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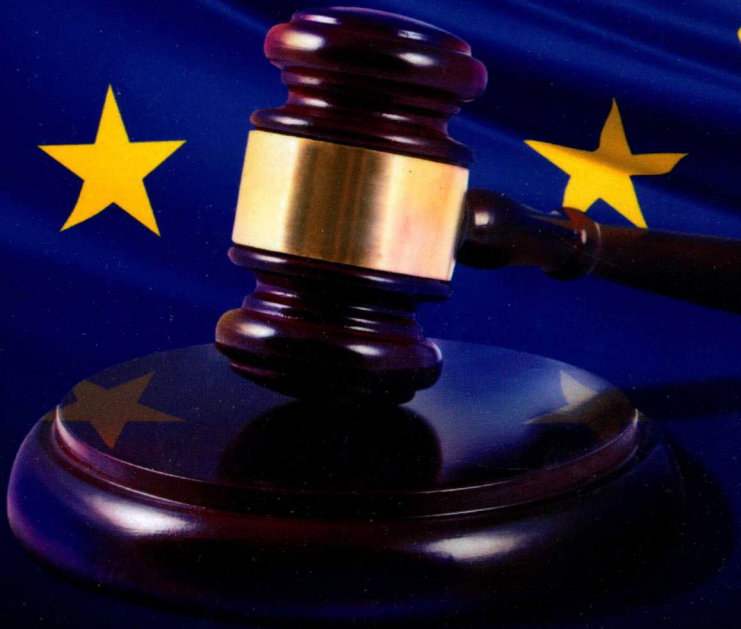
JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS



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Judicial Dialogue and the Creation of Supranational Laws

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Abbreviations

CEE	Central and Eastern European
EAW	European Arrest Warrant
EC	European Community (also 'European Charter')
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights (the Strasbourg Court)
ECJ	Court of Justice of the European Union (the Luxembourg Court)
EU	European Union
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
WTO	World Trade Organization

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PART I

1. The interaction between Europe's legal systems: an introduction to the investigation

1. GOALS OF THE RESEARCH

This book examines the broad issue of the rapprochement between the EU and ECHR legal systems. While there is a massive amount of literature in terms of monographs, collected volumes and national reports analyzing either the issue of the national application of EC/EU law or that of ECHR norms, a specific comparative analysis that takes into account the national judicial treatment of both laws is still lacking. This volume aims to answer the following research question: Are the EU and ECHR legal systems converging?

By 'convergence' we mean the possibility of encountering those structural principles that have traditionally contributed to the *sui generis* nature of EU law – namely direct effect and primacy – when dealing with the ECHR. This means that we are not going to compare the levels of protection of fundamental rights in these contexts but rather the impact that these two European legal systems have on national legal structures.

In order to answer this research question we are going to compare both the national judicial treatments of these two European legal systems and the interpretative approaches employed by the Strasbourg and Luxembourg Courts in cases that are sensitive for the national constitutional structures. This means that while the first part of this volume is going to focus on how national judges 'apply' EU law and the ECHR, the second part is going to be devoted, instead, to the European Courts, with an analysis of their origins and then of their recent attitudes. The research question of the first part is 'Are national judges treating the ECHR provisions the same way (or, at least, in a less different way than) they treat EU law?' The second part will investigate whether the Luxembourg and Strasbourg Courts have started adopting similar approaches when dealing with some sensitive areas touching the national constitutional structures. Obviously these two dynamics are strongly related and both European Courts have undergone deep transformations

in recent years, especially after the enlargements of the EU and the Council of Europe.

This book originates from a very well known issue: according to many scholars, a clear distinction exists between ECHR and EU law, and this was recently pointed out by Lord Hoffmann in his Judicial Studies Board Annual Lecture (2009).[1] Despite such important scholarship, after a detailed analysis of the national and European case law, this conclusion is questioned. On the contrary, at a first glance, at least in our view, it is possible to argue that, in a way, we are already dealing with partial convergence in the application of EU law and the provisions of the ECHR.

