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Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon

Ben Smulders and Katharina Eisele^(*)

1. Introduction

Over the last two years, not only inside but also outside the framework of the EU treaties, far reaching measures have been taken at the highest political level in order to address the financial and economic crisis in Europe and in particular the sovereign debt crisis in the Euro area. This has triggered debates forecasting the “renationalisation of European politics.” Herman Van Rompuy, the President of the European Council, countered the prediction that Europe is doomed because of such a renationalisation: “If national politics have a prominent place in our Union, why would this not strengthen it?” He took the view that not a renationalisation of European politics was at stake, but an Europeanization of national politics emphasising that post war Europe was never developed in contradiction with nation states.¹ Indeed, the European project is based on a mobilisation of bundled, national forces which are of vital importance to a democratically structured and robust Union that is capable of acting in a globalised world. To that end, the Treaty of Lisbon created a legal basis. The new legal framework redefines the balance between the Union institutions and confirms the central role of the Community method in the EU legislative and judiciary process. This contribution critically discusses the development of the EU's institutional balance after the entry into force of the Treaty of Lisbon, with a particular emphasis on the use of the Community Method and the current interplay between national constitutional courts and the Court of Justice. This interplay has to date been characterised by suspicion and mistrust, rather than by a genuine dialogue between the pertinent judicial actors.

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¹ Herman van Rompuy, “Non pas renationalisation de la politique européenne, mais européisation de la politique nationale”, speech delivered in Paris on 20 September 2010, p. 2.

2. Keeping a Balance: The Union's Institutional System

The EU is an entity of a *sui generis* nature, to which its Member States have transferred powers with the aim of creating an economic and political Union. The way these powers are divided between and exercised by the Union institutions has for long occupied the minds of policy makers, academics and civil society alike. In 2001, at the Laeken summit, the European Council highlighted the democratic challenge the EU was faced with and the ensuing need to redefine its institutional balance on the eve of enlargement process which would virtually double the number of its members.² The European Council made clear that the EU's legitimacy was based on its democratic values, its objectives, the powers it holds and the instruments it had at its disposal – as well as its democratic, transparent and efficient institutions. At the same time, however, it pointed out that the democratic legitimacy and transparency of three of its institutions, the Council, the Parliament and the Commission, needed to be reinforced, and the question was raised how the balance and reciprocal control between the institutions could best be ensured.³ Almost a decade later and despite two European Conventions and three IGCs, it was Chancellor Merkel who repeated the imperative necessity to establish a functioning and balanced institutional system in the Union when she delivered at the College of Europe in Bruges in 2010.⁴ She emphasised the importance of the people's support for Europe, including the EU institutions. In her view Europe needed institutions which rendered it capable of acting and she noted that, after the new institutional framework introduced by the Treaty of Lisbon, “we face the question of how we can better shape the interplay with the institutions.”⁵

2.1. The Concept of Institutional Balance

Political scientists have in general perceived the concept of institutional balance as a dynamic one that explains the relative power positions of the EU institutions in respect to one another throughout the European integration process: the original bipolar nature of the EEC that only vested the Council and the Commission with real powers developed gradually into a complex power structure that has integrated the European Parliament today as an equal co-legislator in most fields, and in which the

² See Laeken Declaration on the Future of the European Union (Annex I) of the Presidency Council Conclusions of the European Council Meeting in Laeken, 14-15 December 2001.

³ Ibid.

⁴ Angela Merkel, speech delivered at the opening ceremony of the 61st academic year of the College of Europe in Bruges, Belgium, on 2 November 2010, p. 5.

⁵ Ibid.

European Council claims to be the *de facto* executive – or at least the “policy-steering” power.⁶ It has been asserted, however, that the image of an institution changes depending on which aspect is in the focus of interest, in other words, it is decisive whether one endeavours to evaluate for instance the effectiveness or the accountability that an institution displays.⁷ In light of this rationale it has been contended that it is difficult to pinpoint a clear notion of institutional balance within the Union’s political system, and that “the phrase ‘institutional balance’ is favoured by practitioners but absent from the academic commentary, which recognises more explicitly the absence of clear institutional design in the EU.”⁸

Against this background, the authors take the view that it is more useful to define the concept of institutional balance as the legal principle according to which the EU institutions have to act within the limits of their respective powers as provided for by the Treaty.⁹ In this regard, it has been highlighted that the Court has used the latter principle as a substitute for the principle of separation of powers, which is concerned with the protection of individuals against the abuse of power in the reasoning of Montesquieu.¹⁰ As opposed to this, the principle of institutional balance as legal principle, to which the Court of Justice referred for the first time in *Meroni* in 1958, entails that it is upheld as long as every institution does not exceed its respective powers to the detriment of others.¹¹ This appreciation of institutional balance is thus essentially normative and concerned with the extent and the limitations of the competences of each institution as defined by the Treaties; Article 13 (2) TEU confirms this explicitly under the Lisbon regime. As a result, the objective of keeping an institutional balance among the Union institutions very much depends on how the decision-making within the EU takes place, which in turn depends on which powers are allocated to each EU institution.

