This is the original version of this paper. The final (refined) version has been published in "International Journal of Human Rights and Constitutional Studies" (Vol.4, No.2, 2016)

The Judicial Dialogue between the Luxembourg and National Court in the European Framework of the Multilevel Protection of Fundamental Rights

Jizeng Fan
Scuola Superiore Sant'anna Pisa, Italy

Abstract: Both informal and formal mechanism of judicial dialogue between the Luxembourg and National Courts exist under the framework of the European multilevel protection of fundamental rights. The Luxembourg Court usually identifies a general principle of the EU law through the reference to the national constitutional provisions which is regarded as the typical informal mechanism of judicial dialogue. The Court establishes the EU general principle through the diverse judicial techniques. In addition, regarding that the general principle derived from the Convention rights has been regarded as the reasonable interference with the fundamental economic freedom, the Court will assess the justification of the interference through the proportionality test, that is, the interference recognized by EU public interests will be approved. Otherwise, the EU will take any interference as an infringement to the core of rights. However, the Court must reconcile a contradiction between the maintenance of the EU legal order and respect of constitutional order of the member states, because the European Constitutional Court may trigger the doctrine of "counter -limit" to protect their constitutional order. In the judicial practices, the Court will leave a large margin of appreciation to the member states in the cases irrelevant to the uniform market affairs and social policy, whereas it strongly defends the EU law authority even that it may undermine the domestic constitutional order. The mechanism of preliminary reference provides the formal forum between the national and supranational courts. Although the European Constitutional Courts had persisted that they were not belong to the "court or tribunal" provided by the Art. 267, many of them give up this conservative opinion. Obviously, it is necessary for the Constitutional Court to join in the dialogue with the Luxembourg Court. On one side, it will force the Court to prudently interpret the EU provisions; on the other side, the national Constitutional Court can express their worries on the interpretation of national Constitution to the Luxembourg Court.

Key Words: European fundamental rights, judicial dialogue, preliminary reference, the doctrine of counter-limit, constitutional court, the Court of Justice of European Union

1.Introduction

Judicial dialogue is a modern legal phenomenon among autonomous jurisdictions in our modern globalization era. The trans-jurisdictional communication is not a somewhat judicial innovation because it is common to see that a national court frequently cites foreign law in its judgments in the recent decades.[1] The activity of judicial communication naturally brings national judges around the

[1] Tania Groppi & Marie Claire Ponthoreau eds., The Use of Foreign Precedents By Constitutional Judges, Oxford and Portland: Hart Publishing, 2012.

world more closely.[2] More often than the past, constitutional judges, who are scattered in the sovereign jurisdictions, can get inspirations[3] from the similar judgments made by their foreign colleagues. In this sense, the states constitutional judges jointly engaged into a global judicial dialogue in the field of fundamental rights protection.[4] Their involvements in the "transnational judicial dialogue"[5] on the common substantive issues and judicial methodologies not only contribute to "improve the quality of their national decisions" but also produce "a nascent global jurisprudence" diffused within the global judicial community.[6]

The national judges have various motivations engaging into the trans-jurisdictional communications. The citation to foreign decision is one common scene by which the constitutional judges can reveal its specific constitutional identity through the comparative method[7], identify its historical constitutional genealogical relationship with the constitution in other state[8] or make out to what extend the civilized people share constitutional consensus in a certain constitutional field[9].

---

[2] Anne-Marie Slaughter, A New World Order, Princeton: Princeton University Press, 2004, pp.65-104.

[3] Brun-Otto Bryde, The Constitutional Judge and International Constitutionalist Dialogue,in Basil Markesinis & Jorg Fedtke (eds), Judicial Recourse to Foreign Law: A new source of inspiration? London & New York: Routledge, 2007, pp.303-304.

[4] Claire L'Heureux-Dube, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, Tulsa Law Journal (1998), vol.34, p.40.

[5] Melissa Waters, Mediating Norms and Identity: The Role of Transnational Law Dialogue in Creating and Enforcing International Law, Georgia Law Journal (2005), vol.93, p.492; Micheal Kirby, Transnational Judicial Dialogue, Internationalization of Law, and Australian Judges, Melbourne Journal of International Law (2008), vol.9, pp.173-181.

[6] Slaughter, A New World Order, at 70; David S. Law & Wen-Chen Chang, Washington Law Review (2011), vol.86, p.543.

[7] Vicky C. Jackson, Methodological Challenge in Comparative Constitutional Law, Penn State International Law Review (2010), vol.28, pp.320-321; Pier Giuseppe Monateri, Methods in Comparative Law: An Intellectual Overview, in Pier Giuseppe Monateri ed., Method of Comparative Law, Cheltenham: Edward Elgar, 2012, p.9. Monateri argues that "Cultural and difference have always been a central concern of Comparative Law and the first step of the Conventional approach is devoted to dividing the legal world into legal family through the intellectual act of tracing back to common roots, so as to assert undisputed genealogies which are fit to explain and justified the present".

[8] Sujit Choudhry, Globalization In search of Justification: Towards a Theory of Comparative Constitutional Interpretation, Indiana Law Journal (1999), vol.74, p.838; Louis Henkin, A New Birth of Constitutionalism: Genetic Influence and Defects, Cardozo Law Review (1993), vol.14, p.533. Chouldhry distinguishes his discourse "genealogy" from Henkin's definition "genetic". Constitutions are genetic related that one influenced the framing of the others, or if the both were framed under the influence of the third. A genealogical relationship describes a rather different phenomenon - the birth of one constitutional order from another. Constitutions tied together by genealogy are related either like parent and child, or like siblings who have emerged from the same parent legal system.

[9] Mads Andenas & Duncan Fairgrieve, Intent on Making Mischief: Seven Ways of Using Comparative Law, in Pier Giuseppe Monateri ed., Method of Comparative Law, Cheltenham: Edward Elgar, 2012, p.37. Justice Kennedy completes his use of comparative law on how the foreign case decision influenced his determination in the *Lawrence* case

"To the extent *Bowers* relied on the values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere. The European Count of Human Rights has followed not *Bowers* but its own decision in *Dudgeon vs. UK.* Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct ... The right the petitioner seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent".
Angioletta Sperti, United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence, in Tania Groppi & Marie Claire Ponthoreau (eds.), The Use of Foreign Precedents By Constitutional Judges, Oxford and Portland: Hart Publishing, 2012, p.409.
In the decision of Roper, Justice O'Connor remarks her preference to the dialogue with foreign courts as an "evolving understanding of human rights" in her dissenting opinion: "American Courts should not be surprised to find convergence between domestic and international values, especially where the international community has reached clear agreement - expressed in international law or in domestic laws of individual countries - that a particular form of

In the European framework of multilevel protection of fundamental rights[10], judicial dialogue between national and two European courts is a crucial step both for the national and supranational judgments. Particularly, the vertical dialogue between Court of Justice of the European Union (thereafter CJEU) and national Constitutional Courts effectively enhanced the legitimacy of Luxembourg decision.[11] Before the Lisbon Treaty came into effect, the EU fundamental rights were quite often derived from the general principle of EU law generally stemming from three legal sources: the European Convention on Human Rights (ECHR), the European Charter on Fundamental Rights (EU Charter) and constitutional traditions common to member states. The Luxembourg references to the national constitutional provisions and domestic decisions are deemed to be the most persuasive measures to justify the existence of constitutional consensus among the member states in a certain field of fundamental rights protection. Consequently, this consensus would be treated as a legal source of general principle of the EU law.

Apart from that, Art.267 of the Treaty on the Functioning of the European Union (thereafter TFEU) provides a formal mechanism of trans-jurisdictional communication between national and the Luxembourg judges. Any qualified national courts have rights to submit a question concerning the application and interpretation of the EU law to the Luxembourg judges before cases in pending. The Luxembourg Court has competence to interpret and examine the validity of EU law. The preliminary reference mechanism can possibly promote the harmonization of legal application and internal integration in EU jurisdiction.

Within the framework of EU multilevel constitutionalism, the national Constitutional Courts are seemingly reluctant to submit a question to the Luxembourg Court in afraid of losing their exclusive competences of the interpretation. Since every Constitutional Courts commonly regarded themselves as ultimate guardians of constitutional order, they subsequently avoid involving into the interpretative competition with the CJEU. In a long period, the European Constitutional Courts usually declared that they were not a "court or tribunal of last resort" under Art.267 TFEU, even they

---

punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus".
See Jeremy Waldron, Foreign Law and Modern *Ius Gentium*, Harvard Law Review (2005), vol.119, p.136.

[10] Ingolf Pernice, Multilevel Constitutionalism in European Union, European Law Review (2010), vol.27, p.511. Pernice is the first scholar who uses the metaphor "multilevel" to describe the features of pluralism in the constitutional order within the framework European Union. Given that the political live in Europe is at two levels at least: sovereignty was pooled at the European level, but powers were shared between the member states and their common institutions in Brussels, Luxembourg and Strasbourg. "Multilevel constitutionalism" described the ongoing constitutionalism process of establishing new structure of governmental complementary to and building upon the the existing form of self-organization of the people and society. The citizens would entitle dual identities under the EU regimes. They would be the source of legitimacy for public authority at the European as well as - regarding their respective member states - at the national level, they are subjected to the authority exercised at the both level; Also see Federico Fabbrini, The European Multilevel for the Protection of Human Rights, Jean Monnet Working Paper, 15/10, p.9. I would like to borrow the definition of "multilevel" from the Fabbrini context that "[H]uman rights in European are protected by the national, supranational(EU) and International (ECHR) norms and institutions. Each layer of multilevel architecture is endowed with substantive catalog of fundamental rights. In addition, institutional remedies are duly established at every level of European Union human rights architecture to ensure the protection of these constitutionally entrenched".

[11] Bilyana Petkova, Three Levels of Dialogue in Precedent Formation at the CJEU and ECtHR, in Kanstantsin Dzehtsiarou, Theodore Konstandinides, Tobias Lock & Norean O'meara (eds), Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR, London & New York: Routledge, 2014, p.74.

were not belong to an body in the ordinary "Judicial Branch". Thus, the domestic ordinary courts, until now, are the main actors in EU member states performing the duty of preliminary reference. Although the EU legislation and CJEU case-law are granted the primary status and direct effect through the Luxembourg judicial case-law, the European Constitutional Courts still reserve their status as final decision-makers responsible to prevent the national constitutional identity - inalienable constitutional rights and basic constitutional orders - from the penetration of EU law. This constitutional power has not been rooted into the "counter-limits" doctrine but also recognized by Art.4(2) TEU. However, the lack of passion involving into the direct negotiation with the Luxembourg judges may hollow the possibility of Constitutional judges influences on the Luxembourg decisions. The Constitutional Courts are capable of articulately expressing their worries and basic concerns relating to national sensitive issues, e.g. social policy and social rights protection, in contrast with those domestic ordinary courts who mainly concern the continuity of internal and EU law. The preliminary reference submitted by the Constitutional Courts may bring themselves the benefits in the sense that the CJEU will take their opinion into consideration seriously, instead of making a simple interpretation.

The essay is divided into two main parts. In the first part, it is necessary to examine the way of Luxembourg's reference to the national constitutional provisions and case-law in its judgments for deducing a general principle of EU law as an EU fundamental right. The Court uses various techniques to determined the scope of the general principles. Besides, the Court usually takes the EU general principle stemmed from the European Convention as a reasonable restriction to the economic freedom in some cases. The Luxembourg judges, on one side, must prudently deal with the cases, otherwise the EU member states may trigger the "counter-limit" mechanism; the Court, on the other side, is responsible to guarantee the uniform implementation of EU law, even the Luxembourg decision may be in conflict with the national constitutional order.