Convergence, like comparison, should be understood as a process: this means that the two legal orders under consideration might still present differences without this resulting in the impossibility of noticing some analogies. Moreover, even comparison refers to a process; comparing two 'things' does not mean to conclude that they are identical at the end of the process of comparison or that they were identical at the beginning of the process. Comparing does not exclude the possibility of finding differences.

The research question formulated at the beginning of this chapter does not seek to anticipate our conclusion: our research originates from the analysis of some factors present both at the national and supranational/international level. In judgments like *Omega Spielhallen*, *Schmidberger* and, most recently, *Sayn Wittgenstein* the ECJ seemed to leave 'a margin of appreciation for Member States to maintain national constitutional specificities instead of imposing uniform solutions'.[2] On the other hand,

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[1] 'The fact that the 10 original Member States of the Council of Europe subscribed to a statement of human rights in the same terms did not mean that they had agreed to uniformity of the application of those abstract rights in each of their countries, still less in the 47 states which now belong. The situation is quite different from that of the European Economic Community, in which the Member States agreed that it was in their economic interest to have uniform laws on particular matters which were specified as being within European competence. On such matters, the European institutions, including the Court of Justice in Luxembourg, were given a mandate to unify the laws of Europe. The Strasbourg court, on the other hand, has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights . . . The proposition that the Convention is a "living instrument" is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by "European public order"', Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009.

[2] C. Timmermans, 'Relationships between the Strasbourg Court and the ECJ', Intervention Round Table CCBE Luxembourg, 20 May 2011, http://www.ccbe.org/fileadmin/user_upload/document/Roundtable_2011_Luxembourg/Timmermans.pdf.

if scholars had already noticed a certain convergence in countries like the Netherlands – where 'there is no fundamental divide between the application of public international law and EC law'[3] – more recently even in contexts like Italy, for instance, national judges have started setting aside national law that conflicts with the ECHR in the absence of a norm comparable to those present in the Netherlands or in France.

The occasion for reflecting on this issue is given by the impact of the respective 'enlargements' of the two international organizations (the EU and the Council of Europe) to include Central and Eastern Europe, a situation which has induced the two European Courts to reconsider, partly at least, their mission.[4] These factors represent the 'issue' that induced us to commence this research.

Finally, one might argue that the accession of the EU to the ECHR will give a definitive answer that will certainly favour convergence in the judicial treatment of these two European laws. We are not so sure about that. On the contrary, looking at the ECJ case law devoted to international treaties concluded by the EC, one can see how the ECJ has sometimes limited the perfect assimilation between 'EC law proper' and 'Community Agreements'.[5] Moreover, recently, the ECJ has extended the WTO exception (lack of direct effect for WTO law norms) to the provisions of some other international law treaties.[6] Cases like *Mox Plant*,[7] then, reveal how the ECJ considers important the reasons connected to its interpretive monopoly and shows scant tolerance for interpretive competitors.

This is just a reminder of how the conclusions in this field are far from being obvious, even after the Reform Treaty, as always in the fascinating 'journey to an unknown destination'[8] represented by European integration.

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[3] G. Betlem and A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation' (2003) Eur J Intl L 569.

[4] On this, see: W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) Human Rights L Rev 397; O. Pollicino, *L'allargamento ad est dell'Europa e rapporti tra Corti costituzionali e Corti europee. Verso una teoria generale dell'impatto interordinamentale del diritto sovranazionale?* (Giuffrè 2010).

[5] J. Bourgeois, 'The Effects of International Agreements in European Community Law: Are the Dice Cast?' (1984) 82 Michigan L Rev 1250.

[6] See M. Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on the WTO and Beyond' (2004) J Intl Economic Law 885.

[7] C-459/03 *European Commission v Ireland* (2006) ECR I-4635.

[8] J.H.H. Weiler, 'Journey to an Unknown Destination: A Retrospective and

2. TYPOLOGY OF RESEARCH AND THEORETICAL PREMISES: WHY JUDICIAL INTERACTIONS MATTER IN EUROPEAN CONSTITUTIONAL LAW

This is case law based research; it does not seek to provide an answer to the question of the nature of EU law or the possibility of extending the notion of supranationalism[9] to the ECHR. We are going to deal with a massive number of cases decided by national and European courts.

