Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling

By Marta Cartabia[*]

A. Introduction

The European continent has become a space of *constitutional interdependence* and consequently, national Constitutional Courts are now embedded in a constitutional fabric made of national constitutions, European Union (EU) law, European treaties, and conventions. This is all the more evident in the domain of fundamental rights.

This constitutional interdependence affects the national Constitutional Courts' responsibilities: On the one hand, they are charged with new duties, because to some extent they are called to serve as EU law adjudicators; on the other hand, some of their traditional competences are to be adjusted to a more complex legal order.

Moreover, the national Constitutional Courts' mission overlaps in part with the activity of many other judicial bodies and in particular human rights adjudicators, whose decisions impact the work of national Constitutional Courts.

B. How Do Constitutional Courts React to These Facts?

Different reactions can be recorded from the constitutional practice.

(i) Implementation and promotion: although it is a common assumption that EU law tends to displace Constitutional Courts at the margin of the European legal order,[1] because it primarily relies on the cooperation of lower national Courts, undoubtedly the Constitutional Courts' mission includes the enforcement of European obligations. National constitutions provide *European clauses*, so that European obligations are to some extent also constitutional obligations. As a consequence, Constitutional Courts decide a number of controversies on European grounds and when they invalidate national legislation that conflicts with European norms and principles—provided they do not have direct effect, according to the *Simmenthal* doctrine—they contribute to rendering EU law more

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

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effective. At times, some national courts go even further and promote supranational legal concepts well beyond the European mandate: there are a number of cases that could be resolved on purely domestic grounds, but Courts intentionally broaden the scope of their judgments and include EU law. They disseminate the European legal culture through their respective legal orders.

(ii) Reluctance: a number of Courts are inclined to contain the use of transnational law to a minimal level in their own decisions and decide cases on domestic grounds rather than on European ones, tend to avoid formal referral to supranational law and case law, and escape all contacts with other national or supranational Courts.

(iii) Defense: starting in the 1970s, an increasing number of Constitutional Courts have developed some "safeguard clauses" designed to protect the core *values* of the *national constitutional identity* from all forms of interference from foreign or EU law. A similar concern brings some national Courts to mark the boundaries that cannot be trespassed by EU law, maintaining the control of the *competences* that pertain to the national constitutional order. Suffice to recall here *Solange I* and *II, Maastricht, Lissabon,* and the following line of decisions in the German Constitutional Court. A similar position was maintained by the Italian Constitutional Court with the "counter limits doctrine"—an expression that refers to the limits to the limitation of national sovereignty accepted to enter the European Communities. Moreover, at the time of the Constitutional Treaty a number of other national Constitutional Courts (the French, Spanish, and some of the Central and Eastern European ones) endorsed similar doctrines. Indeed the core constitutional values and fundamental rights and competences are part and parcel of the aforementioned safeguard clauses that national Constitutional Courts do not want to give up.

(iv) Challenge: occasionally some Constitutional Courts have challenged straightforwardly a piece of EU legislation or a decision of the European Court on *ultra vires* grounds or on grounds of conflict with basic principles of the national constitutional order. At times, the challenge has been brought before the European Court, as the Austrian Constitutional Tribunal and Irish Supreme Court recently did with regards to the data retention directive; at other times, divergences have resulted in an unsettled, mute conflict.[2]

(v) Participation: in recent years, an increasing number of Constitutional Courts have contributed to the development of common legal principles, taking an active role on the European stage, interpreting and enforcing European standards and especially making use of the preliminary ruling. Suffice here to recall the Spanish preliminary ruling in the *Melloni*

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

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case on the right to defense in the European arrest warrant context;[3] the French *Conseil Constitutionnel* in the *Jeremy F.* case, equally concerning the European arrest warrant and the right to defense;[4] the Italian Constitutional Court concerning the interpretation of directive 1999/70/EC on fixed-term employment and its applicability to teachers and other personnel working in public schools;[5] and the decision of the Austrian Constitutional Court, challenging directive 2006/24 on data retention.[6]

Implementation, promotion, reluctance, defense, challenge, and participation: These approaches often all coexist. The same Court may at times be reluctant, cooperative, defensive, challenging, and so on.

C. What Constitutional Framework for the European Space?

It is worth noting that each of these stances reflects and promotes different understandings of the European public space.

Some of them insist on boundaries, limits, and divisions, and therefore tend to advance a context of *constitutional fragmentation*. In many European countries, this might be a by-product of the traditional dualist approach to international law, based on a sort of "separate but equal" principle.

At the opposite end, and sometimes as a consequence of a monist approach to legal integration, other judicial doctrines foster *uniformity,* implying a sort of top-down relationship between European and national constitutional law and between European and national courts.

Overtaking the old dichotomy between dualist and monist views of European integration, a new *pluralist constitutional approach* can be promoted, in which harmonization does not overlook diversity, standardization does not disregard disparities, and generality does not ignore singularity.

[3] The case was about the interpretation of the European Regulation of the arrest warrant in relation to criminal proceedings in absentia and was decided by the CJEU Grand Chamber. Case C–399/11, Stefano Melloni v. Ministerio Fiscal (Feb. 26, 2013), http://curia.europa.eu/.

[4] French *Conseil Constitutionnel*, Decision 2013–314P QPC, 4 April 2013, *Jeremy F.*

[5] Italian Constitutional Court, Order 207/2013 of 3 July 2013.

[6] VfGH G 47/12–11 G 59/12–10 G 62, 70, 71/12–11, 28 November 2012. Eventually the case was decided by the CJEU. Joined Cases C–293/12 and C–594/12, Digital Rights Ireland and Seitlinger and Others (Apr. 8, 2014), http://curia.europa.eu/.

