Chapter 9

# The Future of Coexistence in the EU and Centripetal Forces, Constitutional Courts and Constitutional Justice

## *European Union, an Ideal Without a Model*[1]

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**Abstract**

The study begins with the premise that in order to gain a better understanding of the European Union as a state structure, it is important to examine the actions of the Court of Justice of the European Union and its collaboration, or lack thereof, with the Constitutional Courts of Member States. Although the Treaties of the EU may not explicitly include the constitutive element of self-determination, the internal actions of the Court of Justice of the European Union, along with the external actions of the Constitutional Courts, seem to be significantly filling this gap. This trend, characterised by an increase in the capacity of the courts (international and supranational) to shape the fragmented and explicitly or predominantly implicitly transferred state sovereignty, is assigned the role of the centripetal force of European integration. The research aims to analyse the integrative mechanism involving the ECJ and national courts, particularly CCs, with the intention of comprehending the intricacies of this collaborative mechanism, how it presents itself, the perspective of evolutions and the impact of constitutional justice on the future of the EU.

**Keywords:** constitutional justice, European Union, constitutional courts, European Court of Justice, centripetal forces.

1 Torchia, 2016, pp. 741–752.

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# 1. Introduction

It has been rightfully noted that the European Union (EU) is a model that is constantly in a state of progress,[2] evolving due to a complex interplay between various movements, actors, and institutions. The EU's normative and institutional system has been shaped by past and current crises, leading to its current legal autonomy. [3] The impact of the crisis "has unleashed a number of centrifugal forces that are straining the EU". [4] It seems, at various times, that under this pressure, the EU is loosening the ties that brought together six and after that more and more States. At the same time, centripetal forces have acted to change the Union's "physiognomy", and founding Treaties, transforming them into quasi-constitutions that serve as the basis for a *sui-generis* constitutional order. This transformation raises important questions about the functioning of "centripetal forces" and their impact on the future of the EU, including whether it will function as a federation of nations or choose a different way of coexisting.

Given the idea[5] that the legal basis of the EU does not derive from the EU itself, but from Member States (MS) by way of treaties, we consider that, within the discussions regarding the future of the Union, special attention should be paid to the constitutions of the MS and their "tectonics", whether we are talking about amendments or interpretations of the constitutions (which most of the time replace or supplement the need for amendment). Theoretically, "the legal basis of the EU is not put at the disposal of the EU";[6] they remain in the will of the MS ("masters of the treaties") because only the states are authorised, in accordance with their own constitutions or adapting them accordingly, to amend the treaties and autonomously determine which sovereign rights/powers they assign to EU. However, according to a famous formula, "Constitution is what the judges say it is",[7] the issue of the will of the States in the said process must be approached nuancedly, taking into account, *inter alia*, the evolution of constitutional justice in Europe.

By the concept of "constitutional justice" we understand, mainly, the "judicial review of laws",[8] to which, over time, complex developments have been added, both regionally and globally. Recent comparative research[9] highlights the role of a constitutional review in limiting the discretion and actions of political decision-makers, extending the idea of constitutionality, and enforcing the supremacy of the constitution. Even the powers of constitutional courts (CCs) somewhat controversially, have increased over time. In addition to their classic role as negative legislators,

2 Cartabia, 2018, p. 744.
3 For the concept of the autonomy of the legal order, see Lenaerts, 2021a, pp. 47–87.
4 Cartabia, 2018, p. 744.
5 Grimm, 2015, p. 275.
6 Ibid.
7 See Walsh, 1951.
8 Criste, 2017, p. 71.
9 Roznai, 2020, pp. 355–377.

these courts now prohibit political parties, cancel election results, disqualify political appointees, and solve conflicts of a constitutional nature. Likewise, despite not always being explicitly given the power to review constitutional amendments, CCs have taken it upon themselves to do so. They no longer solely enforce the constitution but also play a role in policy-making, as a vital component of democratic self-government. This trend towards the "judicialisation of politics",[10] noticed worldwide in recent decades is also important in the light of the "modelling" of the EU as a structure of States.

However, the evolution of constitutional justice in Europe has specific features. As noted, for example, ten years ago, during a Congress covering the topic of 'The Co-operation of CCs in Europe – Current Situation and Perspectives'[11], which brought together the Conference of European CCs, these courts

> are no longer limited to the interpretation of national constitutional law in isolation. The impact of European law on national constitutional law, as well as the interactions between European law and national law, has increased in recent years. For the constitutional courts of the Member States of the European Union, Union law is the primary factor of influence.

In turn, the decisions of the CCs influence the evolution of EU law. Constitutional interpretation considers various factors such as traditions, historical and social context, and their connection to EU law. This process aims to resolve differences and align national legal systems to the EU model. Constitutional adaptation through interpretation may also result in disagreements, which has been evident in the constitutional history of the EU. In this regard, it is helpful to distinguish between "good" and "bad" disputes and their effect on integration.

Therefore, to better understand the construction of the EU as a structure of State, it is necessary to examine the actions of the Court of Justice of the European Union (ECJ) and its collaboration (or lack thereof) with the CCs of MS. Statements such as "EU is externally controlled"[12] should be nuanced from this perspective, since it has been observed that 'in many cases, states are gradually losing control over international and supranational courts' due, amongst other reasons, to the increasing incapability to adequately address the challenges of the shifting reality and the vagueness of many international and EU law provisions allowing for their virtual amendment by the courts.[13] Constitutions and Treaties bind together legislature, which means that the Court's interpretations of Constitutions and treaties, influences the action of legislators considerably. Although the Treaty may not include the 'constitution

10 For the concept, see Tate, 1995.
11 Grabenwarter, no date.
12 Grimm, 2015, p. 275.
13 Belov, 2019, p. 101.

constitutive element of self-determination',[14] the ECJ's internal actions, along with the CCs' external actions, seems to be significantly filling in for this absence.

To this trend, characterised as an increase in the capacity of the courts (international and supranational) 'to shape the fragmented and the explicitly or predominantly implicitly transferred state sovereignty'[15] we assign the role of the centripetal force of European integration. Our study aims to analyse the integrative mechanism involving the ECJ and national courts, particularly CCs. We want to comprehend the intricacies of this collaborative mechanism, how it presents itself, and the impact of constitutional justice on the future of the EU. The book chapter is organised into five parts: Part 1 is the Introduction, Part 2 discusses the state of the EU's constitutional framework and the regulation of constitutional justice, Part 3 analyses the divergence and convergence elements in European constitutional justice, Part 4 examines developments complementary to the action of constitutional justice, such as the establishment of the Rule of Law Mechanism, and Part 5 will offer some final thoughts on the future of coexistence in the EU from the perspective of the constitutional justice.

## 2. State of play. The EU's constitutional framework and the regulation of constitutional justice

### *2.1. National constitutions and the legal integration of the EU order*

The 27 member states of the EU have codified constitutions that establish the fundamental principles of how the state operates, protect basic rights, outline the relationships between public authorities, and include specialised institutions that ensure the constitution is upheld. When it comes to regulating relationships between legal orders, there are various approaches to consider.[16]

A category of constitutions places the issue of relationships between the national legal order and that of the EU within the scope of the general rules relating to international law, settling it according to the same rules [Constitution of Denmark,[17] Estonia,[18] France,[19] Luxembourg,[20] Netherland,[21] Poland[22]]. Another category of

14 Grimm, 2015, p. 275.
15 Belov, 2019, p. 101.
16 For a general approach of the topic, see Safta, 2022b.
17 Constitution of the Kingdom of Denmark, 1953.
18 Constitution of Estonia, 1992, with Amendments through 2015.
19 Constitution of France, 1958, with Amendments through 2008. See Title VI. On treaties and international agreements.
20 Constitution of Luxembourg, 1868, with Amendments through 2009. See Article 49 bis.
21 Constitution of The Netherlands, 1814, with Amendments through 2008.
22 Constitution of Poland, 1997, with Amendments through 2009. Chapter 3, Sources of Law.

constitutions distinctly refers to legal relationships and EU institutions. This category can be further divided into two subcategories. The first subcategory establishes the relationships between norms and emphasises the supremacy of EU law. The second subcategory incorporates elements concerning the European legal system to varying degrees without explicitly addressing priority or primacy/supremacy relationships.

Thus, the Constitution of Austria[23] contains 11 articles grouped in Section B – European Union, from Chapter I – General Provisions. European Union. Relationship and obligations of an institutional nature, the elections for the European Parliament, as well as Austria's participation in the Common Foreign and Security Policy are detailed.

The Belgian Constitution[24] regulates international relations in Title IV, with reference also to the rules regarding the revision of the EU treaties, as well as to the elections of the European Parliament.

The Constitution of Bulgaria[25] does not provide any special title or chapter to relations with the EU, but includes provisions that refer to it when the powers of the constitutional authorities are regulated [see Article 85 (1) 9].

The Constitution of Croatia[26] provides in Chapter VIII – European Union, the legal grounds for Membership and transfer of constitutional powers (Section I), the participation in EU institutions (Section II), EU Law (Section III) and the Rights of EU Citizens (Section IV).

The Constitution of the Republic of Cyprus[27] enshrines the primacy of EU law in Article 1a of Part I – General Provisions and similar provisions are contained in the Constitution of Ireland,[28] in Article 29 – International relations.

The Constitution of Czech Republic[29] establishes, in Art.3, 'that The Charter of Fundamental Rights and Basic Freedoms forms part of the constitutional order of the Czech Republic'.

According to Article 1 of the Constitution of Finland,[30] the country 'is a Member State of the European Union'. Other articles refer to this framework, such as Article 66 which refers to the powers of the prime minister.

The Constitution of Germany[31] contains detailed provisions in Article 23 – European Union – Protection of basic rights – Principle of subsidiarity regarding Germany's participation in the EU, the legal transfer of sovereign powers, the right of the Bundestag and the Bundesstrat to bring an action to the ECJ in order to challenge a

23 Constitution of Austria, 1920, Reinstated in 1945, with Amendments through 2013.
24 Constitution of Belgium, 1831, with Amendments through 2014.
25 Constitution of Bulgaria, 1991, with Amendments through 2015.
26 Constitution of Croatia, 1991, with Amendments through 2013.
27 Constitution of Cyprus, 1960, with Amendments through 2013.
28 Constitution of Ireland, 1937, with Amendments through 2019.
29 Constitution of the Czech Republic, 1993 with Amendments through 2013.
30 Constitution of Finland, 1999, with Amendments through 2011.
31 Constitution of Germany, 1949, with Amendments through 2014.

legislative act of the Union that violates the principle of subsidiarity, and the participation in the EU legislative process.

The Constitution of Greece[32] rules, in Article 28, on the relationships between national and international law, including on the limitation of the exercise of sovereignty, and by the interpretative clause it stipulates that 'Article 28 constitutes the foundation for the participation of the Country in the European integration process'.

According to Article 11 of the Constitution of Italy,[33] the country accepts 'the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations'. The Constitution also refers to the normative framework of the EU, for example through Article 97 (1) concerning public administration, or Article 117 which states that the 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'. Similarly, the Constitution of Latvia[34] refers in Article 79 to the accession to the EU and possible 'substantial changes in the terms regarding such membership'.

An interesting way of incorporating the rules that establish a relationship with the EU can be found in the Constitution of Lithuania,[35] which lays down in Article 150 that they are an integral part of the Constitution of the Republic of Lithuania, inter alia, The Constitutional Act 'On Membership of the Republic of Lithuania in the European Union' of 13 July 2004. This Act provides in point 2 that

> The norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.

The Constitution of Malta[36] refers to the competence of the Parliament to enact laws in accordance with full compliance with Malta's obligations 'in particular those assumed by the treaty of accession to the European Union' (Article 65).

The Constitution of Portugal[37] provides a distinct chapter to the relationships with EU law, Article 8 point 4 establishing in this regard that

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

32 Constitution of Greece, 1975, with Amendments through 2008.
33 Constitution of Italy, 1947, with Amendments through 2020.
34 Constitution of Latvia, 1922, Reinstated in 1991, with Amendments through 2016.
35 Constitution of Lithuania, 1992, with Amendments through 2019.
36 Constitution of Malta, 1964, with Amendments through 2016.
37 Constitution of Portugal, 1976, with Amendments through 2005.