2.2. The Community Method and its Limits: Time for the Union Method?

The Community method has played a key role in the development of the Union as it stands today. In 2007, in light of the non-adoption of the EU Constitution, the Treaty

⁶ See in this regard “Special Issue on the Institutional Balance and the Future of EU Governance”, 15 *Governance: An International Journal of Policy, Administration and Institutions* (2002), 309-412.

⁷ Helen Wallace, “The Council: An Institutional Chameleon?” 15 *Governance: An International Journal of Policy, Administration and Institutions* (2002), 325-344, p. 327; “An ever mighty European Council – some recent institutional developments”, Editorial, 46 *Common Market Law Review* (2009), 1383-1393.

⁸ *Ibid.*

⁹ Jean-Paul Jacqu e, “The Principle of Institutional Balance”, 21 *Common Market Law Review* (2004), 383-391.

¹⁰ *Ibid.*, p. 384.

of Lisbon has been labelled as the “return” to the Community method and has extended the said procedure to all important policy areas, including trade policy, agriculture and fisheries, and in the area of freedom, security and justice.¹² The notion of “return” does, however, not adequately reflect the current state of play. Rather, the legal framework under the Treaty of Lisbon has reinforced the application of the Community method for a considerable number of policy fields, and has thereby contributed to achieving a new institutional balance in the Union.

The President of the European Commission, José Manuel Barroso, emphasised the importance of the Community method in relation to EU action in the field of economic governance with a view to tackle the financial and economic crisis in Europe in February of 2012. He described the Community method as unprecedented when compared to other methodologies stating that “the very term evokes the spirit of the European integration process. Its origins”, he explained, “are to be found in the speeches of the Founding Fathers, and in the texts of the Paris and Rome Treaties.”¹³ Which elements make the Community method so important? First of all, the Commission as “guardian of the Treaties” has the exclusive right of initiative, which provides it with the monopoly to commence the legislative procedure. In addition, the Commission has the power to amend and withdraw legislative proposals. These particular competences have put the Commission in the independent and unique position to identify the Union’s general interests for advancing the European project.¹⁴ Second, the Community method is characterised by qualified majority-voting in the Council, which has been assessed as entailing a positive outcome for decision-making for the following reasons: not only does qualified-majority voting translate into a higher efficiency and promote the culture of compromise, but it also purports a symbolic meaning by abolishing the veto power of individual states.¹⁵ Third, the European Parliament occupies a central position under the Community method, which adds to the democratic legitimacy of the Union as a whole. The European Parliament, the only directly elected parliamentary Union institution, is composed of representatives of the Union’s citizens.¹⁶ Its powers have

¹¹ Case 9/56 *Meroni* [1958] ECR 133.

¹² See Jacqueline Duthel de la Rochère, “The Lisbon Compromise: A Synthesis between Community Method and Union *acquis*”, 31 *Fordham International Law Journal* (2007), 1143-1160.

¹³ José Manuel Barroso, “European Governance and the Community Method”, speech delivered in Brussels on 28 February 2012, pp. 6-7.

¹⁴ Paolo Ponzano *et al.*, “The Power of Initiative of the European Commission: A Progressive Erosion?”, *Notre Europe Study No. 89*, January 2012, p. 7.

¹⁵ Yves Bertoncini/Valentin Kreiling, “Seminar on the Community Method – Elements of Synthesis”, *Notre Europe/BEPA*, February 2012, pp. 5-6.

¹⁶ Article 14 (2) TEU.

once more been reinforced under the Lisbon regime that provides for the active – and in principle equal – participation of the European Parliament within the scope of the ordinary legislative procedure as laid down in Article 294 TFEU. From an initially consultative body, the European Parliament has over time developed into as co-legislator holding seminal budgetary and legislative competences.¹⁷

Fourth, the Community method fully integrates the Court of Justice in Luxembourg as highest judicial authority in the Union that is vested with the task of safeguarding a uniform interpretation and application of Union law. Undeniably, the Court of Justice has contributed to furthering the European integration with its – at times highly contested – case law.¹⁸ Equally, it has ensured compliance with constitutional norms and thus guaranteed the effective enforcement and strengthening of the rule of law. These constituent elements shall ensure coherent and efficient action in a Union of 27, which is in addition based on strengthened democratic legitimacy. The Commission's right of initiative, as well as the role that the latter institution takes from beginning to end in each decision-making process aims to guarantee coherence and the consideration of various interests. Finally, it is to be welcomed that the Community method renders the legislative procedure on Union level more democratic and legitimate by integrating all EU organs.

