—The Scope for Preliminary Rulings from the Italian Constitutional Court*, JEAN MONNET WORKING PAPER, 10/2008, *available at* http:// http://econpapers.repec.org/paper/erpjeanmo/p0207.htm (2008). See also the reactions to the *Mangold* case (Case C–144/04, Mangold, 2005 ECR I–9981), Roman Herzog & Lüder Gerken, *[Comment] Stop the European Court of Justice*, *available at* http://euobserver.com/9/26714 (2008). This piece is the translation of an article originally published in German, *Stoppt den Europäischen Gerichtshof*, FRANKFURTER ALLGEMEINE ZEITUNG, 8 September 2008.

II. Conflicts due to the Dual Role Played by National Common Judges (Winner Wetten, Filipiak, Križan, Melki)

Some of the constitutional conflicts which fall into this category are strongly related to the multiple loyalties characterizing the actors working in a multilevel context and in this respect other examples of constitutional conflicts are represented by the *Filipiak*[85] and the *Winner Wetten*[86] cases. The *Winner Wetten* case originated from a preliminary reference raised by a German court. In 2006, the German Constitutional Court acknowledged that legislation on the public monopoly on gambling on sporting competitions existing in two Länder violated Paragraph 12(1) of the Basic Law. At the same time, it decided not to declare the legislation in question unconstitutional; instead, it decided to maintain it in effect until 31 December 2007, thereby sending a "message" of sorts to the legislature to push it to intervene by that date and to amend the legislation through the use of its discretionary power, in order to save the legislation from breaching Basic Law. Despite this judgment, the CJEU decided to push the referring judge to disapply the legal provision "saved," for a transitional period, by the German Constitutional Court. It concluded that:

> By reason of the primacy of directly-applicable Union law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period.[87]

A very similar case is *Filipiak,* which originated in a preliminary question raised by a Polish judge with regard to proceedings on tax issues between Mr. Filipiak, a Polish national engaging in economic activity in the Netherlands (where he regularly paid the social security and health insurance contributions required by Dutch legislation), and the Director of the Poznań Tax Chamber. What is interesting for the purposes of this article is that the referring court recalled a previous decision of the Polish Constitutional Tribunal. On that occasion the Polish Constitutional Tribunal had ruled that the income tax law in question infringed the principles of equality and social justice enshrined in the Polish Constitution

[85] Case C–314/08, Filipiak, 2009 E.C.R. I–11049.

[86] *Winner Wetten*, Case C–409/06.

[87] *Id.*

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but, at the same time, had decided to postpone the loss of validity of the legislation until 30 November 2008, by exploiting its powers *ad hoc*. The CJEU concluded that:

> the primacy of Community law obliges the national court to apply Community law and to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national Constitutional Court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.[88]

Another case is *Križan,*[89] which originated in a preliminary reference sent by the Supreme Court of Slovakia. Among other things, the a quo judge asked whether Article 267 TFEU requires or enables the supreme court of a Member State to use the preliminary ruling mechanism:

> even at a stage of proceedings where the constitutional court has annulled a judgment of the supreme court based in particular on the application of the EU framework on environmental protection and imposed the obligation to abide by the constitutional court's legal opinions based on breaches of the procedural and substantive constitutional rights of a person involved in judicial proceedings, irrespective of the EU law dimension of the case concerned that is, where in those proceedings the constitutional court, as the court of last instance, has not concluded that there is a need to refer a question to the [Court of Justice] for a preliminary ruling and has provisionally excluded the application of the right to an acceptable environment and the protection thereof in the case concerned?[90]

The answer given by the CJEU in this case presented further evidence of the strong conception of EU law employed by the CJEU in its relationship with national constitutional judges, stressing the autonomy to be left to the a quo judge to refer to the CJEU.

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[88] *Filipiak,* Case C–314/08.

[89] Case C–416/10, Križan & Others, (Jan. 15 2013), http://curia.europa.eu/.

[90] *Križan,* Case C–416/10 at para. 47.