It is necessary to examine the functions and effects of EU's unique communicative mechanism - preliminary reference - in relation to EU fundamental rights protection and guaranteeing of constitutional legal order. In light of some constitutional courts having recently overruled their previous decisions and being aware of the necessity of a direct dialogue with the Luxembourg Court, it is the due time to re-examine those judgments determined by national Constitutional Courts to make out "how" and "why" they changed the previous opinions as well as what the legal consequence had been brought by the preliminary reference.

2. A Legal Source of the EU Fundamental Rights: The General Principle of the EU law Drawn from the Constitutional Traditions Common to the Member States

2.1 Reference to the National Constitutional Provisions

Before the EU Charter on Fundamental rights coming into effect in 2009, none of human rights instruments existed in the EU legal system. It was by no means that the EU was not an accountable regime on the fundamental rights protection. The Luxembourg Court had provided that the Community fundamental rights were based on the general principles of EU law in the *Staunder* judgment[12]. In this case, a German national argued that leaking the beneficiary name in a coupon had

[12] Case C-29/69 [1969] ECR I-419.

infringed his fundamental right provided by the German Constitution. The Luxembourg Court determined that the challenged Community provision did not require identification of the beneficiaries by name, so the member states should employ other methods by which the couples should refer to the concerned person. It declared that "*...the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principle of Community law and protected by the Court*".[13] This judgment was a real "incidental"[14] judicial innovation in the days when the European Community lacked of the commitments to human rights protection.[15] It also paved the way for the seminal *Internationale Handelsgesellschaft*[16] where the Court provided that the fundamental rights formed a part of general principle of the EC law. The general principle were drawn from the constitutional traditions common to the member states. A German national challenged a deposit system founded by the Community agricultural regulations on the ground that it had constituted an unreasonable restriction to his freedom to pursue trade and professional activities provided by the German Constitution. Confronting with the claimant's complaint, the Luxembourg Court had to think out a strategy to secure the primacy of EU law provided by the judgment of *Costa vs. Enel*[17], even though the Court interpretation would actually conflict with national constitutional orders. Hence, the Luxembourg Court had to reconcile the primary effect of the EU law with domestic constitutional rights protection. This was a crucial step at the present case in order to guarantee the primary applicability of the European Community law in the domestic legal order. Otherwise, the Community authority would be criticized not only by European citizens but also by domestic courts if it continued to ignore fundamental rights protection.

Therefore, the Luxembourg Court often based their decision on the shared values between the Member States and the European Community as a source of general principle of the EU law. National constitutions were persuasively regarded as a source of "inspiration" for the fundamental rights protection in the Community legal order, implying that the Court should take the national constitutional rules into their accounts. Meanwhile, these constitutional provisions are synthesized into the general principles of Community law.[18] The Luxembourg reference to the national Constitutions formed a vertical and flexible judicial dialogue in the Community order. This approach, accordingly, enhanced the legitimacy of Luxembourg decision in the field of fundamental rights.

---

[13] Case C-29/69, para.7

[14] Takis Tridmimas, The General Principles of EU Law, Oxford University Press, 2007, 2nd edition, p.301.

[15] Stephen Weatherill, Cases & Materials on EU Law, Oxford University Press, 2014, 11th edition, p.54.

[16] Case C-11/70 [1970] ECR I-1125.

[17] Case C-6/64 [1958] ECR I-585. The Court defines the supremacy of the Community law in the judgment: "*By contrast with ordinary international treaties, the Community Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply ... The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Union itself being called into question*".

[18] B.J.Boulois, Droit Institutionnel des Communautés Européennes, Paris: Montcherstein, 1993, 4th edition, p.208. According to the author's categories, the fundamental rights belong to the principle common to the member states of the EU. Also see R.E.Papadopoulou, Principes Généraux du Droit Communautaire, Bruylant, 1996, p.8. The author divides the EU general principles into three categories. The "fundamental rights" belongs to "*principes communs*" category which is distinct to supra-national legal systems and comprises principles common to the constituent parts of legal system. In this context, it was entitled with the reference to "*the general principle common to the laws of the Member States*" and to "*the general principles of law recognized by civilized nations*".

2.2 The Luxembourg Court Preference on the Establishment of the General Principle

2.2.1 Majoritarian Approach vs. Minoritarian Approach

However, the general principles do not always indicate that the European national constitutions share the consensus with respect to the fundamental rights, neither the Court always defers to the constitutional standards derived from the majoritarian Constitutional provisions. For instance, the Luxembourg Court identifies a general principle of the EU law in the *P v.S* judgment[19] without citations to the national provisions. Although AG Tesauro had cited extensive national laws relating the legal status of the transsexuals in his personal Opinion, the findings were not conclusive yet. Unlike the Strasbourg judges relying on the comparative methods for finding out the scope of consensus on the fundamental rights among the Strasbourg Contracting Parties, the Luxembourg judges seek to find out the general principle through the synthesis processing.[20] This new synthesized EU general principle may differ from the each constitutional provision.[21] This phenomenon may attribute to a reason that the Luxembourg Court, aiming to maintain the EU law primacy and promote the EU integration, sets up a general principle applicable *erga omnes,* but compatible and acceptable to national constitutional orders. In the judgment of *Hauer*[22] concerning the protection of right to property, the Luxembourg Court assessed the lawfulness of restriction on the cultivation of vineyard as a measure to regulate the red-wine production in the Community market. In order to form a general principle applicable to all the member states, the Luxembourg judges took their eyes on the national constitutions. However, the Luxembourg Court did not clearly cite any specific constitutional provision in the judgment, but only provided that "*all the wine producing countries of the community have restrictive legislation, albeit of diverging severity, concerning the planting of vines, the selection of varieties and method of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property*".[23]

Therefore, Tridimas describes the EU general principles as "*enfant terribles*" who "*are children of national law but are brought up by the Court. They are extended, narrowed, restated and transformed by a creative and eclectic judicial process*"[24]. On one side, the Luxembourg Court often adopts the majoritarian approach in the cases regarding the state regulation of traditional national products.[25] AG Maduro perceived that "*if there was a minoritarian interest - one state's tradition - as oppose to the majoritarian interests, which takes the form of interest of all other Member States not sharing or conforming to that tradition*", the Luxembourg Court would always declare a national regulation in question in breach of the proportionality and other general principles of the Community

---

[19] Case C-13/94 [1996] ECR I-2159.

[20] Sabine Gless & Jeannine Martin, The Comparative Method in European Courts: A Comparison between the CJEU and ECtHR, Bergen Journal of Criminal Law and Criminal Justice (2013), vol.1, p.46. The author argues that the Luxembourg Court does not analyze national laws and legal systems with the objective of identifying a common denominator, but seeks to a synthesis of various national laws.

[21] Tridimimas, The General Principle of the EU Law, at 6.

[22] Case C-44/79 [1979] ECR I-3729.

[23] Case C-44/79, para. 21

[24] Tridimas, at 6

[25] Case C-178/84 [1987] ECR I-1227; Case C-407/85 [1988] ECR I-4233; Case C-90/86 [1988] ECR I-4285; Case C-145/88 [1989] ECR I-3851; Case C-312/89 [1991] ECR I-997, etc.

law.[26] Apart from that, the majoritarian approach are usually applied to the hard cases in which the Luxembourg Court are accustomed to create a general principle of the EU law by comparative methods. In the judgment of *Notaries* case[27], the Court assessed whether reserving access to the profession of notary for the own nationals constituted a discrimination beyond Art.51 TFEU that allowed a general prohibition on the basis of nationality in the field of freedom of establishment in connection to the exercise of official authority. After it had compared the effects of notaries among the EU member states, the Luxembourg Court noticed that principal function of the notary was to authenticate legal documents. This finding indicated that although the employees working on notary performed a public affair, this activity could not be regarded as an exercise of official authority regarding that the legal effect of documents to be authenticated could not be changed by the notary unilateral decision. The nature of notary business was competitive, unlike public authority or the representative of official authority. This comparative research revealed the nature of notaries among the EU member states by the deference to majoritarian choices.

However, the majoritarian approach can be only regarded as one of sources of the EU general principles, whereas the Luxembourg Court sometimes prefers to the counter-majoritarian approach as to identify general principles of the EU law in the area of fundamental rights protection. These general principles are usually based on the protection of national public interests implicitly or explicitly acknowledged by the EU legal order. Apart from the well-known decision of *Omega* case[28] concerning the Luxembourg Court restriction on the freedom of providing service for pursuing the public interest recognized by EU Charter - the right to dignity, the judgment *Ilonka*[29] also revealed a fact that the Luxembourg Court tended to reconcile the constitutional conflicts between EU Regulations and national constitutional principles in line with Art.4(2) TEU providing the immunity of national constitutional identity. The appellant alleged that the new Austrian administrative law has deprived his freedom of movement because this challenged new regulation had abolished her nobility title before her registered name. Despite the fact that the Luxembourg Court had noticed that the other national laws as the counter-evidence opposite to the Austrian authority activities, the European judges realized that the Austrian authority regarded the abolishment of nobility as a public policy promoting social equality on the basis of social equality. In absent of preference to the majoritarian constitutional choice applicable to the most member states or the relevant EU Regulation on the right to free movement, the Luxembourg Court highlighted the importance of protection on the Austrian constitutional order, providing that "*the concept of public policy may vary from one state to another*", thereby allowing the State to enjoy a margin of discretion.[30]

2.2.2 The Balance between Fundamental Rights and Fundamental Freedom

Although the Luxembourg judges attache more weight to the fundamental rights protection than Community economic freedoms in some cases, e.g. *Schmidberger*[31] and *Omega* cases, they still

---

[26] Petkova, Three Levels of Dialogue, at 78.
[27] Joined Cases C-47/08, 50-54/08 and 61/08 [2011] ECR I-4195.
[28] Case C-36/02 [2004] ECR I-9641.
[29] Case C-208/09 [2010] ECR I-13693.
[30] Case C-208/09. Para.86-87.
[31] Case C-112/00 [2003] ECR I-5659. The Court regarded no fundamental rights are absolute, but should be restricted by the objectives of social functions and public interests in the judgment of *Wachauf.* The free movement of goods could be restricted by the reason laid down in Art.30 TEC then or justified by the public interest by the EC Law. Therefore, the

claim that the national public interests must be recognized by the EU law and reaffirmed by the Luxembourg Court. However, in the judgments of *Laval*[32] and *Vikings*[33], the Luxembourg Court preferred to the Union's freedom of establishment than the right to strike provided by international human rights treaties. These two cases were *prima facie* distinguished from *Schmidberge* and *Omega* with respect to the right to collective action (the right to strike) was not regarded to fall into the scope of right to association under the ECHR.[34] However, the Luxembourg Court declared that the right to strike should be respected as "*a fundamental right which forms an integral part of the general principle of Community law*"[35] and constituted a legitimate reason to limit the right to establishment[36]. The Court stated that the appropriate limitation on the right to establishment should be interpreted in line with the *Schmidberge* decision, implying that the Community had task not only in the field of constructing coherent, harmonious and sustainable economy, but also enhanced the level of employment and social protection[37]. Hence, the right to strike was treated by the Court as a way to guarantee the public interests[38]. Although the Court held that the task of finding the fact and the appropriate measure of interference of the right to establishment fall into the scope of national court competence[39], it warned to the Member State that the essence of the rights to establishment would be undermined if the original member states prohibited this undertaking from leaving to a state for the reestablishment[40]. As to this judgment, Ludlow remarked that the Luxembourg Court's substantive decision accorded little weight to the protection of labor rights in practice.[41] Although the outcome of the "*balance of bargaining power and between unions and employees obviously varies considerably from case to case*"[42], collective action seemed to be justified, at least in the present case, only where jobs or terms and conditions of enjoyments were jeopardized or under the serious threat, and the trade union must guarantee the measure adopted which was the most appropriate among the alternatives. This judgment indicated that the trade union will be imposed the proportional burden of proof.[43] Thus, Novitz argued that "the constitutionalization organizations so

---

Court was capable of limiting the rights under the proportionality test. The Court has recognized that the fundamental rights provided by the European Convention on Human Rights formed a part of the general principle of the EC law in the judgment of *Rutili*. The Court proceeded to strike the fair balance between the free movement provided by the EC Treaty and the right to association enshrined by the ECHR. The traffic was blocked by the demonstration which had been authorized on the basis of national law and the Austrian authority permission. The road was obstructed on a single route and on a single occasion. It lasted 30 hours. The Court found that the Austrian authority had adopted the less intrusive alternatives, including an extensive publicity campaign through the radio and motoring organization both in its own country and the neighboring countries, and designation of various alternative routes. Moreover, an outright ban on the demonstration would be unconstitutional interference of the fundamental rights to association.