Likewise, the Constitution of Slovakia[38] provides a distinct regulation for the relationship with the EU (Article 7 point 2). A similar regulation regarding the possibility of transferring the exercise of a part of the sovereign rights to international organisations, but without expressly mentioning the EU, is established by in the Constitution of Slovenia (Article 3 a).[39]

The Constitution of Spain[40] refers in Article 135 point 2 to the limits of "structural deficit" applicable by the EU for its Member States.

The Constitution of Sweden[41] regulates, in Chapter 10 – International relations, a Part 4, detailing 'Transfer of decision-making authority within the framework of European Union cooperation'.

The Constitution of Hungary[42] provides in Article E, Paragraph 2 that

> With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union and in Paragraph 3 that 'The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2)'.

The Romanian Constitution[43] incorporates a specific article, 148, that addresses the country's integration into and its relationship with the EU. Paragraph (2) of this article states that, following accession, the provisions of the EU's constituent treaties and other mandatory community regulations will take precedence over any conflicting national laws, in line with the accession act. The following paragraphs outline the duties of various public authorities, such as the Parliament, the President, the Government, and the judicial system, to ensure that the obligations resulting from the accession act are fulfilled. These constitutional provisions should be viewed in conjunction with Article 11, which deals with the connection between international law and national law, and Article 147, which addresses the effects of decisions taken by the Constitutional Court.

This brief presentation highlights a diverse approach to regulating the relationship between national and EU law. Some Constitutions explicitly state the supremacy of EU law, while others prioritise certain EU regulations over internal rules. Some of them "naturally" integrate institutional relations with the EU in the scope of the relations of constitutional authorities, others regulating separately, by express rules, or simply not distinguishing within the framework between the EU and other

38 Constitution of Slovakia, 1992, with Amendments through 2017.
39 Constitution of Slovenia, 1991, with Amendments through 2016.
40 Constitution of Spain, 1978, with Amendments through 2011.
41 Constitution of Sweden, 1974, with Amendments through 2012.
42 Constitution of Hungary, 2011, with Amendments through 2016.
43 The Constitution of Romania, 1991, with Amendments through 2003.

international structures. The lack of clarity of the constitutional framework can lead to conflicts between national and EU legal systems. In practice, the responsibility of the coherence in this regard falls on the CCs and courts of law, called to interpret and apply the national constitutional framework, on the one hand, and the EU constitutional framework, on the other.

### *2.2. Courts and models of constitutional review*

Despite its small size, the EU has various models and types of constitutional review.[44]

Thus, in most EU States, CCs on the Kelsenian model (i.e., specially created authorities, independent, distinct from the court of law system, whose role is to guarantee the supremacy of the Constitution) operate under various names (in Austria, Belgium, Bulgaria, Croatia, France, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Czech Republic, Slovakia, Romania, Slovenia, Spain, and Hungary). In Germany, the Federal Constitutional Court, which is entrusted with the constitutional review, belongs to the judiciary (Article 92), but is a separate, special and specialised court for carrying out constitutional reviews. Similarly, in Malta, a court belonging the judiciary system operates under the name of the Constitutional Court, whose role, expressly established by the Constitution, is to guarantee the supremacy of the Constitution, to defend the fundamental rights of the individual and to protect citizens aggrieved by acts by the Government. In other States, such reviews are entrusted to the courts of law, namely in Denmark (any level of court), Greece (each court being considered competent to rule upon the compliance of the legal norms with the Constitution, but only the Special Supreme Court[45] being able to exclude such norms from the legal order), Estonia (the Supreme Court),[46] Finland (any court of law),[47] Ireland (the Supreme Court and the High Court), and Cyprus (the Supreme Court). In one single EU State (the Netherlands),[48] the Constitution does not allow the constitutional review of laws. Each court has unique characteristics that either align it with or differentiate it from traditional models of constitutional review. For instance, constitutional review in Cyprus has been identified as 'an example of local adjustment in extremis'[49] of the Kelsenian model.

This heterogeneous character is enhanced by the differences of the powers of the CCs and the extent of the review they carry out. As mentioned in the *Introduction*, in addition to the classical constitutional review, there are now other powers attributed to CCs that positions them in the role of arbitrators between constitutional

44 See Safta, 2022a.
45 Constitution of Greece, Art. 100.
46 Constitution of Estonia, Art. 149.
47 Constitution of Finland, Section 106 – Primacy of the Constitution.
48 Constitution of The Netherlands, Art. 120.
49 Kombos, 2020.

authorities, particularly in situations where it is challenging to differentiate between political and legal matters.

It is also important to consider the contribution of each court's case-law to their own competence. Typically, the legislation governing the CCs' organisation and functioning supports this approach. For instance, Article 3 of Law 47/1992 on the organisation and functioning of the CCR[50] states that the Constitutional Court's powers are determined by the Constitution and the law. Additionally, the Constitutional Court 'is the sole authority that can determine its competence", and "this cannot be challenged by any public authority'. From this perspective, the activism and profile of judges should be carefully considered. Just as at EU level, where the ECJ appears as a "zealous architect"[51] of integration and, implicitly, of defining its own competence, at national level the CCs "build", on the one hand, to strengthen their legitimacy, and on the other hand, to expand their jurisdiction.[52] This is a topic of high interest for the CCs itself, as demonstrated by thematic conferences such as the one entitled Judicial Activism of CCs in a Democratic State.[53] Hosted by the Constitutional Court of Latvia, the conference highlighted the special role of CCs in a democratic society, explaining, in essence, that the cases they review are complex, which may cause them to depart from the classical Kelsenian concept of constitutional review. It was also emphasised that CCs may engage in judicial activism, which may lead to discussions about their place within the system of separation of powers.[54]

### *2.3. EU Treaties as a quasi-constitution and ECJ acting as quasi-constitutional court*

In the legal literature[55] the question was raised as to whether there is a European constitution. We agree that the answer should be nuanced:

> if we define a constitution as those founding laws that regulate the society, then the EU undoubtedly has a constitution. Nevertheless, if we formally limit the concept of constitution by referring to the concept of State, then the EU cannot have a constitution, because the EU is not a State, but a Union of States.

In this sense, some authors[56] have thoroughly examined the idea of the EU's legal autonomy.

50 Law No. 47 of 1992, On the Organisation and Operation of the Constitutional Court, Romania.
51 Gáspár-Szilágyi, 2016.
52 See Safta, 2022c, pp. 98–113; Safta, 2012, pp. 1–20.
53 Venice Commission, 2016; Constitutional Court of the Republic of Latvia & European Commission for Democracy through Law.
54 For the issue regarding the legitimacy of the Constitutional Courts, see De Visser, 2018.
55 Schutze, 2021, p. 44.
56 See, for example, Lenaets, 2019.

Based on the answer/perspective, we also can qualify the ECJ as the supreme interpreter of the treaties of the EU. However, the debate is purely theoretical with regards to the qualification of the ECJ, since it is obvious that it behaves as and over time has upgraded itself to a genuine constitutional court. Thus, the diversity among MS constitutional provisions, the fragmentation that is evident, and the unfeasibility of a normative solution such as the European Constitution has led to the ECJ's centripetal action. This has created a favourable environment for the ECJ to interpret and fill in the gaps in a heterogeneous normative content, resulting in a coherence governed by its own rules of interpretation. Starting with the so-called historic judgments in cases such as *Van Gend & Loos, Case C-26/62, Flaminio Costa v. E.N.E.L., Case C-6/64, Amministrazione delle Finanze dello Stato v. Simmenthal SA, Case C-106/77*,[57] the ECJ has 'planted the seeds of an autonomous legal order',[58] whose supremacy consistently states and protects it: '[EU] establishes a new legal order of international law, in favour of which the States have limited their sovereign rights, even if in a limited number of areas, and whose subjects-maters are not only the Member States, but also their nationals'. The solutions pronounced in the preliminary references have essentially contributed to the "drawing" of a distinct constitutional architecture. As also noted, the ECJ 'played a formative role in the evolution of the EU from a free-trade zone to something approaching a nation'.[59]

### *2.4. Horizontal and vertical relationships between Courts in the EU*

Fragmentation in terms of constitutional regulations and constitutional judicial reviews results in legal consequences, in terms of the effects of the decisions pronounced by the courts, as well as in horizontal and vertical relationships between them. These relationships are essential for the role of the centripetal force of constitutional justice in the EU.

Concerning the horizontal relationship, the situations are different as we are dealing with a constitutional review carried out within a justice system, compared to the one carried out by a court outside of this system. In the latter situation, specific challenges arise, concerning the relationships between specialised courts and courts of law, in terms of interpreting and applying EU law.

This issue is complex and not easy to resolve. Establishing the boundaries of jurisdiction for different courts in relation to EU law and ECJ jurisdiction, as well as enhancing these relationships, requires a significant time and effort through judicial dialogue, sedimentation, and refinement. For example, in Italy, where a Kelsenian model constitutional court operates, acceptance of international and supranational law has gradually been embraced by both the courts of law and the Constitutional Court. In this light, it was shown that 'one of the most interesting features of the

57 Case 106/77.
58 Pernice, 2013, p. 56.
59 Maduro, 1998, p. 152.

Italian justice system is the progressive sharing of tasks and liabilities between the constitutional court and the courts of law within the judicial review of legislation and the enforcement of fundamental rights'. The first 40 years (1956-1996) of constitutional review of the Italian court were compared to a long "orchestral rehearsal", in which 'the Constitutional Court and its judges gradually prepared the procedural instruments at their disposal in order to fill the blank spaces' within the legal framework. In years, especially at the beginning of the new millennium, 'it was instead dedicated to the strengthening of the connection rules and above all to the confirmation of the collaboration of the two types of entities, the mutual interdependence of their work and the sharing of the same goals.'[60]

In Romania, where the Kelsenian/European model of constitutional review operates, the judge from the courts of law has a monopoly in interpreting the infra-constitutional legislation, but also obligations arising from Articles 20 and 148 of the Constitution, which lay down the priority of international treaties in the field of human rights when they offer higher protection than the national legislation and, respectively, the priority of mandatory EU norms when they violate the national legislation. The interpretation and enforcement of the same constitutional texts, with *erga omnes* binding nature, is carried out by the Constitutional Court (CCR). Over time, significant steps have been taken to refine the powers of the two categories of courts in the interpretation and enforcement of EU law. Various stages have been passed, starting with the assumption of a competence to control internal rules in relation to EU legislation, continuing with the rejection of this competence and emphasising the competence the courts in the field (somewhat following the French model)[61] and later by creating a so-called doctrine of "interposed norms", which allows the compatibility of internal norms with EU law based on art. 148 of the Constitution to be verified in a nuanced way. According to the CCR:

> the use of a norm of European law within the constitutional review as a norm interposed to that of reference [A/N the Constitution] implies, based on Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by itself or its meaning must have been established clearly, precisely and unequivocally by the Court of Justice of the European Union and, on the other hand, the norm must be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation of the Constitution by the national law – the only direct norm of reference within the constitutional review. In such a hypothesis, the approach of the Constitutional Court is diffrent from the simple enforcement and interpretation

60 Lamarque, 2012, p. 192.

61 Dec no 2010-605 of 12 May 2010: 'it is not for the Conseil constitutionnel, but for the ordinary and administrative courts to examine whether legislation is consistent with EU law, to apply EU law themselves on the basis of their own assessment, and to refer questions to the ECJ'; Bossuyt, 2012, p. 53.

> of the law, a power that lies with the courts and administrative authorities, or from the possible issues related to the legislative policy promoted by Parliament or the Government, as the case may be.[62]

It is still not sufficiently clear how tasks and responsibilities for interpreting and enforcing EU law are divided between the CCR and courts of law, particularly concerning the doctrine of interposed norms, since the notion of "constitutional relevance" of European law norms lacks a clear definition. Things have become even more complicated due to recent ECJ jurisprudence,[63] which allows courts of law to disapply the judgments of the CCs.

Other countries are also working to clarify their court relationships. Even where the CCs fall under the judiciary, it has taken time to establish horizontal relationships between them, while considering the constitutional order of the EU and the ECJ.[64] As was emphasised, for example with regard to Germany, in order to prevent a fragmented enforcement by the multitude of national courts of EU law with reference to the identity clause, alongside the Solange limit and the *ultra vires* concept developed equally in the case-law of the Federal Constitutional Court, the monopoly of verifying compliance with the national constitutional identity was undertaken by the Federal Constitutional Court. Procedurally, the review can follow various paths, including the path of the constitutional complaint based on Article 93.1 no. 4 a) of the Fundamental Law. Thus, if a court of law refers to the priority of EU law in a way that is not in accordance with the constitutional identity, the aggrieved party has the possibility of formulating a constitutional complaint.[65]

The interaction between courts on the same level also affects their relationship with the ECJ, with significant consequences arising for the constitutional order of the EU. The preliminary reference system should especially serve as a central nervous system in this regard, ensuring the consistent and complete application of EU law, as well as promoting the harmonisation of the constitutional framework. Recent developments shows a new role for the ECJ as an "arbiter" in internal jurisdictional conflicts, which leads to a reconfiguration of relationships between courts.