The question arises how to proceed in cases in which the Community method reaches its limits. It was Chancellor Merkel who first came up with the so-called “Union method” stressing that a common position is pivotal for a Europe of the citizens. In her view the Union method implied coordinated action in a spirit of solidarity at European level, in the area of one's competence but all working towards the same goal.¹⁹ The President of the European Commission pointed out that the Union method “was seen as a way to weave together the intergovernmental and supranational elements of our decision-making process”, and opined that “[A]lthough this has been interpreted as an attempt to construct a new approach, I believe that the Chancellor was articulating what happens in the Union already. We operate with both processes. From time to time, the emphasis is placed on one more than the

¹⁷ Youri Devuyst, “The European Union’s Institutional Balance After the Treaty of Lisbon: ‘Community Method’ and Democratic Deficit’ Reassessed”, 39 *Georgetown Journal of International Law* (2008), 249-325, pp. 306-308.

¹⁸ Takis Tridimas, “The Court of Justice and Judicial Activism”, 21 *European Law Review* (1996), 199-210.

¹⁹ Angela Merkel, speech delivered at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010, pp. 7-8.

other.”²⁰ This demonstrates the practical approach that policy makers endeavour with a view to ensure that the Union remains capable of acting if the Community method cannot be applied.

2.3. Grey Areas

The new institutional framework displays, however, also weak points that can generate tensions among various stakeholders. This section outlines some controversial aspects that concern the implementation of principle of institutional balance since the entry into force of the Treaty of Lisbon in December 2009. In the last two years genuine attempts have been made to develop a more stable framework for inter-institutional cooperation on the basis of *inter alia* a framework agreement between the European Parliament and the Commission²¹, Regulation (EU) No 182/2011 that provides for new rules for the control by Member States of the Commission’s exercise of its implementing powers²² and the Common Understanding on the Use of Article 290 TFEU²³, and arrangements between the Council, the High Representative of the Union for Foreign Affairs and Security Policy (the High Representative) and the Commission on EU statements in multilateral organisations. Despite these agreements uncertainties persist, because the institutions are still in the process of adapting themselves to the new setting. Some areas of conflict have emerged, which relate to the following subject matters.

First, as regards co-decision it must be pointed out that despite many years of experience and a set of highly sophisticated treaty rules, virtually any legislative file of some importance is dealt with in *trilogues* towards the end of the first reading. This poses a problem of transparency as it means that such files are negotiated and decided behind closed doors on the basis of an exchange of *non-papers* by the Council Presidency, EP rapporteurs, and the responsible Commissioner, assisted by officials of the three institutions.

²⁰ José Manuel Barroso, “European Governance and the Community Method”, speech delivered in Brussels on 28 February 2012, pp. 15-16.

²¹ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, p. 47.

²² Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and the general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55, 28.2.2011, p. 13.

²³ Council of the European Union, “Common Understanding” of 10 April 2011, document number: 8753/11.

Second, the Treaty of Lisbon has created – admittedly an important institutional novelty – a hierarchy of norms.²⁴ The main purpose of this hierarchy was to enable the lawmaking authorities to concentrate on the political aspects of particular issues rather than on questions of detail, which it could delegate to the Commission or the Member States. It becomes clear, however, that the divide made by the Treaty of Lisbon between legislative and non-legislative acts is not very rational. In current practice, the European Parliament and the Council tend to distinguish between delegated acts and implementing acts not on the basis of clear normative criteria but political considerations, which may at times appear rather arbitrary.²⁵ Only the case law of the Court of Justice can provide for certainty in this regard.

Third, one can observe a pluralisation of the EU executive structure, triggering delicate questions of scope and delimitation of powers. Today, executive power is vested with an ever-growing number of institutions and bodies: the European Council, the Council, the Commission, the High Representative seconded by the European External Action Service (EEAS), the European Central Bank, and an exponentially increasing number of agencies, in particular in the area of financial services following the so-called *de Larosière* reform.²⁶ Traditionally, these agencies have the mandate to carry out tasks that require highly scientific and/or technical expertise. But practice, in particular in the area of financial services, shows that constantly attempts are made to explore the boundaries of the *Meroni* case law.²⁷ Regarding the latter case it was elucidated that “[W]hile the Court did not exclude the ‘possibility’ of delegating powers to a distinct body with separate legal entity (from this was deduced the power to establish an agency), it did exclude that the powers so delegated would involve discretionary power, a result the Court said was unacceptable since it ‘replaces the choices of the delegator with those of the delegate (and) brings about an actual transfer of responsibility. Such a transfer of responsibility’ – it was made clear – “interfered with the normal institutional balance

²⁴ See Articles 290 and 291 TFEU.