[32] Case C-341/05 [2007] ECR I-11845.

[33] Case C-438/05 [2007] ECR I-10806.

[34] Case C-438/05 para.43.

[35] Case C-438/05 para.44.

[36] Case C-438/05 para.47.

[37] Case C-438/05 para.78.

[38] Case C-438/05 para.77.

[39] Case C-438/05 para.80.

[40] Case C-438/05 para.69.

[41] Amy Ludlow, The Right to Strike: A Jurisprudential Gulf between the CJEU and ECtHR, in in Kanstantsin Dzehtsiarou, Theodore Konstandinides, Tobias Lock & Norean O'meara (eds), Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR, London & New York: Routledge, 2014, p.133.

[42] Anne Davids, One Step Forward, Two Step Back? The *Viking* and *Laval* Cases in the ECJ, Industrial Law Journal (2008), Vol.37, p. 456.

[43] Catherine Barnard & Simon Deakin, European Labor Law after *Laval,* in Marie-Ange Moreau (ed), Before and After the Economic Crisis: What Implications for the 'European Social Model', Cheltenham: Edward Elgar Publishing, 2011,

as to secure employers' market freedom"[44].

The judgment of *Laval* offered a good chance to the Luxembourg Court to balance right to strike with free service under the EU law. Since a Latvian company had failed to sign an agreement with the Swedish Work Union on the minimum salaries of the posted workers, the Swedish Building Work Union, accompanied with the other Work Unions, started a collective action in the form of a blockade at the Laval building. The collective action resulted into the bankrupt of its subsidiary company, so the Company Laval withdrew its posted workers. The Luxembourg Court applied the proportionality test to the present case with the aim to examine whether the restriction to the free service could be justified by attainment of the public interest objectives.[45] However, unlike the *Viking* decision, the Luxembourg Court did not leave the national court any latitude of the margin of appreciation, whereas the European judges unilaterally defined the function of collective action as an external measure to force the labors and employers into a negotiation with employee under Art.49 TEC.[46] It meant that the essence of right to establishment would be infringed if the collective action fulfillment consequently led to the undertaking bankruptcy. The Court noticed that the minimum standard of workers' wage was autonomously regulated by the Swedish Labor Union in the absence of the national public regulation. Moreover, none of the Swedish law had intentionally authorized the Swedish Trade Union to force foreign undertakings to accept the wage minimum standard in line with the Swedish nationals.[47] Given the absence of the national legislative rules and beyond the purpose of guaranteeing public policy, public health and public security provided by Art.46 EC, this Luxembourg reference to the Swedish law led the Luxembourg Court to determine that the collective action exercised at the present case was disproportionate and breached the right to establishment provided by the EC Treaty.

3. The Protection of the Constitutional Identity from the Penetration of the EU Law

3.1 The Doctrine of Counter-Limit

The Luxembourg Court generally prefers to apply the doctrine of margin of appreciation as the Strasbourg did in some sensitive cases concerning the fundamental rights protection but having little connection with the internal market affairs of the European Union, because any inappropriate interference of the national identity or domestic constitutional order may lead to trigger the European Constitutional Court the doctrine of counter-limit against the penetration of EU law if the implementation of latter rules are not compatible with the domestic constitutional order. The counter-limit doctrine are usually rooted into the legal order of dualism states where the binding power of international law derived from the principle of self-limitation to the state sovereignty. In this sense, the self-authority of International law could not immediately penetrate into the state legal order. For instance, both the German and Italian Constitutional Courts set up this "counter-limits" doctrine for resisting the penetration of EU secondary legislation into State domestic legal systems, partially refusing to accept the decision of *International Handelsgesellchaft* in which the Community law was granted the primary status even prior to the constitutional provisions.

---

p.259

[44] Tonia Novitz, Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and Its Potential Impact, Canada Labor and Employment Law Journal (2015), vol.15, p.469.

[45] Case C-341/05, para.103.

[46] Case C-341/05, para.85.

[47] Case C-341/05, para.118.

The German Constitutional Court has identified three core constitutional reservations in its previous case-law: the fundamental rights, the democratic institution and the subsidiarity.[48] In the judgment of *Solange I,* the German Constitutional judges claimed its jurisdiction over reviewing the secondary legislation of the Community law "*as long as the integration has not reached a stage where the Community law contains a catalogue of human rights adequate to the fundamental rights enshrined in the constitution*"[49]. Although the German Constitutional Court weakened its original position in the decision of *Solange II* where the Court claimed its conditional desist from its jurisdiction over reviewing the constitutionality of Community law as long as the standard of fundamental rights protection provided by Community law was in an equivalent standard to the German Constitution,[50] the German Constitutional Court re-stressed its reservation against the European integration by policy-making and declared that the limits of integration would be overstepped in the case that "*member states do not retain the certain room for political formation of economic, cultural and social circumstance of life*".[51] In a judgment determined in the Post-Lisbon era, the German Constitutional Court reaffirmed its competence to review the constitutionality of an European Act applied by the Union's institutions and substantively examined whether the relevant EU Regulations were incompatible with the "*inviolable core content of the international identity of the Basic Law*".[52]

This German Constitutional decision substantively impacted on the Italian Constitutional Court[53] who subsequently created the "doctrine of counter-limit" (*dottrina dei controlimiti*) in the judgment of *Frontini*[54] several months after the Luxembourg decision *Internationale Handelgelsellchaft.* In this Italian judgment, the Italian Constitutional Court regarded itself as the ultimate guardian of national constitutional order. Because of the objection to monist legal order, the Italian Constitutional Court could set aside an national act of execution of the EC Treaty in the condition that the challenged EC provision was found to be a conflict with the constitutional order. The Italian Constitutional Court identified the Italian inalienable constitutional rights as one of core reserved constitutional orders in the decision of *Granital*[55]*,* indicating that it would cut off the Italian connection to the EU law which undermined the constitutional order. However, the counter-limit doctrine was little changed in the decision of *Fragd*[56] where the Italian Constitutional Court would not invalid the national Act on the incorporation of EU law into domestic law when their provisions were in contrast to the Constitutional order, while these national acts (Community rules) were not disapplied.[57]

---

[48] Philipp Cede, Report on Austria and Germany, in Giuseppe Martinico & Oreste Pollicino (eds.), The National Judicial Treatment if the ECHR and EU Laws: A Comparative Constitutional Perspective, Europa Law Publishing, 2010, p.58.
[49] BVerfGE (1974) 37, 271.
[50] BVerfGE (1986) 73, 339.
[51] Cede, Report on Austria and Germany, at 59.
[52] Cede, Report on Austria and Germany, at 59.
[53] Giuseppe Martinico & Oreste Pollicino, Report on Italy, in Giuseppe Martinico & Oreste Pollicino (eds.), The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective, Europa Law Publishing, 2010, p.275.
[54] Corte Costituzionale, sentenza 183/1973.
[55] Corte Costituzionale, sentenza 180/1974.
[56] Corte Costituzionale, sentenza 232/1989.
[57] Marta Cartabia & Joseph.H.Weiler, L'italia in Europa, Bologna: Il Mulino, 2000, pp.171-172.

3.2 The Circumstance of Luxembourg Self-limitation on the Interference of the Sovereign Power of States

3.2.1 The *Grogan* Case: The Doctrine of Margin of Appreciation

The principle of subsidiarity requires the Luxembourg Court to limit its competence to an inappropriate interference of the sovereign power of member states not in relating to the EU internal market or uniform implementation of EU law. Meanwhile, Art.4(2) TEU provides that the EU should respect the state constitutional identities, indicating that the Luxembourg Court will leave member states a latitude of the margin of discretion in compliance with the distribution of powers between supranational and national regimes. The Court was required to assess to the justification of freedom of expression in a highly sensitive abortion in the *Grogan* case[58]. The Luxembourg Court, at the present case, had to strike a fair balance between the protection of right to the unborn enshrined by the Irish Constitution and freedom of expression under the Community legal order. The Irish Supreme Court had ever determined that assisting pregnant women to travel abroad to obtain the information on location and concrete service of the specific clinic constitute an infringement to the Constitution.[59] Consequently, one pro-life organization brought a legal proceeding to the Irish High Court for alleging the Student Union's distribution of the information on abroad abortion clinics was unlawful. The Irish High Court submitted the case to the Luxembourg Court in the consideration that the main case dispute concern right to free service in the Community legal order. The Luxembourg Court noticed that the abortion was commonly lawful and permitted among the EU member states and the advertisements of medical abortion fell into the scope of right to free service enshrined by Art.49 TEC. Considering that it was already a pending case at the Strasbourg Court as well as a possibility that the domestic court might question the legitimacy of Luxembourg determination on such a sensitive issue, the Luxembourg judges did not address the substantive compatibility of the Irish Constitution with European Community law in the consideration that this Irish Student Union did not act in cooperation with the clinic. In this sense, the circulation and dissemination of the information was not regarded as a market service, but a way of the manifestation of freedom of expression under Art.11 ECHR. Consequently, the Luxembourg Court had no jurisdictional competence to examine the compatibility of national legislation with the ECHR according to the judgment of *Cinetheque*[60]. AG Gerven had actually ever suggested that the Luxembourg Court, given this circumstance unrelated to the EU institution of free economy, the Strasbourg doctrine of margin of appreciation should be adopted under Art.11 ECHR.[61]

3.2.2 The *Melloni* Case: The Supremacy of the EU Law in the State Legal Order

However, the Court completely returned to the judgment of *Internationale Handelsgesellschaft* in which the supremacy of EU law was not allowed to be undermined by the domestic law even though the national standard of constitutional rights afforded by the Constitution was higher than EU standard.[62] The Spanish Constitutional Court submitted a preliminary question to the Luxembourg

---

[58] Case C-159/90 [1991] ECR I-4685.

[59] Attorney General vs. Open Door Counselling Limited [1998] IR 593.

[60] Case C-60-1/84 [1985] ECR I-2605.

[61] Case C-159/90 [1991] ECR I-4721. Gerven got inspiration from the Strasbourg judgment of *Handyside* in which the European Court of Human Rights provided a wide margin of appreciation to the British authority when there was no a common moral rule among all the Contracting States.

[62] Eleanor Spaventa, Fundamental Rights in the European Union, in Catherine Barnard & Steve Peers (eds), European Union Law, Oxford University Press, 2014, p.244.

Court in the *Melloni* case[63] for asking whether Art.47 and 48(1) EU Charter provided the Italian national, who had been convicted *in absentia* by an Italian court, an opportunity to be reheard before a Spanish Court under the Framework Decision of the European Arrest Warrant (EAW). In other words, the Spanish Constitutional Court was eager to know whether Art.53 EU Charter could be interpreted in line with Art.53 ECHR that the Charter could be regarded as minimum standards of fundamental rights protection thereby the Member State could adopt the higher standard of fundamental rights protection enshrined by the Spanish Constitution.[64] The Luxembourg Court conditionally rejected the interpretation of Art.53 EU Charter to be a floor standard. Thus, the national court was not allowed unilaterally to set aside the National Act of the execution of EAW in conflict with the Constitutional rights.[65] The Luxembourg Court articulately clarified that the constitutional standard of fundamental rights protection can be adopted in two conditions under the EU legal order[66]: (1) constitutional rights should not undermine fundamental rights standard in the EU level, indicating that the Charter rights were regarded as the flooring criteria. Thus, the EU and national courts were obliged to examine the state rules and measures on the implementation of EU at least in accordance with the Charter rights and Luxembourg case-law. Any lower standard would be regarded as a breach of EU legal order; (2) the primacy, unity and effectiveness of the EU law should not be undermined. This requirement indicated that a constitutional rule should be put aside, though had been set in a higher standard than the EU law provision, if the EU rules were compatible with the Charter rights. The main purpose of Luxembourg authority was to maintain the effectiveness and uniformity of the Union's institutions. Consequently, the Luxembourg Court argued that due to fact that the procedural rules provided by the EAW were the consensus of EU member states, the surrender convicted *in absentia* was granted to an opportunity to be heard before a Spanish court would cast doubt on the uniformity of implementation of EU law under the EAW Framework Decision.

