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The Primacy of the Rule of Law and Member States' Constitutional Identities

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I. INTRODUCTION: DIVERGENCE, CONVERGENCE, AND SOLVING CONSTITUTIONAL CONFLICT

If the rule of law is to have the foundational function attributed to it in European Union law, one would think this requires 'the rule of law' (*l'État de droit*, *der Rechtsstaat*, *el Estado de Derecho*, *rättsstaten*, *oikeusvaltio*, *o Estado de direito*, *de rechtsstaat*) to be a unified concept. There is reason to think this is not the case. Part of the explanation lies in the nature and reality of the European constitutional order being composed of both the EU and the national constitutional orders. It may be a better question to ask if and to what extent it *needs* to be a unified concept. After all, the Union's motto is 'united in diversity'. Academic reflection on this aspect of the rule of law (*Rechtsstaat*, etc) is urgent because, in recent years, the issues of constitutional communality and legitimate constitutional diversity have gained in prominence, leading to oversimplifications of the constitutional ins and outs of the problem of unity in diversity, legally speaking. Abusive and authoritarian constitutionalism in some Member States and 'captured courts' have created embarrassment for critical discourse about constitutional adjudication.[1] Similarly, the abusive employment of claims to diversity and national constitutional identity threatens to silence rational critical discourse about constitutional unity and diversity in the European Union. Were this to happen, it would not only be a surrender to abusive forms of constitutionalism but would ultimately also undermine the constitutional legitimacy of the Union and of the process and project of European integration.

[1] Cf M Tushnet, 'Writing While Quarantined: A Personal Interpretation of Contemporary Comparative Constitutional Law' (2021) 15 *Vienna Journal on International Constitutional Law* 53.

The ideas of unity and diversity have found expression in the Union's founding Treaties. In their present form they express constitutional unity in terms of commonality of constitutional 'values': the ideas of liberty, democracy and the rule of law are the very constitutional foundations of both the European Union and the Member States.[2] This commonality establishes a form of constitutional 'homogeneity' of the EU and the Member States.[3]

At the same time there is the constitutional norm of Article 4(2) TEU, which expresses diversity in terms not merely of value or constitutional principles, but as a legal obligation for the Union to respect the identity of the Member States' political and constitutional structures.[4] Unless this 'identity clause' is a (near) repetition of the 'homogeneity clause', it protects 'structural' constitutional identities of Member States also, and I would say precisely there, where they are mutually not fully co-extensive. This is at any rate how Member State courts tend to understand it.

Whether the rule of law in the EU is a unified concept is essentially an empirical question. Answering it would ideally require a delimitation of what the existing constitutional commonality or homogeneity in fact consists of and, in particular, of where the constitutional diversity between Member States and the Union lies. Such an exercise is far beyond the scope of this brief chapter.

Apart from the variety of understandings of what the rule of law comprises in the respective Member States, there is also a rule-of-law divergence as regards the law that applies in cases of incompatibility between legal orders. This divergence concerns the answer to the question which of the two concepts is supposed to prevail if the EU and national constitutional understandings prove to be incompatible.

So there is a twofold issue. Firstly, there is the problem that the rule of law (especially, but not only in a thick, substantive sense) has a different content in Member State law from that in Union law. Examples in the case law include the divergent interpretations of the principle of legality in criminal matters on various points – such as the prohibition of substantive retroactive effect (*lex praevia*), the principle of personal guilt (*culpa*), the *lex certa* principle, and *ne bis in idem*. Other examples are divergent interpretations of certain fundamental rights, such as the scope of the duty to respect human dignity (do laser games infringe human dignity?) or the freedom of religion (in a state based on the principle of separation of church and state, is it for the courts to determine what a specific religion does or does not require?).[5] Secondly, there is the

[2] Cf art 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights … values [that] are common to the Member States'; pre-Lisbon art 6(1) EU: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

[3] Art 2 TEU has been called a 'homogeneity clause', a term deriving from federal studies, eg F Schorkopf, *Homogenität in der Europäischen Union, Ausgestaltung und Gewährleistung durch Art. 6 Abs. I und Art 7 EUV* (Berlin, Duncker & Humblot, 2000); R Miccù and V Altripaldi (eds), *L'omogeneità costituzionale nell'Unione Europea* (Padua, CEDAM, 2003); G Delledonne, *L'omogeneità costituzionale negli ordinamenti composti* (Naples, Editoriale Scientifica, 2017).

[4] Art 2(4) TEU: '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.'

[5] Cf. the cases leading to the *Taricco*-saga (C-105/14, *Taricco and Others*, ECLI:EU:C:2015:555, and C-42/17, *MAS and MB*, ECLI:EU:C:2017:936), as well as Cases C-399/11, *Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107; C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin*

related but distinct problem that the rule of law would seem to require that in case of an incompatibility of legal norms stemming from different legal orders in a concrete case, one of them will have to prevail. Uncertainty as to what law governs a specific case in practice defies the rule of law as the observance of the norms becomes uncertain. This becomes acute when there are discrepancies as to the principles on which to resolve such norm conflicts. And indeed, as a matter of empirical fact, the Union law and Member State perspectives on these diverge.