²⁵ Consider for instance the different viewpoints of the Legal Services of the Council and the Commission; see also Council of the European Union, “Opinion of the Legal Service on the Application of Articles 290 and 291 TFEU” of 11 April 2011, document number: 8970/11.

²⁶ See Report of the “High-Level Working Group on Financial Supervision in the EU”, chaired by Jacques de Larosière, Brussels, 25 February 2009; based on this report, the reform proposed measures relating to European economic governance to address the implications of the financial crisis.

²⁷ Hanna Sevenster and Ben Smulders, “Het Europese perspectief na Lissabon. De veranderende rol van de Nederlandse staatsinstellingen in de rechtsorde van de Europese Unie”, in: H.D. Tjeenk Willink *et al.* (eds.), *De Raad van State in perspectief* (Boom Juridische uitgevers, Den Haag 2011), 69-105, p. 88.

foreseen by the Treaty.”²⁸ The pluralisation of executive bodies is contrasted, however, by a hierarchisation, and therefore simplification, of the executive power at EU level which results directly from the fact that the European Council, in practice, considers its tasks “to provide the Union with the necessary impetus for its development” and “to define the general political directions and priorities” specified in Article 15 TEU as very broad.

Fourth, the EU's external representation has raised highly contentious issues. In this regard it is crucial to point out that the Treaty of Lisbon was in fact supposed to render the Union's external representation more consistent and unified by providing the EU explicitly with legal personality and by creating the position of the High Representative who conducts the Union's common foreign and security policy and the common security and defence policy, assisted by the EEAS.²⁹ The High Representative's role has been called “double-hatted” seeing that the latter holds the combined post of the former High Representative for External Relations and the former Commissioner for External Relations.³⁰ The High Representative has to reconcile the Council's interests with the viewpoints of the Commission.³¹ It still remains to be seen how and to which extent this “super-Minister of Strategic and Foreign Relations” accommodates both possibly conflicting positions.³² The Union's competence in matters of common foreign and security policy covers all areas of foreign policy and all questions relating to the Union's security.³³ Article 2 (4) TFEU stipulates that the Union is competent, in accordance with the TEU, to define and implement a common foreign security policy. P. Eeckhout emphasised that “the EU's CFSP competence is neither exclusive nor shared, but rather in an undefined category of its own.” He argued that the CFSP was explicitly not defined as shared so as to prevent a pre-emptive effect.³⁴ While the Member States are under the obligation to support the Union's external and security policy actively and unreservedly, and Council decisions taken on the basis of Article 28 (1) TEU commit the Member States in their positions and activities, the Treaty of Lisbon favours the

²⁸ “An ever mighty European Council – some recent institutional developments”, Editorial, 46 *Common Market Law Review* (2009), 1383-1393, pp. 1389-1390.

²⁹ See Articles 3 (5), 18, 21, 27 (3) and 47 TEU.

³⁰ Christine Kaddous, “Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Treaty of Lisbon”, in: S. Griller and J. Ziller (eds.), *The Treaty of Lisbon: EU Constitutionalism without a Constitutional Treaty?* (Springer Verlag, Wien 2008), 205-221, p. 209.

³¹ Article 18 (4) TEU.

³² Pieter Jan Kuijper, *Of 'Mixity' and 'Double-hatting', EU External Relations Law Explained* (Vossiuspers UvA, Amsterdam 2008), pp. 14-15.

³³ Article 24 (1) TEU.

intergovernmental approach in that the new framework reinforces the Council's decision-making powers and simultaneously limits competences of the Commission, the EP and the Court.³⁵ The Council shall adopt the necessary decisions when “the international situation requires operational action by the Union.”³⁶ Such decisions are, as a general rule, taken by the European Council and the Council acting unanimously except where provided for otherwise.³⁷