In the construction of this "puzzle" of European constitutional justice, we should not ignore the role of the European Court of Human Rights (ECtHR), which, as we will explain further, has become increasingly involved in the EU construction.

62 Decision No 668/2011, Official Gazette no. 487 of 8 July 2011; See also Decision No 414/2019, Official Gazette no. 922 of 15 November 2019.
63 See Case C-430/21; Case C-107/23 PPU.
64 See Fabbrini and Maduro, 2017.
65 Grosche, 2018, p. 136.

# 3. Convergences and divergences within the cooperation of the courts

### *3.1. Constitutional review of Treaties – "the filtering effect"*[66]

The constitutions of MS act as "filters" in the development of primary European law since any changes made to constitutive treaties must be coherent with the constitutional framework of the MS.[67] As this compliance is verified, with regard to the particularities stated above, by the MSs' CC, their "voices" carry a particular weight, in respect to the establishing of the EU's normative/constitutional framework. Although less addressed, this contribution particularly expresses the role of the centripetal force of constitutional justice, as long as, bridges are built in this way between the national structures regulated through the constitutions and the constitutional core of the EU and its founding treaties. Through the decisions they issue, the CCs provide the "green light" to ever closer integration and, simultaneously, a national perspective on this integration, emphasising limits, but also necessary steps to develop the EU's constitutional order.

Given its vast scale and importance, this topic deserves a thorough examination, in terms of the powers of the CCs and their envolvment in the constitutional review of international agreements. However, to ensure that all CCs in the EU have their voices heard, it is necessary to regulate appropriate and effective powers for the "filtering effect". In Romania for example, the CCR's power to review treaties before their ratification by the Parliament is merely decorative.[68] In 2003,[69] during the revision of the Constitution,[70] a provision was established (currently Article 146 letter b) of the Constitution) that gave the CCR the power to exercise prior control over international treaties before they were ratified by Parliament. However, this provision has never been put into practice because the Court has not been notified of any such cases. For example, the Treaty of Lisbon was ratified in a timely manner by the Romanian Parliament through Law No 13/2008[71] without any objections to its constitutionality.[72] The rapid and undisputed ratification is not a problem in itself, but in

66 For the concept of the "filtering effect", see Grimm, 2015, p. 276.
67 Ibid.
68 Toader and Safta, 2023.
69 The law on the revision of the Constitution of Romania No 429/2003 was approved by the national referendum of 18-19 October 2003, and came into force on 29 October 2003, the date of the publication on the Official Gazette of Romania of the No. 3 of 22 October 2003 for the confirmation of the ballot returns of the national referendum of 18-19 October 2003 regarding the Law on the revision of the Romanian Constitution.
70 In its initial form, the Constitution was adopted at the meeting of the Constituent Assembly on 21 November 1991 and came into force following its approval by the national referendum on 8 December 1991.
71 Official Gazette No. 107 of 12 February 2008.
72 Parlamentul României, 2008.

the light of recurrent discussions that exist in Romania on the subject of supremacy versus priority of EU law with respect to the Constitution it, would have been helpful to have the perspective of the CCR on these relations, as established by the Treaty of Lisbon (especially since this treaty consistently took over from the provisions of the draft Constitution for Europe).

At the opposite pole regarding the constitutionality control of EU treaties, the example of Germany (*Bundesverfassungsgericht)* is well known. Both in the Maastricht[73] and the Lisbon judgment,[74] the *Bundesverfassungsgericht* has the possibility to share its perspective on the EU's structure and developments, serving as a model for other CCs as well. Thus, in the *Maastricht judgment*, the Court characterised the Treaty as being likely to give 'further substantial functions and powers to European institutions, in particular by extending the powers of the EC and by incorporating the monetary policy'. However, 'these functions and powers have not, as yet, been supported at treaty level by a corresponding intensification and extension of the principles of democracy'. According to the Court, if a group of democratic States has sovereign powers and carries out the duties of public authority, the peoples of the MS are the ones who must legitimise it democratically, through national parliaments. Therefore, the democratic legitimisation is achieved by recuperating the action of the European bodies to the parliaments of the MS. As the nations of Europe continue to integrate, the additional fact that the institutional structure of the EU transmits democratic legitimacy through the European Parliament elected by the citizens of the MS becomes apparent. In this regard, the German Constitutional Court concluded that

> it is therefore crucial, both from the point of view of treaty law and that of constitutional law, that the principles of democracy upon which the Union is based are extended in step with its integration, and that a living democracy is retained in the Member States while the process of integration is proceeding.

These conclusions underline a problem of EU constitutionalism, also discussed in the specialised literature, namely the fact that it has not been adequately paralleled by its democratisation.[75]

Likewise, in the Lisbon judgment, referring to the structure of the EU, the *Bundesverfassungsgericht* held that

> the structural problem of the European Union is at the centre of the review of constitutionality: The extent of the Union's freedom of action has steadily and considerably increased, not least by the Treaty of Lisbon, so that meanwhile in some fields of policy, the European Union has a shape that corresponds to that of a federal state,

73 German Federal Constitutional Court, 1993, Decision of October 12, 1993, In Re Maastricht Treaty, Cases 2 BvR 2134/92, 2 BvR 2159/92.

74 German Federal Constitutional Court, 2009, BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil).

75 See also Belov, 2019, p. 103.

> i.e. is analogous to that of a state. In contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation, i.e., are analogous to international law; as before, the structure of the European Union essentially follows the principle of the equality of states. As long as, consequently, no uniform European people, as the subject of legitimisation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority.

According to the German Federal Constitutional Court,

> in Germany, accession to a European federal state would require the creation of a new constitution, which would go along with the declared waiver of the sovereign statehood safeguarded by the Basic Law. There is no such act here. The European Union continues to constitute a union of rule (*Herrschaftsverband*) founded on international law, a union which is permanently supported by the intention of the sovereign Member States. The primary responsibility for integration is in the hands of the national constitutional bodies which act on behalf of the peoples. With increasing competences and further independence of the institutions of the Union, safeguards that keep up with this development are necessary in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States. With progressing integration, fields of action which are essential for the development of the Member States' democratic opinion-formation must be retained. In particular, it must be guaranteed that the responsibility for integration can be exercised by the state bodies of representation of the peoples.

Also, the Constitutional Court of the Czech Republic was twice called upon to verify the constitutionality of the Treaty of Lisbon. Rejecting the referrals,[76] the Court found*, inter alia*, that

> in a modern democratic state governed by the rule of law, state sovereignty is not an aim in and of itself, i.e. in isolation, but is a means to fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands [...] The transfer of certain competences to the state, which arises from the free will of the sovereign and will continue to be exercised with its participation in a pre-agreed, controlled manner, is not a sign of the weakening of sovereignty, but, on the contrary, can lead to strengthening it in the joint process of an integrated whole.

Both courts took into consideration the states' will in achieving deeper integration and were careful in balancing various factors when characterising the EU's profile. We

76 See Constitutional Court of the Czech Republic, 2009, Press Release.

believe that these considerations are also applicable to Romania. According to Article 152 of the Constitution, Romania has a "unitary" character, which comprises a fundamental component. If Romania were to become a part of a federal structure in the traditional sense, adopting a new Constitution would be put into question.

Somewhat symmetrically, in addition to the "filtering effect", it is important to consider the power of CCs to verify amendments to their own constitutions. It is essential to analyse this dimension, because as the German Federal Court has stated, 'every transfer of sovereign rights results in an alteration of the constitutionally defined system of competences and thus in substance a constitutional amendment'.[77] For example, the CCR ruled the unconstitutionality of a proposal to revise the Constitution, aiming to amend the relationships between the national legal order and that of the EU,[78] with important consequences in terms of the general interpretation of these relationships.

However, as noted,[79] 'this filtering effect cannot prevent every deviation from the national constitutions that is associated with the exercise of sovereign rights by supranational institutions'. Its proper functioning is nevertheless crucial to support the integration process, offering a better understanding of the constitutional boundaries of integration and the perspective of CCs in this regard.

### *3.2. Implementation of EU Law in the Member States*

#### *3.2.1. Ways of reception EU law through constitutional jurisprudence*

Based on the previous section's overview of the constitutional framework, it is evident that several states recognise the primacy of Union law and its direct applicability. In other states, constitutional provisions are open to interpretation, making it more challenging for CCs to fulfil their mission when dealing with the relationship between legal orders. Also taking into account this specificity of the constitutional regulation, we can analyse the role of CCs in promoting integration through at least three different aspects. The first aspect involves the interpretation of constitutional provisions in such a way that avoids conflicts. The second aspect involves the referral of their decisions to ECJ jurisprudence. The third aspect involves the utilisation of the mechanism of preliminary reference as a direct way to communicate with the ECJ. Each of these aspects is susceptible to extensive analysis and consideration, but in this context we will point only a few relevant points out.

Concerning the first aspect, we can consider "conformity interpretation",[80] meaning the role of the courts to interpret 'national constitutional law and, possibly, ordinary law in a spirit that is open to European law and/or open to international

77 German Federal Constitutional Court, 1981. BVerfGE 58, 1(36).
78 See Decision No 80/2014, Official Gazette No. 246 of 7 April 2014.
79 Grimm, 2015.
80 See Grabenwarter, no date.

law'. For example, the Portugal Constitutional Tribunal, in its Ruling no. 422/2020,[81] containing a detailed analysis of the legal nature of the EU and the relationships it generates, stated that 'it can only be workable with a dynamic based on factors and practices which induce some kind of systemic coherence, based on something other than hierarchical normative integration.' (para 2.4.1) Concerning the primacy of the EU Law, the Portuguese Tribunal consider that

> This issue is unequivocally resolved in the Portuguese legal system by Article 8(4) of the CRP, which states that [t]he provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law. (para. 2.5.1)

Also, in the Ruling No. 268/2022[82] the Portugal Constitutional Tribunal stated that the principle of conforming interpretation – which emerged in the 1970s in connection with the obligation of national courts to interpret national law in such a way as to render effective directives that do not have a direct effect (cf., among many others, the *CJEU Judgments Mazzalai*, of 20.05.1976, Case 111/75, and *Von Colson*, of 10.04.1984, Case 14/83; *Marleasing*, of 13.11.1990, Case 106/89) – has been developed into a general canon for interpreting national law (all national law) in order to render European Union law fully effective. This principle states that national courts, when applying domestic law, are required to interpret it, as far as possible, in the light of European law: "This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them".[83]

Consequently,

> as the provisions under review fall within the scope of EU law, an interpretation of the constitutional parameters to which the rules at issue are subject takes into account European provisions, seeking to establish the interpretation that is closest to European law.[84]

81 Ruling No. 422/2020, Case No. 528/2017.

82 Ruling No. 268/2022, Case No. 828/2019.

83 CJEU Judgment of 24.01.2012, Maribel Dominguez, Case C-282/10.

84 See also Ruling of the Portuguese Constitutional Court No. 464/2019: 'by virtue of Article 8 of the Constitution, which establishes the importance of international law and Union law in the domestic legal order, and also of the open-ended clause in respect of fundamental rights enshrined in Article 16 of the Constitution, this Court cannot fail to consider the fundamental rights enshrined in the CFREU and in said Convention. It must also take into account, in a spirit of inter-jurisdictional dialogue, their interpretation by the competent bodies for the purpose of their application, particularly the Court of Justice of the European Union ('CJEU') and the European Court of Human Rights ('ECtHR').'

We specifically mentioned these rulings to illustrate the idea that the priority of EU law does not necessarily imply a normative or institutional hierarchy. This can and must be accepted as an effect within the limits of the states' will legal and constitutional interpretation.