In this chapter I focus on some of the main principles governing the resolution of conflicts between legal rules pertaining to the national constitutional identities and Union law, principles I refer to as conflict rules. These rules are relevant to solving a potential or actual norm conflict in cases involving constitutional norms – and of understandings of the rule of law implicit in them – that may not be compatible with a norm of Union law.

Before I delve deeper into this matter, I first sketch the problem of reducing the meaning of the concept of the rule of law to 'thin' conceptions, as this is central to the argument I make about the primacy of the rule of law. Next, I move to look into the Union and Member State perspectives on constitutional conflict, respectively. I indicate a cause of continuous constitutional divergence and conflict, which lies in what I refer to as a 'jurisdictional gap', and sketch the various and at least seemingly contrary views of the Union and Member States on the relevant conflict rule. I subsequently make some remarks concerning ways of resolving the different approaches to constitutional conflict by bridging the various perspectives. In this context, I argue that non-abusive constitutional identity approaches by Member State courts are, paradoxical as it may seem, less problematic than is often argued from the point of view of substantive understandings of the rule of law. Ultra vires review can be more problematic, also in terms of possibilities to overcome the motive behind this form of Member State review of Union decision-making. On the part of EU law, I submit, conflict resolution requires a fundamental change in the European Court of Justice's (ECJ) understanding of primacy of Union law, one which moves from a thin and formal concept to one which focuses more clearly on substantive elements of the rule of law.

II. DIVERGENT CONCEPTIONS OF THE RULE OF LAW

Even without going into any conceptual and theoretical detail, it is useful to make the common distinction between 'thin' and 'thick' notions of the rule of law.[6] Thin notions of the rule of law focus on the subjection of the powers that be to the law, the rule of law instead of the rule of men. They focus on the inherent restraints on government broadly, including legislative power of any kind, by virtue of crucial

der Bundesstadt Bonn, ECLI:EU:C:2004:614, and C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, ECLI:EU:C:2017:851, respectively.

[6] See, *ex multis*, BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004), ch 7.

values such as certainty, predictability, security and the like.[7] This notion presupposes or implies values like equality before the law and the principle of legality. Otherwise, the purpose of this concept of the rule of law would largely be defeated, just as the notion would have little practical meaning in the absence of legal institutions and an independent judiciary and other institutions of law enforcement operating within a legal culture. Thinner notions of the rule of law are distinct from thicker notions in so far as the former are not dependent on any particular quality of the law's content; as a consequence, the thinner concept can apply in a greater variety of different historical, political and cultural environments. 'Thicker' notions of the rule of law incorporate the 'thin' notions, its presumed values and functions, but they go beyond them in also incorporating such principles as democracy, protection of fundamental rights, and distribution or separation of powers beyond the idea of judicial independence. More generally one can say the thicker notions of the rule of law are dependent on a particular substantive quality of the content of the law and take a broader look at state institutions than the nearly exclusively lawyerly 'thin' understanding of the rule of law. Clearly, such 'thicker' conceptions have fewer instantiations than the 'thin' ones.

Thin concepts of the rule of law are often viewed and analysed, particularly in positivist legal theory, as inherent in the concept of law; hence, lawyers and courts tend to focus on, or even equate the rule of law with, this thin concept. This lawyers' bias towards thin concepts is related to the fact that 'thick' concepts of the rule of law are determined by inherently political choices, principles and values, however fundamental these may be in the specific context of a particular political and legal order, and notwithstanding the fact that those political choices have been enshrined and reflected in specific legal rules and arrangements.

To confront the problem of unity and diversity head on, we must adopt a broad understanding of the concept which excludes neither thinner nor thicker notions.[8] This is all the more necessary because at least some articulations of the two concepts reveal that 'thin' notions presume and flow over into 'thicker' notions. This is particularly evident with the principle of legality, which is core to thin notions of the rule of law.

I would define the constitutional principle of legality, apart from everything else, as meaning that the exercise of public authority must have a basis in an act of the legislature or the Constitution itself. In democratic states under the rule of law, this principle is fundamentally geared towards two other constitutional values or principles. Its first function is to protect liberty in the classic 'liberal' sense: in that conception, the citizens are free to do as they prefer unless and in so far as the law prohibits this or otherwise tells them how they have to behave, while public

[7] See J Raitio's Chapter 5 in this volume.

[8] The Commission's and Council of Europe's concept of the rule of law strongly rely on a thin concept, which translate rule-of-law problems to legal problems or problems concerning the legal institutions for the dispensation of justice; see eg Commission Communication on A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final of 19 March 2014, Annex I, and the Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), endorsed by the Ministers' Deputies at the 1263rd Meeting (6–7 September 2016), Council of Europe, Study No 711/2013, CDL-AD(2016)007rev. This may conceal the broader political and societal dimensions of the rule-of-law problems that are presently haunting Europe.

authorities are not free to act unless and in so far as the legislature allows for this or otherwise tells them how they have to act. Secondly, at least since the introduction of the universal franchise, this principle has in essence guaranteed the democratic legitimacy of public authority as long as legislative power is essentially parliamentary, and thus directly representative of the people. Viewed in this manner, legality may in itself be a thin concept of a largely formal nature, but it involves thicker notions of the rule of law inasmuch as it incorporates the requirements of liberty and democracy. Taken in this sense, the principle of legality actually lends an important form of democratic legitimacy to government.[9]