The ambiguity that surrounds the new Treaty rules on the Union's external representation has led to some inter-institutional tensions. Indeed, the Commission is regularly faced with arguments concerning the EU's external representation which it considers to be incorrect. For instance, some Member States hold the view that when a matter is of shared competence, the EU and the Member States must act together and that then consensus/unanimity is required. However, in the Commission's view shared competence does not imply that the Union and the Member States *must* act together but that both, the Union and the Member States, *can* act with a view to adopting internal EU legislation as well as externally-oriented instruments.³⁸ This is notwithstanding the duty of sincere cooperation as specified in Article 4 (3) TEU according to which the Union and the Member States shall assist each other in carrying out tasks which flow from the Treaties. Next, national authorities have advocated the common view that the Commission, the High Representative or the EU delegations can only speak on behalf of the Union if their statement was previously approved by the Member States. As has been indicated, the Union's external representation is ensured by the Commission, the High Representative and the delegations in line with Articles 15, 17, 27 TEU and Article 221 TFEU. Taking into account these legal bases transferring competence, the Member States' stance of requiring their prior approval is legally wrong. To clarify, a statement of behalf of the EU can only be communicated to external partners if an established EU policy, an EU common position, or an EU strategy/EU concerted action exists. Provided that such an EU position does exist, the Commission, the High Representative or the delegations may deliver a statement of behalf of the EU *after they have informed* the Council giving it the time to comment; otherwise the statement can only be made *if it is approved, or at least endorsed* by the Council.³⁹ In defiance of these criteria, since

³⁴ Piet Eeckhout, *EU External Relations Law* (2nd ed. OUP, Oxford 2011), pp. 167-171.

³⁵ See Article 24 (3) TFEU and 28 (2) TEU.

³⁶ Article 28 (1) TEU.

³⁷ Article 31 (1) TEU.

³⁸ Article 5 (2) TEU and Article 2 (2) TFEU.

³⁹ See Article 16 TEU.

November 2011, more than 50 EU statements have not been delivered in international fora.

Lastly, collaboration between the Member States has also been intensified through the conclusion of arrangements outside the Treaty framework irrespective of whether the Treaty in fact contains provisions regulating the respective subject-matters. Such cooperation deals with the core of the discussions on the future of a “European economic government.” Recent examples are the Euro plus pact, the European Stability Mechanism and the Unified Patent Court, and the European Fiscal Compact. With respect to the latter instrument, Commission and European Parliament ensured the compatibility of the Fiscal Pact with Union law during the negotiations. However, some scholars⁴⁰ have indicated potential overlaps and inconsistencies of such intergovernmental cooperation mechanisms in respect to the EU legal order. In this context, the new rule of the Fiscal Compact that provides for a “reversed” qualified majority decision making needed in order to block Commission proposals made in the context of the so-called six pack, a collection of EU Regulations⁴¹ based on *inter alia* Article 136 TFEU and aimed at reinforcing the Growth- and Stability Pact, was criticised. Likewise, objections were raised with regard to the role of the EU institutions under the Fiscal Compact without the participation of the EU-27, such as the special jurisdiction of the Court of Justice, as well as the right conferred to it to impose sanctions on the contracting parties. This recourse to the Court is based on Article 273 TFEU according to which the Court “shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.” What does this provision imply? Usually, this clause can be found in international agreements between MS to stipulate the Court’s competences for disputes relating to the application and interpretation of the treaty. Under the Fiscal Compact, however, this power is defined very broadly to an extent that one could argue that “mimics” the infringement procedure under Article 260 TFEU.

⁴⁰ With regard to the Fiscal Compact, see Anna Kocharov (ed.), “Another Legal Monster? An EU Debate on the Fiscal Compact Treaty”, *EUI Working Papers LAW 2012/09*; in view of the European Stability Mechanism, see Rodrigo Olivares-Caminal, “The EU Architecture to Avert a Sovereign Debt Crisis”, *OECD Journal: Financial Market Trends 2011/2*, pp. 13-16.

⁴¹ See O.J. L306, 23.11.2011, pp. 1-47.

3. The Interplay of National Constitutional Courts and the Court of Justice

The interaction between the national courts of the Member States and the Court of Justice has in the past triggered heated debates about the principle of supremacy of Union law and constitutional pluralism. Before discussing current developments concerning the relationship between the aforementioned judicial actors in the Union, which all – some to a greater extent than others – postulate claims to power as ultimate arbiter, several general remarks on the theory of constitutional pluralism seem appropriate.

3.1. Constitutional Pluralism in the Spotlight

Constitutional pluralism has become a fashionable subject of research as apparent from recently published, rich academic literature on the topic – what does constitutional pluralism imply and what makes an extensive analysis of the notion so attractive? Originally, MacCormick provided the following definition of constitutional pluralism: “Where there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant governmental powers), it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another.”⁴² In the EU setting, “[T]he idea of constitutional pluralism derived a lot of its initial focus and momentum from the circumstances of high-profile constitutional clashes over the implications of Europe’s supranational arrangements. The key sites of these clashes were the supreme or constitutional courts of the Member States.”⁴³ Arguably, the notion of constitutional pluralism emerged in the wake of the *Maastricht* judgment of 1993, in which the *Bundesverfassungsgericht* (German constitutional court) confirmed the compatibility of the German constitution with the Treaty of Maastricht while preserving itself the final authority to identify acts taken *ultra vires*.⁴⁴ Rather than considering constitutional pluralism merely as a reaction to the *Maastricht* judgment that aims to describe the phenomenon and tries to accommodate those competing constitutional claims, Maduro emphasised that a meaningful debate on constitutional conflicts of authority required a broader understanding of the nature and legitimacy of

⁴² Neil MacCormick, *Questioning Sovereignty* (OUP, Oxford 1999), p. 104.