When this preliminary decision returned to the Spanish Constitutional Court, the judges should have to consider whether the Declaration 1/2004[67], which had set a Spanish-style doctrine of counter-limit,[68] enabled the national court to resist against the penetration of Luxembourg decision. According to the Declaration 1/2004, Spanish Constitution was the supreme order in the Spanish constitutional framework. The Spanish Constitutional Court was entitled the ultimate power to make decision in the event of the legal conflicts between the Constitution and the EU law. However, the

---

[63] Case C-399/11, judgment 26 February 2013.

[64] Aida Torres Perez, *Melloni* in Three Acts: From Dialogue to Monologue, European Constitutional Law Review (2014), vol.10, p.316.

[65] Case C-399/11, para.60. The Court provided that "*... Article 53 of the EU Charter confirms that, where an EU legal act call for national implementing measures, national authorities and court remain free to apply the national standard of the protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of the EU law are not thereby compromised*".

[66] Perez, *Melloni* in Three Acts, at 316.

[67] Tribunal Constitucional, declaracion 1/2004. The Spanish Constitutional Court sets the counter-limit doctrine into the Spanish Constitutional order through the distinction between *"primacia"* (primacy) and *"supermacia"* (supremacy). It states that "*supremacy and primacy are categories which are developed in differentiated orders. The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons*".

[68] See Giuseppe Martinico & Oreste Pollicino, The Interaction between Europe's Legal System: Judicial Dialogue and the Creation of Supranational Law, Cheltenham: Edward Elgar, 2012, p.113.

Constitutional Court did not substantially address whether the measure of the execution of European Arrest Warrant affirmed by the Luxembourg Court was compatible with the Constitutional rules at the present case, nor adopted the counter-limit doctrine against the penetration of Luxembourg interpretation of Art.53 EU Charter. It turned to a compromise to the Luxembourg decision when the Spanish Constitutional Court had known that Art.53 EU Charter provided little latitude on the adoption and implementation of higher constitutional standard than Art.53 ECHR.[69] The preliminary decision of *Melloni* becomes a hermeneutic tool for the Spanish Constitutional Court reinterpreting right to fair trial. The Spanish Constitution Court held that the denial to provide a rehearing opportunity to Mr. Melloni was acceptable on the basis that the Strasbourg decision of *Sejdovic*[70], cited by the Luxembourg justice, revealed that the deprivation of rehearing right of the surrender convicted *in absentia* had not constituted an infringement of right to fair trial enshrined by Art.6 ECHR unless the convicted person or his agent had not been well informed on the procedural rights and related consequence. When the preliminary decision returned to the Spanish Constitutional Court, the Constitutional judges did not substantively take Declaration 1/2004 into account. On the contrary, some constitutional judges chose to link this preliminary interpretation to Art.94 of the Spanish Constitution that consequently turned this Luxembourg decision into a constitutional source granting it a primary status in the domestic constitutional order. Unfortunately, the Spanish Constitutional Court failed to articulately clarify the relationship between Art.94 Spanish Constitution and Declaration 1/2004 at the present case decision. Moreover, even some concurring judges surprisingly called for removal of the Declaration 1/2004. In my view, the Constitutional Court needs to profoundly explain that by what reasons the Constitutional judges chose derogating from the protection by constitutional standard in the circumstance that the Spanish Constitutional Declaration 1/2004 is still in effect.

4.The Preliminary Reference: The Formal Mechanism of Judicial Dialogue Between National and Luxembourg Courts in the Field of Fundamental Rights Protection

4.1 Art.267 of Treaty of the Functioning of the European Union(TFEU)

Art.267 TFEU - the mechanism of preliminary reference - provides a formal channel on judicial dialogue between the national and Luxembourg judges.[71] According to the EU principle of subsidiarity, the mechanism of preliminary reference is not based on a hierarchical relationship between a court of first instance and a court of appeal. It is embedded on the distribution of tasks that, on one side, the national courts have the dual identities: (1) finding the fact and application of the national law, and (2) making the decision on needs and grounds for a reference, and applying decisions of the Luxembourg Court to the case at hands of the national courts.[72] In addition, the Luxembourg judges possess the competence with respect to the interpretation of EU law to examine the national measures on the EU law implementation.

---

[69] Perez, *Melloni* in Three Acts, at 320.

[70] Sejdovic vs. Italy, application no. 56581/00, judgment 1 March 2006.

[71] Albertina Albors-Llorens, Judicial Protection before the Court of Justice of the European Union, in Catherine Barnard & Steve Peers (eds), European Union Law, Oxford University Press, 2014, p.284; Also see Case C-283/81 [1982] ECR I-3415, para.7. Actually, the preliminary reference mechanism is seen by the Luxembourg Court as an ultimate manifestation of a cooperative relationship between the national court and the CJEU.

[72] Case C-6/64 [1964] ECR I-585, 593; Case C-35/76 [1976] ECR I-1871, para.4.

The mechanism of preliminary reference contributes to apply the EU law in uniformity.[73] The preliminary reference contributes to promote the direct dialogue between the national courts and the CJEU with respect to the right application of EU law by the former courts under Art.267 TFEU. Art.267(1) TFEU lays down two functions of preliminary reference mechanism: the EU law interpretation and review the validity of EU secondary law. The domestic courts usually submit preliminary references to the Luxembourg Court in the cases where the national judges confuse whether the rules provided by EU law are incompatible with fundamental rights provided by the EU Charter or derived from general principles of the EU law or the ECHR. As to the issue, Professor De Witte points out that the European Convention is granted a special status in the EU legal order where the EU is not be externally bounded by the European Convention on Human Rights, while the Luxembourg Court can autonomously apply and interpret the Convention's provisions in accordance with their needs under Art.6(2) TEU providing the ECHR a status of general principle of the EU law in the area of fundamental rights.[74] Although the European Convention on Human Rights may be treated as a binding instrument by the Luxembourg Court in legal practice, the Court seems to limit the Convention binding effect to supranational affairs. A local court of Region Bolzano of Italy had ever submitted a reference to ask whether Art.6(2) TEU could be interpreted that the European Convention had the complete primary effect same as other EU primary legislation by which the domestic courts were obliged to set aside all the national rules contravened to the EU law. However, the Luxembourg Court replied that it took no competence to review the domestic rules in accordance to the European Convention before the EU would be a Contracting State to the ECHR in the preliminary decision of *Kamberaj*[75]. The Luxembourg Court repeated this opinion in the latter decision *Fransson*[76] due to the fact that the Convention "*does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into the Union law*". The Luxembourg Court attitude towards the application of the European Convention was partially "unsystematic" and "eclectic",[77] but thanks to the mechanism of preliminary reference that the Luxembourg Court could manoeuvre role of the ECHR for the reconciliation of the two European regime.

In order to design an efficient and convenient dialogic mechanism between national and supranational courts, Art.267(2) TFEU simply provides that anyone national court or tribunal can refer a preliminary question to the Luxembourg Court when the case is pending and the Luxembourg opinion is a necessary premise to the domestic judgment. This provision does not set a strict parameter on which tribunals own the mandate to submit the preliminary reference, but the Luxembourg Court has summarized the common characteristics of the qualified tribunals in the judgment of *Syfait I*[78]: (1) established by law[79]; (2) having a permanent existence[80]; (3) exercising

---

[73] Case C-66/80 [1981] ECR I-1191, para.11; Case C-166/73 [1974] ECR I-33, para.2.

[74] Bruno de Witte, The Use of ECHR and Convention of Case Law by the European Court of Justice, in P.Popelier, C. Van de Heyning & P. Van Nuffel (eds.), Human Rights Protection in European Legal Order: The Interaction between the European and National Court, Intersentia, 2011, p.22

[75] Case C-571/10, judgment 24 April 2012.

[76] Case C-617/10, judgment 26 February 2013.

[77] De Witte, The Use of ECHR and Convention of Case Law, at 24.

[78] Case C-53/03 [2005] ECR I-4609. Para.29; also see Caterina Drigo, Preliminary Reference to the European Court of Justice and Multilevel Protection of Human Rights: The Complex Dialogue between the European Court of Justice and Constitutional Court, The Turkish Yearbook of International Relations (2013), vol.44, p.14

[79] Case C-110-147/98 [2000] ECR I-1592, para.34.

binding jurisdiction[81]; (4) its procedure must be *inter partes*[82]; (5) must apply rule of law; (6) be independent[83]. The absence of legislative limitation grants the Luxembourg Court a margin of appreciation to the assessment on whether a national referring court is qualified under the provision of Art.267(2) TFEU.[84] Under this provision, the national court is required to deliver the disputed case and the question articulately. The Luxembourg Court may declare these references inadmissible regarding that (1) the question is not articulate[85] or (2) the national referring court fails to submit the sufficient information on the fact and legal backgrounds of the pending case at hand[86]. The Luxembourg Court must substantially reply to the question of national courts if their answers will be applicable to a real dispute between the *inter partes,* rather than only provide advisory opinions to the Court determinations.[87] Thus, the irrelevant[88] and hypothetical[89] national references will be regarded as inadmissible by the Luxembourg judges.[90]

Pursuant to Art.267(3) TFEU, national court "against whose decisions there is no judicial remedy" is obliged to submit the preliminary reference to the CJEU whenever the question is necessary before the final judgment concerning the interpretation and validity of the EU law. The scope of "national courts of last resort" does not specifically refer to the national highest court in the domestic jurisdiction, but also entails those lower national or local courts who can determine the non-appealed judicial results under the particular jurisdictions. The national court possesses the discretionary competence to reject the requirements *inter partes* to submit a preliminary reference in two conditions: (1) where the answer to question has already clarified in a preliminary ruling[91], or where the point of law have already been addressed by the Luxembourg Court in a previous decision[92]; (2) the *acte claire* doctrine: it means that "*correct application of Union law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question is to be resolved*"[93].

---

[80] Case C-54/96 [1997] ECR I-4992, para.22.

[81] Case C-110-147/98, para.36.

[82] Case C-17/00 [2001] ECR I-9496, para.14.

[83] Case C-363/11, judgment 19 December 2012, para.23-25.

[84] Albors-Llorens, Judicial Protection before the Court of Justice of the European Union, at 286; also see Case C-102/81 [1982] ECR I-1095. Since a privately appointed arbitrary had not fulfilled all the criteria, the CJEU did not consider their requirements of the preliminary reference.

[85] Case C-83/91 [1992] ECR I-4871

[86] Case C-320-322/90 [1993] ECR I-393.

[87] Case C-104/79 [1980] ECR I-745. It would not entertain a reference where there is evidence that the parties before the national courts have no genuine disputes or have contrived proceedings with the exclusive purpose of triggering a reference on a particular point of the EU law.

[88] Case C-126/80 [1981] ECR I-1563, para.6; Case C-343/90 [1992] ECR I-4673, para.18; Case C-283/81 [1982] ECR I-3417, para.10. The Court states that the national court of last resort on the EU law application "is not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question, regardless of what it may be, can in no way affect the outcome of the case".

[89] Case C-83/91, para.30.