III. THE CAUSE OF ONGOING CONSTITUTIONAL CONFLICT: THE JURISDICTIONAL GAP

Two self-evident jurisdictional truths are at the origin of much constitutional conflict: the European Court of Justice has the exclusive power to interpret European Union law authoritatively and has no power to interpret national law; national constitutional courts have the exclusive power to interpret national constitutional law and have no power to definitively interpret EU law. Each must accept the other's law as interpreted authoritatively by its competent court. The general position of constitutional courts is that if issues of incompatibility arise in the constitutional sphere, they have to refer the case to the ECJ, so that a national constitutional court can in principle, as a next step, adjudicate on the basis of an understanding of the law as authoritatively interpreted by the ECJ – just as is normally the case for the Court of Justice in preliminary rulings, where it takes national law to be what it is as authoritatively interpreted by the national court.

Yet, these various procedures may produce conflicting outcomes as to the applicable law in the concrete case. And, as we have already said, the rules that the two courts, the European and the national, employ to resolve such outcomes differ as well. Let's look at the respective European and domestic approaches.

IV. THE EU LAW PERSPECTIVE ON CONSTITUTIONAL CONFLICT: PRIMACY

At a most general level, the EU law perspective on constitutional conflict is approached with the principle of primacy – in the literature often equated with the

[9] Other aspects of legality exist independently from the substantive democratic aspect, such as the criteria of knowability and transparency, which the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) consider sufficient qualities of legality short of direct or indirect involvement of elected bodies. Thus, the ECJ has allowed 'secret' legislation, reducing the level of sufficient publicity of legislation at EU level to the relevant legislation merely being known to the person concretely affected even when the Court itself does not know it: *curia nescit iura*. Thus, European integration has eroded the scope and democratic nature of the principle of legality. Cf N Lupo and G Piccirilli, 'The Relocation of the Legality Principle by the European Courts' Case Law' (2015) 11 *EuConst* 55; M Bobek, 'Case C-345/06, *Gottfried Heinrich*, Judgment of the Court of Justice (Grand Chamber) of 10 March 2009' (2009) 46 *CML Rev* 2077; A Albi, 'From the "Banana Saga" to a Sugar Saga and beyond: Could the Post-communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?' (2010) 47 *CML Rev* 791.

term 'supremacy', a term that the Court of Justice has studiously avoided in its case law – as the major rule for resolving conflicts between Union law and national constitutional law. Union law of whatever nature, either primary or secondary, either directly effective or not-directly-effective,[10] prevails over incompatible national law, including constitutional law, of whatever rank and nature.

In *Melloni* this principle was paired with 'unity and effectiveness', although the Court did not explain what precisely these two added to what primacy itself could do – and did – on its own in this case. That is not to say that 'unity and effectiveness' could not, separate or together, be a way of deciding about a conflict of norms. Other principles that can be used in EU law in situations of apparent incompatibilities are subsidiarity, procedural autonomy of the Member States, and proportionality. But primacy takes a place of honour. It is clear, simple, and uncontaminated with considerations of substantive principle: when, in a case within the scope of EU law, a conflict arises between norms, EU law prevails even if constitutional principles are involved. *Internationale Handelsgesellschaft* and *Simmenthal II* are standing case law to this day.[11] Primacy has all the characteristics of a 'thin' rule-of-law concept. It is formal and emptied out of any substantive considerations as to the quality and nature of the norms conflict that it is intended to solve: EU law *über alles*.

The 1970 judgment in *Internationale Handelsgesellschaft* was quite clear in this regard: 'the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to … the principles of a national constitutional structure'.[12] In 2009, the Lisbon Treaty chose a formulation of the national identity clause that is in striking contrast to the wording of *Internationale Handelsgesellschaft*: 'The Union shall respect the … Member States['] … national identities, inherent in their fundamental structures, political and constitutional'.[13] Below we discuss what difference this could make, also in terms of the applicability of the principle of primacy.

V. THE MEMBER STATE PERSPECTIVE ON CONSTITUTIONAL CONFLICT: CONSTITUTIONAL IDENTITY

Empirically there is little doubt that all the constitutional and supreme courts of Member States have accepted the primacy of Union law over statutory national law

[10] See Case C-399/11 *Melloni* ECLI:EU:C:2013:107 which concerned the not-directly-effective Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1; differently, see Case C-579/15 *Popławski I* ECLI:EU:C:2017:503, which confirmed that the Framework Decision has no direct effect, and Case C-573/17 *Popławski II* ECLI:EU:C:2019:530, which this time took the view that, due to this lack of direct effect, EU law does not require that national law contrary to the Framework Decision be disapplied by national courts.

[11] Cases 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114, and 106/77
Amministrazione delle Finanze dello Stato v Simmenthal SpA ECLI:EU:C:1978:49.

[12] Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, para 3.

