

Absolute Primacy of EU Law vs. Pluralism: the Role of Courts

Concluding Remarks

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According to the European discourse about primacy of EU law and pluralism, the concept of national constitutional identity in Article 4(2) TEU means that the member states can define its own national identity, but the decision about the compatibility of the national identity with EU obligations since the Treaty of Lisbon is always vested in the European Court of Justice, which makes the ultimate decision on Kompetenz-Kompetenz. Under the revised identity clause of Article 4(2) TEU member state constitutions can specify matters of constitutional identity, and constitutional courts can apply identity control tests to EU acts. Under certain limited circumstances, member states are even permitted to invoke constitutional limits on the primacy of EU law. The boundaries of these constitutional limits are embedded in the principle of sincere cooperation contained in Article 4(3) TEU.

This understanding of the relationship between EU law and the constitutional laws of the member states complements concepts such as constitutional pluralism,¹ the network concept,² multilevel constitutionalism,³ and composite constitutionalism (Verfassungsverbund),⁴ all of which aim to resist the absolute primacy of EU law.⁵ The joint characteristic of these scholars' arguments is that rather than seeking to definitely resolve the standoff between the ECJ and national constitutional courts through any 'all-purpose superiority of one system over another' (McCormick), they propose to leave the questions of Kompetenz-Kompetenz unsettled, and try to avoid conflicts through mutual accommodation between constitutional

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¹ N. MacCormick, 'The Maastricht Urteil: Sovereignty Now', 1 *European Law Journal*, 1995. 259.; N. Walker, 'The Idea of Constitutional Pluralism', *MLR*, 2002, 317.; M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (Ed.), *Sovereignty in Transition*, Hart, 2003. 501.; for a representative collection of essays on constitutional pluralism pro and con, see M. Avbelj and J. Komárek (Eds.), *Constitutional Pluralism*, Oxford: Hart, 2012.

² See A. Peters, *Elemente einer Theorie der Verfassung*, Duncker & Humblot, 2001.

³ See I. Pernice, 'Multilevel Constitutionalism in the European Union', 5 *EL Rev.*, 2002. 511.

⁴ I. Pernice, 'Theorie und Praxis des Europäischen Verfassungsbundes', in Callies (Ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, Mohr Siebeck, 2007.

⁵ A. v. Bogdandy and S. Schill, 'Overcoming Absolute Primacy under the Lisbon Treaty', *CMLR*, 2011. 48: 1-38.

courts (Maduro). Critics of constitutional pluralism, like Martin Loughlin, argue that it is oxymoronic.⁶ Others, like Daniel Kelemen, even go so far as to claim that the concept is not only untenable, but also immoral, and that the scholarly community that supports it should end its ‘dangerous dalliance’ with constitutional pluralism.⁷ Nevertheless, Kelemen admits that the threat to the EU legal order comes not from the national constitutional courts claims of Kompetenz-Kompetenz as such, but from the remedy they propose for violations, namely the inapplicability of unconstitutional EU law. He takes the position that the only appropriate and feasible remedies are (1) an amendment to the national constitution, (2) a secure an opt-out, or if necessary, (3) withdrawal from the EU altogether.⁸ Hence Kelemen concludes that the supremacy of EU law and deference to the ECJ on questions of Kompetenz-Kompetenz does not threaten the constitutional identity of the Member states because they remain free to leave the Union.⁹ In other words, even the most inexorable critic of constitutional pluralism accepts that national constitutional courts must retain responsibility for – as the German Federal Constitutional Court puts it - ‘safeguarding the inviolable constitutional identity’ of their states, as long as they reconsider the appropriate remedies for its violations.¹⁰

Ever since its seminal judgment in *International Handelsgesellschaft*,¹¹ the ECJ has confirmed that national constitutional norms in conflict with secondary legislation should be inapplicable. This means that EU law always takes precedence over national constitutional law, while EU law must respect the national identities of the member states. As the ECJ has stressed in its case law, EU laws have to be interpreted strictly so as to be applicable only when the case at hand entails a ‘genuine and sufficiently serious threat to a fundamental interest of society’.¹² There is no strict and exhaustive list of constitutional identity-sensitive matters accepted by the ECJ, but taking into account the jurisprudence of the ECJ, there are

⁶ M. Loughlin, ‘Constitutional Pluralism: An Oxymoron?’, 3 *Global Constitutionalism*, 2014. 9-30. It isn’t clear, whether Loughlin rejects constitutional pluralism because the ultimate legal authority is vested uniquely in the ECJ, or because political authority remains uniquely vested in the member states.