[90] Case C-363/11, para.22; See also Drigo, Preliminary Reference to the European Court of Justice, at 15. The reference can be held inadmissible if the Luxembourg Court realizes that its decisions are not of a judicial nature.

[91] Joined Case C-28-30/62 [1963] ECR I-31, 38.

[92] Case C-283/81, para.12.

[93] Case C-281/81, para.16. The Court stated that "*tribunals, including those referred to in the third Paragraph of Article 177 (now Art.267 TFEU), remain entirely at liberty to bring a matter before the CJEU if they consider it appropriate to do so … The correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the court of other member states and*

However, the second condition may open a leeway for the court of last resort to abuse the discretion. These courts can refuse such requirements of parties by the reasons that the previous Luxembourg case-law is both clear and obvious beyond doubt.[94] As to fill the gap of this institutional deficiency, the competent national courts are obliged to take relevant Strasbourg case-law into account, given that the European Court of Human Rights has set the relative perfect criteria concerning that the related national decisions not to refer a preliminary question to the Luxembourg Court constituted a breach of right to a fair trial under Art.6 ECHR.[95]

4.2 Are European Constitutional Courts Exceptions in the Area of European Judicial Dialogue?

In contrast with the ordinary courts and tribunals conveniently submitting their questions to the Luxembourg Court, European Constitutional Courts seem lack of passion with respect to the direct dialogue with the CJEU. In some states adopting the monist system, the direct communication between the Luxembourg Court and the European Constitutional Courts develops more smoothly than those dualist States. The Belgian Constitutional Court, who govern the relationship between the national and EU law through the monist approach at the beginning, is the most active constitutional actor with respect to the direct dialogue with the Luxembourg judges.[96] After its first preliminary question referring to the Luxembourg Court in 1970s, the Belgian Constitutional Court keeps a "record" until now that the Belgian questions submitting to the Luxembourg Court entail both requirements of the interpretation and validity of the EU provisions.[97] Similarly, the Austrian Constitution Court prefers to move a preliminary reference, after an answer from a constitutional question, whenever it perceives that the challenged Austrian provision may conflict with a Community rule[98]; the Latvian Constitutional Court, who regards itself as a "national court" under Art.267 TFEU, has referred its first preliminary question to the CJEU in 2007[99].

The distribution of competences between the EU and member states has not been clearly written by the EU Treaty.[100] Although the primacy of EU law was established by the decision of *Enel vs Costa*, this doctrine has not yet been incorporated into the body of recent EU Treaty. Hence, the potential tension in the European multilevel constitutionalism still exists with respect to "*who has the last word in Europe*". The primacy of Union's law, though commonly respected as one of basic characteristics of the EU legal order, is not absolute in the sense that Art.4(2) TEU explicitly

---

to the Court of Justice. Only if those conditions are satisfied, may be the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it".

[94] Anthoney Arnull, The Use and Abuse of Article 177 EEC, Modern Law Review (1989), vol.52, p.622

[95] Schipani and Others vs. Italy, application no. 38369/09, judgment 21 October 2015; Dhahbi vs. Italy, application no.17120/09, judgment 8 April 2014; Also see Regina Valutyte, State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling under the European Convention on Human Rights, Jurisprudence (2012), vol.19, pp.8-9.

[96] Giuseppe Martinico, Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue, Tilburg Institute of Comparative and Transnational Law, Working Paper No.2009/10, p.5.

[97] Thomas A. Vandamme, Prochain Arrêt: La Belgique! Explaining Recent Preliminary Reference of the Belgian Constitutional Court, European Constitutional Law Review (2004), vol.1, p.128.

[98] Ulrich Jedliczka, The Austrian Constitutional Court and the European Court of Justice, Vienna Online Journal of International Constitutional Law (2008), vol.2, p.304.

[99] Drigo, Preliminary Reference to the European Court of Justice, at 21.

[100] Ioana Pelin-Raducu, Deferential Dialogue between the Court of Justice and Domestic Court Regarding the Compatibility of the EU Data Retention Directive with National Fundamental Rights Standards, Université du Luxembourg, Law Working Paper Series, No.2014/03, p.2

expresses that the development of EU integration cannot overstep the national identities reserved by the member states. The Constitutional Court, conceived as an owner of the fifth state power[101], controls the interpretation and implementation of national constitutions.[102] The model devised by the Danish Supreme Court in the decision of *Carlsen* is particular but seems set up a good example on the reconciliation between the primacy of the EU law and the supremacy of constitutional order. If the Danish Supreme Court doubts about the consistency of a Union's Act with the constitutional order, it can bring the question to the CJEU. After that the preliminary decision returned to Denmark, the Supreme Court can decide the constitutionality of Luxembourg interpretation, then it can decide to trigger the "counter-limits" mechanism or not.[103]

As mentioned above, the European Constitutional Courts were usually reluctant to refer the case to the CJEU because they were afraid of the supranational legal invasions undermining the constitutional standard of fundamental rights protection. Consequently, the preliminary reference was a task exclusive for the ordinary courts who were given the real competence on the submission of the preliminary question regarding the interpretation and the examination of the validity of a secondary legislation.[104] However, many European Constitutional Courts have changed their previous decision in the recent decade. In this part, it is the due time for us to examine the motivation on what bring them to turn to cooperation with the CJEU.

4.2.1 The German Constitutional Court

The German Constitutional judges are persuasively conceived as a group of conservative actors in the area of transnational judicial dialogue in that they fear of losing their decisive powers on shaping of German constitutional order.[105] Despite of the fact that the German Constitutional Court recognized that they were belong to "the court of last resort" under Art.267 TFEU (ex.Art 234 ECT) in the decision of *Solange I*, the Constitutional judges had no experience of submitting a preliminary question to the Luxembourg Court before 2014. In the proceeding of *Maastricht* case[106], the Constitutional Court intentionally avoided the submission of preliminary reference to the Luxembourg Court through hearing the testimony of the Director General of Commission Legal Service.[107] The Constitutional Court generally provided that the competence to the assessment on the compatibility between domestic law and EU law was attributed to the ordinary courts.[108] However, the German Constitutional Court seemed get inspiration from the Danish model in aspect of the distribution of powers and cooperation between the EU and domestic authorities later. In a judgment determined in 2014[109], the German Constitutional Court explicitly confined the mandate of

---

[101] The classic tripartite of state power are legislative, judicial and executive power. The fourth power of state is "political direction" owned by the constitutional subject who is capable of deciding and defining the state's fundamental policies, and adopting state acts.

[102] Martinico, Preliminary Reference, at 8.

[103] Martinico, Preliminary Reference, at 13.

[104] Stefano Civitarese Mattenucci, The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the First Time a Preliminary Ruling in an Indirect Proceeding, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363893. p.5.

[105] Jan Bergmann, Das Bundesverfassungsgericht in Europa, Europäische Grundrechtzeitschrift (2004), p.627.

[106] BVerfGE 89, 155.

[107] Martinico, Preliminary Reference, at 4

[108] A. Di Martino, Il Bundesverfassungsgericht dichiara l'incostutuzionalità della data retention e torna sul rapporto tra libertà e sicurezza, Giurisprudenza Costituzionale, 2010, p.4059.

[109] BVerfGE, Case No.2. BvR 2728/13.

constitutional review to the issues whether the acts of State bodies or Union's institutions had overstepped their limits or invaded into the national identity reserved by the member states.[110] Hence, the Luxembourg Court was up to the interpretation of the Union's provisions, while the German Constitutional Court was responsible to defend the untouchable constitutional identities, particularly determining whether those measures or meanings of provisions had undermined the cores of German constitutional reservations or not. This judgment paved the way for the direct cooperation between the Constitutional and supranational courts in the proceeding of *OMT*. This constitutional complaint in this case focused on whether the implementation of EU policy on the purchase of government bond in the secondary market for stabilizing the domestic economic policy constituted the unlawful transfers of state power. Given the presumption of premise that the OMT was convicted as an action *ultra vires* not explicitly or implicitly authorized by the relevant EU Regulations of Monetary Union of Euro States, the German Constitutional Court should require the state organs to refrain from this national Act in favor of the abolition of the Council decision.[111] The adjudication of constitutionality of state organs acts fell into the scope of jurisdiction over the German Constitutional Court. Consequently, it submitted the preliminary questions concerning the competence of European Central Bank for the OMT policy and the interpretation of Art.119, 123 and 127 TFEU to the Luxembourg Court.

4.2.2 The French Constitutional Council

The preliminary question submitted by the French *Conseil Constitutionnel* (Constitutional Council) to the Luxembourg Court is a recent story. Similar to the cognition of the Italian Constitutional Court, the French Constitutional Council had not regarded itself to be a "court or tribunal" under Art.267 TFEU in a long period between 1975 and 2013.[112] The Constitutional Council held that the ordinary courts were responsible to the assessment to the compatibility between the national legislation and EU law. This French constitutional authority sometimes resorted to the *acte claire* doctrine so as to escape asking for an interpretative guidance from the Luxembourg Court answer. Apart from these reasons, before the introduction of the *Question Prioritaire du Constitutionnalité* (QPC, the Preliminary Reference of Mechanism on the Issues of Constitutionality), the Constitutional Council was granted very limited jurisdictional capability over the examination of constitutionality of the

---

[110] Drigo, Preliminary Reference to the European Court of Justice, at 26-27. The former situation happens when such bodies and institutions have gone beyond the boundaries of their competence in a way that has injured specifically the principle of "limited single attribution", that is, when the violation of competence is "sufficiently serious". In these situations it is excluded that constitutional bodies, authorities or national courts may in some way implement such measures. The latter situation means that the German Constitutional Court will control the relationship between two regime's legal orders through the examination of *ultra vires.* This reminds us of the decisions of *Mangold-Honeywell* determined in 2010. According to the German legal order, it must be recognized the primacy of application of Union law. The controlling power of the Constitutional Court is to be exercised only in a limited manner and with the favor to the European law. This means that the *ultra vires* control should respect the decisions of the Court of Justice as a binding interpretation of the EU law, with the result that, before declaring the existence of an *ultra vires* act of European organs and institutions, the Constitutional Tribunal shall, in the context of the preliminary ruling procedure under the Art.267 TFEU, allow an interpretation of the Treaty and a decision on validity and interpretation of the legal act in question.

[111] Eva Julia Lohse, The German Constitutional Court and Preliminary Reference - Still a March Not Made in Heaven, German Law Journal (2015), vol.16, p.1505.

[112] François-Xavier Millet & Nicoletta Perlo, The First Preliminary Reference of the French Constitutional Court to the CJEU: *Révolution de Palais* or Revolution in French Constitutional Law, German Law Journal (2015), vol.15, p.1471.

parliamentary bills and constitutional rules *ex ante*, within a period no longer than one month, between the adoption and promulgation of text of bills. The instrument QPC grants a new mandate to the *Conseil* who can start a constitutional review *ex post* towards a statute in line with the French constitutional rights and freedom. However, international and EU treaties or agreements are not subjected to the jurisdiction of constitutional review. This is the very reason can substantively explain why the Constitutional Council had not been able to refer a preliminary question to the Luxembourg Court until 2013.

