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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

Jean Monnet Working Paper 16/08

Giuseppe Martinico

**A Matter of Coherence in the Multilevel Legal System:
Are the “Lions” Still “Under the Throne”?**

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European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship* – Second Series. The project was launched in 2006 on the following premise. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

The Second Series followed the same procedures with noticeable success of which this Paper is an illustration.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler

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A Matter of Coherence in the Multilevel Legal System: Are the “Lions” Still “Under the Throne”?

By Giuseppe Martinico*

“Let judges remember that Solomon’s throne was supported by lions on both sides: let them be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty”

Francis Bacon

Abstract

The judicial dialogue represents a privileged perspective for studying the relations between interacting legal orders, especially looking at the multilevel and pluralistic structure of the European constitutional legal order.

The aim of this paper is to focus on that particular form of judicial conversation represented by what I have endeavoured to call the techniques of “hidden dialogue” between the ECJ and the national Constitutional Courts.

By the formula “hidden dialogue” I mean that unexplored side of the relationship between the Constitutional Courts and the ECJ which feeds itself with the somehow non- orthodox ways of judicial communication (that is ways of judicial communication which are different from the preliminary ruling and which are not formalized according to the letter of the Treaties, i.e. art 234 ECT).

The final remarks of the paper will be devoted to the possible “destiny” of these techniques in the light of the latest judicial trend.

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The Structure of European Constitutional Law

The common core of the massive literature regarding the notion of European Constitution undoubtedly rests on the idea of diversity conceived as the ultimate value to be preserved in all the phases of the EC/EU integration process.

A confirmation of the correctness of this approach can be found in the maniacal reference to the notion of diversity contained in the Preambles of the Constitutional Treaty, especially the second Preamble of the Charter of Nice:

“The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels”.

In these statements, Europe is described as suspended on cultural and historical diversities conceived as a factor of spiritual richness rather than a danger for the common route.

This “tension” is highlighted in the main works devoted to European integration which find a common core (leaving the different starting perspectives out of consideration) in the acceptance of this phenomenon as *novum*.

The reflections of the most important scholars stress this aspect using different formulas: from the notion of *constitutional tolerance*¹ to that of *cosmopolitan communitarism*².

According to Weiler the main feature of Europe³ is the capability to mix a high level of legal integration with the preservation and respect of the different political identities and the sovereignty of the member States. The interpretation adopted in order to summarize this combination is the *constitutional tolerance* which corresponds to the spirit of the European

¹ J.H. H. Weiler, “European Democracy and the Principle of Constitutional Tolerance: The Soul of Europe”, in F. Cerutti and E. Rudolph (eds), *A soul for Europe*, I, Peeters, 2001, 33-54.

² R. Bellamy - R. Warleigh, *Cementing the Union: The Role of European Citizenship*, F. Cerutti and E. Rudolph (eds), *A soul for Europe*, I, 2001, Peeters, 55-72.

³ J.H.H. Weiler, , “European Democracy and the Principle of Constitutional Tolerance: The Soul of Europe”, in F. Cerutti and E. Rudolph (eds), *A soul for Europe*, I, Peeters, 2001, 33-54, 35.

peoples' voluntary acceptance of a binding discipline that was not pronounced in their name (the authority, in this case, not being founded on the existence of an European *demos*).

Bellamy and Warleigh also focus their reflection on diversity in their *cosmopolitan communitarism*, a synthesis of the communitarian and cosmopolitan perspectives on citizenship. Trying to overcome the weaknesses of the other visions, the authors stress the multilevel nature of EU, defining it as “*a multitrack polity, involving co-operation between actors with different values and concerns.*”⁴

Against this background, the identities are multiple rather than one-dimensional because the citizens of the Union are simultaneously members of several communities.

This idea of cooperation between actors characterized by different values and concerns is supported by those theories which emphasize the interpenetration between constitutional entities as the real engine of the EU's progressive constitutionalization.

Multilevel constitutionalism⁵ is exactly that: a reconstruction which captures the dynamic aspect of integration between legal orders and stresses the idea of complementarity between national and supranational levels.

According to Pernice- the inventor of this formula- it is possible to conceive of the European Constitution as a process rather than a specific document⁶.

This Constitution is the result of a steady coordination of two -national and supranational- legal orders. From a dynamical point of view this interplay (as Pernice said, the national and supranational legal systems are “closely interwoven and interdependent”, one cannot be read and fully understood without regard to the other)⁷ is well represented by Art. 6 EUT which refers to the national constitutional traditions as a part of the European legal order.

⁴ R. Bellamy -R. Warleigh, *Cementing cit.* 69.

⁵ I. Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making-Revisited?’, *CMLR*, 1999. 703-750.

⁶ F.Mayer.I.Pernice, “La costituzione integrata dell’Europa”, in G.Zagrebelsky (ed.), *Diritti e Costituzione nell’Unione Europea*, Laterza, Roma-Bari, 43-68, 49.

⁷ I. Pernice, “Multilevel constitutionalism in the European Union”, *ELRev.* (2002), 511 ff.

Whereas the “national level” is far from being homogeneous⁸ (because of the several differences existing between the member states’ legal orders) and starting from the idea that compatibility between constitutional levels facilitates coordination, we can conclude that- from a theoretical point of view- whereas the European Constitution is the result of the coordination between legal orders, the outcome of this process will depend on the national legal order taken as a parameter of coordination.

Due to the Member States’ different legal traditions such a comparison between these two levels cannot be described as typical: on the contrary different kinds of coordination can be observed.

A good example of such a horizontal diversity is represented by the coordination between national administrative legal systems and the supranational principles of European administrative law.

There have been different reactions to the European principle of proportionality, due to the characteristics of the various national orders: “refusal” in UK, “adaptation” in Italy and “mutation” in Germany⁹.