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The national rule which obliges the Supreme Court of Slovakia to follow the legal position of the Constitutional Court of Slovakia cannot, therefore, prevent the referring court from submitting a request for a preliminary ruling to the CJEU at any point in the proceedings which it judges appropriate, and to set aside, if necessary, the assessments made by the Constitutional Court which might prove contrary to EU law.[91]

The need to preserve the direct relationship between the CJEU and national judges was also at the heart of a different decision, the *Melki* case.[92] This case originated in the reform introduced in France by Article 61–1 of the French Constitution by which the *incidenter* control of constitutionality was introduced.[93] This provision was implemented by Organic Law No. 2009–1523, which amended Ordinance No. 58–1067 of 7 November 1958. After this reform, Article 23–5 of the Ordinance, second paragraph, provided for the priority of the question of constitutionality over the review concerning conformity with EU Law. Doubting the compatibility of this provision with the CJEU's jurisprudence, the French *Cour de Cassation*[94] referred a preliminary question to the CJEU, asking whether Article 267 TFEU precludes legislation such as that resulting from the French reform:

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[91] "Finally, as a supreme court, the Najvyšší súd Slovenskej republiky is even required to submit a request for a preliminary ruling to the Court of Justice when it finds that the substance of the dispute concerns a question to be resolved which comes within the scope of the first paragraph of Article 267 TFEU. The possibility of bringing, before the constitutional court of the Member State concerned, an action against the decisions of a national court, limited to an examination of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement, cannot allow the view to be taken that that national court cannot be classified as a court against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU. In the light of the foregoing, the answer to the first question is that Article 267 TFEU must be interpreted as meaning that a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court." *Id.*

[92] "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 E.C.R. I-0000, paragraph 32)." *Melki and Abdeli*, Joined Cases C–188/10 and C–189/10 at para. 42.

[93] Article 61-1states, "If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period. An Organic Law shall determine the conditions for the application of the present article." On this, see Federico Fabbrini, *Kelsen in Paris: France's constitutional reform and the introduction of a posteriori constitutional review of legislation*, 9 GERMAN L.J., 1297 (2008).

[94] The saga is indeed multilevel: during a proceeding initiated by Mr. Melki and Mr. Abdeli, two Algerians, unlawfully present in France. They were arrested and put into detention after a police control carried out in an

> in so far as those provisions require courts to rule as a matter of priority on the submission to the Conseil Constitutionnel of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution.[95]

Before the CJEU pronounced on this, the French *Conseil Constitutionnel*[96] had interpreted this provision in a manner consistent with the *Simmenthal*[97] and *Cartesio*[98] doctrines. In June 2010, the CJEU decided to take into account the decision of the *Conseil Constitutionnel*[99] which had in the meantime attempted to give an interpretation of the legislation consistent with EU law and with the CJEU's case law. In *Melki*, the CJEU pointed out the need to respect the "essential characteristics of the system of cooperation between the Court of Justice and the national courts."[100] It specified that in no case is it possible to infer from the judgment of a constitutional court declaring national legislation unconstitutional (in proceedings regarding the constitutionality of national legislation implementing a directive, for instance) the invalidity of the supranational directive, since

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area close to the Belgian border, on the basis of Art. 78–2, p. 4, of the French Code of Criminal Procedure. The judge deciding on provisional detention decided to refer to the Court of Cassation (as we know the French Constitutional Reform gave the *Court de Cassation* and the *Conseil d' État* a role of filter of the questions raised by the lower courts) a question concerning the consistency with the French Constitution of the possibility to check the identity of persons in a border area. The referring judge had in mind Art. 88-1 of the Constitution, which reads 'The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common pursuant to the [Treaties]', in so far as Union law ensures the absence of internal border controls for persons. The Court de Cassation deciding on the possibility to pass the question to the French Conseil Constitutionnel, aware of the consequence on European Union law of a decision like that and doubting the mechanism of the priority of the constitutional question devised by the French Reform, raised a preliminary reference to the CJEU.

[95] *Melki*, Joined Cases C–188/10 and C–189/10 at para.22

[96] Conseil Constitutionnel [French Constitutional Council], Décision no. 2010–605 DC of 12 May 2010, *available at* http://www.conseil-constitutionnel.fr/decision/2010/2010-605-dc/decision-n-2010-605-dc-du-12-mai-2010.48186.html.

[97] Case C–106/77, Simmenthal, 1977 E.C.R. I–62.

[98] Case C–210/06, Cartesio, 2008 E.C.R. I–9641.