⁷ D. Kelemen, ‘On the Unsustainability of Constitutional Pluralism. European Supremacy and the Survival of the Eurozone’, 23 *Maastricht Journal*, 136-150, at 139. Despite these harsh words, Kelemen admits that there was a period of constitutional pluralism, when it may have served as a useful developmental stage for the EU legal order.

⁸ *Ibid.* 149.

⁹ *Ibid.* 140. Here he does not mention the possibility of opting out, whatever it means.

¹⁰ *Ibid.* 147.

¹¹ Case C-11/70, *International Handelsgesellschaft mbH* [1970] ECR 01125.

¹² Case C-208/09, *Sayn-Wittgenstein*, para 86.

some more frequently acknowledged issues, such as decisions on family law, the form of the State, foreign and military policy, and protection of the national language.¹³

In recent years, several national constitutional courts have openly challenged the primacy of EU law and the authority of the Court of Justice of the EU in their judgments. The attitude of these courts varies from constructive dialogue to explicit defiance. At times, national constitutional courts have invoked Article 4(2) TEU and their national constitutional identity to justify the violation of the common values set out in Article 2 TEU. These two core provisions of the Treaty have a difficult relationship with each other, and it is also not easy to evaluate the effectiveness of EU instruments to defend and enforce common values. A specific focus should rest on the principle of the rule of law. As is demonstrated by the essays in this special issue, national constitutional courts have developed specific review mechanisms (fundamental rights, *ultra vires* and identity reviews) to deny, in exceptional cases, the applicability of EU law within their domestic legal orders.

The approaches of national constitutional courts are different. They allow for the primacy of EU law over national law (including constitutional law) in general, but not over the core of the constitution, which they specify as matters of constitutional identity. These constitutional courts, as the German Federal Constitutional Court puts it – retain the authority for ‘safeguarding the inviolable constitutional identity’ of their states. This means that they all reserve the right to review EU law, but only in exceptional cases, and will involve the ECJ via the preliminary reference procedure. So far, they have been reluctant to actually exercise the review powers that they have claimed for themselves. This is demonstrated e.g. in the jurisprudence of the German Federal Constitutional Court, which refers to its co-operative relationship with the European Court of Justice, emphasizing its ‘Europe-friendliness’,¹⁴ and

¹³ See these matters mentioned in P. Faraguna, ‘Taking Constitutional Identities Away from the Courts’, *Brook. J. Int’l L.* Vol. 41:2. 2016. 491, at 506-508. In addition, Sayn-Wittgenstein, Faraguna mentions the Groener judgment (Case C-379/87) from 1989, and the more recent Runevi judgment (Case C-208/09). Barbara Guastaferrero discusses also the Omega and Dynamic Medien Cases (Case C-391/09), the Spain v. Eurojust Case (Case 160/03), as well as the Affatato Case (Case 3/10). See B. Guastaferrero, ‘Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause’, *Yearbook of European Law*, Vol. 31. No. 1 (2012), 263-318. Besides these cases, Monica Claes also mentions from the pre-Lisbon case-law the Michaniki case (Case 213/07) and Adria Energia AG (Case 205/08), where the reference was to the protection of the national cultural identity of the relevant member states rather than to the more political form of it. See M. Claes, ‘National Identity: Trump Card or Up for Negotiation?’, in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, 2013. 109-139, at 131-32.