⁸ We can also find some confirmations of this lack of national uniformity in the Treaties. Art. 295 ECT, for example reads: “*This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership*”. Similarly the Charter of Nice always makes a reference to the national legal orders by dividing rather than unifying them (see, for example, artt. 34, 35, 36). All these provisions imply the acknowledgment of the horizontal diversity of the national level.

⁹ The principle of proportionality was clearly “extracted” from the German legal tradition, although the classic three-step partition (*Geeignetheit, Erforderlichkeit, Verhältnismäßigkeitsprüfung im engeren Sinne*) elaborated by the German judges is rarely respected by the ECJ (, C-96/03 e C-97/03, *A. Tempelman e Coniugi T.H.J.M. van Schaijk c. Directeur van de Rijksdienst voor de keuring van Vee en Vlees*, ECR, 2005, I-1895). A broad distinction between the cases involving EU institutions and cases involving Member States can be found in the ECJ’s activity. In the first case the ECJ seldom declares the illegitimacy of the measures. Rather, with regard to the Member States, the Court seems to insist on the reasons of integration, declaring the violation of the “loyalty duty” to the Treaties. Then the translation of the German principle in the supranational context was enriched by the French experience of the “*bilan avantages- coûts*” (costs and advantages analysis) as elaborated in the *Conseil d’Etat* case law.

Such bottom-up flows (from the national traditions to the supranational level) induced the creation of a supranational principle. As I said above, the constitutional exchange among levels is continuous and implies a second constitutional flow from the EU level to the national levels. Due to the diversification of the national legal orders we can distinguish different “spill over” effects. Galetta (D.U.Galetta, “Il principio di proporzionalità comunitario e il suo effetto di spill over negli ordinamenti nazionali”, *Nuove autonomie*, 2005, 541-557) has identified three examples of different reactions to this top-down flow. The first case is that of England where the judges refused to apply the proportionality test preferring the so called “*Wednesbury-test*” until 1998, year of the Human rights Act which represented a fundamental turn in this sense. Another example is represented by Italy, where national judges misunderstood the test of proportionality: clear proof of such a situation can be found in the confusion between reasonableness and proportionality (TAR Lecce, Bari, Sez. III, from 2483/2004 to 2493/2004, available at: www.giustizia-amministrativa.it) . Last but not least, the German case: here the same principle of proportionality comes back after the “supranational transformation” causing new evolutions in the judges’ activity in

Another case is represented by the national resistance to the European economic constitution sometimes causing the Treaties to be forced to interact with more compatible legal orders (for example, the UK) or, in other cases, with less liberalist orders (such as Italy)¹⁰

Why am I dwelling on this point? Because what seems to be neglected in Pernice's reasoning is the concrete consequence of the horizontal diversity which characterizes the national constitutions as such.

In this respect, on the contrary, the theory of constitutional pluralism seems to pay much more attention to this factor especially when looking at the *theory of contrapunctual law* by Miguel Poiares Maduro¹¹.

The system we are describing in fact does not present itself as merely plural but also as characterized by a strong constitutional pluralism and the need of interpretive uniformity against the danger of axiological fragmentation is the real challenge for those actors playing in this system.

Moreover Pernice's pattern seems not to pay sufficient attention to the gap between the letter of each level's fundamental charter and its material enforcement by the Courts, thus presenting another ambiguity.

This is evident with regard to the principle of primacy which was extracted from the spirit (and not from the letter) of the Treaties, but it is also confirmed by the national constitutional experience where the national Constitutional Courts have integrated the formal European national clauses in their case law by identifying for example some impenetrable barriers to European integration despite the absence of an explicit constitutional provision limiting the

order to adapt their case law to the supranational demands (*Gundesverwaltungsgericht*, BVerwG- Federal Administrative Court, *Deutsches Verwaltungsblatt* (DVBl) 613, 1993; *Gundesverwaltungsgericht*, BVerwG- Federal Administrative Court, *Deutsches Verwaltungsblatt* (DVBl) 68 1997).

¹⁰ The Italian case is paradigmatic because of the heavy impact of negative integration which caused the substantial abrogation of entire provisions of the Constitution.

¹¹ M.Poiars Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in N. Walker, *Sovereignty in Transition*, Hart Publishing, 2003, 501-537.

European integration itself (see the Italian, French and Spanish cases according to the Italian *Corte Costituzionale*'s doctrine of the “*controlimiti/counter-limits*¹²”).

On the contrary the theory of constitutional pluralism (especially Maduro's vision) keeps in good consideration the role that the judicial dialogue has had in building and supporting such a constitutional pluralistic (and multilevel) structure. Maduro acknowledges that the decisions of courts have a crucial role in the context he describes but, at the same time, the judicial actors are a “piece” of a bigger puzzle because “*the language of courts in defining what the law is does not become their exclusive property. It is taken over and used by a broader legal community with meanings that may be different from those originally intended*¹³”.

In other words, the courts play a fundamental systemic function and the judicial dialogue is a privileged perspective for studying the relationship between legal orders without exhausting the subject.

This last remark will allow me to shift from the general consideration I made concerning the nature and the structure of the EU legal order to the ambit of the judicial interconnections in multilevel and pluralistic systems.

At the same time, the systemic function played by the courts explains their political role in such a context: they are part of a process of political bargaining and the “*motives behind the [judicial] transactions may vary greatly. Judicial criteria are not simply a result of judicial drafting but of a complex process of supply and demand of law in which the broader legal community participates*¹⁴”.

¹² This formula was introduced in the Italian scholarly debate by Paolo Barile: P. Barile, ‘Ancora su diritto comunitario e diritto interno’ in *Studi per il XX anniversario dell’Assemblea costituente*, VI Firenze, 1969, 49.