Why are we going to examine judicial interactions? What do they represent in the economy of this book? One of the starting assumptions of this work is that the interpretive action of judges is fundamental in order to understand the real impact of EU law and the ECHR on the domestic boundaries, as we are going to show in the following chapters. Judges create links between legal orders even in the absence of expressed norms of connections. Suffice it to think of those contexts originally characterized by the absence of a European clause, where judges adapted and reshaped the original wording of their national constitutions in order to provide a legal basis for explaining the authority of EC law.

The Italian case, for instance, is emblematic of this trend. When looking at the original Italian Constitution[10] it is very hard to understand how the guardians of the Constitution have permitted the erosion of competences caused by EC/EU interference. Article11, in fact, 'agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed'.[11] This provision was conceived for Italy's participation in the UN or other limited-power organizations but not for the EU. The

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Prospective of the European Court of Justice in the Arena of Political Integration' (1993) 31 J Common Market Studies 417.

[9] J.H.H. Weiler, 'The Community System: the Dual Character of Supranationalism' (1981) Ybk Eur Law 267; P. Hay, *Federalism and Supranational Organizations* (University of Illinois Press 1966). For an overview of the different theories of supranationalism, R. Leal-Arcas, 'Theories of Supranationalism in the EU', 2006, http://law.bepress.com/cgi/viewcontent.cgi?Art.=8481&context=expresso&sei-redir=1#search=%22supranationalism%20weiler%22.

[10] Article 11 of the Italian Constitution: 'Italy repudiates war as an instrument offending the liberty of the peoples and as a means for settling international disputes; it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends'.

[11] Italian Constitution, Article 11.

latter imposes limitations of sovereignty for goals that go beyond the 'peace and justice between nations' mentioned in Article 11. The Italian Constitutional Court was forced to 'manipulate' the original meaning of Article 11 in order to allow such limitations. At the same time, when looking at Article 101 ('judges are only subject to the law'[12]), it is impossible to find the legal basis of the judge's power of non-application of the national rule contrasting with EU law.

The theoretical framework supporting the need for research like that we are proposing here can be linked to the existence of a multilevel constitutional legal order[13] and of a constitution that is perceived as the outcome of the steady process of comparison and dialectic between interdependent levels of governance (Member States and the EU). Against this background, by European Constitutional law we mean that study committed to the analysis of a European Constitution thus conceived as a *monstrum compositum*, composed of constitutional principles developed at the European (Union) level and complemented by (common) national constitutional principles[14] and by some other 'materials' like, for instance, the principles of the ECHR and the doctrines of the ECtHR.

Although the EU is not (yet) formally part of the ECHR, the Convention has always played a fundamental role in the progressive constitutionalization of the EU, working as a sort of external engine of such a process. Many fundamental judgments of the ECJ are very rich in references to the judgments of the ECtHR or to the provisions of the ECHR, and the Charter of Fundamental Rights of the EU was shaped, in many cases, with the provisions of the Convention in mind.

All this explains why, in the economy of this book, EU law, national law and the ECHR are conceived as the three sources of European constitutional pluralism.[15] The interplay between levels (or poles/sites if we want

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[12] Italian Constitution, Article 101.

[13] I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?' (1999) CML Rev 703; F. Mayer and I. Pernice, 'La costituzione integrata dell'Europa', in G. Zagrebelsky (ed.), *Diritti e Costituzione nell'Unione Europea* (Laterza) 43, 49; I. Pernice, 'Multilevel Constitutionalism in the European Union', (2002) Eur L Rev 511. On multilevel constitutionalism, see also L. Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie* (Europa Law Publishing 2007).

[14] See, among others: M. Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006).

[15] On constitutional pluralism, see N. MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1. See also N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317; M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N. Walker (ed.). Sovereignty in Transition,

to avoid the word 'level'[16]) renders the idea of the non-simple distinction between the territorial actors' legislative domains. As a matter of fact, one of the most relevant difficulties in the multilevel legal system is represented by the existence of shared legal sources which make the attempt to define legal orders as self-contained regimes very difficult. This is coherent with the effort of providing an integrated and *complex* (i.e. interlaced[17]) reading of the levels, and represents one of the most fascinating challenges for constitutional law scholars.