[99] Conseil Constitutionnel [French Constitutional Council], Décision 2010-605 DC, *available at* http://www.conseil-constitutionnel.fr/decision//decision-n-2010-605-dc-du-12-mai-2010.48186.html. Francis Donnat, *La Cour de Justice et la QPC: chronique d'un arrêt imprévisible et imprévu*, RECUEIL DALLOZ, 1640 (2010); Federico Fabbrini, *La Corte di Giustizia si pronuncia sulla "legittimità comunitaria" del nuovo modello di giustizia costituzionale francese*, QUADERNI COSTITUZIONALI 4 (2010), Daniel Sarmiento, *L'affaire Melki: esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 588 (2010).

[100] *Melki*, Joined Cases C–188/10 and C–189/10 at para. 51.

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this would result in a violation of the *Foto Frost* doctrine.[101] Concluding on this typology, it is possible to recall other cases that could be traced back to this group, for instance *Chartry*[102] and, more recently, *A v. B*.[103]

III. Conflicts over the Interpretative Monopoly Caused by an "Octroyée" Interpretation of the National Constitutional Materials (Mangold, Kücükdeveci)

Another group of cases concerns those conflicts triggered by decisions detrimental to the interpretative sovereignty of Constitutional Courts.

The *Mangold*[104] case is one such example. There, in order to react to the impulse for flexible labor markets by following a framework agreement reached by the social partners, the German legislation in question authorized fixed-term employment contracts for a maximum of two years. The German legislature also added that within that maximum limit of two years, a fixed-term contract could be renewed up to three times.

The fixed-term employment contracts were accepted without the above-mentioned condition, if the worker had reached the age limit of sixty—lowered to fifty-two years in a second moment—at the commencement of his employment term. In *Mangold,* the CJEU was asked to verify the compatibility of the German law with EU Directive 2000/78, and in particular with the principle of non-discrimination on grounds of age drawn from it.

The CJEU recalled that Community law (specifically Article 6, n. 1 of the Directive) should be construed as precluding:

> a provision of domestic law such as that at issue in the main proceedings which authorizes, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration

[101] C–314/85, Foto-Frost, 1987 E.C.R. 4199 ("It should also be observed that the priority nature of an interlocutory procedure for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly.").

[102] C–457/09, Chartry, 2011 E.C.R I–00819.

[103] Case C–112/13, A v. B., (Sept. 11, 2014), http://curia.europa.eu/. On the differences between *Melki* and *A v. B*, see Andrea Guazzarotti, *Rinazionalizzare i diritti fondamentali? Spunti a partire da Corte di Giustizia UE, A. c. B. e altri, sent. 11 settembre 2014, C–112/13*, *available at* www.diritticomparati.it (2014).

[104] *Mangold*, Case C–144/04. See Roberta Calvano, *Il caso "Mangold": la Corte di giustizia afferma (senza dirlo) l'efficacia orizzontale di una direttiva comunitaria non scaduta?*, *available at* www.associazionedeicostituzionalisti.it (2006).

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> concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.[105]

The term for the implementation of the Directive had not yet expired, and in fact the *Mangold* case is interesting for the way in which the CJEU resolved the conflict between EU and national laws. The Court recalled that "during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive."[106]

Later, however, the CJEU seemed to "change" its parameter, shifting its focus from the Directive to general principles of Community law. This shift is confirmed by the words of the Court, in which it is evident that the conflict at stake is that between national legislation and the principle of non-discrimination on the basis of age, a principle which would find its source "in various international instruments and in the constitutional traditions common to the Member States."[107]

The CJEU concluded by recalling the duty to disapply of the national judge:

> It is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law [...] It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.[108]

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[105] *Mangold*, Case C–144/04 at para. 78.

[106] *Id.* at para. 67.

[107] *Id.* at para. 74.

[108] *Id.* at paras. 77–78.

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Hatzopoulos,[109] one of the first commentators on this judgment, read it together with other cases like *Carpenter*[110] and *Karner*.[111] These cases are all characterized by material reference to the legal material of the ECHR and to general principles. The conclusion reached by Hatzopoulos is that the mix between hard and soft law sources influences the legal reasoning of the CJEU by affecting its linearity. The CJEU cannot solve these cases by appealing to a clear legal parameter but rather has to appeal to a vague parameter (a general principle), hence why it refers to general principles and the case law of other courts (other elements sometimes testifying the lack of a strong legal reasoning of the judge) so much:

> Since EC hard legislation will be rare in fields in which some EU coordination takes place, the Court will be obliged to control national measures by reference to general principles and fundamental rights, in order to effectively protect the latter. This, however, is not a commendable development, at least by currently applicable legal standards, and all the judgments above have been strongly criticised.[112]
>
> However what is interesting to us is the way in which the CJEU took inspiration from national constitutional materials in order to construct this general principle.