The second aspect shows the role of the CCs to enhance the coherence of the EU legal order by citing ECJ jurisprudence. The so called "power of legitimisation" could be discussed in a way "by acknowledging and citing European decisions, they [CCs] underpin the legitimacy on the latter. With Constitutions containing provisions derived from European law, the CCs specify the constitutional obligations and requirements through reference to European provisions".[85]

The third aspect concerns the operation of the mechanism of preliminary reference provided by Article 267 TFEU, being an "engine" of integration and constitutionalisation. It is widely accepted that no other institution has had such a significant impact on defining the main characteristics of the EU order, accelerating its development, and enhancing the integration process.[86] From the perspective of the CCs, this collaboration strengthens the impact of ECJ case law and enables CCs to present their interpretations based on a constitutional order that incorporates European law. By posing questions to the CJEU and presenting their own stance and solutions, CCs can engage in a constructive dialogue with CJEU case law. This is especially significant for novel issues like competition and conflicts between individual fundamental rights, where the preliminary ruling procedure helps to synchronise national and European approaches.[87] This viewpoint is a desirable perspective on the cooperation in European constitutional justice, which generally reflects the state of play. However, it is important not to overlook the potential issues that arise from this cooperation, including disputes of authority between the CCs and the ECJ.[88] The preliminary reference mechanism may not invalidate norms, but it does place constraints on national constitutions and courts. They no longer have the sole authority to reject national laws. Consequently, the CCs have diverse reactions towards developments in the use of the instrument of preliminary references. As was expressed casually with reference to the developments in the use of the instrument of preliminary references (especially in the States which have more recently become EU member),

> the time of curious discoveries and innocent delight has passed rather quickly. A few years later, darker shadows crept in as well. While certain courts in the new MS have indeed learned to discuss, others have started to yell and others have remained knowingly silent. Furthermore, certain courts have learned with remarkable speed to use the procedure of preliminary references for their own purposes.[89]

85 Grabenwarter, no date.
86 Tizzano, 2012.
87 Grabenwarter, no date.
88 Ibid.
89 Bobek, 2014, p. 782, with reference to Bobek, 2014, p. 54.

On the other hand, the authoritarian tone of the ECJ and the progressive construction of what some authors call an "imperial" profile is not exempt from criticism.[90] In other words, even when it has qualified as a keystone of European integration, the preliminary reference does not settle all disputes. In fact in some cases, it can lead to conflicts if the courts take an overly authoritative stance. This will be explored further in the upcoming sections, where the difference between constructive and destructive conflicts will be illustrated.

However, even if not as "enthusiastic" as the courts of law, one by one the CCs have addressed the ECJ with preliminary references, especially concerning fundamental rights.[91] This cooperation has a significant impact on the legislation of the MS. Thus, for example, following the preliminary reference submitted by the CCR and the Ruing of the ECJ in the Case Coman C -673/16, the Romanian court upheld the exception of unconstitutionality raised in that case and found that the provisions of Article 277 (2) and (4) of the Civil Code were constitutional in so far as they permitted the granting of the right of residence on the Romanian State, under the conditions laid down in European law, to the spouses – citizens of the Member States of the European Union and/or citizens of non-member countries – of marriages between persons of the same sex concluded or contracted in a MS of the EU.[92] It is a significant change in terms of the Romanian legislation (its interpretation) and further developments.

In terms of ECJ jurisprudence, a significant step that could "encourage" courts of last instance (including CCs) to use the mechanism of preliminary reference is represented by Cases C-283/81, Cilfit S.R.L. and Lanificio di Gavardo SpA v. Ministry of Health, Judgment of 2 October 1982,[93] as well as more recently, C-561/19 Consorzio Italian Management and Catania Multiservizi, Judgment of 6 October 2021.[94] The ECJ established that

> Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to bring before the Court of Justice a question concerning the interpretation of EU law that has been raised before it, unless it finds that that question is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.[95]

Emphasising the importance of the judicial dialogue, the ECJ also confirmed that a national court of last instance must refer a new question if, after a first preliminary

90 See Belov, 2019, p. 107. With reference to the "Gobal Judicial Empire".
91 For a detailed presentation, see Toader and Safta, 2016.
92 Decision No. 534/2018, Official Gazette No. 842 of 3 October 2018.
93 Case 283/81.
94 Case C-561/19.
95 Points 59 and 66; In this regard, see also Joined Cases C-569/16 and C-570/16, point 21.

ruling, it continues to face doubts about the interpretation of Union law in the case in which it was notified. When a new request for a preliminary ruling is made, the national court of last instance will transparently state its concerns in such a way, so as to allow all Member States to submit their observations in the proceedings before the Court of Justice, which after deep reflection and taking into account all the submitted observations, will bring up additional clarifications or specify its case law.

In recent times, the ECtHR has been increasingly involved in the "multilevel sovereignty games"[96] by backing the ECJ, particularly concerning the responsibility of courts to send preliminary references. Thus, for example, in the Case *Georgiou v. Greece, Judgment of & July 2023*[97] it has found a violation of Article 6 § 1 of the Convention "on the ground that the Court of Cassation did not examine the applicant's request for a preliminary ruling to be sought from the CJEU." This practice of the ECtHR seems to offer a solution to the issue raised in legal doctrine[98] about finding a "useful remedy" when national courts fail to address preliminary referrals, despite being required to do so.

### *3.2.2. Bridges and walls. Protection of human rights and counter-limits*

#### 3.2.2.1. The process of convergence in the field of human rights – lights and shadows

Within the process of implementing EU law, the area of protection of human rights perhaps illustrates to the highest degree the functioning of the centripetal mechanism that we associated with constitutional justice ('in the field of fundamental rights a process of convergence is going on in Europe').[99]

This "process of convergences" is a very complex one, due to the coexistence of different catalogues of human rights (constitutions, the Charter of Fundamental Rights of the European Union,[100] and the Convention for the Protection of Human Rights and Fundamental Freedoms).[101] Each catalogue offers standards of protection, and each level has its own "guardian", which includes the CCs, the ECJ, and the ECtHR. Given the vital role of fundamental rights, the question of how to reconcile these sources and voices to prevent legal insecurity for European citizens arises. The identification of solutions to this problem leads to the creation of "bridges", in the sense of a higher coherence of the European legal order.

The ECJ has developed, with regards to the relationships between national (constitutional) law and EU law, a "doctrine" which offers a methodology for the interpretation and enforcement of various standards of protection of fundamental rights.

96 See Belov, 2019, p. 103.
97 European Court of Human Rights, 2023, *Case of Georgiou v. Greece*, Application no. 57378/18.
98 See Broberg, 2015, pp. 9–37.
99 Arnold and Feldbaum, 2016.
100 Charter of Fundamental Rights of the European Union, 2012 (2012/C 326/02).
101 European Convention on Human Rights, 1950.

The distinction is based on the degree of harmonisation at the EU level, essentially being explained by the President of ECJ at the most recent Congress of the Conference of European CCs in 2021, as follows:

> in the light of the seminal judgment of the Court of Justice in *Melloni*, this means, in essence, that where a normative conflict between provisions of national (constitutional) law and EU law occurs, in a situation where the EU legislator has fully harmonised the level of protection of a fundamental right, the compatibility of a national measure with such a right is to be examined in the light of EU law, and not according to national constitutional standards.[102]

Conversely, in line with the judgment of the Court of Justice in *Åkerberg Fransson*, where there is no such harmonisation, national standards that are higher than those guaranteed by the EU Charter may apply, provided that 'the primacy, unity and effectiveness of [EU] law are not thereby compromised".[103]

This approach raises sensitive issues concerning the national and EU law standards, all the more so national constitutions and practices incorporate the standards of the European Convention for Human Rights, as interpreted by the ECtHR. For example, in Austria, the European Convention on Human Rights was granted the rank of constitutional law by explicit constitutional order.[104]

As for the Constitutional Courts, an example of convergence in terms of the interpretation and application of the instruments of protection of human rights in Europe is offered, for example, by the Portugal Constitutional Tribunal, in its Ruling no 268/2022 where it was noticed that

> in the context of protecting fundamental rights, there is a tendency towards consistency between the European legal order and the national legal order. This is understandable, given the network of constitutional protection generated by constant communication between the national and European legal orders. The European legal order feeds on the national catalogues.

Indeed, the Treaty states that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law' (Article 6(3) TEU), while the European Union itself is bound by the CFREU, which contains a catalogue of fundamental rights drawn up in the image of the national constitutions. According to Freitas Do Amaral and Nuno Piçarra, this is the "counterpart of the principle of primacy: the guarantee of substantive congruence between the legal order of the

102 Case C-399/11.
103 Case C-617/10, para. 29.
104 See Holoubek, no date.

European Union and the national legal orders as regards fundamental constitutional principles" ('*O Tratado de Lisboa e o princípio do primado do direito da União Europeia: uma 'evolução na continuidade*'', Revista de Direito *Público, no. 1, 2009). This follows very clearly from the absorption into the acquis* communautaire of the 'constitutional traditions common to the Member States' in the area of fundamental rights, as a standard for interpreting the Charter itself (Article 52(4) CFREU).

In this context, the Constitutional Tribunal stated that 'In plain terms, this multi-level interconnection does not occur in this direction alone'. In fact, in accordance with Union law, any interpretation of national law (in any of its sources) takes European law into account: 'It is for the national court, within the limits of its discretion under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of the applicable Community law' (CJEU Judgment of 4 February 1988, Murphy, Case 157/86). This is the case in the domain of fundamental rights which are simultaneously provided for in the Constitution and in the CFREU, especially when the latter provides for a higher level of protection (Article 53 CFREU). As such, international sources of fundamental rights are considered when applying domestic constitutional provisions and principles. It follows that when the State applies European Union law (Article 51(1) CFREU), the fundamental rights determining the validity of domestic provisions should be interpreted in a way that prioritises consistency with the European provisions to which the State is bound, thereby establishing an interactive rather than hierarchical relationship. And, should conflicts occur between these parameters, the solution will be found 'by seeking to interpret the Constitution according to Community law' (Rui Moura Ramos, 'The adaptation of the Portuguese Constitutional Order to Community Law').

However, the issue of fully harmonising protection standards across the EU is a complicated one. Most of the challenges have been determined by mixed reports, which involve all three categories of courts (and international instruments), national, the ECtHR and ECJ, due to the risk of different interpretations of the same rights.

Emphasising the importance for European harmony, this complex issue was the subject of the most recent Congress of the Conference of European CCs, hosted in 2021 by the Constitutional Court of the Czech Republic.[105] The speeches of the presidents of the ECtHR, the ECJ, the Venice Commission, and the CCs expressed various aspects of the protection of fundamental rights and the role of European judges in articulating the various interpretations of the competing norms in the matter, emphasising the role of the Conference "to understand it, is to analyse and rationalise these differing catalogues of rights and their relationship with one another".[106] Metaphors were commonly utilised to provide valuable insights into effectively resolving potential conflicts. Thus, with regards to the relationships

105 Conference of European Constitutional Courts; Conference of European Constitutional Courts. National Reports.

106 Robert Spano, President of the ECHR; Ibid.

between the catalogues of rights and the courts in Europe, a speech by the former President of the German Federal Constitutional Court, Prof. Dr. Andreas *Voßkuhle*[107] was mentioned, where he compared it to a mobile, meaning a 'a kinetic sculpture which consists of an ensemble of balanced parts that can move but are connected by strings or wire'. This image is opposed to that of a pyramidal structure, where "pyramid" is understood as a fixed geometric structure that has a base and a top. It seems that the European human rights protection was better understood as "mobile", with the CCs and the European courts having distinct but complimentary roles which are inherently linked to each other. Fixing the cooperation between these sources more concretely or pragmatically, the president of the ECJ expressed that 'as to the ECHR and the Charter, it is worth noting that although both catalogues are committed to protecting fundamental rights, their respective systems of protection do not function in precisely the same way'.[108] Whilst the Convention operates as an external check on the obligations imposed by that international agreement on the Contracting Parties, the EU's Charter is an internal component of the rule of law within the EU. As a result, the meaning and scope of the rights recognised by the Charter that correspond to those protected under the Convention are constantly and directly influenced by the case law of the ECHR, on the contrary, the Charter invites cooperation with *Strasbourg*, even where EU law has followed its own autonomous path. In the same vein, it is the Charter itself that requires the ECJ to interpret fundamental rights in harmony with the constitutional traditions common to the Member States. That harmony 'does not, however, rule out the adoption of a uniform standard of protection at EU level that prevents national (constitutional) courts from applying higher standards'. Likewise, the opinion that an orderly application of fundamental rights does not necessarily entail a "separated application" of those rights according to their national, supranational, or international origin was expressed. Instead, in the European legal space, 'the highest level of protection may be achieved by different layers of protection that interact and complement one another'.[109] All these ideas sound fine in theory, but in practice, this interaction is a continuous source of challenges, as it is difficult to identify a clear methodology to be followed by all parties involved, especially when there are "overlaps" of various incident regulations and the application is carried out by the judge of a national court.