In the case of *Jeremy F.*, the claimant was arrested by French authority when the UK Government issued an European Arrest Warrant. The UK authority requested the investigating judges of the Court of Appeal of Bordeaux to extend the surrender decision to the offence of "sexual intercourse with a minor under the age of 16" on the basis of Articles 27(3)(g) and 27(4) of the EAW Framework Decision 2002/584.[113] As soon as the French investigating judges accepted the British request, the defendant was immediate aware that he would suffer a sentence twice. Consequently, he had to challenge the legal basis of this charged extension before the French *Cour de Cassation* (Appealing Court), according to that the UK authority had gone beyond the limit of speciality regulated by a British law that imposed restriction to the government action. However, according to the Art.695-46(4) of the French Code of Criminal Procedure Law, the judgment of investigating judges could not be appealed within the thirty days. The defendant turned to complain that this provision violated the constitutional principle of equality before the law and the right to fair trial provided by the mechanism of *Question Prioritaire du Constitutionnalité.* Given the privileged status of the EAW in the French Constitution,[114] the *Cour de Cassation* had to make out who was the real author of this French Criminal Procedural Provision. This challenge could only be accepted that this provision did not necessarily derive from the intention of the Union's drafters. The *Cour de Cassation* perceived that it was not an easy task to determine whether Art.27 and 28 of the EAW Framework Decision had blocked the right to appealed against the judgment of investigating judges because the two relevant provisions articulately provided that "*the decision will be issued within the thirty days*". Considering that Recital 12 of the EAW Framework Decision provided "*the current framework decision is not meant to the prevent a Member State from applying its own constitutional standards regarding the right to a fair trial*", the *Cour de Cassation* seemed to have determined that the Union lawmakers had left a certain latitude of discretion to the domestic drafters with respect to the implementation of the EAW. Therefore, the *Cour de Cassation* submitted to the Constitutional Council a question of constitutionality of the domestic provision through the QPC mechanism, rather than directly ask for an answer from the Luxembourg Court.

Art.88-2 of the French Constitution, according to the interpretation by the French *Conseil*, aims to remove constitutional barrier blocking the enactment of domestic legislative provisions that

---

[113] Under British law the offence of "sexual intercourse" refers to a minor for persons aged under sixteen, whereas under French law the offence of sexual assault on a minor is only applicable when the victim is under fifteen.

[114] In order to give full effect to the EAW, the French authority has already granted a sort of "constitutional immunity" to all the transposed domestic provisions from the EAW. Article 88-2, a new constitutional provision adopted a Constitutional Act of 25 March 2003, provides that "*the law sets down the rules concerning European Arrest Warrant in compliance with legal decision adopted by the the institutional of the European Union*". Generally, the provision ensuring the application of the EAW should not be considered unconstitutional, even in cases of breach of other constitutional principle, including those amounting to the "constitutional identity of France".

necessarily follow from the acts adopted by the EU Institutions relating to the execution of EAW. This constitutional interpretation actually reflects that the "constitutional immunity" is only permissible provided the legal provisions "necessarily" stem from the EU legislative requirement. The French Constitution thereby grants a mandate to the *Conseil Constitutionnel* the examination of constitutionality of the discretion of the lawmakers under the "necessary standard".[115]

At the present case, the French Constitutional Council adopted the same approach of constitutional review as the *Cour de Cassation* did in the determination on whether (1) the absence of any possibility of recourse against the ruling of investigating judges was a direct requirement of the implementation of Art.27 and Art.28 EAW Framework Decision, or (2) the challenged criminal procedure provision was strictly derived from the will of EU legislators. Regarding that the Union texts were not articulately enough for the national judges to dig out the intention of European lawmakers, the French *Conseil* consequently submitted the question to the Luxembourg Court. Moreover, it even declared a deference to the Luxembourg preliminary decision.[116] This determination seemed unconstitutional regarding that no Constitutional Act had authorized the *Conseil* to subject itself to the decisions made by international tribunals.[117] This constitutional decision may be a result from the direct effect of Luxembourg decision under the EU legal order. In addition, Art.88-1 of the French Constitution explicitly provides the presumption of constitutionality to the domestic adopted legislation concerning the implementation of the EAW Framework Decision. The deference to Luxembourg decision can be thereby regarded as a logic consequence in this circumstance.

However, the procedural period for exercising constitutional review is very short: one month for a constitutional review *a priori* and three months for a constitutional review *a posteriori*. Thus, the French Constitutional Council hardly submits a preliminary question to the Luxembourg Court within the permissible period of constitutional review *a priori.* As to the constitutional review *a posteriori*, three months deadline will not be suspended by its action of submitting a preliminary question to the CJEU.[118] Some scholars accordingly exclude the possibility of a wider use of preliminary reference mechanism by the French *Conseil*.[119] Yet, given an annual report 2012 issued by the Luxembourg Court has provided that the average duration through the urgent preliminary procedure (PPU) was 1.9 months, the *Conseil* holds that the period of duration is compatible with the constitutional deadline. Unfortunately, the maximum three months duration at the present case have not been respected, but the French *Conseil* still substantively judged the case on the basis of the

---

[115] Bruce Rabillon, Question sur la question! Nouvelles déclinaisons du contrôle de la constitutionnalité des lois de transposition, POLITEA (2013), vol.23, p.99.

[116] The French Constitution Council outlines its approach to the decision of constitutional review: "*[U]nder the aforementioned terms of the framework decision, an assessment of the possibility of an appeal against the original decision of the Court, beyond the period of the thirty days, and suspending the execution of the original decision requires that a ruling be provided on the interpretation of the act in question, and that, pursuant to Art.267 TFEU, the Luxembourg Court alone shall have jurisdiction to issue preliminary rulings on such a question, and that, consequently, it is necessary to refer to it and defer to it the decision concerning the priority issue of constitutionality raised by (applicant).*"

[117] François-Xavier Millet & Nicoletta Perlo, The First Preliminary Reference of the French Constitutional Court, at 1477.

[118] Marc Guillaume, QPC: textes applicables et premières décisions, CAHIERS DU CONSEIL CONSTITUTIONNEL (2010), vol.29, p.21.

[119] Drigo, Preliminary Reference to the European Court of Justice, at 43.

Luxembourg interpretation.

Can we bold to say that the *Conseil* becomes a Union court or the *Conseil* revised its previous decision that it has no competence to review domestic legislation in accordance with the international treaties? These questions are hardly answered in a simple way. The *Conseil* has explicitly clarified the reason of the submission of preliminary reference to the CJEU. Reviewing the conventionality of legislative provisions concerning the implementation of EAW Framework Decision under Art.88-2 French Constitution was not the starting point of constitutional review, but it was only a "verification stage", which was an indispensable step before the constitutional review.[120] Accordingly, some held that this interpretation could be regarded as the second reason blocking the *Conseil* frequent accession to the preliminary reference that would only be a need to restrict the scope of a law "which is supposed to contrast with a right or freedom guaranteed by the Constitution".[121] This argument obviously ignored the real motivation of the *Conseil* hidden by its clarification though the provision concerning the implementation of the EAW has been granted the constitutional privilege of the presumption of constitutionality. The *Cour de Cassation* referring the case to the *Conseil* can reasonably be seen as a hint that it has already believed that the challenged domestic provisions derived from the legislative discretion, rather than strictly observed to the willing of the EU legislator. Because of the absence of competence to review the constitutionality of domestic legislative provisions, the *Cour de Cassation* has no choice but to submit the case to the French *Conseil.*

The preliminary submission to the Luxembourg Court was not inevitable in the sense that the activity of preliminary submission to the *Conseil* from the *Cour de Cassation* implied that the French domestic provisions was not a requirement stemmed from the EU drafters, whereas the Union's drafters have left member states a certain latitude of discretion. The *Conseil* should have thereby started to review the constitutionality of domestic provisions. However, the French *Conseil* submission to the Luxembourg Court revealed a fact that the *Conseil* had already stretched its jurisdiction to the examination of conventionality of the domestic provision under the constitutional order. Indeed, this French constitutional decision constituted a substantive break towards the constitutional precedence that the French *Conseil* could not review the conventionality of a national law in accordance to international treaties. However, this constitutional decision has to be dated back to 1975, when the European pluralism constitutional framework has not yet developed into a complex and intrigued one like in nowadays. The contemporary European constitutionalism has not only built on a new construction in the supranational level, but also triggered an interactive influence on the constitutionalization of supranational law through the national constitution-making. In this sense, the European Constitutional Courts, as the ultimate guardians of national Constitutions, inevitably has competence on the examination of conventionality of the domestic law, even though they intended to hide its true motivation under its official clarification that the submission to the Luxembourg Court was no more than a "verification" before the constitutional review. This clarification seemed imply, in contrast to the formal dialogue at present case might be an isolate example or an example by chance,[122] that the *Conseil* had opened the door for communicating to the

[120] Henri Labayle & Rostane Mehdi, Le Conseil constitutionnel, le mandat d'arrêt européen, le renvoi préjudiciel à la Cour de justice, REVUE FRANÇAISE DE DROIT ADMINISRATIF (2013), p.461.

[121] Drigo, Preliminary Reference to the European Court of Justice, at 43, Roberto Romboli, Corte di Giustizia a giudici nazionali: il rinvio pregiudiziale come strumento di dialogo, p.29.

[122] Drigo, Preliminary Reference to the European Court of Justice, at 25.

Luxembourg Court, while it must avoid explicitly contravening to the relevant previous constitutional case-law.

4.2.3 The Spanish Constitutional Court

The Spanish Constitutional Court adopts Kelsenian model controlling the constitutionality of the State legislations and actions. After Spain became a Community member state in 1986, the Spanish Constitutional Court had been resisting from taking an active cooperation with the Luxembourg Court until the well-known *Melloni* judgment. Because the Spanish Constitutional Court was not recognized as a traditional judicial body[123] in a long time, it lacked of a constitutional competence on the jurisdiction over the EU law application[124]. However, the Spanish Constitutional Court was given the mandate to review the constitutionality of the EU treaties provided one legislative provision had been alleged in violation of the Constitutional order under Art.95 of the Spanish Constitution. Apart from that, the Spanish Constitutional Court could possibly manipulate its discretionary power to decide whether or not submit the preliminary reference to the CJEU. The Constitutional Court can adjudicate the *amparo* case (alleging the fundamental rights violation) in the condition that applicant has exhausted the judicial remedy before the ordinary courts because the Spanish Constitutional Court has perceived a constitutional controversy possibly occurred at the constitutional proceeding when the Spanish constitutional rights or constitutional rules have been disregarded by the Union rules or law application by the national courts.

The Spanish Constitutional Court can possibly, like the French *Conseil*, submit a question or a "verification" request to the Luxembourg Court. Art.163 of the Spanish Constitution pushes the constitutional judges towards the Luxembourg Court provided that the Spanish ordinary judges have questioned the constitutional conformity of an Act of *Corte Generales* (Parliament). Indeed, the Basque Parliament had ever required the Constitutional Court to submit a preliminary reference to the Luxembourg Court in a constitutional proceeding concerning the interpretation of a Decision of the European Council regarding the election of European Parliament representatives. Unfortunately, the Spanish Constitutional Court replied that it was up to the decision of ordinary judges. This judgment implied that the Spanish Constitutional Court would adjudicate the cases concerning the EU law provided that EU law application might substantively undermine the domestic constitutional order. Actually, the Spanish Constitutional Court had ever taken EU rules and the Luxembourg preliminary rulings[125] into account in its adjudication of the fundamental rights. However, it did not indicate that the Spanish Constitutional Court would readily abandon its previous case-law in the absence of constitutional power on the jurisdiction over the EU secondary legislation. The legal conflicts between the Community and national laws have to be reconciled by the Spanish

---

[123] Art 53(2) Spanish Constitution provides that the individual appeal to the Spanish Constitutional Court is a subsidiary procedure to protect fundamental rights. The initial claims should be submitted to the ordinary courts in traditional Judicial Branch. The only exception appears in Art.42 of the General Act of the Constitutional Court in relating to the resolutions of Parliament which have no legal force and may constitute violations to the fundamental rights. In that case, the appeals can be directly submitted to the Spanish Constitutional Court.

[124] Gil Carlos Rodriguez Iglesias & Alejandro del Valle Galvez, El derecho comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de los Derechos Humanos y los Tribunales Constitucionales nacionales, Revista de Derecho Comunitario Europeo (1997), vol.2, p.354.

[125] S.T.S, Sep.11, 1995 (No.130). It was the first time for the Spanish Constitutional Court claiming that the Community law had the interpretative role regarding the fundamental rights; S.T.S, Nov.30, 2000 (No.292). In this case, the Constitutional judges connected this role to the constitutional mandates in Art.10(2) of the Spanish Constitution.