German scholars reacted harshly to *Mangold*, questioning the viability of inferring such a principle from the constitutional traditions common to the Member States. For example, in an article published in English on *EUobserver*, Herzog and Gerken argued that:

> However, this 'general principle of community law' was a fabrication. In only two of the then 25 member states namely Finland and Portugal is there any reference to a ban on age discrimination, and in not one international treaty is there any mention at all of there being such a ban, contrary to the terse allegation of the ECJ. Consequently, it is not difficult to see why the ECJ dispensed with any degree of specification or any proof

[109] Vassilis Hatzopoulos, *Why the Open Method of Coordination is Bad for You: A Letter to the EU*, 13 EUR. L. J. 309, 337 (2007).

[110] Case C–60/00, Carpenter, 2002 E.C.R. I–6279.

[111] Case C–71/02, Karner, 2004 E.C.R. I–3025.

[112] Hatzopoulos, *supra* note 109, at 337.

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> of its allegation. To put it bluntly, with this construction which the ECJ more or less pulled out of a hat, they were acting not as part of the judicial power but as the legislature. [113]

Mangold is thus emblematic of that "octroyée methodology of construing common constitutional traditions"[114] according to which the CJEU has been jeopardizing the interpretive sovereignty of national Constitutional Courts.

The CJEU recalled *Mangold* in *Kücükdeveci.*[115] There, it confirmed the existence of a general principle of non-discrimination based on age and conceived this general principle as its parameter, although the term for implementing the directive had already expired at that time. It also recalled the EU Charter of Fundamental Rights only to "prove" the later codification of this general principle despite the fact that the EU Charter was already in force at that time.

It is no coincidence that, following *Mangold*, the German Constitutional Court indirectly responded to the CJEU with the famous Lisbon decision[116] and then directly with the *Honeywell*[117] decision.

IV. Constitutional Conflicts Concerning the Contrast between EU Law—as Interpreted by the CJEU—and Provisions Included in the National Constitutions (Kreil and Michanicki)

This final category of constitutional conflicts refers to cases of judgments where the CJEU found there to be incompatibility between a national constitutional provision and EU law. The conflicts here are not conflicts of "interpretation" in a narrow sense, but rather cases of real contradiction between EU law and national law.

The most famous case which falls into this category is, perhaps, *Kreil.*[118] In *Kreil*, the CJEU *de facto* affirmed the prevalence of EU law over a national constitutional provision, by holding that a general exclusion of women from military posts involving the use of arms (as

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[113] Herzog & Gerken, *supra* note 84.

[114] Dani, *supra* note 84.

[115] Case C–555/07, Kücükdeveci, 2010 E.C.R. I–365.

[116] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] *123*, *267* – Treaty of *Lisbon*, 2009, https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[117] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2 BvR 2661/06, www.bundesverfassungsgericht.de

[118] Case C–285/98, Kreil, 2000 E.C.R. I–69.

provided for in Article 12a.4 of the *Grundgesetz*) was in conflict with the content of the Equal Treatment Directive (76/207). Subsequently, the *Grundgesetz* was amended.[119]

The *Kreil* decision concerned the case of Tanja Kreil who, in 1996, had applied for joining the weapons electronic maintenance service of the German Federal army. Her application was rejected on the basis of Article 12a.4 of the *Grundgesetz*, and she subsequently went before the Hannover Administrative Court, claiming that the rejection on the basis of her sex only was contrary to Equal Treatment Directive (76/207). The local court made a preliminary reference to the CJEU in order to verify the consistency of the national provisions with the Directive in question.

Another interesting case is *Michaniki.*[120] The *Michaniki* case stemmed from a constitutional reform of 2001, whereby Article 14 of the Greek Constitution was amended. After this reform, Article 14, paragraph 9[121] provided a sort of irrebuttable presumption of general incompatibility between the media sector and the sector of public contracts, in order to promote transparency in the public works sector. On the basis of this provision, a company, Michaniki AE, failed to win the contract at the end of the tendering procedure and it consequently brought an action before the Greek Council of State, which referred a preliminary question to the CJEU concerning the interpretation of Directive 93/37/EC on public works contracts. The CJEU recalled that the assessment of the compatibility of EU law with national law goes beyond its jurisdiction in preliminary ruling proceedings and also said that the Directive does not *per se* forbid a Member State from providing other exclusionary measures in order to ensure transparency and equal treatment of the tenderers if these measures are consistent with the proportionality principle.