[13] See art 4(2) TEU.

unconditionally. It is equally an empirical fact that a very large majority of Member State constitutional or supreme courts do not accept the primacy of Union law over their national constitution (Bulgaria, Malta, and Poland), or not unconditionally (which includes Belgium,[14] France,[15] Germany, Italy, and arguably now even the Netherlands[16]).[17] There are various forms of non-acceptance and some of them are more amenable to resolving potential conflict than others. I argue that non-abusive constitutional identity approaches may be among the less problematic approaches to overcoming conflict.

There are three forms of constitutional review of Union law, which are in historical order:

– fundamental rights review (of which primary examples were the Bundesverfassungsgericht's (BVerfG) *Solange I* and *II*[18] in Germany, and the Corte costituzionale in *Frontini*[19] and *Fragd*[20] in Italy);
– ultra vires review (eg Danish Højsteret in *AJOS*,[21] BVerfG in *PSPP*[22]);
– constitutional identity review (eg Conseil Constitutionnel 15 October 2021 *Société Air France*;[23] Corte costituzionale in *Taricco II*/ *MAS & MB*[24]).

These three forms of review can blend or overlap, if not in the overt language of the constitutional case law at least conceptually.

Fundamental rights review has often been a constitutional identity issue, although it has not always been phrased in such terms, in particular if constitutional fundamental rights protection does not find an equivalent in Union law. An early example is provided by the language used by the Italian Corte costituzionale in *Fragd*:

> It is … true that the fundamental rights guaranteed by the legal systems of the Member States constitute, according to the case law of the Court of Justice of the EEC, an essential and integral part of the Community legal order. But this does not mean that the

[14] There seems to be a divergence between the highest ordinary courts and the Constitutional Court.

[15] The Conseil constitutionnel probably has a more restricted scope of French constitutional law that prevails as compared to the Conseil d'État, although the scope of review has recently converged: see below nn 24 to 29.

[16] In *State of the Netherlands v Urgenda*, judgment of 20 December 2019, ECLI:NL:HR:2019:2007, the Hoge Raad judged the minimum greenhouse gas reductions set by the first EU Climate Package as followed by the Netherlands to be incompatible with the ECHR; the ECHR is an integral part of the Netherlands legal order and has a supra-constitutional rank within it: see L Besselink, 'Dutch and EU Targets for Greenhouse Gas Reduction Infringe the ECHR: the judicial review of general policy objectives' (2022) 18 *EuConst* 155.

[17] An overview of constitutional obstacles in the further development of Union law is contained in L Besselink, M Claes, Š Imamović, and JH Reestman, 'National Constitutional Avenues for Further EU Integration', Study, European Parliament, Constitutional Affairs Committee, PE 493.046 EN, Brussels March 2014: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET(2014)493046_EN.pdf.

[18] BVerfGE 37, 271 *Solange I*, 2 BvL 52/71; BVerfGE 73, 339 *Solange II*.

[19] See n 33 below.

[20] See n 25 below.

[21] Højesteret Case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The Estate left by A*, 6 December 2016.

[22] BVerfG, Judgment of the Second Senate of 5 May 2020 (*Weiss II*), 2 BvR 859/15.

[23] Conseil Constitutionnel, *Société Air France*, Décision n° 2021-940 QPC, 15 October 2021 ECLI:FR:CEASS:2021:437125.20211217.

[24] See n 5 above.

> Constitutional Court has no competence to verify, by examining the constitutionality of the law incorporating the Treaty, whether or not a treaty norm, as interpreted and applied by the institutions and organs of the EEC, is in conflict with the fundamental principles of the Italian Constitution or violates the inalienable rights of man. Ultimately, that which is highly unlikely, could still happen. Moreover, it must be taken into account that, at least theoretically, it cannot be stated absolutely that all the fundamental principles of the Italian constitutional order are to be found amongst the principles which are common to the legal orders of the other Member States and are therefore included in the Community legal order.[25]

The fundamental principles of the Constitution here blend with inalienable human rights (which at that point in European law were only protected so far as contained in the constitutional traditions common to the Member States and the human rights treaties to which they were parties).

Ultra vires review is in general inspired by concerns to protect the powers of a Member State over fears of 'competence creep' and shifts in *Kompetenz-Kompetenz*. This sovereignty concern is clear, for instance, in the Danish Højsteret's approach in the *Maastricht* judgment, also due to the language of the constitutional provision on the transfer of competence to international organisations.[26] But in the background to its *AJOS* judgment, which on the face of it involved a mere ultra vires review, looms the constitutional principle that courts cannot review acts of parliament against unwritten general principles, which is closely linked to defining traits of the Nordic constitutional tradition.[27] Ultra vires review is, under the German approach, based on the principle of democracy, as part of the Bundesverfassungsgericht's understanding of the Federal Republic's constitutional identity. Nevertheless, ultra vires review and identity review do not substantively coincide. Although logically an infringement of the state's constitutional identity by Union law would seem to imply an ultra vires act, and not every ultra vires act would seem to be necessarily an infringement of a substantive element of constitutional identity, it is unclear to what extent this applies, if we look at for example the German *PSPP* judgment.[28] However, in Austria, for instance, ultra vires review is considered to be entirely distinct from review against constitutional provisions.[29]

An example of overlap between constitutional identity review and fundamental rights review is the Bundesverfassungsgericht's Order of 15 December 2015,[30] sometimes referred to as *Solange III*. In it the BVerfG made clear that the duty to respect

[25] N° 232/1989, *Fragd v Amministrazione delle Finanze dello Stato*, judgment of 21 April 1989 ECLI:IT:COST:1989:232, para 3.1, author's translation.