¹³ And then: “...courts may sometimes end up saying more than they wanted to say or being interpreted more broadly than they wanted to be interpreted. Judicial decisions are not the property of courts but of the legal community and this includes other legal actors whose preferences for judicial activity may vary from those of courts”. M.Poiars Maduro, “Contrapuntual Law *cit*, 514. On the political implications of the judicial decisions see: M.Shapiro, *Law and politics in the Supreme Court: New approaches to political jurisprudence*, Sage Publications, Inc, New York, 1964; C.Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press, 1996; With regard to the ECJ see J.H.H.Weiler, “The transformation of Europe”, in J.H.H. Weiler, *The Constitution of Europe*, CUP, 1999, 10-101.

¹⁴ M.Poiars Maduro, “Contrapuntual Law *cit*, 514.

The existence of multiples sites of constitutionalism and the absence of a clear interpretative sovereignty causes that form of interpretative competition which nourishes the relationship between the ECJ and the domestic courts (especially Constitutional Courts)¹⁵.

As we know both the Constitutional Courts and the ECJ conceive their own documents (respectively the national Constitutions and the Treaties) as the highest law and claim the ultimate authority; this context was described as interpretative competition and it represents the judicial and dynamic side of the struggle for sovereignty.

Confirmation of this interpretative competition can be seen in the endeavour of some Constitutional Courts to avoid the preliminary ruling through the attempt of creating a parallel and alternative way of communicating with the ECJ.

The national Constitutional Courts have traditionally preferred to level the playing field avoiding the preliminary ruling (as ECJ's domain) because this would have implied the loss of interpretative sovereignty, given the fact that the game within the ambit of the preliminary ruling is governed by the Treaties which represent the competitor's fundamental charters (i.e. the ECJ). Concluding this theoretical part, in all the said approaches the European Constitution was conceived as the composition (or better, the interplay) of very diversified constitutional levels and in the rest of the paper I am going to focus on the judicial consequences of this interplay.

From the Structure to the Actors: Looking at the Law in Action

As I attempted to point out above, the theoretical framework supporting the need for a research like that I am proposing can be linked to the existence of a multilevel constitutional legal order and of a constitution which is perceived as the outcome of the never-ending comparison and dialectic between interdependent levels of governance (states and EU).

¹⁵On the inter-court competition as a key to read the relationship between judges see the fundamental works by K.Alter: K. Alter, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration", in A.Slaughter-A.Stone Sweet-J.H.H.Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context*, Hart Publishing, 1997, 227-252

The interplay between levels renders the idea of the non-simple distinction between the territorial actors' legislative domains.

As a matter of fact, one of the most relevant difficulties in the multilevel legal system is represented by the existence of shared legal sources which make the attempt of defining legal orders as *self contained regimes* very difficult.

This is coherent with the effort of providing an integrated and *complex* (i.e. interlaced¹⁶) reading of the levels and represents one of the most fascinating challenges for constitutional law scholars.

At the same time, as a consequence of the lack of a precise distinction within the domain of legal production, it is sometimes impossible to resolve the antinomies between different legal levels on grounds of the prevalence of a legal order (e.g. the national) on another (e.g. the supranational). Moreover, in this context, because of the inextricability of such a complex system, many legal conflicts present themselves as *conflicts of norms* (conceived as the outcome of the interpretation of legal provisions¹⁷) rather than *conflicts of laws*¹⁸.

Another interesting aspect is represented by the nature of multilevel constitutionalism, a descriptive formula which does not say which level will prevail on the others and why.

In this sense, it pays the absence of an unambiguous *primacy* clause (the scholars have identified at least four different meanings of primacy/supremacy in ECJ case law¹⁹ and the notion of primacy which came from art. I-6 of the Constitutional Treaty seemed to be different from that used by the ECJ).

¹⁶ G. Martinico, *Complexity and Cultural sources of Law in the EU context: from the multilevel constitutionalism to the constitutional synallagma*, *German Law Journal*, 2007, 3/ 2007, 205-230.

¹⁷ According to the distinction between statements (disposizioni) and norms (norme) by V.Crisafulli.V.Crisafulli, sub voce "Disposizione (e norma)", in *Enc. Dir.*, XIII, Milano, Giuffrè, 1964. 195 ff

¹⁸ J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law*, Cambridge, Cambridge University Press, 2003, 6-8.

¹⁹ See, e.g. M.Claes, *The national courts' mandate in the European Constitution*, Hart Publishing, Oxford, 2006, 100-101.

Against this background and because of the absence of an unambiguous norm of collision, the role of the judge appears as fundamental: my assumption is that such a context exalts the case-by-case judicial approach for solving legal contrasts between rules and governing the relations between judicial actors, forced to interact within relations among each other: the impossibility to operate a distinction between legal orders implies the end of interpretative autonomy for these courts, showing the other side of the sovereignty crisis conceived as *ius excludendi alios*. The judicial actors are forced to act in a relational- although not always cooperative- way.

Once more such a concept is well explained by Maduro: “*National courts when acting as EU courts have also to have a different institutional understanding of their role. They are obliged to reason and justify its decisions in the context of a coherent and integrated European legal order. In fact, the European legal order integrates both the decisions of national and European courts interpreting and applying EU law. In this context, any judicial body must justify their decisions in a universal manner by reference to the EU context*²⁰”.

The Techniques of Hidden Dialogue

After the assumption of the EC law primacy, the Constitutional Courts had to face another enigma: how could they guarantee the equilibrium between the levels as well as the dialogue with the ECJ?

Like Póitares Maduro said: “*The acceptance of the supremacy of EU rules over national constitutional rules has not been unconditional, if not even, at times, resisted by national constitutional courts. This confers to EU law a kind of contested or negotiated normative authority*²¹”.