Constitutional Court under its due consideration of the Union's law, instead of actively submitting this preliminary question to the EU. In fact, the Spanish Constitutional Court had never submitted a preliminary reference until the judgment of *Melloni* in 2014 since that its mandates were perceived to confine to the scope of constitution.[126]

The Constitutional Declaration 1/2004 provided a revolutionary impact on the Spanish constitutional reform. Despite the fact that the Constitutional Court guaranteed its constitutional status of the ultimate decision-maker through the distinction between the constitution as the "supreme" legal order and the EU law as the "primary" command, the primary status of EU law was successfully incorporated into the Spanish constitutional order. The Declaration implicitly acknowledged that the Constitutional Court would be a court in last resort adjudicating disputes relating to the EU law. In a judgment concerning the regulating taxation[127], the Spanish Constitutional Court provided that the judgment determined by an ordinary court was void because the judges failed to submit a preliminary question to the Luxembourg Court. This constitutional verdict not merely guaranteed the EU authority in the domestic legal order, but reflected a fact of the constitutionalization of EU law. In another Luxembourg judgment concerning right to fair trial[128], the Constitutional Court declared that the refusal of an ordinary court's requirement to the application of the Luxembourg decision had breached requirement of a fair trial provided by Art.24 of the Spanish Constitution, which was regarded as a constitutional development in guarantee of the primacy of EU law through the constitutional interpretation.[129]

The constitutional judges are obliged to reconsider the relationship between the EU law (EU Charter on Fundamental Rights) and Constitutional order under Art.10(2) of the Spanish Constitution providing that "*provisions related to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain*". The statement reveals that the Spanish Constitutional Court, even though continuously avoids the direct communication to the Luxembourg Court, is obliged to take the EU Charter into account as long as an allegation is raised in violation of the fundamental rights.

The *Melloni* case was a very one determined in a circumstance that the EU Charter on Fundamental Rights had been granted a complete primary legislative status in the EU legal order. Under Art.10(2) of the Spanish Constitution, the EU law was not treated as a non-constitutional issue any longer. Thus, the Constitutional Court promulgated the Constitutional Order 86/2011 for declaring its constitutional duty on the submission of preliminary reference to the Luxembourg Court with respect to the issues of interpretations of EU Charter and the related provisions provided by the EAW Framework Decision. In the constitutional proceeding of *Melloni* case, the Spanish Constitutional Court noticed that the decision of Spanish National High Court, though in line with the EAW Framework Decision, was not compatible with the constitutional standard of right to fair trial

---

[126] Luis Maria Diez Picazo, El derecho comunitario en la jurisprudencia constitucional española, Revista Española de Derecho Constitucional (1998), vol.54, p.262.

[127] S.T.S Apr.19, 2004 (No.58)

[128] S.T.S Jul.30, 2012 (No.145)

[129] Daniel Sarmiento, Reinforcing the Constitutional Protection of Primacy of EU Law: Tribunal Constitucional, Common Market Law Review (2013), vol.50, p.875.

provided by Art.24(2) of the Spanish Constitution. Actually, the Constitutional Court had ever adjudicated a case with a similar fact that the Romanian authority issued an European Arrest Warrant towards one Romanian national who had been convicted to crime *in absentia* by a Romanian Court. The Spanish Constitutional Court then ruled the Order of transferring this Romanian surrender back to issuing State had constituted a breach of constitutional rights.[130] In the constitutional proceeding of *Melloni*, the constitutional judges needed to know whether Art.47 and 48(2) EU Charter would provided for the surrender convicted *in absentia* an opportunity to be reheard before the Spanish Court. If not, could the Spanish Constitutional Court regard Art.53 EU Charter as a permission for the member state to adopt a higher fundamental rights standard than those provided by the EAW Framework Decision?

The later story has already been well-known. The Luxembourg Court made a very clear clarification that the EAW was not incompatible with the Charter provisions. Moreover, Art.53 EU Charter could not be applied to derogate from the EAW implementation. Given that the EAW Framework Decision was a consensus instrument among the EU member states, the Spanish authority had the obligation to fulfill the task under the EU legal order . Consequently, the Constitutional Court followed the Luxembourg interpretation and explicitly took this international jurisprudence as a hermeneutic tool to its own decision.

4.2.4 The Italian Constitutional Court

The Italian constitutional Court is a latecomer on the direct communication with the CJEU, but it stands with many Luxembourg far-reaching decisions and contributes to some basic tenets of the Community law *vis-à-vis* national law, such as primacy of the Community law and direct effect.[131] The Italian Constitutional Court does not define itself to be "a court or tribunal of last resort" under Art.267TFEU until 2008.[132] Due to many distinguished differences on the mandates of the Constitutional Court and ordinary courts and tribunals, the former could hardly be equally seen as a traditional judicial bodies in the Court system[133].

The reasons that the European Constitutional Court are reluctant to a direct dialogue with CJEU may be detected from the functional perspective. The Luxembourg aim to set up a mechanism of preliminary reference is to ensure the uniform implementation of EU law as to promote the Community integration, while the task of Constitutional Court is to guard the national constitutional order and identity. The referring to the Luxembourg Court might subject the Constitutional Court authority to the jurisdiction of the Luxembourg Court.[134] This issue essentially reflects a judicial competition between the EU and national regime. The Constitutional judges contribute to prevent

---

[130] S.T.S Sep.28, 2009 (No.28)

[131] Giorgio Repetto, Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court, German Law Journal (2015), vol.16, p.1449.

[132] Matteucci, The Italian Constitutional Court Strengthen the Dialogue with the European Court of Justice, at 1. Also see Corte Costituzionale, Ordinanza 536/1995, 319/1996. The Italian Constitutional Court stated that its role was strictly linked to a function of constitutional control and of supreme guardian of the allegiance to the Constitution by the Constitutional organs of the State and the Regions, so that it cannot be considered to be a national judicial authority in the terms of then Art.267 TFEU (ex. Art.177)

[133] Corte Costituzionale, Ordinanza 536/1995.

[134] Giuseppe Martinico, The Tangled Complexity of the EU Constitutional Process: The frustrating knot of Europe, London and New York: Routledge, 2012, p.136.

their constitutional identity from the penetration of the foreign law and cherish their privileged roles in the national legal system.[135] These reasons naturally cut off the Constitutional Court connection to the CJEU.

The Italian dualist system started from the judgment of *Granital* in which the EC law had been distinguished from the domestic legal authority. The Constitutional Court acknowledged the direct and prevailing effect of the Community law in the domestic legal order. Accordingly, the ordinary and administrative court could lay aside the national legal provisions contravening the Community law without needing to trouble the Constitutional Court to review them again. On the other side, the Italian Constitutional Court pointed out that two legal orders were "*autonomous and separated, even if cooperated according to the separation of competence established and guaranteed by the Treaty*", indicating that the domestic provision - in the case of conflicting with the Community law - would not be void, but only be disapplied by the ordinary judges. The rationale behind this decision was based on the doctrine of "autonomous but coordinate" stemmed from the necessity to protect the Italian constitutional identity and sovereignty.[136]

However, this constitutional judgment shadowed the prospect of the domestic provision contravening the Community provision with indirect effect. The national ordinary judges, loaded with dual responsibilities on the application of both domestic and supranational law, might simultaneously convey their claims to the Luxembourg Court and national Constitutional Court. Thus, the Italian Constitutional Court had chance to touch the EU law which might be a concerned issue in the case of the examination of constitutionality of a provision. However, the Italian Constitutional Court usually determined the requirement of constitutional review "inadmissible" with reasons that the domestic act was not regarded to be in conflict with the Community law[137] or it was the very task for the ordinary court to submit the related legal dispute to the Luxembourg Court. The Constitutional Court[138] granted Luxembourg decision the direct effect in the national legal order, so that the ordinary court could determine the case immediately after the preliminary decision. In some occasions[139], the Italian Constitutional Court ruled the conventionality of some domestic provisions with referring to the Luxembourg Court.

Despite the frequent refusal to direct communication to the Luxembourg Court, Martinico reminds us that European National Constitutional Courts usually attempt to create an alternative and parallel

---

[135] Martinico, The Tangled Complexity, at 136. Martinico attributes this phenomenon to two aspects: (1) institutional issue: it means that the constitutional judges are not common judges. Their mission is particular and their autonomy is perceived as a guarantee for the constitutional autonomy of their legal order; (2) axiological issue: it has inspired the national constitutional courts over the years, e.g. the necessity to preserve a certain standard in the protection of fundamental rights, here might be understand as "constitutional goods".

[136] Antonia La Pergola & Patrick Del Duca, Community Law, International Law and the Italian Constitution, American Journal of International Law (1985), vol.79, pp.614-615. La Pergola interpreted the reason of approving the primacy of the Community law within the Italian Constitutional Order, providing "the dualist rationale behind this result is that Italy has chosen to grant superiority to the international law by withdrawing its national law ... Italy applies Community law because the Constitutional Court interprets Italian constitutional principles as indicating that the Italian legal order chooses not to impede the application of Community law as maintained by the Court of Justice".

[137] Corte Costituzionale, Ordinanza 267/1999.

[138] Corte Costituzionale, Sentenza 113/1985, 389/1989.

[139] Corte Costituzionale, Sentenza 384/1994; 94/1995; 129/2006.

communicative channel to the Luxembourg Court beyond Art.267 TFEU.[140] Regarding this model of judicial dialogue is informal and hardly perceived by the legal scholars, Martinico calls this communication a "hidden dialogue".[141] The Italian dual preliminarity, a dialogic techniques handled by the Italian Constitutional judges,[142] provides a possibility to the "hidden dialogue" between the two Supreme Courts. The interactive relationships of dual preliminarity can be easily perceived in a structure that the premise of constitutional judges examining the constitutionality of one domestic provision is that they need to know the result of preliminary decision from the Luxembourg judges. It entails two separate but closely related questions to be answered by the two Courts. The Italian Constitutional Court is always the final decision-maker in the dual preliminarity. When the ordinary court submits two questions simultaneously to two Courts, the Italian Constitutional Court usually waits for the Luxembourg decision before making its conclusion,[143] or returns the case the ordinary courts with the declaration of "inadmissibility". This informal mechanism effectively avoids the potential conflict with the Luxembourg decision.

The Italian Constitutional Court is the exclusive body involving into the constitutional review in *principaliter* proceedings[144] (direct constitutional review). No court has jurisdiction over the appealed case above the Constitutional Court, so it is the very court of last resort in *principaliter* proceedings. Thus, the Constitutional Court can set aside the national law in contrast to the EU law with direct effect. As to the EU provision with the indirect effect, the Constitutional Court has two choices: self-interpretation of the EU law (e.g. the application of *acte claire* doctrine) for not referring to the Luxembourg Court or submitting the question to the CJEU under Art.267 TFEU. In the *ordinanza* 102/2008 and 103/2008, the Italian Constitutional Court unexpectedly submitted the preliminary questions to the Luxembourg Court, indicating that the Italian Constitutional Court was a court of last resort under Art.267 TFEU. Considering the decisions of *sentenza* 406/2005 and 129/2006 as well as constitutional status provided by Art.117 of the Italian Constitution, the Italian Constitutional Court provided that in *Principaliter* proceeding was admissible the evocation of the European provisions as elements to integrate the parameter of constitutionality of Art.117 of the

---

[140] Martinico, The Tangled Complexity, at 136.

[141] Giuseppe Martinico, Judging in the Multilevel Legal Order: Exploring the Techniques of "Hidden Dialogue", King's Law Journal (2010), vol.21, p.257; Also see Martinico, The Tangled Complexity, at 138. The formula of "hidden dialogue" refers to the origin of of such a dialogue: this dialogue is hidden because it is not formalized according to the wording of the European Treaties. It is hidden because it is "unexplored" by the literature. Finally, it is hidden because it represents an alternative channel of dialogue if compared with the 'official' route represented by the machinery set up by Art.267 TFEU.