⁴³ Neil Walker, “Constitutionalism and Pluralism in Global Context”, in: M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, Oxford 2012), 17-37, p. 21.

⁴⁴ See Matej Avbelj and Jan Komárek (eds.), “Four Visions of Constitutional Pluralism”, *EUI Working Papers LAW 2008/21*, pp. 9-12 and Julio Baquero Cruz, “The Legacy of the Maastricht-Urteil and the Pluralist Movement”, 14 *European Law Journal* (2008), 389-422; BVerfGE 89, 155 of 12 October 1993; see also below Point 3.3.

the European and national constitutions and their relationship with constitutionalism.⁴⁵ From an empirical perspective constitutional pluralism related in the scholar's view to “the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them.”⁴⁶ From a normative viewpoint, Maduro assessed the competing constitutional claims underlying constitutional pluralism as equally legitimate or, at least – he specified – they cannot be balanced against each other at large.⁴⁷ De Búrca encapsulated the big picture of the ‘constitutional pluralism’ rationale in plain terms as follows: “In sum, what unites the pluralist approaches to the international legal order is their emphasis on [...] the existence of a multiplicity of distinct and diverse normative systems, and the likelihood of clashes of authority claims and competition for primacy in specific contexts. From the perspective of its advocates, the multiple pressure points of global legal pluralism, and the constant risk of mutual rejection of the authority claims of different functional or territorial sites, provide a more promising model for promoting responsible and responsive global governance than constitutional or cosmopolitan approaches which emphasize coherence or unity.” The author made clear that “[R]obust pluralist approaches deny the possibility of a shared, universally oriented system of values and question the meaningfulness of the idea of an international community.”⁴⁸

3.2. National Constitutional Courts and the Preliminary Reference Procedure

The well-known *Solange I and II* decisions of the *Bundesverfassungsgericht* (German constitutional court) handed down in 1974, and in 1986 respectively, in which the latter court reserved itself the right to scrutinise the compatibility of Union law with German legal norms, were indicative for the relationship between some of the Member States’ constitutional courts and the Court of Justice in Luxembourg in the subsequent years.⁴⁹ How has the rather distant position of these constitutional courts meshed with the preliminary ruling procedure – “the jewel in the Crown” of the

⁴⁵ Miguel Poiares Maduro, “Three Claims of Constitutional Pluralism”, in: M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, Oxford 2012), 67-84, pp. 68-69.

⁴⁶ *Ibid.*, pp. 69-71.

⁴⁷ *Ibid.*, pp. 75-77.

⁴⁸ Gráinne De Búrca, “The ECJ and the International Legal Order: A Re-Evaluation”, in: G. De Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge University Press, Cambridge 2012), 105-149, p. 130.

⁴⁹ BVerfGE 37, 271 of 29 May 1974; BVerfGE 73, 339 of 22 October 1986; on the theory of a – reversed – EU law ‘*Solange* doctrine’, which implies that outside the scope of the EU Charter Union citizens cannot invoke EU fundamental rights as long as it can be presumed that the essential content of the fundamental rights (*Wesensgehalt der Grundrechte*) is guaranteed in the Member State concerned, see Armin von Bogdandy *et al.*, “Ein Rettungsschirm für europäische Grundrechte – Grundlagen

jurisdiction of the Court of Justice – which provides for a mechanism on the basis of which national courts can start a discourse with the Court of Justice regarding question on the scope of Union law if they consider the latter law to be in conflict with national law?⁵⁰ This question is in particular of interest considering that the procedure set out in Article 267 TFEU has allowed the Court to decide cases of major importance for the development of Union law, such as the principles of direct effect and supremacy. Considering the tension mentioned above, it comes at no surprise that constitutional courts have sometimes refrained from entering into direct dialogue with the Court of Justice, or they have at least been very reluctant to ask the Court in Luxembourg for preliminary rulings in the past.⁵¹