This reveals the existence of a never-ending judicial bargaining between the domestic courts (especially Constitutional and Supreme Courts) and the ECJ and I would like to dwell on this phenomenon in this part of the paper.

²⁰M.Póitares Maduro, “Interpreting cit.”,

²¹M.Póitares Maduro, “Interpreting European Law: Judicial Adjudication in a context of constitutional pluralism”, in European Journal of Legal studies, 2/2007, available on www.ejls.eu

As we know the Irish,²² Greek,²³ Danish,²⁴ and Finnish²⁵ Supreme Courts have accepted the dialogue with the ECJ while the Constitutional Courts (except for the Belgian²⁶, Austrian²⁷, Lithuanian²⁸, Italian²⁹ Constitutional Courts) in general have avoided it. They have always preferred to be excluded from the dynamics of the preliminary ruling by refusing to define themselves as “judges” according to EC law.

On the contrary, they have raised some ultimate barriers against the penetration of EC law in order to define the fundamental principles of the legal orders of which they are the guardians. Many Constitutional Courts, in fact, do not consider themselves as judges on the basis of art. 234 ECT and have always refused to raise the question to the ECJ³⁰ in contrast with ECJ orientation.³¹

To resolve such a problem, the national constitutional justices have created some strategies to prevent communication with the ECJ from being interrupted.

Traditionally the literature has already and widely focused on the preliminary ruling as a tool of judicial cooperation between ordinary judges and the ECJ. At the same time, many authors have stressed the communicative difficulty between the ECJ and the Constitutional Courts due to the avoidance of the preliminary ruling (with the famous exceptions already mentioned).

²² 182/83 *Fearon c. Irish Land Commission* [1984] ECR 3677.

²³ 348/96 *Calfa* [1999] ECR I- 11.

²⁴ 151/78 *Sukkerfabriken Nykobing* [1979] ECR, 1147.

²⁵ 172/99 *Liikenne* [2001] ECR 475.

²⁶ *Cour d'Arbitrage*, 19th February 1997, No. 6/97, in <http://www.arbitrage.be/fr/common/home.html>

²⁷ *VfGH*, 10 March 1999, B 2251/97, B 2594/97, in <http://www.vfgh.gv.at/cms/vfgh-site>

²⁸ *Lietuvos Respublikos Konstitucinis Teismas*, decision of 8-5-2007,

<http://www.lrkt.lt/dokumentai/2007/d070508.htm>

²⁹ *Corte Costituzionale*, sentenza 102/2008, www.cortecostituzionale.it

³⁰ See Italian cases *Corte Costituzionale*, ordinanza No. 206/1976, www.cortecostituzionale.it; *Corte Costituzionale*, sentenza No. 168/1991, www.cortecostituzionale.it and *Corte Costituzionale*, ordinanza No. 536/1995, www.cortecostituzionale.it; Spanish case *Tribunal Constitucional*, sentencia No. 372/1993, www.tribunalconstitucional.es; French case *Conseil Constitutionnel*, 2006-540 DC, <http://www.conseil-constitutionnel.fr>

³¹ 54/1996 *Dorsch Consult Ingenieurgesellschaft / Bundesbaugesellschaft Berlin* [1997] ECR, I-4961.

Few analyses have been devoted, instead, to the techniques of hidden dialogue invented by the Constitutional Courts in order to assure, at the same time, the coherence of the multilevel legal order and the national constitutional autonomy.

Schematically I have identified the following techniques of hidden dialogue:

- a) introduction of a new step in the normative hierarchy;
- b) distinction between ‘primacy’ and ‘supremacy’;
- c) admissibility of *recurso de amparo* against denial of 234 ECT;
- d) *Erga omnes* effects for ECJ’s interpretive rulings;
- e) dual preliminaryity;
- f) disapplication versus non-application.

In my opinion it is possible to read these techniques in the light of the contrapunctual law³² principles: pluralism³³, consistency and vertical and horizontal coherence³⁴, universalisability³⁵ and the principle of the institutional choices³⁶.

All these principles contribute to define the judicial power as a rational and interactive power and exalt the systemic role of the courts themselves in a context of integrated and pluralistic constitutionalism.

The courts have to interact if they want to maximize the coherence of the multilevel legal order, it is convenient for them to enter the market of judicial transactions, the risk of the isolation being too high: the increasing EC law competence in several fields makes the risk to passively wait for an impact on the Member States constitutional structures too high for the national courts. The spread of EC legislation or of national laws related to EC law is accompanied by the

³² M.Poiães Maduro, “Contrapunctual law *cit.*, 525 ff.

³³ According to Maduro pluralism is mutual respect for the identity of the other legal orders and promotion of the broadest and most equal participation achievable.

³⁴ In his own words: “*When national courts apply EU law they must do so in such a manner as to make to these decisions taken by the European Court of Justice but also by other national courts*”, *Ibidem*, 528

³⁵ According to Maduro every judge in the multilevel system should be obliged to argue and justify its decisions so that the national courts have to justify their decisions “*in a manner that could be universalisable*”, *Ibidem* 530

³⁶ The institutions of each legal order must “*be fully aware of the institutional choices involved in any request for action in a pluralist legal community*”, *Ibidem* 530.

extension of the interpretive domain of the ECJ: access to interpretative competition through the attempt of contributing to the interpretation's final outcome is much better than a dangerous wait.

From the domestic courts' perspective there are two ways of cooperating with the ECJ: the former represents the "official" route provided by art. 234 ECT (although entirely "governed" by the interpretative competitor: the ECJ), the latter is the parallel and informal route whose dynamics are mostly discretionary (so both the procedures and the outcome of such a cooperation can be bargained). The second way is the one historically preferred by the Constitutional Courts : CC judges are very proud actors, jealous of their status of constitutional guardians, who perceive themselves as champion horses that do not want to participate to an ordinary championship.