¹⁴ See for instance the judgement of the German Federal Constitutional Court of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07. This judgment was referred to by the Supreme Court of the United Kingdom in *State v. Secretary of State for Transport*, 22 January 2014.

aims to increase the level of protection offered by the EU.¹⁵ In the case of the European Central Bank's Outright Monetary Transaction (OMT) programme, the German Court, in its first preliminary reference ever, de facto declared the OMT programme illegal, and called on the Court of Justice to strike it down.¹⁶ But after the ECJ's ruling delivered on 16 June 2015 reaffirmed the rule that a judgment of the Court of Justice "is binding on the national courts, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings,"¹⁷ the German Court complied with the answer given by the ECJ.¹⁸

In its 2015 *Taricco* judgment,¹⁹ the Grand Chamber of the ECJ held that the Italian legislation concerning the limitation period for VAT fraud was too lenient to ensure the protection of EU financial interests, as required by Art. 325 TFEU, and had to be disapplied. The Italian Constitutional Court, in its preliminary reference in *Taricco*,²⁰ explained to the ECJ the reasons why the Italian justices thought that the ECJ Grand Chamber judgment infringed upon the Italian constitution's principle not to be prosecuted beyond the statute of limitation period that was applicable at the time the criminal offence was committed, and invited the ECJ to correct or qualify its decision. As Davide Paris rightly observes, even though the ECJ might well be unhappy with this development of 'threatening references of appeal', it is better than a situation in which national constitutional courts unilaterally invoke constitutional identity to decide whether and to what extent the member states shall comply with EU law, without the ECJ having the opportunity to express its opinion.²¹

In the framework of a dialogue between national constitutional courts and the ECJ, the Spanish Tribunal Constitucional also emphasized the harmony between European and Spanish basic values, and read into the identity clause a confirmation that an infringement of

¹⁵ Order of 15 December 2015, 2 BvR 2735/14. This decision of the German Federal Constitutional Court on the European Arrest Warrant led to the Judgment of the Grand Chamber of the European Court of Justice of 5 April 2016 in the case of Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen. C-404/15.

¹⁶ BVerfG, Case No. 2 BvR 2728/13, order of 7 February 2014.

¹⁷ Case C-62/14 Gauweiler, para 16.

¹⁸ BVerfG, 34/2016. Judgment of 21 June 2016.

¹⁹ Judgment of 8 September 2015 in case C-105/14.

²⁰ Order 24/2017

²¹ D. Paris, 'Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case *Taricco*', QIL, Zoom-in 37 (2017), 5-20.

the core principles of the Spanish Constitution would also violate the European Treaty.²² The Czech Constitutional Court similarly reserved its review powers for exceptional cases, such as the ‘abandoning the identity of values’ or exceeding the scope of conferred powers, albeit without making a reference to the ECJ.²³ Even though the Czech Court did not frame the decision as an identity case, the reasoning contained in the Czech decision, which argues that the ECJ did not understand the particular historical context of the case, makes clear that the Court considered the case to be an identity issue. The Czech constitutional court’s famous judgment of 2012 for the first time made a finding that an ECJ’s decision was ultra vires.²⁴ But the Court seems to adhere to a euro-friendly interpretation of the Czech constitutional order and it has even interpreted the Eternity Clause itself – especially concepts like democracy or sovereignty – with respect to the logic and nature of European integration. The Czech Constitutional Court’s Europe-friendliness is further complemented by the respect that EU law pays to the national – especially constitutional – identities of the member states.

In 2015, the Supreme Court of Denmark requested a preliminary ruling in the case of Dansk Industry, acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen concerning the interpretation of the principles of non-discrimination on grounds of age, legal certainty and the protection of legitimate expectations. The dispute concerned Ajos’ refusal to pay Mr. Rasmussen a severance allowance. In December 2016, the Supreme Court of Denmark, in its decision in the Ajos case disregarded the guidelines of the Court of Justice of the European Union. It used the occasion to set new boundaries to the applicability of the ECJ’s rulings in Denmark. It did so in two steps: first, the highest Danish court delimited the competences of the EU through the lens of its interpretation of the Danish Accession Act. Second, the Supreme Court delimited its own power within the Danish Constitution.²⁵

²² Tribunal Constitucional 13.12.2004, Declaration (DTC) 1/2004. Quoted by M. Claes, ‘National Identity: Trump Card or Up for Negotiation?’, in A. S. Arnaiz and C. Alcobarro Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, 2013. 109-139, at 128.