[26] The judgments of the Corte costituzionale in what is referred to as the *Taricco*-saga are a recent illustration of the same approach.

[27] H Krunke, 'Impact of the EU/EEA on the Nordic Constitutional Systems' in H Krunke and B Thorarensen (eds), *The Nordic Constitutions: a Comparative and Contextual Study* (Oxford, Hart Publishing, 2018) 194; E Smith, 'Judicial Review of Legislation' in H Krunke and B Thorarensen (eds) *The Nordic Constitutions: a Comparative and Contextual Study* (Oxford, Hart Publishing, 2018), 107–32.

[28] See n 22 above.

[29] For a presentation and discussion of further varieties as per January 2014, see Besselink and others, above n 17, 22–27.

[30] *Solange III* 2 BvR 2735/14.

human dignity under the first article of the *Grundgesetz* involves the constitutional identity of the Federal Republic as it is unamendable under the Constitution's 'eternity clause'. Consequently the Court will admit complaints of its infringement, notwithstanding the standing case law on the non-admissibility of complaints of infringements of German constitutional rights.

Let us now turn to a discussion of the conflict potential of these various ways in which national courts find themselves able to review EU law against their constitutional standards, focusing on ultra vires review and constitutional identity review respectively.

A. Ultra Vires Review

Ultra vires review by national courts concerns whether the Union has exceeded the powers conferred on it. The question whether an EU act has remained within the bounds of Union competence is itself clearly a 'rule-of-law' issue, but one which is mostly formal in nature in as much as the legal measures reviewed do not necessarily concern constitutional principles or values themselves, but thinner and more technical issues. In some respects this was the case in the *PSPP* judgment, where one problem was the relative 'incomprehensibility' for the Bundesverfassungsgericht of the Court of Justice's allegedly opaque reasoning and the European Central Bank's non-transparent decision-making. One could say that some counter-voice is useful to keep the Court of Justice sharp. This is very much in the service of the rule of law, as remaining intra vires is the most basic element of any concept of the rule of law. *Pacta sunt servanda* works both ways. This is precisely the problem of ultra vires review. As we just said, the constitutional dimension of *vires* review relates to sovereignty, understood in the European tradition as democratically legitimated government. As democratic decision-making concerns every and any legal decision or measure, the scope of *vires* review is in principle limitless, but clearly – and this is reflected in the case law of national constitutional courts that engage in this kind of review – it would defeat the purpose of entering into the constitutional compact of the European Union to engage in this review for each and every decision; doing so would raise doubts as to the *fides* that is at the basis of *pacta sunt servanda*. The question of who has the ultimate say remains sensitive because of the uncertain democratic settlement in the Union. It is historically and legally clear that the European Union is not the *locus* of constituent power in relation to the Member States. Notwithstanding the deeply enmeshed legal and political orders of Union and Member States, the opposite remains true.

This is reflected in the position of Member State constitutional courts that the national constitution is the ultimate source that determines which law can operate validly within the national legal order: without the constitution allowing for the operation of EU law, it cannot be effective in the national legal order. This argument has, of course, the conflict-prone consequence of asserting the precedence of national constitutional law in an entirely hierarchical and formal principle – it mirrors a 'thin' understanding of the rule of law.

We have seen this kind of conflict playing out in the worst possible way in the aftermath of the *Weiss/PSPP* follow-up judgment of the Bundesverfassungsgericht,[31] when presidents of European and national courts began a war of words in highly damaging press releases and interviews, in essence each asserting its supremacy, without, of course, any sensible outcome. It could only bring to mind Cassius Clay in the 1960s: 'I am the greatest!'.

B. Constitutional Identity

As pointed out above, in some Member States in case of conflicts with EU law all constitutional norms have precedence over EU law, whereas in others this precedence only exists with regard to core constitutional norms and institutions. In the latter, precedence exists only with regard to the 'constitutional identity' of that Member State, although it might of course be that in those countries where no norm of the constitution can be set aside for incompatibility with Union law, *all* constitutional norms are considered to make up the state's constitutional identity. If the latter applies, we end up again with the precedence of national constitutional law as a mere hierarchical and formal principle – which is a 'thin' understanding of the rule of law – that is prone to be more conflictual than the former understanding, as will be explained in the following.

In the doctrine it has been pointed out that two approaches to constitutional identity are discernible in the national case law. In the German case law, the scope of constitutional identity is not limited to where Germany's identity-conferring rules might be different from those of the Union or the common constitutional traditions, but is inspired by its 'eternity clause' and therefore comprises also values we find expressed in Article 2 TEU. Germany's constitutional identity may be violated when a core principle of the German Constitution is not sufficiently protected in the EU legal order, irrespective of whether or not the principle exists at the EU level (eg *nullum crimen sine culpa*,[32] or data protection). Whenever a relevant provision of Union law, as interpreted by the Court of Justice, is alleged to infringe any element of German constitutional identity in a manner that passes the threshold of seriousness in order to be admissible, the Bundesverfassungsgericht will adjudicate that claim.