As for recent developments, the manner in which the ECtHR and ECJ are each gathering forces is notable, in what was called the growing 'interplay between the European Convention on Human rights and EU law'.[110] As noted, for a long time, the ECJ and the ECtHR have been seeking to adjust to each other's case law, but

107 Voßkuhle, 2014.
108 Lenaerts, 2021b.
109 Polakiewicz, 2016.
110 See Callewaert, no date.

> this trend has gained momentum in the last couple of years, as a result of a rapidly growing number of issues of relevance to both legal systems. Both European courts seem well aware that any discrepancies in the interpretation of the same fundamental rights would be detrimental for citizens and MS alike, if only because the latter are bound to apply EU law at the same time as being within the jurisdiction of the Strasbourg Court.[111]

For example, in the case of Spasov v. Romania,[112] the ECtHR found that the applicant had been the victim, inter alia, of a denial of justice (Article 6 of the Convention) because he had been convicted on the basis of Romanian criminal law which previously had been found to be in breach of EU law. By not applying these rules, which had a direct effect on the Romanian legal order and took precedence over national law, the Romanian courts had made a manifest error of law.[113] Likewise, in the case of Moraru v. Romania,[114] the ECtHR found a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1 to the Convention on account of the failure by the domestic authorities to put forward any reasonable and objective justification for the disadvantage faced by the applicant, whose height and weight were below the statutory thresholds, in order to be admitted to study military medicine. The ECtHR found, among other considerations, that in adjudicating the applicant's case, the Romanian courts failed to "meaningfully engage" with the relevant case-law of the ECJ, giving rise to the ruling in Kalliri (C-409/16) (§§ 24 and 54).[115] It can be considered that this approach strengthens the position of the ECJ, but also of the ECtHR. As noted,[116] compared to EU law, the ECHR is in a weaker position as it lacks the ability to claim precedence over national law and unify the law in Europe. However, by condemning EU member states for violating the ECJ rulings, the ECtHR associates the effects of the ECJ decisions, both of priority and uniformity.

What should be the role of the national judge in this "game of sovereignty"? The analysis laid out here leads us to believe that the national judge should be proactive and should engage in discussions with both international courts, rather than acting as a passive recipient. This is especially important given the vague language used by the ECtHR, for example in the case of Moraru v Romania, ("meaningfully engage") that leaves a wide margin of appreciation to the international court. The coherence of protection of fundamental rights must be supported through judicial dialogue: "since a harmonious fashion to apply these sources of law is needed, it is equally essential that the national courts, the CCs, the ECJ, and the ECtHR engage in constant dialogue based on mutual trust".[117]

111 Callewaert, 2009.
112 Case *Spasov v. Romania* (Application no. 27122/14).
113 See Callewaert, no date.
114 Case of *Moraru and Marin v. Romania* (Applications nos. 53282/18 and 31428/20).
115 Ibid.
116 Grimm, 2015, p. 285.
117 Lenaerts, 2021b.

### 3.2.2.2. The doctrine of counter-limits

In a legal order established to a significant extent by interpretation, different positionings, and attempts to draw fundamental boundaries around some core statal functions are inherent. The ECJ's interpretation of EU law in the *Van Gend and Loos, Costa v Enel, and Siementhal* cases marked a new era. However, it also increased the power of the ECJ and sparked debates on the primacy versus priority of EU law and the importance of cooperation between national courts. While 'the ECJ began to interpret the EU treaties in a constitutional mode, namely as more or less detached from the member states will and oriented instead by an objectivised purpose',[118] the CCs opposed the "expansionism" of the ECJ limits derived from the interpretation of national constitutions (so called "doctrine of counter-limits").

These counter-limits were mainly developed in the jurisprudence of the German Federal Constitutional Court, but are also present, with inherent particularities, in the jurisprudence of other states. Professor Andreas Paulus, judge of the German Federal Court summarised this in a Conference organised by CCR in 2019[119] explaining that, according to the principle of mutual respect, the Federal Constitutional Court had developed three doctrinal instruments, the so-called "counter-limits", regarding the obligation of the international treaties, namely: 'the effective protection of human rights (Solange), the constitutional review of *ultra vires* acts and the absolute protection of constitutional identity'. Thus, 'the constitutional judiciary buttressed the concept of Open Statehood by reconciling at times diverging interests of national democracy and international integration'.[120] The doctrine of counter-limits is activated, according to German case law, 'only in case of manifest violation' and, moreover, before finding an EU act as *ultra vires*, 'the Federal Constitutional Court addresses a request for a preliminary decision on the legal aspect underlying it to the CJEU pursuant to Article 267 TFEU'.[121] The Federal Constitutional Court

> does not consider this national reservation to be a violation of Article 19 TEU, which assigns the CJEU the task of interpreting and applying European treaties. On the whole, *ultra vires* acts of EU institutions, bodies, offices and agencies violate the European integration agenda (...) and therefore the principle of peoples' sovereignty (...) The review of *ultra vires* acts aims at protecting against such violations of the law.[122]

Similar ideas are enshrined in the case-law of other CCs like, for example, of the Italian Constitutional Court, which identified barriers, "*contralimitti*" to entry the EU law into the legal system, like fundamental principles of the constitutional legal

118 Grimm, 2015, p. 302.
119 Dorneanu and Krupenschi, 2019.
120 Paulus, 2019, pp. 36–49.
121 With reference to the German Federal Constitutional Court, 2010, BVerfG 126, Honeywell.
122 With reference to BverfG 126 Honeywell and BverfGE 142 –OMT.

order and inviolabile human rights[123] or the Portugheze Constitutional Tribunal, where it was stated[124] that the final part of Article 8(4) of the Constitution contains a "limiting clause", meaning 'the fundamental principles of a democratic state based on the rule of law'.

Examining the jurisprudential developments in the MS, it is evident that the CCs have assigned varying degrees of significance to different counter-limits, which have contributed to shaping the legal framework of the EU. Over time the focus has evolved, with safeguarding fundamental rights being a primary concern in the past ("*Solange story*")[125] due to the lack of a comprehensive list of such rights in the EU. However, the introduction of the Charter of Fundamental Rights of the EU has resulted in a decrease in resistance from the CCs concerning this matter. The most recent and significant developments refer to the constitutional identity that has developed as a "key" concept of the relationships between the MS and the EU, started from the normative content of Article 4 (2) of the TEU (as amended by the Treaty of Lisbon) according to which

> 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.

Article 4 (2) of the TEU was described in the legal literature as a 'Europeanised counter-limit',[126] consisting of a binding obligation for the EU to respect national constitutional identities. As for the identity of the constitutions themselves, the attempt to define it has given rise to waves of debate. For example, Professor Bosko Tripkovic, in his work 'Constructing the Constitutional Self: Meaning, Value and Abuse of Constitutional Identity',[127] outlining the difficulties of formulating a definition, distinguishes between the constitutions that include the so-called identity clause (a set of values that could be subject to the concept of constitutional identity), and the constitutions that do not include such a clause, but for obvious reasons, lays down principles which can be interpreted as defining this identity as a set of fundamental values for a given community at a specific time. From this point of view, a constitutional identity necessitates a unique set of principles or standards to support it, like an identity clause, or a truly fundamental set of values which define identity.

123 Tesauro, 2012, p. 211.
124 Ruling No. 422/2020, para. 2.6.2.2.
125 Sadurski, 2006.
126 Martinico, 2022, cited in Faraguna, 2016, p. 500.
127 Tripkovic, 2020.

As the power to interpret constitutional texts and determine the concept of constitutional identity lies with specific courts, their margin of appreciation in defining the concept of constitutional identity is also subject to debate. Without clear criteria, there is a risk of the abusive use of constitutional identity. Even if a Constitution includes an identity clause, national CCs may still consider other values essential and related to constitutional identity. As noted in the doctrine, 'the identity clause has been seen as a twofold invitation to struggle, involving its interpretation and the definition of the competent authority in charge of that interpretation'.[128] It was noted in this regard that the identity discourse has become a part or a dimension of a so-called "counter-constitutionalism"[129] phenomenon, 'a paradigm that has increasingly come to the fore (...) in addition to the European constitutionalisation process',[130] a "reaction" of some CCs in the Member States to the union constitutionalisation process, which manifests itself on two levels: the possibility of declaring an EU act *ultra vires* and a more refined one, developed over years, to oppose this development, namely by invoking a kind of hard core of fundamental principles on which the existence and structure of each State is based, designated by the concept of "constitutional identity". There is a very rich seam of legal literature on this topic, with reference to landmark decisions of the CCs in which the subject of constitutional identity was invoked, more or less authoritatively, malignantly, or benignly.[131] National courts and ECJ struggle with issues (sometimes in a tensioned manner) and this evolution continues to shape EU constitutionalism. In this regard, it is therefore necessary to distinguish between "bad fights" and "good fights".

### *3.3. Good fights and bad fights*

#### *3.3.1. Pathology of the constitutional conflicts. General aspects*

Constitutional justice in the EU and, in itself, its centripetal potential, does not always equate to harmony. Fairly recent examples of divergent jurisprudence or even conflicts involving ECJ and CCs from the Czech Republic,[132] Germany,[133] Poland,[134] and Romania[135] have paved the way for the emergence of an actual juridical order of the EU. There are also divergences involving the courts of the judicial system as, for example, the Romanian cases regarding the Mechanism for Cooperation and Verification of Progress (MCV) and the specialised section of the Public Prosecutor's

128 Faraguna, 2016.
129 Concept used in Arcari and Ninatti, 2017.
130 Galimberti and Ninatti, 2020, p. 416.
131 See, for example, Galimberti and Ninatti, 2020.
132 Komárek, 2012.
133 Not only the Solange saga, but also the recent judgment delivered on 5 May 2020 regarding the European Central Bank's PSPP programme; the reaction of ECJ: Press Release No. 58/20.
134 See Alexander, 2021.
135 Selejan-Gutan, 2022.

Office with exclusive competence to investigate offenses committed by judges and prosecutors.[136] The outcome of arbitration by the ECJ in such disputes can significantly affect power and authority relationships within the EU and even shape national legislation.

Concerning the relationship between the ECJ and the CCs, the usual tensions were pointed out a decade ago, in the Conclusions of the Congress dedicated to the cooperation of CCs in Europe[137] as follows:

> Such divergences are not due to different interpretations of the law, but to differences in approach in certain constellations. They are attributed to the fact that CCs have to respect the national constitution and protect national interests, which may lead to differences in assessment in certain constellations. (…) The ECJ holds that Union law supersedes the constitutions of the Member States, while the CCs accept the primacy of Union law over ordinary, national law, but not over the constitution. Unlike the ECJ, these CCs do not accept the comprehensive primacy of Union law over national constitutional law.

As time passes, these tensions, which were qualified as "usual", become complicated when other ingredients, which call into question the respect for democracy and the rule of law, are added. Likewise, at the origin of these conflicts are concepts that are not yet sufficiently clarified, such as national constitutional identity mentioned above, a kind of "shield" more or less outlined, and coherently used. As Professor J H Weiler emphasised in a comprehensive study of judicial review in the modern world,[138] identity can be worn out or abused as part of a political or constitutional argument; this return to identity in the case law of CCs can be a more or less sincere, reactive or constitutive display of political and social sensitivity. As will be highlighted, however, the argument of constitutional identity as a coherent and well-founded discourse can produce constructive vertical dialogue, taken as such by the case law of the ECJ, as demonstrated at various moments in the history of the EU.

As has been previously mentioned, it is necessary to distinguish between "healthy" and "pathological" ways to deal with conflicts. What is the limit where conflict can be differentiated from pathology? What is the standard for qualifying a behaviour as pathological? The answer to these questions could provide an overview of "reasonableness" also regarding the reactions of international courts, which must equally demonstrate balance in their approaches.

The constructive vision (which we embrace), emphasising the desirable ("healthy") nature of such conflicts, was expressed in the same conclusions of the Congress dedicated to the cooperation of CCs in Europe[139] as follows:

136 For example Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.
137 Grabenwarter, no date.
138 Lustig, 2018, pp. 315–372.
139 Grabenwarter, no date.