All the techniques of hidden dialogue (which represents the informal way of communication) have been shaped and negotiated among courts and their extreme flexibility is the reflection of such a genesis.

- a) A first technique consists of the uncertain place assigned by the national Constitutional Courts to EC rules in the national hierarchy of sources of law. The Constitutional Court- forced to renounce to a dualistic strategy according to which EC laws are external sources to their domestic legal order- have accepted the erosion of the boundary between legal orders, by "devising" a new step (in the legal sources hierarchy) which is "super-legislative" but also "sub-constitutional": this way they guarantee the EC law prevalence over domestic law without infringing the constitutional supremacy. Such an attempt has created confusion in the Constitutional Courts' case-law itself, as the contradictions of the *Tribunal Constitucional's* findings demonstrate.

In case no. 28/1991, in fact, the *Tribunal Constitucional* used two formulas to define the normative strength of the EC law – “*non constitutional law*” and “*infra-constitutional law*” - while in other cases it used the formula “*constitutionally relevant (law)*”.³⁷

Consequently, according to the *Tribunal Constitucional*, the contrast between EC law and national law cannot be seen as a figure of the national rule’s un-constitutionality: it is a legality issue which has to be resolved by the ordinary judges³⁸. As a consequence, the reasons of EC law do not touch the national Constitution’s supremacy which remains the highest law according to the *Tribunal Constitucional*’s perspective.

The Spanish example is probably emblematic but not isolated: many Constitutional Courts, in fact, voluntarily shrink from making the hierarchical level of the EC law clear or identifying the supranational rules with some typical sources of the national legal system.

Broadly speaking, we can stress that the terminological uncertainty which characterizes the judgments being recalled is a symptom of the hierarchical criteria’s crisis which can be visually illustrated with the shift from the logics of the “*pyramide*” to that of the “*réseau*”³⁹.

Something similar happened in the UK in *Thoburn*⁴⁰ case (although in this case the main actor is the *High Court* that is something different from a Constitutional or a Supreme Court).

In his judgement Lord Justice Laws recognized the existence of a constitutional group of statutes and acts which also included the 1972 EC Act. According to his words:

“In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental [...] And from this a further insight follows.

³⁷ See *Tribunal Constitucional*, sentencia No. 28/1991, www.tribunalconstitucional.es. Concerning the terminology used by the *Tribunal Constitucional* see: C. Vidal Prado, *El impacto del nuevo derecho europeo en los Tribunales Constitucionales*, Madrid, 2004, 156-159.

³⁸ Similarly, there is an evident manipulation of the constitutional text operated by the Belgian *Cour d’Arbitrage* with regard to art. 34 of the Constitution in order to give a partial super-constitutionality to the EC law, without endorsing the competence of its guarantee.

³⁹ F. Ost - M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, Publications des Facultés universitaires Saint-Louis, 2002

⁴⁰ High Court, *Thoburn v. Sunderland City Council*, CMLR, 50.

We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b)."

The Magna Carta, the Bill of Rights 1689, the Acts of Union 1707, the Reform Acts, the Human Rights Act 1998, the Scotland Act 1998, the Government of Wales Act 1998 and the European Communities Act 1972 belong to the category of "constitutional" statutes.

Thoburn case caused a real earthquake in the English constitutional system, but looking at Laws' reasoning it is possible to appreciate a further effort to conciliate EC law primacy (now vested of constitutional *status*) and Parliamentary sovereignty.

According to Laws, in fact, the primacy of EC law is based on the Parliament's self-limitation, in other words the legal basis of the United Kingdom's relationship with the EU rests on national law provisions and not on EU law:

"There is nothing in the [European Communities Act] which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it".

b) Another example of the creative constitutional case-law is the distinction between "*primacia y supremacia*" conceived by the *Tribunal Constitucional*⁴¹:

"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"⁴²

⁴¹ *Tribunal Constitucional*, declaración 1/2004, www.tribunalconstitucional.es

⁴² *Ibidem*.

Usually the ECJ itself does not use the term “supremacy” (in *Costa Enel*,⁴³ for example, the ECJ used the words “primacy” or “precedence”).

The only exceptions in the ECJ’s case-law are represented by cases like *Walt Wilhelm*⁴⁴ and *Leonesio*.⁴⁵ Despite this terminological absence in the text of the ECJ judgements and in the Treaties, the notion of supremacy has entered the common language of lawmakers and scholars: the best example of this trend is confirmed by the debate about Art. I-6 of the Constitutional Treaty (disappeared in the Reform Treaty of Lisbon), that would have crystallised the so-called “*supremacy clause*”. The word “supremacy”, in fact, is borrowed from the term used by the American Constitution and presumes the existence of a perfect federal model and of a normative “monism”. An evident exception to this ‘linguistic trend’ is provided by the French scholarship which has preferred to use the word ‘*primauté*’ instead of ‘*suprématie*’ in order to describe the priority given to the EC law.⁴⁶

Unlike classical federal experiences, the ‘secret’ of the European Communities lies in the ‘constitutional tolerance’⁴⁷ and the consequence of such a peculiarity is the impossibility of resolving the antinomies in terms of invalidity, as the Constitutional courts have maintained for many years.

Constitutional tolerance, in fact, implies a form of voluntary obedience to the EC law, which cannot be inferred by the existence of a hierarchy between legal orders.

This conceptual distinction between *primacy* and *supremacy* is also present in many other Constitutional Courts’ case laws. According to the language used by the Spanish justices:

⁴³6/64 *Costa Enel* [1964] ECR, 1141.

⁴⁴14/68 *Walt Wilhelm* [1969] ECR 1.