The Italian approach has been likened to the German one, in as much as the Corte costituzionale will review Union law that allegedly infringes the 'supreme principles of the Constitution'.[33] In the 2018 follow-up decision in *MAS & MB*, which concerned the particularly Italian understanding of the principle of legality in criminal matters (ie that the statute of limitations touches on the prohibition of substantive retroactive effect and the *lex certa* principle) the Corte reiterates, as it had done in

[31] See n 22 above.

[32] BVerfG, 2 BvE 2/08 of 30 June 2009, *Lissabon Urteil*, 364; an application thereof in BVerfG Order of 15 December 2015 2 BvR 2735/14, which essentially rejects the ECJ judgment in *Melloni*.

[33] N° 183/1973, *Frontini*, judgment of 18 December 1973, ECLI:IT:COST:1973:183; on the concept of supreme constitutional principles M Cartabia, *Principi inviolabili e integrazione Europea* (Milan, Giuffrè, 1995), remains the standard work.

the order for referral, that 'it alone is entitled to ascertain whether EU law contrasts with the supreme principles of the constitutional system and, in particular, with the inalienable rights of the person.'[34] In this *MAS* case, the Court of Justice had for all intents and purposes reversed crucial aspects of its previous judgment in *Taricco*, thus allowing for the exceptional Italian understanding of legality. This in turn allowed the Corte costituzionale to conclude that allowing for the disapplication of the rule and interpretation formulated in *Taricco*, as a matter of EU law as interpreted by the Court of Justice, created space for accommodation under the Italian Constitution as interpreted by the Corte costituzionale.

The approach which is typical of the French Conseil d'État and Conseil constitutionnel, but arguably inspired by the German *Solange* approach, is that these courts will not adjudicate on the compatibility of Union law, as interpreted by the Court of Justice, with a norm protected by the French Constitution as such (Conseil d'État) or with a constitutional norm belonging to the French constitutional identity (Conseil constitutionnel) if that norm or its equivalent is also protected in EU law.[35] In the recent case law, this idea of 'equivalent' protection[36] is scrutinised more carefully by the Conseil d'État than the Conseil constitutionnel. The latter, in its judgment of 15 October 2021, reasserted the classic view that in the hierarchy of norms the Constitution is supreme, adopting the criterion of the Conseil d'État that it will only review the French rules and principles belonging to its constitutional identity that do not have equivalent protection in Union law, and found that the French constitutional principle that the exercise of public force cannot be privatised is not protected in Union law.[37] It found without further ado that as a consequence of this criterion the appeal on the bases of the right to personal liberty, the presumption of innocence and the *égalité devant les charges publiques* had to be dismissed. The Conseil d'État, to the contrary, scrutinised the case law of the Court of Justice on the applicability and interpretation of the Working Time Directive[38] to the armed forces – the case concerned working times of the Gendarmerie nationale (a branch of the French armed forces) – in order to conclude that the principle of the government's free disposition

[34] N° 2018/115, *MAS and MB*, judgment of 10 April 2018, ECLI:IT:COST:2018:115, 8.

[35] This approach finds its origin in *Conseil constitutionnel*, Décision n° 2006-540 DC, 27 July 2006; the *Conseil d'État* set out the framework for judicial review of the constitutionality of EU law in Conseil d'État, Assemblée, N° 393099, 21 April 2021, *France Data Network*, ECLI:FR:CEASS:2021:393099.20210421.

[36] The notion of equivalence, as traced to both the ECtHR in *Bosphorus* (n 44 below) and the BVerfG *Solange* (nn 18 and 30 above) case law, recurs in the extra-judicial speeches and writings of the previous vice-president of the Conseil d'État, Jean-Marc Sauvé, since 2012; eg *Propos introductifs* (FIDE Congress 2012, Tallinn) www.conseil-etat.fr/actualites/discours-et-interventions/la-protection-des-droits-fondamentaux-au-niveau-de-l-union-europeenne-et-des-etats-membres#1; *A l'ère du pluralisme juridique, 31 mai 2014, Intervention de Jean-Marc Sauvé* (FIDE Congress 2014, Copenhagen), www.conseil-etat.fr/actualites/discours-et-interventions/a-l-ere-du-pluralisme-juridique; *Intervention à la Faculté de droit de l'Université Humboldt de Berlin le 28 octobre 2015*, www.conseil-etat.fr/actualites/discours-et-interventions/presentation-a-berlin-d-un-ouvrage-de-droit-compare-franco-allemand; and *Intervention le 25 avril 2017 au déjeuner du Cercle des constitutionnalistes*, www.conseil-etat.fr/actualites/discours-et-interventions/le-conseil-d-etat-et-la-constitution.

[37] Conseil Constitutionnel, *Société Air France*, 15 October 2021 ECLI:FR:CEASS:2021:437125.20211217, 13.