The Member States' constitutional courts are keen to preserve a certain level of autonomy and sovereignty, which in their view could be lost if placed under the interpretative authority of the Court of Justice. The first reference for a preliminary ruling submitted by the Spanish constitutional court lodged on 28 July 2011 came thus rather unexpected and was received as puzzling but welcomed.⁵² The legal issue in the case of *Melloni* concerns the validity and interpretation of a rule concerning the execution of a European Arrest Warrant (EAW) in respect to the protection of fundamental rights. The instrument of the EAW as established by Council Framework Decision 2002/584/JHA of 13 June 2002 provides for an extradition system between the Member States that permits judicial authorities to request the surrender of suspected or sentenced persons for prosecution purposes, or in order to ensure the execution of a criminal sentence.⁵³ The crux in *Melloni* relates to the delicate question of how the principle of mutual recognition of judicial decisions – upon which the EAW mechanism is based – is compatible with the right to a fair trial of constitutional value, and the same right as guaranteed under EU law.⁵⁴ One may wonder whether this “entering into dialogue” with the Court of Justice

einer unionsrechtlichen *Solange*-Doktrin gegenüber Mitgliedsstaaten”, 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2012), 46-78, pp. 66-77.

⁵⁰ Paul Craig/Gráinne De Búrca, *EU Law* (5th ed. OUP, Oxford 2011), p. 442.

⁵¹ See Marta Cartabia, “Europe and Rights: Taking Dialogue Seriously”, 5 *European Constitutional Law Review* (2009), 5-31, p. 25; see also 2011 Annual Report of the Court of Justice for an overview on the new references for preliminary rulings, pp. 119-121.

⁵² Aida Torres Perez, “Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court knocking on Luxembourg's Door”, 8 *European Constitutional Law Review* (2012), 105-127, pp. 119-122; pending Case C-399/11 *Melloni*, the hearing is scheduled for 3 July 2012.

⁵³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

⁵⁴ For a legal analysis on the multilevel fundamental rights protection in the EU legal order and the significance of Article 53 EU Charter in the *Melloni* case, see Clemens Ladenburger, FIDE 2012 –

will incite more national constitutional courts to ask the highest judicial authority in the EU for interpretative guidance. Yet, *de facto* some current developments seem to suggest the opposite.

3.3. A Relationship of Cooperation?

The relationship between the Member States' constitutional courts and the Court of Justice has been addressed by the President of the *Bundesverfassungsgericht* Prof. Dr. Voßkuhle on the occasion of delivering a speech on the *Bewahrung und Erneuerung des Nationalstaats im Lichte der Europäischen Einigung* ("the preservation and reformation of the nation state in the light of the European unification") to the Hessian Parliament in March 2012.⁵⁵ Andreas Voßkuhle argued that the *ultra vires* control of constitutional courts – which he called *Notkompetenz* (emergency competence) – could only be invoked in exceptional cases when an EU institution has clearly exceeded its powers. He emphasised the importance of this emergency competence that the German constitutional court developed in the *Maastricht* judgment.⁵⁶ With satisfaction the President of the *Bundesverfassungsgericht* gave account of two decisions of the Polish and Czech constitutional courts respectively stating that for the first time the *ultra vires* control was put into effect and that the Czech constitutional court declared a decision of the Court of Justice inapplicable in the Czech Republic.⁵⁷ He appraised these developments as "salutary" for the Court of Justice in that it incited the latter not to act too expansively, and to consistently take into account the national peculiarities – highlighting law as being such a cultural peculiarity of each Member State – and to be more reticent. This is why Voßkuhle considered the latent threat of an *ultra vires* decision of the German constitutional court as "reasonable."

How does one have to assess these considerations of the President of the *Bundesverfassungsgericht*? The autonomy and the primacy of EU law *vis-à-vis* national law has been a reality for almost 50 years, and which has to be regarded as a milestone in the European integration process. There is no doubt that a fruitful and

Session on "Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions", Institutional Report, pp. 24-26.

⁵⁵ Andreas Voßkuhle, speech "Bewahrung und Erneuerung des Nationalstaats im Lichte der Europäischen Einigung" delivered to the *Hessischer Landtag* in Wiesbaden on 1 March 2012.

⁵⁶ BVerfGE 89, 155 of 12 October 1993.

⁵⁷ See Judgment of the constitutional court of the Czech Republic, No. Pl. US 5/12 of 14 February 2012, the so-called "Slovak pensions" case; a follow-up reference for a preliminary ruling of the Czech supreme administrative court has been made on 9 May 2012, see Case C-253/12 *JC*.