At the same time, as a consequence of the lack of a precise distinction within the domain of legal production, it is sometimes impossible to resolve the antinomies between different legal levels on the grounds of the prevalence of a legal order (e.g. the national) over another (e.g. the supranational). Moreover, in this context, because of the inextricability of such an intertwined order, many legal conflicts present themselves as *conflicts of norms* (conceived as the outcome of the interpretation of legal provisions[18]) rather than *conflicts of laws*.[19]

One of the most evident differences between the EU and federal experiences is given by the absence of a supremacy clause. This has permitted the ECJ over the years to devise and reshape the content of the primacy principle, giving it an incredible flexibility. On the other hand, multilevel constitutionalism also suffers from the absence of an unambiguous primacy clause. Scholars have identified at least four different meanings of primacy/

(Hart, 2003) 501–37; M. Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 2 Eur J Legal Studies, available at: http://ejls.eu/index.php?mode=htmlarticle&filename=./issues/2007-12/MaduroUK.htm. For a comparison between the different visions of constitutional pluralism, see M. Avbelj and J. Komarek (eds), 'Four Visions of Constitutional Pluralism', EUI Working Paper No. 28/2001, available at: http://cadmus.iue.it/dspace/bitstream/1814/9372/1/LAW_2008_21.pdf. For a different concept of pluralism conceived as being in opposition to that of constitutionalism, see N. Krisch, 'Europe's Constitutional Monstrosity' (2005) 25 Oxford J Legal Studies 321. See also: S. Douglas-Scott, *Constitutional Law*, (Harlow Longman, 2002) 523–30.

16 Besselink, *A Composite European Constitution*.

17 G. Martinico, 'Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma' (2007) German L J 205.

18 According to the distinction between statements (*disposizioni*) and norms (*norme*), see, V. Crisafulli, 'Disposizione (e norma)', in Enc. Dir., XIII (Giuffrè 1964) 195 ff.

19 J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 6–8.

supremacy in ECJ case law[20] and the notion of primacy which came from I-6 of the Constitutional Treaty seemed to be different from that used by the ECJ.

A consequence of the impossibility of tracing these principles back to the wording of a univocal primacy clause,[21] for instance, has underscored the role of the judge. Our assumption is that this context exalts the case-by-case judicial approach to solving legal conflicts between rules. The impossibility of operating a distinction between legal orders implies the end of interpretative autonomy for these courts, showing the other side of the sovereignty crisis. Judicial interactions thus represent a privileged perspective for studying the relations between legal orders, especially when looking at the multilevel and pluralistic structure of the European constitutional legal system.[22]

3. WHAT IS THE ROLE OF COMPARISON?

From a methodological viewpoint, the intertwined nature of the European Constitution implies the massive use of comparative law concepts. First of all, in fact, it is not possible to understand the constitutional exchanges between levels without knowing the constitutional features of the horizontal state level. Secondly, the comparative method is one of the most important approaches carried out by the ECJ[23] in the interpretation of EU law despite the few explicit comparative references contained in the judgments of the ECJ. Thirdly, the importance of the comparison is testified by the origin of the common constitutional traditions. Fourthly, the importance of foreign case law in the interpretation of constitutional law in general[24]

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20 See, e.g, Claes, *The National Courts' Mandate*, 100–101.

21 Scholars have identified at least four different meanings of primacy/supremacy in ECJ case law. Moreover, the notion of primacy enshrined in Article I-6 of the Constitutional Treaty seems to be different from that used by the ECJ. See e.g. Claes, *The National Courts' Mandate*, 100–101. In order to find a solution to this ambiguity, some scholars have devised a 'law of laws'; see T. Eijsbouts and L. Besselink, 'Editorial: "The Law of Laws" – Overcoming Pluralism' (2008) Eur Constitutional L Rev 395.

22 G. Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of "Hidden Dialogue"', (2010) 21 King's L J, 257.

23 A. Torres Pérez, *Conflicts of Rights in the European Union* (Oxford University Press 2009) 141–79.

24 S. Choudhry, 'Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation' (1999) 74 Indiana L J 821; A. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 U. Richmond