[38] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

of armed forces at all times and places was not protected in an equivalent manner by Union law.[39]

The French approach was essentially also followed by the Portuguese Constitutional Tribunal, in its judgment of 15 July 2020 on the alleged infringement of the equal protection clause of Article 13 of the Portuguese Constitution.[40] It reiterated that it exclusively is competent to adjudicate whether Union law complies with the counter-limit of the fundamental principles of the democratic state under the rule of law, as contained in Article 8(4) of the Portuguese Constitution. But it decided that it would only do so in the case of a fundamental principle which, within the scope of EU law itself, as interpreted by the Court of Justice, 'does not enjoy a parametric value that is materially equivalent' to that of the Constitution.[41]

The 'German' and 'French' approaches have distinct features and result in different judicial techniques. I submit, however, that the differences are less in terms of the substantive meaning and scope of constitutional identity. The 'French' approach essentially acknowledges that there is a body of substantively coextensive constitutional principles and norms contained in both Union and French law. The consequence is, however, only procedural in as much as it leads to a division of judicial tasks. It does not mean that EU law has superior rank over core national constitutional principles, but this becomes relevant only when they are not sufficiently protected under EU law. Moreover, one can say that also in the 'German' approach there are judicial limits in the form of admissibility requirements that have been developed both as regards fundamental rights review (*Solange II* and its progeny[42]) and as regards ultra vires review (*Honeywell*).[43] Neither of these approaches excludes a reserve power of constitutional review of Union law, nor do they diminish the importance of the Member State perspective on constitutional conflict, which is premised on the prevalence of (core) constitutional principles over Union law, no matter how absolute the latter's principle of primacy is supposed to be.

VI. RESOLVING CONFLICT

A. Convergence Between National Constitutional Law and Union Law

The hypothesis of a convergent tendency in national constitutional case law is borne out by the 'French' approach: where equivalent protection of the same constitutional rule or principle in Union law entails that there is no room or necessity for the national court to step in to protect that norm in the national context, since this is being done in the context of Union law. This means that the national constitutional

[39] Conseil d'État, 17 December 2021, ECLI:FR:CEASS:2021:437125.20211217, 16. The Conseil constitutionnel found that the constitutional identity was not infringed, and the Conseil d'État did not need to engage in identity review because there was no discrepancy between the EU Working Time Directive and the actual French rules on working times of the gendarmerie.

[40] Tribunal Constitucional, Acórdão Nº 422/2020, judgment of 15 July 2020.

[41] The appeal was therefore rejected, as the Tribunal found there to be such equivalence.

[42] BVerfGE 102, 147, judgment of 7 June 2000, 2 BvL 1/97, *Bananas*.

[43] BVerfGE 126, 28, judgment of 6 July 2010, 2 BvR 2661/06, *Honeywell* (ultra vires control *Mangold*).

rules and principles are coextensive (or homogenous) with Union constitutional rules and principles. This is not only co-extensiveness or homogeneity at the abstract level of the 'value' of the rule of law, but at the level of concrete legal rules and principles.

This approach of equivalence that implies co-extensiveness of constitutional rules and principles in practice, is inspired by the German *Solange* approach, that was in a sense also adopted in the ECtHR's *Bosphorus* doctrine.[44] The same co-extensiveness occurs, for instance, in the eventual outcome of the *MAS & MB* case, where – as we saw – the Italian constitutional court observed that the principle of legality that was at stake as a matter of constitutional identity for the Italian court, was respected by the ECJ by allowing for the disapplication of the '*Taricco* rule' in its own *MAS & MB* judgment. What is striking in this particular case is that the matter of the legality principle at stake concerned a particularly Italian understanding of that principle that is shared in hardly any other Member State: Italy is one of the very few states where time limits on the ability to prosecute criminal offences is not considered to be merely a matter of procedural law that does not affect the punishability of a delict, but instead extends materially into liability to be punished at all, and therefore involves the *lex praevia* principle, the prohibition of substantive retroactive effect, and – at least under the terms of the Court of Justice's *Taricco* judgment – the *lex certa* principle. So here it was not a matter of allowing for a classic public policy exception to a free movement right, as in *Omega*, but a purely national constitutional claim that is (nearly) unique to one Member State outside the sphere of market regulation. Although the Court of Justice managed to avoid mentioning the words 'constitutional identity', it found the constitutional claim justified and legitimate in terms that concerned the constitutional substance and value of the principle of legality involved.

B. What Is the Trend in the ECJ Case Law?

The ECJ's *MAS & MB* judgment picks up where an earlier trend broke off, but it is very hard to tell whether this is incidental or not. This trend is well-known and can very briefly be summarised as one starting from a formalistic hierarchical notion of primacy that wishes to remain indifferent to national constitutional values, initially also because Community law was conceived of as administrative rather than of constitutional substance [*Stork* (1959),[45] *President Ruhrkohlen and others* (1960),[46] *Internationale Handelsgesellschaft* (1970)[47] and *Simmenthal* (1978)[48].

[44] ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, judgment of 30 July 1996.See n 36 above.

[45] Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* ECLI:EU:C:1959:4.

[46] Case 36/59, *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community* ECLI:EU:C:1960:36.

[47] Case 11/70 *Internationale Handelsgesellschaft* (n 11 above).

[48] Case 106/77 *Simmenthal* (n 11 above).