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[119] Article 12a 4 states: "If, during a state of defence, the need for civilian services in the civilian health system or in stationary military hospitals cannot be met on a voluntary basis, women between the age of eighteen and fifty-five may be called upon to render such services by or pursuant to a law. Under no circumstances may they be required to render service involving the use of arms."

[120] Case C–213/07, Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias, 2008 E.C.R. I–9999.

[121] Article 14, p. 9 provides: "The ownership, financial standing and means of financing of the media must be disclosed, as stipulated by law. The measures and restrictions necessary to ensure full media transparency and pluralism shall be specified by law. It is prohibited to concentrate control of several media of the same or different form. In particular, it is prohibited to concentrate control of more than one electronic medium of the same form, as specified by law. The status of owner, partner, main shareholder or management executive of a media undertaking shall be incompatible with the status of owner, partner, main shareholder or management executive of an undertaking which undertakes with the State or a legal person in the public sector in the broad sense to perform works or provide supplies or services. The prohibition in the previous subparagraph shall also extend to any form of intermediary, such as spouses, relatives or financially dependent persons or companies. A law shall set out the specific regulations, the sanctions (which may go as far as revocation of a radio or television station's licence and an order prohibiting the signature of, or cancelling, the contract in question), the system of supervision and the guarantees to prevent circumvention of the foregoing subparagraphs."

The Luxembourg Court also stated, however, that:

> Community law must be interpreted as precluding a national provision which, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.[122]

Finally, it is worth noting that, in his Opinion, Advocate General Maduro used the old Article 6(3) TEU to recall how it was among the EU's obligations to respect the constitutional identity of the Member States. This, in my view, confirms that there exists a continuity between the pre-Lisbon Article 6(3) TEU and the post-Lisbon Article 4(2) TEU.

F. On the Future of Constitutional Conflicts

My final thoughts thus concern the issue of constitutional conflicts in a context that is characterized by a new openness towards the preliminary ruling mechanism on the part of national Constitutional Courts.

As earlier stated, the progressive openness shown by Constitutional Courts does not *per se* lead to greater cooperation with the CJEU, and this is confirmed by the fact that the CJEU is alternating between very "sensitive" decisions (those decisions based on Article 4(2) TEU, for instance)[123] and "muscular" decisions (the majority of decisions now, I would say). At the same time, there are many hot issues, related, for instance, to the former third pillar, where there is already precedence for some Constitutional Courts using the counter-limits weapon.[124]

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[122] *Michaniki AE*, Case C–213/07 at para. 69.

[123] On this case law, see Barbara Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, 31 Y.B. EUR. L. 263 (2012).

[124] As we know, while in the first pillar the counter-limits bomb never exploded (and this might be seen as a confirmation of the particular strength of the interpretative position of the CJEU in this context), the third pillar knew some episodes of tension between the Constitutional Courts and the CJEU: the decisions of the Polish (*Trybunał konstytucyjny*, P 1/05, *available at* www.trybunal.gov.pl/eng/index.htm) and German (*BVerfG, 2 BvR* 2236/04, *available at* www.bundesverfassungsgericht.de/enl) Constitutional Courts (but also see the decisions of the Cypriot *Ανώτατο Δικαστήριο*, 294/2005, *available at* www.cylaw.org and Czech judges *Ústavní Soud*, Pl. ÚS

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Confirmation of the very real tensions existing between the CJEU and national Constitutional Courts comes from the East, and is exemplified by the moves of the Czech Constitutional Court following the *Landtová*[125] decision of the CJEU. In that case, the Luxembourg Court challenged the case law of the Czech Constitutional Court, 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."[126] In reaction to this, the Czech Constitutional Court surprisingly decided to apply the *ultra vires* control, devised by the German Constitutional Court, to the CJEU's decision; and it went on to declare the CJEU's decision *ultra vires*.[127] It made this declaration without firstly referring a preliminary question to the CJEU, and this marks it as importantly different from the German case and as going beyond the menace set by the German Constitutional Court in the Lisbon decision[128] (and mitigated in the *Honeywell* case).[129] This in itself proves that conflicts are still on the everyday agenda and why some of the most evident transformations in the European legal order have been driven on by these conflicts, especially in the field of fundamental rights protection.