²³ Decision 2611.2008, Lisbon I, Pl. ÚS 19/08. Quoted by J. Rideau, ‘The Case Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the ‘German Model’’, in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, 2013. 243-261, at 255-256.

²⁴ ‘Slovak pensions’ case, no. PI ÚS 5/12.

²⁵ Judgement of the Supreme Court, Delivered Thursday 6 December 2016, Case 15/2014. See M. R. Madsen, H. P. Olsen and U. Sadl, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court’s Decision in the Ajos Case and the National Limits of Judicial Cooperation*, iCourts Working Paper Series, No. 85, 2017.

After a failed referendum and constitutional amendment, in December 2016, in a judgment on the immigrants' quota system, the Hungarian Constitutional Court endorsed in the abstract the possibility to refuse compliance with EU law in the name of a Member State's sovereignty and constitutional identity, based on the historical constitution of the country.²⁶ According to this populist agenda, immigrants, refugees and minorities are perceived as threats to the constitutional identity of the people, a danger to 'political unity' in the sense that Carl Schmitt uses the term. Constitutional populists rely on Carl Schmitt's understanding of constitutional identity, which posits that it holds a position above the written constitution and based on the will of the people as a constituent power. This concept of constitutional identity means also that it can change from moment to moment as the will of the people changes. In a constitutionalist sense, in contrast, constitutional identity goes beyond the uncontained constituent power of people, which - following Kelsen's critique - is always fictional, and is tied to a constitutional text, even though it "only makes sense under conditions of pluralism",²⁷ and emerges "dialogically from the disharmony between the constitution and the social order".²⁸

The abuse of constitutional identity and constitutional pluralism by the Hungarian, the Polish or any other constitutional court is nothing but national constitutional parochialism,²⁹ which attempts to abandon the common European constitutional whole, and is inconsistent with the requirement of sincere cooperation of Article 4(3) TEU. This misuse of constitutional identity for merely nationalistic purposes discredits every genuine and legitimate reference to national constitutional identity claims, and strengthens the calls for the end of constitutional pluralism in the EU altogether. It is a call for unlimited hierarchy³⁰ in order to avoid the disintegration of the EU as a value community.³¹

²⁶ For a detailed analysis of the decision see G. Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law,' *Review of Central and East European Law*, 43 (2018), 23-42.

²⁷ See M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*, Routledge, 2010. 21.

²⁸ Cf. G. Jacobsohn, *Constitutional Identity*, Harvard University Press, 2010. 7.

²⁹ See the term used M. Kumm, 'Rethinking Constitutional Authority: On Structure and Limits of Constitutional Pluralism', in M. Avbelj and J. Komárek, *Constitutional Pluralism in the European Union and Beyond*, Hart, 2012. 51.

³⁰ See Joseph Weiler arguing that as a check on the hubris of unbound liberty, both of the collective and the individual, the European as any other constitutional order besides pluralism needs hierarchy as well. J.H.H. Weiler, 'Prologue: Global and Pluralist Constitutionalism - Some Doubts', in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, CUP, 2012. 17.

³¹ In a recent article, Viktor Orbán warned the 'unionist' of the EU, who call for a United States of Europe and mandatory quotas, if they refuse to accept the 'sovereignists' desire for a Europe of free and sovereign nations, who will not hear of quotas of any kind, the mainstream will follow precisely the course that Hungary has set

The more general experience of the national constitutional courts' case law is that the reference to national constitutional identity of Article 4(2) is legitimate only if the Member State refuses to apply EU law in a situation where a fundamental national constitutional commitment is in play.³² Adopting Matej Avbelj's term for the relationship between EU law and transnational law,³³ for the role of national constitutional courts and the European Court of Justice, this approach can be characterised as 'principled legal pluralism'.

forth to affirm its constitutional affirmation of Christian roots, its demographic policy, and its effort to unify the nation scattered across borders. See V. Orbán, 'Hungary and the Crisis of Europe: Unelected Elites versus People', *National Review*, January 26, 2017.

³² See M. Kumm and V. Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', 3 *ICON*, 473, 491 and 492.

³³ See M. Avbelj, *The European Union Under Transnational Law*, Hart, 2018.