> despite mutual influences and adaptations, divergences in jurisprudence of a short-term, medium-term or – in individual cases – even long-term nature are bound to occur, which, under certain circumstances, is considered to be not only acceptable, but desirable. It is incumbent on the CCs to arrive at adequate solutions in cases of conflict. **A** process of mutual acknowledgement and adaptation between national and European Courts may provide valuable input in this context (…). In the majority of cases, divergences are resolved after some time and tend to result in a higher level of protection.

However, while some conflicts have led to significant and desirable developments in the European legal landscape, others have created very sensitive problems even today, with uncertain prospects for resolution.

### *3.3.2. Effects following conflicts. How constitutional courts affect political transformations*

Perhaps the most analysed example of positive effects in the specialised literature, concerns the fundamental rights, namely the "opposition" of the CCs of the Solange type, determined by the lack of a catalogue of fundamental rights at EU level. The "battle" of the courts to comply with the constitutional standards of fundamental rights led to the adoption of the Charter of Fundamental Rights of the EU and, through this, a fluidisation of the centripetal mechanism of constitutional justice, by annihilating a source of conflict. The adoption of the Charta was a significant legal and political movement in the EU's constitutional order.

Another suggestive example of positive effect is the invalidation by the ECJ of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communication services, or of public communication networks and the amendment of Directive 2002/58/EC,[140] after several national courts had deemed it unconstitutional. The CCR was the first constitutional court which found the unconstitutionality of the law transposing that Directive (Law No 298/2008 on the retention of data generated or processed in connection with the provisions of publicly available electronic communications services or of public communications networks and for the amendment of Law No 506/2004 on the processing of personal data and the protection of private life within the electronic communications sector),[141] essentially for lack of clarity and precision. The CCR's decision was influenced by the ECtHR' standards on these issues.[142] The subsequent rulings by the ECJ and the CCR demonstrated the effectiveness of judicial dialogue on these

140 Joined Cases C-293/12 and C-594/12.

141 CCR found the unconstitutionality of the law through Decision No. 1258/2009.

142 *Sunday Times v. United Kingdom*, Application no. 6538/74; *Rotaru v. Romania,* Application no. 28341/95.

matters across Europe. Other CCs, such as those in Germany, Czech Republic,[143] Bulgaria, and Cyprus, have also drawn similar conclusions. Next, the EU legislator will have to find solutions compatible with fundamental rights, in the light of the considerations of the ECJ and CCs.

Another well-known example of "positive conflict" concerns the so called "saga Taricco", expression of the dialogue between the ECJ and the Italian Constitutional Court. Briefly, in the judgment of 5 December 2017 in Case C-105/14, at the request of the Tribunale di Cuneo (Italy), the ECJ ruled that national legislation on criminal liability, such as that provided for the Italian Criminal Code, which stated that the act of interruption in criminal proceedings concerning serious fraud in the field of value added tax had the effect of prolonging the limitation period by only one quarter of its original duration, may prejudice the obligations imposed on MS by Article 325 (1) and (2) TFEU in the hypothesis in which this national regulation would prevent the application of effective and dissuasive sanctions in a significant number of cases of serious fraud affecting the financial interests of the EU, or would provide for longer limitation periods for cases of fraud affecting the financial interests of MS concerned than for cases of fraud affecting the financial interests of the European Union, which should be a matter for the national court to verify. According to the ECJ, it was up to the national court to ensure the full effect of Article 325 (1) and (2) TFEU not applying, if necessary, the provisions of national law which would have the effect of preventing the MS concerned from complying with the obligations imposed on it by Article 325 (1) and (2) TFEU. As this solution clashed with the principle of the lawfulness of offenses and punishments, as regulated by the Constitution of Italy, the Constitutional Court was notified, which referred the above to the ECJ, raising the issue of a possible breach of the principle of the lawfulness of offenses and penalties which could result from the obligation laid down by the Taricco judgment to not apply the concerned provisions of the Criminal Code. The doctrine commented that the Italian Constitutional Court had decided to give ECJ a chance to clarify or better substantiate its point of view in Taricco and to interpret Article 325 of the TFEU in a way that went beyond the conflict with the supreme constitutional principle of legality, to avoid a constitutional collision between the two legal orders.[144] Consequently, in the Case C42/17, M.A.S,[145] the ECJ decided that the national courts were obliged to leave the rules in question unapplied

> unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.

143 PL. ÚS 24/10, 2011; Data Retention in Telecommunications Services, Constitutional Court of the Czech Republic.

144 Fabbrini and Pollicino, 2017.

145 Case C-42/17.

It was commented that the ECJ 'has thought things twice and its decision is different now. It is wiser too';[146] 'instead of firmly rejected the counter limit doctrine, the ECJ has been able to transform them into a vital and dynamic part of the judicial dialogue'.[147] Criticisms were also formulated, even invoking political pressure.[148] However, it must be taken into account that the sensitive area in which these decisions were pronounced, namely that of criminal law, continues to be a challenge for the dialogue of the courts and the legal order of the EU.

Progress and positive results of conflicts can also be noted in defining constitutional identity. The CCs' initiative to organise conferences and debates for constructive solutions in this regard is remarkable. These conferences range from bilateral to wider formats, usually including the participation of the ECJ.

For example, the CCR organised a Conference on this topic in 2019, which presented a great opportunity for debates.[149] Yvonne Ott, the judge of the German Federal Constitutional Court, emphasised the context that 'identity review is ultimately a lifeline used only in the event that domestic courts or, in an emergency, possibly even the European systems fail. Invoking constitutional identity remains the extreme exception'.[150] These are important clarifications and nuances especially since, at least with regard to the doctrine of the constitutional identity, the German Federal Constitutional Court was characterised as 'a sort of commander-in-chief of the national constitutional army'.[151] Likewise, in 2021 a large Conference was organised on the topic 'EUnited in diversity: between common constitutional traditions and national identities'. It was hosted by the Constitutional Court of Latvia, and opened by the President of the ECJ. The president of the Latvian Court emphasised in the context that 'It is essential to draw figurative borders between the common constitutional traditions of Europe as a whole and the sacrosanct core of constitutional identity in each Member State',[152] because it cannot be contradictory to the European constitutional tradition. More recently (26 May 2023), on the occasion of the meeting of the judges of the CCs of the Baltic States on the occasion of the anniversary of the Supreme Court of Estonia, the message transmitted was that

> it is important not to seek conflicts between national constitutional fundamental principles or constitutional national identity, on the one hand, and European identity and values, on the other, but, on the contrary, to regard harmony between them as a starting point (...) membership of the Republic of Lithuania in the European Union has become an inseparable part of the national constitutional identity.[153]

146 Manes, 2018, p. 17, cited in Allegrezza, 2019, p. 183.
147 Ibid.
148 Ibid.
149 Dorneanu and Krupenschi, 2019.
150 Ott, 2019, pp. 15–21.
151 Faraguna, 2016, p. 522.
152 CJEU, 2021, Conference proceedings, p. 13.
153 The Constitutional Court of the Republic of Lithuania, 2023.

Other bilateral meetings added new inputs concerning the cooperation of the courts to a convergent meaning of the constitutional identity.[154] In this light, some "accents" in certain decisions of the CCs[155] would seem to be just 'accidents on the road' compared to the approach oriented towards a constructive meaning of the topic of identity.

A significant evolution for the centripetal judicial mechanism of integration was the affirmation of the EU's own identity, having at its core the values laid down in Article 2 of the Treaty on European Union. Thus, in a more recent judgment concerning an action for annulment based on Article 263 TFEU, brought on 11 March 2021 by Hungary, and advocated by the Republic of Poland, v. the European Parliament and the Council of the EU (Case C156/21),[156] the ECJ held, *inter alia*, that

> 127. The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties. (…) 232. In that regard, it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.

Discussing the case law of the ECJ with special reference to the case cited above, professors Pietro Faraguna and Timea Drinoczi identify three dimensions of European identity revealed by the CJEU: identity can emerge in the interaction of one legal system with another (this happened in the EU with the Kadi judgment, where the Court of Justice put constitutional limits on international law, aiming at protecting parts of the EU's constitutional identity. In that seminal decision, the Court of Justice discerned between limitations placed on fundamental freedoms of the internal market, which are to be held permissible under exceptional circumstances, and limitations entailing a violation of the untouchable core of the EU's fundamental principles, to be rejected under all circumstances.); another dimension unfolds in the procedure established by Article 7 TEU and the new rule of law conditionality mechanism, which the CJEU has declared to be in conformity with the Treaties (this procedure intends to protect the values expressed in Article 2 TEU); a procedural dimension (even though Article 48 TUE, which provides for the ordinary and simplified revision procedure of the Treaties, does not include any textual hints to determine a

154 See, for example, Curtea Constituțională a României, 2022; 'Comunicat de presă – 30 septembrie 2022'.

155 Like the atypical Decision No 390/2021 of the Constitutional Court of Romania.

156 Case C-156/21.

European eternity clause, substantive constraints to the Treaty amending power may derive from theories of implicit unamendability).[157]

Establishing the identity core of the EU around the values enshrined in Article 2, with the principle of the rule of law at its centre, decisively influences the borders of the constitutional identity of the MS, bound by the same shared values. The case law of the ECJ establishes a counter-limit for the affirmation of the "distinct national identities" of the MS, meaning that this cannot be opposed to the rule of law as an integrative principle of the values enshrined in Article 2 of the TEU.

Despite all these developments, the debate regarding the definition and limits of constitutional identity remains relevant. Although the EU shares core values with its MS, there are still distinct elements that differentiate each State and contribute to its specific profile. As noted,[158] 'no other corner of the planet bears such an intensity of differences and contrast. Compared with the rest of the world, a major part of Europe's character is the richness brought by the many different languages spoken and many histories and traditions contained in an area of only half a million square kilometres'. It is not possible for these elements to blend together on their own and form a single identity. Having a dialogue is essential to support the process of modelling and remodelling. This helps to ensure that everyone understands, defines and respects the common core, while also retaining the unique characteristics of each state. As concerns the power to establish the content of constitutional identity, we agree the distinctions made, for example, by the Advocate General Nicholas Emiliou[159] in Case C-391/20 having as subject-matter a reference for a preliminary ruling formulated by Constitutional Court of Latvia, explaining, with reference to the "dual nature" of Article 4(2) TEU*:*

> it is not for the EU to determine, for each MS, the elements that form part of that kernel of national identity. MS enjoy significant leeway in that respect. However, MS' discretion cannot be without limits. Otherwise, Article 4(2) TEU would amount to an all-too-easy escape clause from the rules and principles of the EU Treaties that could be triggered by any Member State at any time. An obligation for the EU to 'respect' MS' national identities cannot be tantamount to a right of a MS to disregard EU law at its convenience. (para.86)

In other words, the strategy of avoiding conflicts involves assigning the same meaning to the common values of the EU and the Member States, and establishing a coherent and mutually accepted doctrine of constitutional identity. The recent Rule of law mechanism, imposed on all MS, can be a tool to lead to this goal, depending, by all means, on how it is implemented.

157 Faraguna, 2022.
158 Faraguna, 2022, p. 492.
159 Opinion Of Advocate General Emiliou, 2022; Case C-391/20.

### *3.4. The "art of uncertainty"[160]. Application of the decisions of the CCs and delimitation of powers in the relationships between the courts at the EU level*

In more recent cases, the expression of tense dialogue between the ECJ and the CCR, against the background of several waves of preliminary referrals by the Romanian courts of law, led to a jurisprudence that we consider raising sensitive issues in the current moment regarding the relationships between EU courts. This topic is extensive, and here the issue will only be mentioned, leaving space for analysis in the next stages of the Project concerning the future of coexistence in the EU.

Thus, the main issue lies in the application of the CCs decisions by the courts of law. Although these decisions are typically considered to be generally binding according to the constitution, recent ECJ rulings have clarified that national courts of law can choose not to apply them, much like domestic laws that conflict with EU laws. Thus, responding to the Romanian courts in Case RSEuro Box Promotion and others, Joined Cases C357/19, C379/19, C547/19, C811/19 and C840/19,[161] the ECJ established that

> The principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928.

Likewise, with reference to the risk of incurring the disciplinary liability of judges who disapply de CCR decisions, the ECJ established in the case RS C-430/21[162] that

> The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.

The context in which this decision was pronounced cannot be ignored. We notably refer to the issues raised by the Romanian courts when the CCR established in

160 The concepts belong to Allegrezza, 2019, p. 183.
161 Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.
162 Case C-430/21.