The use of Article 267 TFEU by Constitutional Courts does not help in overcoming these tensions between national guardians and the CJEU but this conclusion is not necessarily pessimistic.

Even going beyond the relationship between the EU and Member States it is possible to see how conflicts have played a systemic function, by favoring confrontation and change in the global context. In this sense it has been argued that it is possible to compare judgments such as *Bosphorus*[130] with the famous *Solange* case. According to some

66/04, *available at* http:// http://www.usoud.cz/), which have recalled the question of the ultimate barriers in the field of the European arrest warrant. Jan Komárek, *European constitutionalism and the European Arrest Warrant: In search of the limits of contrapunctual principles*, JEAN MONNET WORKING PAPER, 10/05 *available at* http://econpapers.repec.org/paper/erpjeanmo/p0250.htm (2005).

[125] Case C–399/09, Landtová, 2011 E.C.R. I–05573.

[126] *Id.* at para. 49.

[127] Ústavní soud [Czech Constitutional Court], judgment of 31 January, Pl. ÚS 5/12, Slovak Pensions XVII. The English translation is available at http:// http://www.usoud.cz/.

[128] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 June 2009, 2 BvE 2/08, www.bundesverfassungsgericht.de/en.

[129] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 26 Aug. 2010, 2 BvR 2261/06, www.bundesverfassungsgericht.de/en.

[130] Bosphorus v. Ireland, App. No. 45036/98, (June. 30, 2005), http://hudoc.echr.coe.int/.

authors,[131] another application of the *Solange* method is the *Kadi* case,[132] in which, to use Zucca's terminology, the CJEU stated the prevalence of the principle *Jura Sunt Servanda* over that of *Pacta Sunt Servanda*.[133]

Before concluding this article, it is worth recalling why the "constitutional conflict" will continue to play a central role in the life of the EU.

Aside from the aforementioned risks connected with open provisions like Article 4(2) TEU, other factors also confirm the centrality of conflicts. The financial crisis, for instance, has led to the introduction of some problematic clauses like that, which is included in Article 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG).

Article 3(2), in particular, sets out the need for States to codify the budget rule in national law "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to". It is debatable whether this is consistent with Article 4(2) TEU, which sets out the need to respect the national identity and constitutional structure of EU Member States. Does this Article imply a constitutional obligation for Member States? Who is in charge of respect for this Article?

Even in this case there will be an overlapping zone since the golden rule laid out in Article 3(2) will be, at the same time, both part of the TSCG and of some national constitutions, leading to the possibility of increased interpretative competition between courts.

It is not a coincidence that, more recently, Constitutional Courts (or Supreme Courts in other cases) have been progressively involved in this ambit of economic governance – an area which has traditionally been a domain of the political institutions.[134]

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[131] Antonios Tzanakopoulos, *The Solange Argument as a Justification for Disobeying the Security Council in the Kadi Judgments*, *in* KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE *KADI* TRIAL 121 (Matej Avbelj, Filippo Fontanelli & Giuseppe Martinico eds., 2014). *See also* Andrea Gattini, *Joined Cases C–402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008*, 46 COMMON MKT. L. REV. 213, 234 (2009); GORDILLO, *supra* note 31, at 235–57, 311–13.

[132] Joined Cases C–584/10 P, C–593/10 P, and C–595/10 P, Commission, Council, United Kingdom v. Yassin Abdullah Kadi, (July 18, 2013), http://curia.europa.eu/; Joined Cases C–402/05 P and C–415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation, 2008 ECR I–6351. On the *Kadi* saga, see THE MULTIFICATED ANALYSIS OF THE *KADI* TRIAL, *supra* note 131.

[133] Lorenzo Zucca, *Monism and Fundamental Rights in Europe*, *available at* http:// http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734602 (2011). A slightly different version was published in PHILOSOPHICAL FOUNDATIONS OF EU LAW 331 (Julie Dickson & Pavlos Eleftheriadis, eds., 2012).