⁴⁵ 93/71 *Leonesio* [1972] ECR 287. See D. Piqani, ‘Supremacy of European Law revisited: New developments in the context of the Treaty Establishing a Constitution for Europe’, paper presented at the VII World Congress of the International Association of Constitutional law, Athens, 11-15 June 2007, available at <http://www.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf>

⁴⁶But about this point see the language used by the French scholars with regard to the recent *Arcelor* judgment (*Conseil d’Etat, Assemblée Société Arcelor et autres*, 8 février 2007, http://www.conseil-etat.fr/ce/jurisprd/index_ac_ld0706.shtml)

⁴⁷ J. H. H. Weiler, ‘Federalism and Constitutionalism: Europe’s Sonderweg’ (2000) Harvard Jean Monnet Paper available at <http://www.jeanmonnetprogram.org/papers/00/001001.html>

“In principle, all supremacy implies primacy (which leads to its occasional equivalence, as in our DTC I/1992, FJ 1), unless the same supreme regulation has set forth, in some scope, its own displacement or non-application. The supremacy of the Constitution is therefore compatible with application systems which award applicative preference to regulations of another legislation other than the national legislation as long as the Constitution itself has set forth said provision, which is what happens exactly with the provision set forth in Art. 93...In short, **the Constitution has accepted**, by virtue of Art. 93, the primacy of the Union legislation in the scope inherent to said Law, as now recognized expressly in Art. I-6 of the Treaty⁴⁸”.

Here again the national judge accepted to respect the prevalence of EC law assuming that primacy rests in the acceptance and in the self-limitation of the Spanish Constitution which is conceived as the highest law.

c) As we saw above, the main feature of the techniques of hidden dialogue is their compensatory nature, they are forms of judicial compensation which characterize the market of the judicial transactions.

A clear example of this aspect is given by a very important decision of the *Tribunal Constitucional* which acknowledged⁴⁹ the exhaustibility of the *recurso de amparo* when the ordinary judge refuses to refer to ECJ ex Art. 234 ECT.

If this refusal implies the violation of a fundamental right guaranteed by the *recurso de amparo*, it is possible to proceed before the *Tribunal Constitucional* for violation of Art. 24 of the Spanish Constitution⁵⁰. By this *revirement* the *Tribunal Constitucional* has compensated the ECJ for having refused to accept the mechanism of preliminary ruling.

The *Tribunal Constitucional* specified that the refusal of raising preliminary questions to the ECJ is relevant for the admission of the *recurso de amparo* when the domestic judge is obliged to ask

⁴⁸ *Ibidem*.

⁴⁹ *Tribunal Constitucional*, sentencia 58/2004, www.tribunalconstitucional.es

⁵⁰ “En el presente caso la Sentencia impugnada, al inaplicar el recargo autonómico por supuesta incompatibilidad con el Derecho comunitario europeo, viola el derecho al proceso con todas las garantías (art. 24.2 CE) y el derecho a una Sentencia que fundamente razonablemente la inaplicación de la ley española (art. 24.1 CE). Ello se aprecia en especial cuando, como aquí sucede, se funda la decisión en la Sentencia del Tribunal de Justicia de las Comunidades Europeas de 26 de junio de 1997, que versa sobre unos puntos bien distintos de aquellos otros en que reposa la decisión de inaplicar la ley española en la Sentencia contra la que se pide el amparo, que contiene un razonamiento palmariamente insostenible que no hace sino deformar el sentido propio de los rasgos caracterizadores del impuesto sobre el valor añadido o sobre el volumen del negocio”. *Tribunal Constitucional*, sentencia 58/2004, www.tribunalconstitucional.es

the ECJ according to art. 234 ECT and when there is the lack of ECJ's precedent rulings on analogous or identical cases.

The mere refusal of raising the preliminary question does not, on its own, give rise to the possibility of using the *recurso de amparo* and in this sense the EC law continues not to have constitutional *status*.

d) The Italian Constitutional Court is particularly active in this field with expedients like the acknowledgement of *erga omnes* effects (*i.e.* the normal effects of the classical sources of law according to some scholars⁵¹) to the interpretive rulings of the ECJ and the *dual preliminaryity* (“doppia pregiudizialità”). The first technique consists of the acknowledgment of the peculiar interpretive function of the ECJ: the Italian Constitutional Court has recognized *erga omnes* effects to the ECJ's rulings in its case-law (mainly in 113/1985⁵² and 389/1989⁵³) because they share certain characteristics with the classic EC legal sources.

In the Italian Constitutional Court's reasoning, these interpretive rulings present the normal effect of the classical EC legal sources when they contain the interpretation of EC legal provisions characterized by the following effects: direct applicability and direct effect. In this way the Italian Court put the classic EC acts (regulations, directives) on an equal footing with the ECJ interpretive rulings. Following this reasoning, according to the Italian Constitutional Court, the ordinary judge's duty to non-apply the internal law contrasting with the EC law has to be extended to the case of contrast between the national law and those interpretive rulings of the ECJ. The reasoning of the Italian Constitutional Court takes as its starting point the particular position covered by the ECJ in the EC legal system.

The interpretive rulings of the ECJ would be second grade sources because they infer their legal power from the interpreted provisions.

⁵¹ A. Pizzorusso, 'Le fonti del diritto', in A. Scialoja - G. Branca (eds.), *Commentario del codice civile, Disposizioni sulla legge in generale* (Artt. 1-9), Bologna-Roma, 1977, 15. Pizzorusso tried to look at the effects of a normative act or fact, finding in its *erga omnes* effects (conceived as the opposite of the *inter partes* effects which characterize, instead, a contract) the common feature of all the sources of law in order to overcome the critiques put forward towards the theory of the general and abstract act.