This evolved into a period with judgments that were sensitive to national constitutional concerns, which corresponded with a growth of the EU into a more mature constitutional order, with an occasional early case like *Groener* (1989);[49] it was the period of roughly the first decade of the millennium with *Kadi I*,[50] *Schmidberger*,[51] *Omega*,[52] and post-Lisbon *Filipiak*[53] and *Sayn-Wittgenstein*.[54] This line was abruptly broken off in *Melloni* which aimed consciously to lower a national constitutional standard of fundamental rights protection, and subsequently *Opinion 2/13*, which can easily be considered to be the greatest disservice to the rule of law by the Court of Justice.[55] In this case law primacy was again the absolute, formal and hierarchical principle, emptied of the constitutional values of the early period, except that we were no longer dealing with more or less insignificant pieces of technical administrative law case law based on a thin rule-of-law understanding trumping the thicker rule-of-law considerations of the period of more mature constitutionalism. Given the unexpected revival of a purely formal and hierarchical understanding of primacy also after *Melloni*, it is hard to predict where the Court is going. But this does not prevent us from arguing where, normatively, the Court should be going.

VII. THE WAY FORWARDS: THE PRIMACY OF THE RULE OF LAW

Member State constitutional courts have engaged *bona fide* in forms of constitutional identity review that build on the co-extensiveness of constitutional values, principles and rules of the Union and Member States, thus limiting the area of possible conflict, emphasising the substance of the matter rather than blindly applying considerations of formal hierarchy. This is a confirmation of the earlier approach in fundamental rights review: it is the substantive importance of the matter at stake which informs the dynamics of conflict and its resolution. The *Solange* and *equivalent protection* approaches have served their purpose. In the end the reserve power of national constitutional courts in fundamental rights review has been restricted by high admissibility thresholds, which prevents abusive practices in this field. In ultra vires review cases, one can detect a similar trend: only when other substantive constitutional issues are at stake – issues similar to constitutional identity issues – does there seem to be a legitimate concern at stake. And also in such cases, admissibility thresholds should prevent abusive appeals. So all in all, I would argue that substantive rule-of-law considerations

[49] Case C-379/87 *Groener v Minister for Education and the City of Dublin Vocational Educational Committee* ECLI:EU:C:1989:599.

[50] Case C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461.

[51] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* ECLI:EU:C:2003:333.

[52] Case C-36/02 *Omega* (n 5 above).

[53] Case C-314/08 *Filipiak v Dyrektor Izby Skarbowej w Poznaniu* ECLI:EU:C:2009:719.

[54] Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien* ECLI:EU:C:2010:806.

[55] *Opinion 2/13* (Accession of the Union to the ECHR) ECLI:EU:C:2014:2454.

can or should be the only legitimate reasons for national constitutional courts to resort to these forms of review of EU law.

There are several arguments why the Court of Justice should follow suit and make a substantive rule-of-law consideration take precedence over the empty formal hierarchy that has so far characterised its primacy rule.

Firstly, the Founding Treaties have evolved. In *President Ruhrkohlen and others* the Court suggested that not only was it not its function to ensure that national constitutional rules are respected, but there were no general principles of Community law that protected relevant fundamental rights either. However, in *Internationale Handelsgesellschaft* it expressly reinterpreted Community law as containing fundamental rights that are found in the common constitutional traditions of the Member States. In *Internationale Handelsgesellschaft*, the language of the Court suggests that invocation of the principles of the constitutional structure of a Member State cannot affect the validity of European law, and precisely these constitutional structures are to be respected pursuant to the identity clause as formulated in the Lisbon Treaty.

Moreover, the national identity clause itself imposes a duty to respect Member States' constitutional identity not as a heteronomous counterbalance (*controlimite*), but as a matter of EU law itself. Primacy has, as a matter of Union law, a built-in modification of the concept as sheer hierarchical supremacy. It can no longer be a merely a 'thin' notion of the rule of law which is blind to the constitutional features of Member States as democratic states based on values such as human dignity, freedom, equality, the respect for human rights – including the rights of persons belonging to minorities – pluralism, tolerance, and solidarity. On this view, the principle of primacy must at least take into account not only the aspects of 'thin' concepts of Member States' constitutional identity, but also aspects of a 'thick' notion of the rule of law.

VIII. CONCLUSION

We can articulate the legal relation between and the consistency of Articles 2 and 4(2) TEU in this formula: the Union must respect a Member State constitutional identity that does not infringe the 'homogeneity' of constitutional values; Member States must respect the unity of EU law that does not infringe the constitutional identity.

To be constitutionally meaningful, in a democratic state under the rule of law, the rule of law must not be the hollowed out 'thin' concept we lawyers tend to embrace. To be constitutionally meaningful, EU law primacy must not be an empty shell of merely formal hierarchy that is not based on the constitutional values enunciated in Article 2 TEU.

Merely formal primacy leads at best to *aporia*. Can one require Member States to comply with the values of constitutionalism: liberty, democracy, fundamental rights, the rule of law – in short with their constitution – and simultaneously require them to accept primacy as overruling their constitution, even if it concerns liberty, democracy, fundamental rights, the rule of law?

That EU law applies in accordance with EU law and with the fundamental principles of the democratic state under the rule of law is the normative assumption of national constitutions. This is what membership of the Union rightly requires. Primacy should therefore apply with respect for the fundamental principles of the democratic state under the rule of law, lest the common foundation of the Union and Member States be undermined.