[134] On this, *see* Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328060 (2013);

More generally, the contemporary significance of conflicts can be confirmed by the legacy (one might say, the aftermath) of the mega-constitutional politics of the period of the Conventions. This point has been raised by Roberto Bin: "The Constitutional Treaty has discovered a nerve – that of constitutional symbolism – using "words" that have come to recall dangerous and misleading domestic analogies (law, constitution, Minister), causing real worry about the existence of a plan to transform the EU into a state."[135] This argument relies on the scholarship[136] that views the silence present in constitutions (referring to elements "of dormant suspension" [137]) positively, since silence could serve as a way to avoid the emergence of conflicts. On this view, "abeyances are valuable, therefore, not in spite of their obscurity, but because of it",[138] since they are essential in order to "preserve constitutional settlements from conflicts and crises."[139]

In other words, the periods of the Conventions would have broken a sort of silent pact between the EU and its Member States, recalling dangerous (for the states' sovereignty) analogies and paving the way for new conflicts.

This reconstruction captures only a part of the phenomenon: conflicts have always been a part of the EU constitutionalization process, even when some "F-words" had not been pronounced; but, of course, the fear of the domestic analogy is at the heart of some judgments of the German Constitutional[140] Court, especially after the *Lissabon Urteil*.[141] As

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Giacomo Delledonne, *Financial Constitutions in the EU: From the Political to the Legal Constitution?*, SANT'ANNA LEGAL STUDIES (STALS) RESEARCH PAPER 5/2012, http://stals.sssup.it/files/Delledonne%20Stals%205%202012.pdf (2012).

[135] Roberto Bin, *Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia* 363, 372–73 (2010), http://www.robertobin.it/articoli/scritti_modugno.pdf.

[136] MICHAEL FOLEY, THE SILENCE OF CONSTITUTIONS: GAPS, 'ABEYANCES', AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT 198 (1989).

[137] *Id.* at 3.

[138] *Id*. 10.

[139] Leonardo Pierdominici, *Fear of activity, fear of activism, the silence of courts. The docket and the legitimacy of the ECJ and its "Passive Virtues"*, paper presented at the seminar 'Comparative Law and Comparative Institutional Analysis', European University Institute, 23 April 2012. On file with Author.

[140] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 28 Feb. 2012, 2 BvC 4/10 and BVerfG, 2 BvE 8/11. "It is in this sense that integration cannot be well understood as an autonomously "constitutional" phenomenon in its own right, as some of integration's most fervent advocates like to maintain. Rather, despite the EU's extensive normative power, the process of integration lacks the autonomous capacity to legitimize itself in democratic and constitutional terms. For that, the integration process still very much needs the nation-state and national constitutional oversight, whether legislative, executive, or judicial. The most recent decision of the German Federal Constitutional Court regarding national-parliamentary oversight is simply a concrete expression of this continuing dependence." Peter Lindseth, *National parliaments in European integration: Europeanization,*

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I have argued, conflicts belong to the life of constitutional polities. This has been demonstrated by scholarship in sociology and political science, and particularly with regard to social conflicts.[142] But conflicts also belong specifically to the *essence* of constitutionalism, which has a 'polemical' (and not irenical) nature, since it is founded on a never-ending friction between liberty and power, as Luciani wrote.[143] This indicates that the mega-constitutional politics of the period of the Conventions has not only failed to magically solve (and indeed it could not) all the democratic problems of the EU, but, on the contrary, has opened another "fracture". This could have serious effects on the future of the EU, paving the way for possible new conflicts and confirming, therefore, the 'polemical' spirit of European constitutional law.[144]

renationalization, or reconciliation? (2012), *available at* http://eutopialaw.com/2012/03/01/national-parliaments-in-european-integration-europeanization-renationalization-or-reconciliation/.

[141] 123 BVERFGE 267.

[142] JACK KNIGHT, *supra* note 74; ALESSANDRO PIZZORNO, LE CLASSI SOCIALI (1959); ALESSANDRO PIZZORNO, LE RADICI DELLA POLITICA ASSOLUTA (1993); COLIN CROUCH & ALESSANDRO PIZZORNO, CONFLITTI IN EUROPA (1977); Ralf Dahrendorf, *Toward a Theory of Social Conflict*, 2 J. CONFLICT RESOL. 170 (1958); RALF DAHRENDORF, ESSAYS IN THE THEORY OF SOCIETY (1968).

[143] Massimo Luciani, *Costituzionalismo irenico e costituzionalismo polemic* (2006), *available at* http://archivio.rivistaaic.it/materiali/anticipazioni/costituzionalismo_irenico/index.html.

[144] GIUSEPPE MARTINICO, LO SPIRITO POLEMICO DEL DIRITTO EUROPEO. STUDIO SULLE AMBIZIONI COSTITUZIONALI DELL'UNIONE (2011).

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