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Constitutional pluralism seems to better correspond to the self-understanding of Europe itself, whose identity is defined by "unity in diversity" and is founded on a "subsidiarity framework" that requires a core of common legal principles surrounded by a margin of appreciation wide enough to allow national constitutional cultures to survive.

D. New Questions About the Preliminary Ruling Procedure

The preliminary ruling procedure is one of the more powerful procedural connectors among courts serving the cause of constitutional pluralism. New signs of interest in this procedure are spreading all over Europe.[7]

As has been said above, in the EU context, an increasing number of Constitutional Courts have abandoned their reticence and have started referring questions of interpretation or validity of EU legislation to the Court of Justice of the European Union (CJEU) by means of preliminary rulings.

Moreover, a preliminary procedure is now envisaged in the new Protocol 16 to the European Convention of Human Rights (ECHR), so that the highest court of each Contracting Party may request the Strasbourg Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights protected by the ECHR.

Finally, a special form of coordination between the ECHR and the CJEU is described in the Draft Agreement for the accession of the EU to the European Convention[8]—the so-called prior involvement—so that, if a case has been taken to Strasbourg without the question having been considered by the CJEU, the procedure is to be suspended in order for the CJEU to be given precedence. Even though the fate of the draft agreement is hardly predictable in the light of Opinion 2/13, delivered on 18 December 2014 by the CJEU, the aforementioned provisions indicate that the culture of constitutional judicial dialogue is pervasive in Europe.

All these signs show that the time is ripe for formal interactions among constitutional and European courts.

In a way, whereas a few years ago the question was *whether* Constitutional Courts were to join the judicial dialogues taking place among other courts in Europe, at present this question has been given an affirmative answer. Apparently, Constitutional Courts no

[7] See, for instance, this *Special Issue* on *The Preliminary Reference to the Court of Justice of The European Union by Constitutional Courts* (Maria Dicosola, Cristina Fasone & Irene Spigno, eds.)

[8] The Co-respondent and the prior involvement mechanisms are envisaged by Article 3 of the Draft Agreement—Council of Europe CDDH–UE (2011) 16 fin.

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longer fear that a preliminary ruling request might raise the expectation of passive obedience to another court. The preliminary ruling procedure is rather seen as an opportunity for national Constitutional Courts to be *agents* rather than passive *recipients* of the European constitutional construction.

This move towards a greater engagement of national Constitutional Courts in European constitutional conversations raises new questions that might be usefully addressed.

For example, in case of double preliminary questions—constitutional and European—*what order of priority* should be followed? The CJEU has addressed some of these questions in the *Melki* case,[9] concerning a *question prioritaire de constitutionnalité* asked by the *French Cour de Cassation*. However, a number of issues have not yet been clearly answered. Considering the pluralistic constitutional framework of Europe, there might be *equivalence*, but also *diversity* in the interpretation of the same legal principles and fundamental rights by different judicial actors. So the question arises of whether it is more convenient and appropriate that Constitutional Courts decide first on national constitutional grounds before the European Courts pronounce their decisions? Is this always true, both for the CJEU and the European Court of Human Rights? Or is the opposite true? What court should have *a* "*final say*," if any? What court should have a "*first say*," if any?

Moreover, is it possible that, after requesting a preliminary ruling, a Constitutional Court disregards the statement of the CJEU, held to be in contrast with the national constitution or with its core principles? Or, once the question is asked, is the national court definitely bound by the European decision? Or should a margin of appreciation be left for Constitutional Courts? Should the European Courts leave room for a margin of appreciation by national Constitutional Courts in the end?

Does a request for a preliminary ruling sent by a Constitutional Court have an *added value* for the European courts? Does it bring to their attention more arguments that are useful for a better comprehension of the case? Does it enrich their understanding of the national contexts? Is it therefore useful that a Constitutional Court refers to the European courts even when other similar questions have already been sent by lower courts? This last scenario occurred in the aforementioned question relating to the data retention directive, in which the Austrian Constitutional Court joined a previous preliminary ruling sent by the Irish Supreme Court. Similarly, in the case on fixed-term employment the Italian Constitutional Court added a new set of questions to a previous one sent by the Tribunal of Naples.

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

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For the purpose of constitutional pluralism, what kind of preliminary ruling is more effective and useful? In fact, one thing is a preliminary ruling for *interpretation* of EU law, which is the most common one and which usually results in an indirect form of supervision of domestic legislation; another thing is a preliminary ruling for the review of the *validity* of EU measures, that prompts the CJEU to act as a veritable Constitutional Court of the EU (as happened in the Austrian and German cases, respectively about the data retention directive and the powers of the European Central Bank, concerning the Outright Monetary Transaction). Moreover, within the second one, a distinction can be drawn between questions for infringements of *fundamental rights* and question concerning *ultra vires* issues. Should these forms of preliminary ruling be treated differently?

Moreover, so far, in Europe, preliminary rulings typically move from the peripheries to the center. Might it be useful to envisage new forms of preliminary rulings going in other directions, from the center to the peripheries or connecting different peripheries? These possibilities are thus far unknown in Europe. However, the practice of some US federal courts shows that they have asked the state courts for "certification" of the correct interpretation of state legislation implied in the federal case.[10] This is an interesting example of dialogue moving from the center to the peripheries, which is worth exploring in more detail.

Although these questions seem to be highly theoretical at present, it is quite predictable that some or all of them will soon come to the bench. The links among courts are becoming stronger and the need for procedural connection is growing.

Indeed, all these questions might receive different answers depending on the purpose attached to preliminary ruling. The answers to these—and other—questions will shape the form of the European judicial dialogue and will reallocate the positions of the different courts, reflecting, therefore, the understanding of the constitutional space in Europe.

[10] Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance,* 78 N.Y.U. L. REV. 1293, 1306 (2003).

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