smooth communication between the Member States' courts and the Court of Justice is very useful but remains a major challenge. The question arises whether statements that challenge fundamental principles of the EU legal order as well as the authority of the Court of Justice are supportive in this respect. Is it constructive to instruct Luxembourg with a wagging finger from Karlsruhe about "salutary" and "reassuring" emergency competences of national constitutional courts with a view to seek affirmation among one's peers? It makes a significant difference whether a national constitutional court postulates reservations and emergency competences merely in an abstract and restrained way, or whether, such as in the case of the Czech Republic, a decision of the Court of Justice is criticised – without warning and without addressing a second preliminary ruling to the Court of Justice – as a paragon of ignorance and a product of an unfair procedure, and repudiated as *ultra vires*. One has to keep in mind that it was the German constitutional court that has shaped the concept of constitutional pluralism as outlined above. The position that the EU is not capable to effectively protect higher – and constitutionally guaranteed – fundamental values in the Member States is comprehensible against the backdrop of Germany's history and the associated high priority of the catalogue of fundamental rights set out in the German constitution of 1949. The legally binding EU Charter of Fundamental Rights and the EU's imminent accession to the European Convention of Human Rights call for a re-examination of constitutional pluralism and its relevance in the EU legal framework.⁵⁸

Interestingly enough, the German constitutional court defined in the *Maastricht* judgment the exercise of its jurisdiction on the application of secondary Community law as a "relationship of cooperation" in respect to the Court of Justice – as mentioned by Voßkuhle. It is therefore not a tug-of-war but cooperation that is today – maybe more than ever – necessary and desirable. What matters is that the democratic basics of the Union are extended inline with the integration and that a vivid democracy is maintained in the integration process within the Member States.⁵⁹ This much-cited "relationship of cooperation" forms also the basis of a recent decision of the constitutional court of Austria.⁶⁰ In its reasoning the latter court points

⁵⁸ See, however, also the judgment of the German constitutional court in respect to the Treaty of Lisbon (BVerfGE 123, 267 of 30 June 2009), in which the court conditioned Germany's ratification of the latter Treaty on more participation rights of the *Bundestag* and *Bundesrat*, and stipulated certain national powers and limits for EU integration.

⁵⁹ BVerfGE 89, 155 of 12 October 1993, at C.I.2.b.1: "*Entscheidend ist, daß die demokratischen Grundlagen der Union schritthaltend mit der Integration ausgebaut werden und auch im Fortgang der Integration in den Mitgliedstaaten eine lebendige Demokratie erhalten bleibt.*"

⁶⁰ Judgment of the constitutional court of Austria (*Verfassungsgerichtshof Österreich*), VfGH U 466/11-18 und U 1836/11, of 14 March 2012.

out that the EU Charter must be regarded in the same way as the Austrian constitution in procedures in which Union law is of relevance. With regard to two principles of Union law, the principle of effectiveness and the principle of equivalence, the EU Charter of Fundamental Rights must be used as the standard of scrutiny by the judges of the constitutional court. As a consequence, fundamental rights that are protected by the EU Charter are also constitutionally protected rights that can be claimed before the constitutional court. If, in the context of legal proceedings, the constitutional court is of the opinion that a law is in violation with the EU Charter, the Court will repeal the law in question. The Austrian constitutional court stresses in this regard that it will take this step without prior consultation with the Court of Justice only if the underlying subject-matter is unequivocal. In case the constitutional court has doubts concerning the interpretation of the EU Charter, the court will ask the Court of Justice for a preliminary ruling to clarify the issue at hand.

4. Concluding Remarks

As this contribution has demonstrated the ‘checks and balances’ of the Union’s system has been improved by the Treaty of Lisbon. We have shown, however, that this does not mean that all institutional problems have been resolved by the current legal framework. How will Europe’s future look like? In a Union of 27 – or soon 28 – it is crucial that the Member States and the EU act in concert to lay the foundation for a common future in Europe. A Europe of the citizens requires, as Chancellor Merkel has pointed out, an improved institutional balance between the Union organs that is based on coordinated action. Just as important is a cooperative relationship between national courts and the Court of Justice, which is mutually beneficial for a establishing a coherent legal system in the EU. The active, participatory attitude of national constitutional courts is not only highly preferable but necessary. In this regard, it has been stated that “[B]oth the national constitutional systems and the European constitutional systems could pay too high a price if their courts shut themselves out of the European constitutional dialogue [...] [P]reliminary ruling could be a valid tool in bringing traditions, experience, reasoning and different points of view before the court of Justice on the part of the national constitutional courts. In short, it is the simplest way to keep pluralism alive within the European constitution.”⁶¹ By calling upon the Court of Justice, the Spanish constitutional court has in *Melloni* for the first time overcome its previous reluctance to engage into a

⁶¹ Marta Cartabia, “Europe and Rights: Taking Dialogue Seriously”, 5 *European Constitutional Law Review* (2009), 5-31, p. 25.

legal dialogue of great importance. There is hope that other constitutional courts in the EU will learn a lesson from this initiative despite the recent opposing developments that have shaped the debates on the Union's constitutional order. The issue as to how a genuine institutional balance of the EU can be attained that entails a more efficient, transparent and democratic course of action of the Union should in any event be solved constructively.

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