Decision No 390/2021,[163] that, in accordance with Article 148(2) of the Romanian Constitution, as interpreted by the CCR, national courts may not examine the conformity with EU law of a provision of national law, that has been found to be constitutional by a decision from the CCR. However, despite this regrettable context, the approach of the ECJ may lead to conflicts between courts of law and the CCs if the collaboration mechanism is not effectively established in terms of the judges' competence, knowledge, and balance.

From this perspective, the ruling that followed, in Lin (Case C-107/23 PPU) of 24 July 2023, falls under what we called "the art of uncertainty" since the ECJ decided that Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the TEU, on the protection of the European Communities' financial interests, must be interpreted as meaning that the courts of a MS

> are not required to disapply the judgments of the constitutional court of that MS invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability,

stating, in the same time, that the courts of law have the authority to dissaply not only CCR decisions, but also those of the High Court of Cassation and Justice in the circumstances described as follows:

> The principle of the primacy of EU law must be interpreted as precluding national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect.

To decide in this way, the ECJ places the analysis in the scope of the protection standards of fundamental rights, offering the national courts the tools to balance them according to a European practice established over ten years ago in the *Meloni* and A*kerberg Fransson* cases:

163 Decision No 390/2021.

> where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, 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 European Union law are not thereby compromised (see, in relation to the latter aspect, Case C399/11 Melloni [2013] ECR, paragraph 60). (para.29)

This ingenious and, nevertheless, logical construction creates a bridge between ECJ and national courts of law, showing that they have a "free hand" in assessing in each case, and to apply or disapply the decisions of the supreme courts of the land, when it comes to the interpretation and application of EU law. Thus, the problem of the limits of the powers of the courts in the EU and the relationship between them become a topic of extensive debates, imposing adequate solutions to avoid legal uncertainty.

However, although conflicts may arise, situations in which a court of law disapplies a decision of the Constitutional Court could serve as a warning signal regarding the constitutional coherence of the EU. This could have positive consequences in the long run, as it would require identifying the cause of such conflicts[164] and find solutions.

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## 4. Complementary mechanisms for strengthening constitutional justice at EU level

### *4.1. No war of the judges? The importance of cooperation in strengthening constitutional justice*

The concept of "European judges" is often used when it comes to the relationship between the courts in the EU. However, the concept is not "magical" in terms of a solution for resolving disputes. It should be seen rather as an awareness of the new responsibilities that comes with membership of the EU. National judges are expected to uphold the principle of the EU law's supremacy, interpret national law in accordance with EU law and invalidate national provisions that conflict with EU law, apply EU law as needed, and refer questions to the ECJ when necessary to resolve domestic legal disputes. Constitutional judges have the same duties as other judges, but with the added responsibility of upholding the supremacy of the Constitution. It

164 We will analyse the topic in extenso in a next stage of the Project (Conference).

requires time, efforts and open communication to ensure consistency within the EU's legal system. Different contexts in which national and international courts operate "promote a cooperative relation", in which dialogue is crucial, even when discussing the dialogue within international structures, namely associations of CCs, the Venice Commission and the cooperative relations created at the level of the ECHR and the CJEU, or within the various forms of bilateral cooperation.

Declarations and resolutions made during these events reflect shared positions and mutual support in addressing common interests, which positively contributes to institutional dialogue. For this reason, such documents are specifically mentioned in this study, especially the conclusions and reports of the Congresses of the Conference of European Constitutional Courts.[165] If the topics of the last four Congresses, held over a decade ( XVth Congress in 2011 – Constitutional justice: functions and relations with the other public authorities, XVIth Congress in 2014 Cooperation of CCs in Europe – Current Situation and Perspectives, XVIIth Congress in 2017 Role of the CCs in Upholding and Applying the Constitutional Principles, XVIIth Congress in 2021, Human rights and fundamental freedoms: the relationship of international, supranational and national catalogues in the 21st century) are analysed, it is found that they all aim, in one way or another, towards the harmonious coexistence of constitutional justice in Europe. Interventions and taking positions on such occasions highlight the clear will of a dialogue between equals, excluding the idea of hierarchy. Even though the diplomacy involved in such situations may make things seem smoother than in reality, its ultimate goal of reducing conflict intensity is commendable. The aim is to prevent fights and arrive at generally acceptable and agreed-upon solutions.

Currently (from 31.08 to 1.09 2023), a notable event is taking place (especially in the context of recent developments), namely the Conference "EUnited in Diversity II: the Rule of Law and Constitutional Diversity", held in The Hague, The Netherlands, with the participation of the presidents of the ECJ and the ECtHR. According to the organisers[166]

> the conference aims to continue the dialogue between the highest courts on how to balance the dimensions of unity and diversity of European Union law and human rights national constitutional provisions, while preserving the protection of fundamental rights. Of the representatives of the constitutional and supreme courts of the Member States, of the Court of Justice of the European Union and the European Court of Human Rights will participate in this dialogue in The Hague. They will discuss the role of their jurisdictions in safeguarding fundamental values on which the European Union is founded, such as the rule of law and the human rights.

165 Conference of European Constitutional Courts, no date.
166 Constitutional Court, no date; Press Release.

It is noteworthy that, if the key concept of the first conference with this title was constitutional identity, the key concept of the second edition is *the rule of law*, which is in itself an expression of recent developments.

However, from the perspective of desired "equal partners", even using concepts such as "vertical" or "horizontal" legal relations seems inadequate as it would suggest a hierarchy. As far as we are concerned, we still use these concepts to indicate different reference systems.

### *4.2. The support of other international bodies. The role of the Venice Commission*

As for the involvement and support of international bodies, the most notable is the Venice Commission,[167] an invaluable participant in the various meetings of the CCs and mediator of the constitutional conflicts, especially when political interference occurs. Established in 1990 by the Council of Europe as an advisory body for constitutional law, it has become a global reference for democratic developments, influencing not just Europe but also the rest of the world. The Venice Commission provides opinions on fundamental laws, amendments, and various other documents related to democracy such as the rule of law, justice, elections, referendums, and political parties. In addition, it contributes to the dissemination and consolidation of a "common constitutional heritage", with a significant impact of the constitutional judicial review as well. This "modelling" inherently means the standardisation of fundamental laws and a constitutional review on the mentioned democratic coordinates, which over time has produced a common constitutional framework.[168]

The Venice Commission can be also credited for the gradual development of certain forms of cooperation among CCs, the most extensive being The World Conference on Constitutional Justice which unites 121 CCs and Councils and Supreme Courts in Africa, the Americas, Asia, Australia/Oceania and Europe.[169] From this perspective, the Venice Commission can also be characterised as a "mediator" in the dialogue between the CCs, regardless of the organisation and model of constitutionality review.

Among the many relevant opinions and documents about constitutional justice, the Rule of law checklist, adopted at its 106th Plenary Session, Venice, 11–12 March 2016,[170] should be mentioned. It has had direct inputs into the Rule of Law Mechanism in the EU. In its document, 'Further strengthening the Rule of Law within the Union',[171] the European Commission expressly mentioned the cooperation with the institutions of the Council of Europe and quoted Venice Commission statements concerning the rule of law.

167 See Events of the Venice Commission.
168 See also Safta, 2022d.
169 World Conference on Constitutional Justice , no date.
170 European Commission for Democracy through Law (Venice Commission), 2016.
171 COM(2019) 163 final.

### *4.3. The integrative role of the Rule of law mechanism*

The various forms of cooperation mentioned have a positive role, but do not impose binding rules and effective sanctions in case of "bad" conflicts. Such an instrument was outlined with the establishment in the EU of the Mechanism of Rule of Law, 'a preventive tool, aiming to promote the rule of law and prevent challenges from emerging or deteriorating'.

The first European Commission Report[172] drawn up in this framework, in 2020, outlines the role of the Mechanism 'as a key building block in the common commitment of the EU and the Member States to reinforce the rule of law' and emphasises the integrative role of this principle:

> The rule of law is a well-established principle. While Member States have different national identities, legal systems and traditions, the core meaning of the rule of law is the same across the EU. Respect for the rule of law is essential for citizens and business to trust public institutions, and its key principles are supported by citizens in all Member States; Respect for the rule of law is also at the core of the functioning of the internal market, of the cooperation in the justice area based on mutual trust and recognition, and of the protection of the financial interests of the Union as recently underlined by the European Council.

Analysing the reports drawn up to date, the reference to the role of justice in the MS in the application of EU law has been noticed. For example, in the latest Report, from 2023[173] the importance of an effective justice systems and judicial independence for the application and enforcement of EU law was underlined, upholding the rule of law and safeguarding the values set out in Article 2 TEU: Is was also stated that:

> When reforming their justice systems, Member States must fully respect the requirements set by EU law and the case-law of the Court of Justice of the EU. It is also important that Member States take European standards into account when designing reforms.

Since the impact of supranational courts on the domestic constitutional order 'can be justified predominantly via recourse to the principle of rule of law',[174] it is no coincidence that one of the reference areas of the Mechanism is that of judicial systems, including both courts of law and CCs, as the central pillar of EU constitutionalism. The assessments and measures within this Mechanism shall be in conjunction with

172 COM/2020/580 final.

173 European Commission, Addressing the impact of demographic change in the EU: The way forward, COM(2023) 800 final, 6 December 2023.

174 See Belov, 2019, p. 105.

the policies developed at EU level in the field of justice, which should be properly coordinated with the national strategies in this field.

### *4.4. Upholding the independence of constitutional judges*

A central objective and concern within all the mentioned formats of cooperation, discussions, and support is the issue of the independence of constitutional judges. This is, moreover, a key to the proper functioning of the centripetal mechanism of European integration based on the cooperation of the courts. Professor and constitutional judge Christoph Grabenwarter[175] identifies in this regard three Achilles' heels of the CCs: the nomination of judges, targeted changes in procedural law, and the disrespect of decisions. In our view, these vulnerabilities are closely related, and the greatest one relates to the appointment of judges, which can be a distinct topic in itself. Regarding the appointment procedure, the issue of political influence is usually discussed, but professional competence must be addressed to the same extent. Concerning the CCs, the requirement of "high professional competence" is usually regulated in Constitutions or laws, without being detailed, which makes it difficult to determine and evaluate in practice. This formula aims to ensure that the judges of the CCs have a special, "higher" knowledge.[176] As the Venice Commission emphasised,[177] 'a lack of professional capacity can often be corrected through training, but it is a strong reason not to recruit a person'. In other words, the judges of the CCs are not appointed for such an office with the perspective of being trained, and as far as they are concerned, the CCs are not a place of "professional training". In any case, the professional profile must take account of the activity that they will actually carry out during the term of office, as well as the fact that the judges will immediately start the activity, settling cases referred to the Court. However, it is even questionable that the will to evaluate the fulfilment of the requirement of high professional qualities, as long as it remains within the exclusive margin of appreciation of the authority that made the appointment, cannot be challenged in this respect.

Concerning the ECJ, the Treaty of Lisbon provides in Article 255 the establishment of a panel, known as the "Article 255 panel", whose mission is to give an opinion on a candidate's suitability to perform the duties of Judge and Advocate General. Bringing together the representative members of the various European legal systems, the European Court and the supreme national jurisdictions of the member states, appointed for a period of four years, the art. 255 panel possesses the necessary prerogatives to accomplish its mission. The existence of the website of the panel should be noted, where useful information concerning procedural rules and

175 See: Grabenwarter, 2018.
176 Venice Commission, 2017, paras. 12–13.
177 Venice Commission, 2017, para. 11.

its activity can be found. It could be a good example also for the MS in terms of the organisation of the selection of the constitutional judges.

It is also clear that there are no infallible appointment procedures, not even with regard to international or supranational courts where such "filters", as mentioned above, have been established. In this regard it was noticed[178] with reference to the ECJ that

> it is true that the treaties require that judges be chosen among persons whose independence is beyond doubt, and the appointment procedure includes the consultation of a special committee, in order to ensure the qualities of the candidates to exercise the offices of a judge to the relevant EU court. However, the very fact that judges can be appointed again could be considered to jeopardise their independence; it could be argued that judges would be more likely to be re-appointed (or at least proposed for re-appointment) if the judgments in which they participated were favourable to the interests of the MS and even, more precisely, to the interests of the MS of origin, which traditionally has prerogatives to propose.

Likewise, the fact that the selection of candidates, namely the proposals that will reach the special committee, will be conducted at national level, following more or less transparent procedures, which supports the cited criticism.