[142] Martinico, The Tangled Complexity, at 138. He has identified several techniques of hidden dialogues:
(1) introduction of a new step in the hierarchy of legal source.
(2) distinction between 'primacy' and 'supremacy'.
(3) admissibility of *recurso de amparo* against the domestic judges' refusal to raise the preliminary ruling.
(4) acknowledge of *erga omnes* effects for the ECJ's interpretative rulings
(5) dual preliminarity
(6) distinction between disapplication and non-application.

[143] Corte Costituzionale Ordinanza 165/2004. This is the well-known *Berlusconi* case. Since most of constitutional judges wanted to hear the Luxembourg opinion before issuing their final opinion, the Italian Constitutional Court declared case in pending. The Italian Court had actually prepared its decision before its announcement in case suspending, but it allowed the Luxembourg Court to make a choice whether it would like to challenge the Italian constitutional principle.

[144] The *Principaliter* proceeding is one category of Italian constitutional review in which the Constitutional Court is the unique arbitrator to adjudicate constitutional disputes between the Central government and Regional government.

Italian Constitution.[145] The Italian Court seemed acknowledge that Art.117 imposed the Court a constitutional duty to ensure the primacy of Community law in the domestic order. However, this could hardly be perceived as the basic reason pushing the Constitutional Court on the communication to the Luxembourg Court because the Constitutional Court might run across their direct connections through the application of doctrine *acte claire*. Actually, the Italian Constitutional Court perceived the case circumstance and facts left little room for the constitutional judges to invoke the doctrine *acte claire* as a reason to avoid the case submission to the Luxembourg Court.

Some thought this constitutional decision was a breakthrough against the doctrine of "strategic dualism" because the Italian Court admitted the EU law was prior to the domestic law.[146] Some held that the decision got rid of the precedence on fixing the judicial structure.[147] This case ruling even show that the Constitutional Court would regard the Luxembourg decision as a constitutive part of the constitutional review. On the other hand, some scholars argued that the *sentenza* 102/2008 and 103/2008 were the "continuities"[148] with its precedents because both of decision were fallen into the free area of *Granital* in that the Italian Constitutional Court had not transferred the power of preliminary reference to the ordinary court in *Principaliter* proceeding.[149]

In my view, Art.117 and Art.11 of the Italian Constitution provide the crucial impacts on the Italian Constitutional decision. Art.117 of the Italian Constitution, as one achievement of Italian constitutional reform in 2001, constitutionalizes the Community law which was entitled the primacy to the conflicted domestic national. It thus seemed that the Italian dualist legal hierarchy had been altered into a quasi-monism. However, Art.11 of the Italian Constitution is the fundamental source of the counter-limit doctrine by which the limitation on state sovereignty could be justified. Particularly, Art.11 of the Italian Constitution was usually referred by the judges presenting the legitimate authority of the international rules in the domestic legal order.[150] Art.117 sounded like a monist order regarding that the EU law has been granted the constitutional priority over the domestic law through constitutional reform, while Art.11 still insists the limitation of sovereignty stemmed from the will of national Constitution, instead of the Luxembourg authority *per se*. Actually, this relationship was articulately clarified in the *sentenza* 227/2010:

---

[145] Repetto, Pouring New Wine into New Bottles?, at 1459. The *Sentenza* 102/2008 strictly distinguished the role of Constitutional Court in the *Principaliter* proceedings from in the *Incidenter* proceedings. The Constitutional Court declared that the ordinary judges were entitled to refer a preliminary question to the Luxembourg Court, whereas in the *Principaliter* proceedings, the Italian Constitutional Court noticed that the absence of a judge shifts to the Constitutional Court the duty to transform the question of compatibility of internal law with EU law into a question of constitutionality, through the medium of Art.117(1) of the Italian Constitution.

[146] Matteucci, The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice, at 6-7. The author held that the judgment of *Granital* revealed that the Italian Constitutional Court inclined reluctantly to the EU law primacy. But, in the *sentenza* 28/2010, the Italian Constitutional Court came for the first time to the annulment of a statute on the grounds of its conflicting with an act of EU with indirect effect. In the judgment, the Italian Constitutional Court clarified the relationship between the EU norms and domestic provision within the Constitutional order that EU norms were mandatory and super-ordinate to the domestic laws by means of Art.11 and Art.117 of the Italian Constitution.

[147] Sergio Bartole, Pregiudiziale communitaria e <<integrazione>> di ordinamenti, Le Regione (2008), vol.36, p.900.

[148] Martinico, The Tangled Complexity, at 142.

[149] Repetto, Pouring New Wine into New Bottles?, at 1460.

[150] Giuseppe Martinico & Oreste Pollicino, The Impact of the European Court on the Italian Constitutional Court, in Patricia Popelier, Catherine Van de Heyning, Piet Van Nuffel (eds.), Human Rights Protection in the European Legal Order: The Interaction between the European and the National Court, Intersentia, 2011, pp.265-266.

"Art.117(1) of the Constitution therefore expressly confirmed in part what had already been the position under Art.11 of the Constitution, namely the duty of the State and regional literatures to respect the limits resulting from EU law. However, the limit on the exercise of legislative power imposed by Article 117(1) of the Constitution is only one of the relevant aspects of the relationship between the internal law and European Union law - a relationship which, considered overall and as delineated by this Court over the course of recent decades, still has a 'secure foundation' in Art.11 of the Constitution. Indeed, all of the consequences resulting from the limitations on sovereignty which only Art.11 of the Constitution allows, in both substantive and procedural terms, for the administration and the courts, in addition to the limitations on the legislature and the relative international responsibility of the State, have remained in place even after the reform. In particular, as regards any breach with the Constitution, in contrast to the position for international treaty law (sentenza 348/2007 and 349/2007), the guarantee remains that the exercise of the legislative powers delegated to the European Union is subject to the sole limit of compliance with the fundamental principles of the constitutional architecture of the State and that the greatest protection of the inalienable rights of the person be ensured (sentenza 102/2008, 284/2007, 169/2006)".

This judgment profoundly revealed that the Constitutional Court did not theoretically abandon the "strategic dualism" doctrine provided by Art.11 of the Italian Constitution. Art.117 (1) was a reaffirmation on Art.11 of the Italian Constitution, namely that the primacy of EU law originated from the principle of self-limitation on the basis doctrine of counter-limit. Although the Italian Constitutional Court deferred to the argument that a domestic provision was unconstitutional when it had conflicted with the EU law, the Court was still the ultimate arbitrator engaging into the examination of constitutionality of EU law with indirect effect. Even if the ordinary courts can fulfill its duty of referring the preliminary question to the Luxembourg Court, the Constitutional Court may still need a direct dialogue with the Luxembourg Court in some specific circumstances, particularly considering the their focal points may be different. The ordinary courts usually seek to know the continuity of the domestic and supranational law. In contrast, the Constitutional Court focuses on reconciliation of legal conflicts between the orders constitution and EU law. Hence, the strategy of "hidden dialogue" may be useless when the ordinary and constitutional judges respectively pursue to the different answers towards to a same subject matter.

In the *ordinanza* 207/2013, the Constitutional Court overthrew its previous decision again with respect to the submission to the Luxembourg Court. This case concerned whether the challenged social policy that the public teachers could not convert into a permanent employee and get the damage pay from the government conflicted with EC Directive 1999/70. In the light of that the Community Directive lacked direct effect and the dispute related to the constitutional rights, the ordinary court referred the case to the Constitutional Court. The Constitutional Court noticed the legislative choice concerned the organization of public school relating to the constitutional right to education, so it decided to engage into conversation with the Luxembourg Court.[151] Thus, in order to sweep the barrier set by the previous case-law, the Court stated that "*it must be conclude that this Court also has the status of a 'court or tribunal' within the meaning of Art.267(3) TFEU within proceeding in which it has been seized on an interlocutory basis*".

[151] Repetto, Pouring New Wine into New Bottles?, at 1462-1463.

This paragraph constitutional decision reflected the substantive need of the Constitutional Court to a qualified conversation with the Luxembourg Court in this sensitive circumstance. A plain application of the Community Directive might pose a collision to the fundamental constitutional principles regarding the right to education and the need to the maintenance of administrative competition among public workers. These worries could be easily perceived from the opinion of the Italian Constitutional Court sent to the Luxembourg Court:

"*organization requirement of the Italian school system as set out above constitute objective reasons within the meaning of clause 5(1) of Directive No.1999/70/EC of 28 June 1999 thereby rendering compatible with EU law legislation such as Italian law which does not provide for a right for damages in relation to the hiring of fixed-term school staff*".

Apart from that, it could be easily perceived that in contrast with the ordinary court usually focuses on the continuity of the internal and supranational law, the Constitutional Court at the present case mainly concerns the aspects of the national constitutional order and fundamental policies at stake. Although the Italian Constitutional Court can trigger the counter-limit doctrine towards the Luxembourg decision undermining the Italian fundamental constitutional order, the direct dialogue may be more necessary with respect to that the Constitutional Court can articulately express its basic constitutional standing and rationale in areas of the national social fundamental policies. Accordingly, the Luxembourg Court have to prudently consider these reference from the national Constitutional Court for not touching the sensitive constitutional order in their preliminary interpretation of the EU law.

4. Remarking Conclusion

Various forms of judicial dialogue are intertwined in the European multilevel of fundamental rights protection. The domestic constitutional rights and provisions are often cited by the Luxembourg Court regarding them as a fundamental source of general principles of the EU law in their decisions concerning the fundamental rights. The Luxembourg references to the national constitutional sources have enhanced the legitimacy of Luxembourg decisions because one source of fundamental rights was defined from the constitutional tradition common to the member states. However, the general principle stemmed from common constitutional traditions are usually arbitrarily synthesized by the Luxembourg judges. As to the EU fundamental rights protection, the general principles of the EU law are mainly derived from the constitutional rights commonly embodied into the Constitutions of Member States. However, it is by no means that the standard of EU fundamental rights is modeled on the majoritarian approach or common consensus, whereas the Luxembourg Court sometimes chooses the minoritarian approach or creates a new general principles by its unique approach. Apart from that, given the feature of European plural constitutionalism, the Luxembourg Court usually leaves a margin of appreciation to the member states in the cases in the absence of the relationship to internal market affairs, or only concerning the domestic public orders. In contrast, the Luxembourg Court will require the member states to strictly implement the EU law in the context of the uniform obligation of the member states, even though the EU standard of fundamental rights protection is lower than the domestic constitutional provisions.

The mechanism of preliminary reference provides a forum of judicial dialogue between the national and supranational courts under Art.267 TFEU. On one side, it promotes the European integration; on

the other side, the domestic courts can receive the authoritative interpretation of the EU law from the Luxembourg Court. Moreover, the Luxembourg Court can examine the validity of the EU second legislation under the requirement of national courts through the mechanism of preliminary reference. In a long period, the preliminary reference to the CJEU was mainly regarded as a task of the ordinary judges because the national Constitutional Courts modeled on Kelsenism was hardly treated as an ordinary courts with the competence on the application of EU law. Consequently, the European Constitutional Courts commonly held that they were not "courts or tribunals" under Art.267 TFEU before 2010s. However, with the constitutionalization of the EU law and the Lisbon Treaty coming into effect, it is not wise for the Constitutional Court to be absent in the communication to the Luxembourg Court any more, particularly in the issues concerning fundamental rights and basic constitutional orders. Obviously, the preliminary questions submitted by the Luxembourg Court have more important significance than done by the ordinary courts. The latter mainly concern the continuity of domestic law and EU law, whilst the former's questions often entail the information on the difficulties of the plain application of the EU law or its challenge to the national basic constitutional order. Moreover, since that the Constitutional Courts are commonly defined as the ultimate guardian of the state constitution, the Luxembourg Court will correspondingly take duly the particularity of the national constitutional identity into account and make the final decision in prudence.