⁵² *Corte Costituzionale*, sentenza No. 113/1985, www.cortecostituzionale.it

⁵³ *Corte Costituzionale*, sentenza No. 389/1989, www.cortecostituzionale.it

In fact, the Italian Court recognized the content and the effects of the classic Community sources (direct effect and direct applicability) only if the interpreted provisions have such effects.

This is an indirect recognition of the strong role of the ECJ and implies (for the national judge) the extension of the obligation of non-application of national law contrasting with the interpretive rulings of the ECJ.

- f) According to the technique of dual preliminary (“doppia pregiudizialità”)⁵⁴ the Constitutional Court could be asked to solve a question of constitutionality regarding an Italian norm in cases where such a question is strongly related to another preliminary ruling question contemporarily raised before the ECJ (either by the same or by another ordinary judge) on the meaning/validity of an EC act.

If these two questions are strongly related, the Italian Constitutional Court can decide to return the question (declaring it “inadmissible”) to the ordinary judge (536/1995⁵⁵) or “wait for” the ECJ to pronounce before judging (165/2004⁵⁶).

As we can see, the *dual preliminary* is a technique by which the Italian Constitutional Court recognizes a “priority” to the ECJ and to Art. 234 ECT questions; at the same time, it can work as a “safety valve”, as it avoids a contrast with the ECJ with regard to the possible violation of the counter-limits. In *Berlusconi* case for example the Italian Constitutional Court (165/2004⁵⁷) waited for the ECJ’s answer, preparing itself for a decision that could possibly be incompatible with its fundamental principles. All this was also caused by the ECJ’s progressive orientation to accept questions concerning *de facto* the contrast between EC law and national legislative acts (although “dressed” as interpretive questions of EC law).

⁵⁴ M. Cartabia, ‘Il processo costituzionale: l’iniziativa. Considerazioni sulla posizione del giudice comune di fronte a casi di ‘doppia pregiudizialità’, comunitaria e costituzionale’ (1997) 5 il Foro italiano, 222–225. For a very similar point of view about the dual preliminary see in English M. Cartabia, ‘Taking Dialogue Seriously’ The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union’, Jean Monnet Working paper, 12/07, <http://www.jeanmonnetprogram.org/papers/07/071201.html>

See *Corte Costituzionale*, ordinanza No.536/1995, www.cortecostituzionale.it and *Corte Costituzionale*, ordinanza No. 319/1996, www.cortecostituzionale.it

⁵⁵ *Corte Costituzionale*, ordinanza No. 536/1995, www.cortecostituzionale.it

⁵⁶ *Corte Costituzionale*, ordinanza No. 165/2004, www.cortecostituzionale.it

⁵⁷ *Corte Costituzionale*, ordinanza No. 165/2004, www.cortecostituzionale.it

Thanks to the *dual preliminary*, the Italian Court allows the ECJ to decide whether to challenge the risk of a jurisdictional “clash” or not. On the other hand it is perhaps possible to read the *Berlusconi* case as an attempt to avoid such a danger, and as a chance to show the EC system ripeness about fundamental rights.

- g) Another technique consists of the distinction between disapplication and non-application. In the Italian context, the Constitutional Court started to accept that the guarantee of the EC law’s primacy was entrusted to national judges with an important specification: technically, the judge cannot “disapply”⁵⁸ the national law contrasting with the EC act but he must “not apply” the national rule contrasting with directly applicable EC law (a regulation, in the earlier case-law,⁵⁹ but then also self-executing directives⁶⁰ and interpretive rulings concerning directly effective and directly applicable norms, see cases no. 113/1985⁶¹ and 389/1989⁶²). Disapplication, in the Constitutional Court’s reasoning, is a figure of invalidity⁶³ which would presume a hierarchical relationship between supranational and national legal orders. It would imply the subordination of the Constitutional Court to the ECJ (the hierarchy between orders which conduct to the hierarchy of Courts) while non-application is a figure of inefficacy, limited to the specific case before the national judge.⁶⁴

As a matter of fact looking at the ECJ’s former decisions we can find the idea of the disapplication as a figure of invalidity, for example, in the following statement:

“Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member State on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the

⁵⁸ 106/77 Amministrazione delle finanze dello Stato /Simmenthal, [1978] ECR 629.

⁵⁹ Corte Costituzionale, sentenza No. 170/1984, www.cortecostituzionale.it

⁶⁰ Corte Costituzionale, sentenza No. 64/1990, www.cortecostituzionale.it

⁶¹ Corte Costituzionale, sentenza No. 113/1985, www.cortecostituzionale.it

⁶² Corte Costituzionale, sentenza No. 389/1989, www.cortecostituzionale.it

⁶³ Corte Costituzionale, sentenza No.168/91, www.cortecostituzionale.it. Against this opinion see 104/86 Commission / Italy, [1988] ECR 1799.

⁶⁴ See P. Costanzo - L. Mezzetti - A. Ruggeri, *Lineamenti di diritto costituzionale dell’Unione europea*, Torino, 2006, 284.

*territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions*⁶⁵.

Conceptualizing the Techniques of Hidden Dialogue

Having a look at these techniques it is possible to notice a progressive rapprochement between the Courts (national and supranational) through non-orthodox ways which are not formalized in the letter of the Treaties and which seem to be perfectly parallel to the preliminary ruling mechanism described in art. 234 ECT.

What I would like to stress now is that all the above described dialogic techniques feature a voluntary nature, and therefore develop within a framework of spontaneous practices.