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## 5. Conclusions. Constitutional justice and the future of the EU

We tried to identify in our study some of the main challenges of constitutional justice as centripetal force in the EU, leaving room for further analysis and considerations within the topic.

Based on the points presented, an initial conclusion is that constitutional justice is a driving force of EU constitutionalism. Whatever "good" or "bad" moments occur, the relationship between courts continuously shapes the EU legal order.

A second conclusion (or rather reflection) refers to the operating of this "judicial network" itself, meaning the bases and type of relations between the Courts in the EU.

Concerning the bases, the cooperation of the constitutional courts should be grounded on values like independence, loyalty and honest collaboration. These principles act as a cohesive force in addressing the issues linked to constitutional diversity and consist of numerous elements, including the selection and status of judges.

The risk for the CCs that disrespect such values is to remain "outside the game," ignoring or replacing them if they do not correspond democratically or are "left back"

178 Azizi, 2012.

regarding professional credibility. We note as suggestive the situation analysed by M Florczak-Wątor in his work 'Judicial Law-Making in European CCs'[179] with reference to the Central and Eastern European countries where power was taken by populist governments, affecting the credibility of the CCs, as parliamentary majorities filled them with 'their own' judges As a result, 'the role of the CCs in the countries affected by constitutional crises started to be taken over by the international courts; namely, the ECtHR and the CJEU'.[180] This evolution could be seen as a specific functioning of the doctrine of "layers of protection" that interact and can replace each other (mentioned above), as a kind of safety net when problems arise in the functioning of constitutional justice, typical for the constitutional pluralism of the EU.

Another way to diminish the role of the CCs could be by enforcing the courts of law. The regular court system is larger and therefore more challenging to gain political control over. Therefore, it may be more reliable in terms of upholding democracy as the central principle of governance for states within the EU. Recent developments in Romania show such a strengthening of the courts of law. This comes amidst some tensions in recent years, as well as the development of jurisprudence by the CCR and the ECJ. Thus, beyond the national debates regarding the application of the CCR decisions in the light of this ECJ decision (equally of interest in all MS, due to the general binding nature of the ECJ decisions), in Romania the effects were also felt regarding legislation on the status of judges and prosecutors. Following the case law of the ECJ, in the new laws of justice (adopted in Romania at the end of 2022) the disciplinary liability of judges for non-compliance with the CCR decisions was no longer regulated as a separate offence.[181] Called to rule on the constitutionality of the new regulation, the CCR found 'this does not mean that failure to comply with them cannot give rise to disciplinary liability of the judge or prosecutor to the extent that it is demonstrated that he has exercised his office in bad faith or gross negligence' (para. 139).[182] To this effect, the CCR invoked the general constitutional framework of judges' liability, applicable when they act "in bad faith or gross negligence". Seemingly (with inherent controversies and debates) a way to comply with the general binding nature of the CCR decisions, the binding nature of the ECJ judgments and the independence of judges in the current constitutional framework of the relationships between national and EU law was found. However, the possibility of conflicts remains latent. Regarding the ECJ, it is also a risk to take an excessive authoritarian approach. We do not believe that CCs would form an alliance against the supremacy

179 Florczak-Wątor, 2020.

180 Florczak-Wątor, 2020, p. 266.

181 The disciplinary offense related to 'non-compliance with the decisions of the Constitutional Court and the decisions issued by the High Court of Cassation and Justice in the resolution of appeals in the interest of the law' was introduced by Article I point 3 of Law no. 24/2012 for the amendment and supplement of Law no. 303/2004 on the status of judges and prosecutors and Law no. 317/2004 on the Superior Council of Magistracy; the new laws on justice abrogated the previous regulations.

182 Decision No 520/2022.

of EU law,[183] since doing so would endanger a state's membership in the EU, but such an attitude could however lead to erosion of the ECJ's authority.

Concerning the types of relations, we consider that it is important to balance constitutional instruments in order to ensure optimal efficiency.

It seems that, particularly in the view of the CCs, the harmonious functioning of the EU does not involve a "solar system" type relation (with a strong ECJ in the centre and the CCs-planets gravitating around), but instead a "constellation" type, meaning equal partners. It is clear that CCs, even when considering the ECJ as a constitutional court, are not skilled at creating a hierarchy among themselves. The language used in conferences envisages a collection of pieces (such as a puzzle, a mosaic, etc.), rather than a hierarchy, emphasising the importance of dialogue in clarifying and harmonising each court's position. In this regard, an interesting distinction has been made in the legal literature between dialogue – conversation and dialogue – deliberation.[184] CCs in the EU do not need simple conversations, but dialogue – deliberation involving, *inter alia*, equal partners and respect of the peculiarities of both European and national legal systems. Also in our opinion, these type of relations, based on the competence, independence, and authority of each category of courts might be beneficial for the functioning of the EU, as it would exist as a counter-limit to the excess from whichever side it comes from. Professors and constitutional judges Christoph Grabenwarter, Peter M. Huber, Rajko Knez, Ineta Ziemele[185] have underlined that constitutional justice in the EU has evolved towards a specific branch of the judicial network, 'not only assigned with the common task to enforce EU law, but also to preserve its limits, first and foremost the principle of conferral and the constitutional identities of the Member States'.

However, we are already witnessing a shift in the traditional models of constitutional review driven by the unique pluralism of the EU. By accession to the EU, even in the classical Kelsenian systems, a review carried out by the courts of law within the justice system has overlapped, which aims at ensuring the primacy of EU law, by preventing the contrary rules of domestic law from being enforced. When courts prevent the enforcement of domestic law that conflicts with EU law, they are essentially carrying out a form of constitutional review in relation to a supranational reference system (the EU's quasi-constitution). This unique form of constitutional review is carried out by the courts alongside the review carried out by the CCs on primary rank norms in domestic law, with respect to the national Constitution. This evolution has led to a dynamic of court relationships, not just in terms of dialogue, but also in competition.

183 See in this regard Rasmussen, 2021. 'the worst threat to the room of maneuver of the Court was a possible alliance of national courts of last instance rejecting the key doctrines of European law'

184 Tremblay, 2005, pp. 617–648.

185 Grabenwarter et al., 2021, pp. 43–62.

The third conclusion (reflection) concerns the future of EU. Accepting the centripetal role of constitutional justice in the EU, it would be interesting to answer the question as to where this centripetal force leads us to, as a structure of States.

During a recent intervention on the occasion of awarding the title of doctor honoris causa of the Alexandru Ioan Cuza University in Iași,[186] the President of the ECJ, professor Koen Lenaerts underlined the importance of preserving the diversity of the EU, pointing out, *inter alia*, that there are enough States in Europe and that there is no need for any more, but instead for a harmony in diversity. In agreement with this idea, we consider that EU is an "ideal without a model" or, as expressed by Joseph Weiler 'Europe has charted its own brand of constitutional federalism'.[187] From a constitutional point of view, the EU is an original construction. Its diversity, which is unique, fundamentally distinguishes it in relation to any current federal structure. Unity in diversity is the official motto of the EU, suggesting a centripetal tendency (unity), yet unattainable differences (diversity), reflected in both State entities and constitutions. In this type of constitutional structure, undergoing continuous development, perhaps the key is precisely to abandon the standard classifications of State structures. Not every State structure is a geometrical construction, and not everything can be put into traditional/conservative forms and formulas. The dilemmas of the constitutional review and the dispute of priority versus primacy in the EU come in a large extent from the "captivity" in such a stereotypical vision, with the attempt to place the national and European legal order in the paradigm of the classic Kelsenian pyramid. It was rightly said in this regard: 'forget Kelsen and all the pyramidal frameworks'.[188]

These ideas are expressed in clear terms by the CCs themselves, for example the Portugal Constitutional Tribunal, according to which:

> One of the aspects of the principle of autonomy is precisely the fact that, in the relationship between European law and national law, the "pyramid paradigm" has been renounced, so that any normative conflict does not result in national provisions being annulled or repealed, instead 'moving towards a network paradigm, where no one point has precedence over another, and no point is unequivocally subordinate to another' (Nuno Piçarra, 'A justiça constitucional da União Europeia', Estudos jurídicos e económicos em homenagem ao Prof. Doutor António de Sousa Franco, vol. III, 2006, p. 479). Antinomy between national and European provisions that apply simultaneously in a given case is thus resolved from the point of view of effectiveness: national rules that conflict with European provisions which can be applied simultaneously are disapplied in a given case without the former losing their validity. This is the meaning of the principle of primacy or precedence in the application of European Union law, which is 'a collision rule conducive to the preferential application of European law (pre-emption, Vorrangsanwendung)

186 Universitatea "Alexandru Ioan Cuza" din Iaşi, 2023.
187 Weiler, 2003.
188 Tulkens, 2016.

and not a strict rule dictating normative supremacy, which might lead to the invalidation of national law' (Gomes Canotilho and Vital Moreira, Constituição da República Portuguesa Anotada, vol. I, 4th Edition, 2007, p. 266). (Ruling No. 268/2022).[189]

As for the crises, we agree that they must be seen as potential opportunities rather than verdicts. However, a positive outcome cannot be taken for granted, as crises require fresh, open, dynamic and creative thinking suitable to changing conditions.[190] An important step is that of "breaking" the stereotypes we were referring to, starting with the very idea of the constitution. As noted, 'what separates the treaties from a constitution in the strict sense of the term, is the lack of reference to those subject to rule'[191] (the MS and not the citizens of the EU); the treaties do not fulfil the legitimation function that derives from constituent power of the people under state rule. Also, this state of play can be changed and somehow the right of self-determination would be exercised by EU citizens as a source of European public power. Similarly, the myth of the final authority must be removed. National courts are not subordinate to the EU, but national and supranational judges are European judges with a shared responsibility to apply EU law and guide the change of the legal order.

It is also essential to understand that the constitutional construction of the EU is not solely about the constitutional judicial review and the relationship between courts. Some studies[192] discuss a process 'of self-ordering of the regional supranational empire through judicial dialogue between the ECJ, the ECHR and the CCs of the EU Member States'. The harmonisation of legal systems through constitutional justice, and the ever-closer connection with the consequence of the development of

189 Ruling of the Portuguese Constitutional Court No. 268/2022; See also Spanish Constitutional Court, (Declaration No. 1/2004, of 13 December 2004), according to which: 'The proclamation of the primacy of Union Law by Article I-6 of the Treaty does not undermine the supremacy of the Constitution. Primacy and supremacy are categories which operate in distinct spheres. The former, in terms of applying valid provisions; the latter, in terms of regulatory procedures. Supremacy is based on the hierarchical superiority of a norm and, therefore, it is the source of legitimacy for any subordinate provisions, with the consequence, therefore, that the latter are rendered invalid if they contravene the imperative provisions of the former. Primacy, on the other hand, is not based on hierarchy, but on the distinction between the scope of different provisions, each valid in principle, but with one or some of them being able to displace others by virtue of their preferential or prevailing application based on a variety of reasons. Supremacy implies primacy, in principle (hence its occasional use as an equivalent, as in our Declaration 1/1992, FJ 1), unless the supreme norm itself has provided, in some area, for its own displacement or non-application. The supremacy of the Constitution is, therefore, compatible with enforcement regimes that grant applicative preference to provisions of a legal system other than the national one, provided that the Constitution itself has so provided, which is exactly what happens with the provision contained in Article 93, by means of which it is possible to cede powers derived from the Constitution to an international institution thus constitutionally empowered to rule on matters hitherto reserved for domestic constitutional powers and to apply such rulings to these powers.'

190 Cartabia, 2018, p. 744.

191 Grimm, 2015, p. 292.

192 Belov, 2019, p. 109.

the area of law where the States meet/overlap in the EU, results in an increasingly pronounced growth of the autonomy of the EU's legal order. This, in turn, reduces the autonomy of the legal systems of the MS (also sovereignty, which reflects in the legal system, means autonomy), in the absence of formal intervention by the legislator. We need to pay attention to this consequence to achieve a proper balance between enforcing the constitution and avoiding the courts' exercise of a policy-making function that is better left to legislatures. In other words, constitutional judicial review is a limited resource in terms of EU integration. It is necessary to identify specific political and legislative solutions to strengthen EU constitutionalism as a whole, while preserving the shared competencies of the public authorities at a national and supranational level. The Courts themselves must know when to exercise restrain, be deferent and allow the political process, "even a highly imperfect one",[193] to politically branch itself.

193 See Komesar, p. 152.

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