The Constitutional Courts' cooperative attitude- being based more on a need for peaceful collaboration rather than on a formal obligation- closely resembles the definition of judicial comity, as employed in international law theory⁶⁶. In Shany's words:

*“While the status of judicial comity under positive international law (custom or general principle of law) is somewhat unclear, it may derive its legal effect from courts' inherent authority to manage their proceedings in accordance with principles of justice and efficiency...a related consideration supporting the extension of judicial comity is the need to promote uniform interpretation of international treaties for the purpose of increasing their effectiveness as coordinative measures*⁶⁷”

According Yuval Shany judicial comity is a *“general legal principle, which might be applicable in cases of jurisdictional competition...according to this principle, which is found in the domestic conflict of laws norms of many countries (mostly from common laws systems) courts in one*

⁶⁵ 106/77 Amministrazione delle finanze dello Stato /Simmenthal, [1978] ECR 629. Nevertheless as a form of partial concession, the ECJ stated in Imperial Chemical Industries (para. 34): *“When deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or to disapply that legislation. Where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rule”* (264/96 Imperial Chemical Industries [1998] ECR I-4695).

⁶⁶ F.Fontanelli in F.Fontanelli-G.Martinico, “Focusing on courts: the techniques of hidden dialogue in the multilevel system”, in F.Snyder (ed.), *The evolution of the European Courts: institutional change and continuity*, proceedings of the 6th International Workshop for Young Scholars (WISH), Bruylant, forthcoming, 2009.

⁶⁷ Y.Shany, *Regulating jurisdictional relations between national & international courts*, OUP, 2007,172-175.

*jurisdiction should show respect and demonstrate a degree of deference to the laws of other jurisdictions, including the decisions of judicial bodies operating in these jurisdictions*⁶⁸”.

The principle of comity is important because it alleviates the difficult aspects of jurisdictional competition by encouraging the judges to accommodate related procedures, “*in other words, this principle represents a strategy for soft coordination and harmonization between the entire gamut of jurisdictional configurations*”.

Although this “*general legal principle*” was conceived with regard to the interactions among domestic courts, today it is used to describe their jurisdictional relationship with international law.

Moreover, today “*the comity should arguably be acknowledged as a positive device in the promotion of the systematic nature of international law*⁶⁹”.

Within this scenario of judicial dialogue the policy considerations are essential⁷⁰ and according to the logics of constitutional bargaining they reflect systemic choices which are influenced by the system and, in turn, influence the system.

Even though the ECJ is the Court for a particular legal order (which is neither international nor constitutional), many contributions concerning the relationship between the ECJ and the other international tribunals can be found⁷¹.

Shany himself in his latest book “applies” the notion of judicial comity to the interactions between Constitutional Courts and ECJ without (unfortunately) examining the concept thoroughly⁷².

⁶⁸Y.Shany, *The competing jurisdictions of International Courts and Tribunals*, OUP, 2003, 260.

⁶⁹Y.Shany, *The competing cit*, 261.

⁷⁰ Y.Shany, *Regulating Jurisdictional Relations Between National and International Courts*, OUP 2007, 167

⁷¹See, for example, among the other contributions the issue No.2/2007 of the European Journal of Legal Studies, especially: P.M.Dupuy, “The Unity of Application of International Law at the Global Level and the Responsibility of Judges”, and U.Petersman, “Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with ‘Principles of Justice and International Law’”? The EJLS is available at: <http://ejls.eu/>

⁷²Y.Shany, *Regulating cit*,181.

In one of his recent papers, Allan Rosas⁷³ proposed a very interesting schematization of the relationships between Courts focusing in particular on the ECJ “position”.

According to him, it is possible to identify five categories of judicial dialogue: vertical (e.g. ECJ and CFI), semi-vertical (e.g. ECJ and ECHR or ECJ and WTO Appellate body) and horizontal (formally ECJ and EFTA Court) relationships, cases of overlapping or competing jurisdictions (e.g. ICJ and the Law of the Sea Tribunal in Hamburg) and- last but not least- cases of “*the special relationship which exists between the ECJ and national courts of the EU Member States faced with problems of interpretation or validity of EU law, notably Community ‘First Pillar’ law*”⁷⁴.

I would immediately stress two elements in Rosas’ reasoning: first of all, the peculiar nature of judicial interactions between ECJ and national judges in the first pillar; secondly, the lack of distinction between national ordinary judges and Constitutional Courts.

The first element also explains why this paper does not focus on the judicial conversation in a very controversial field like the third pillar which is currently characterized by a sort of judicial clash between ECJ and Constitutional Courts with regard to the European Arrest Warrant framework decision⁷⁵.

⁷³A.Rosas, “The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue”, in EJLS, 2007, <http://ejls.eu/index.php?mode=htmlarticle&filename=./issues/2007-12/RosasUK.htm>

⁷⁴*Ibidem*

⁷⁵ Despite the current constitutionalization or de-pillarization after decisions like *Pupino* I think we need to distinguish between the interpretative position of the ECJ respectively in the first and the third pillar .

Stressing similarities and differences between the first and the third pillar, some scholars have tried to compare the mechanism of the preliminary ruling described by art. 234 ECT and art. 35 EUT.

My impression is that confirmation of the ECJ’s different interpretative positions in the third pillar can be found through the comparison between these two provisions.

According to art. 35 the ECJ jurisdiction over the interpretation of the framework decisions is “*optional*” (par.2 art. 35) because it provides the possibility for the Member States to “*postpone jurisdiction and to declare unilaterally the ECJ will not have jurisdiction over a particular case*”.

The ECJ jurisdiction is strongly circumscribed by par. 1, 6 and 7 of art. 35 EUT and “excluded” from certain areas by par. 5 of the same article (F.Munari-C.Amalfitano, “Il ‘terzo pilastro’ dell’Unione: problematiche istituzionali, sviluppi giurisprudenziali, prospettive”, in *Il Diritto dell’Unione Europea*, 4/2007, 773-809, 780-784). Art. 35 par. 3 acknowledges another faculty for the States: that of deciding whether the preliminary questions can be raised by all national judges or only by those “*against whose decisions there is no judicial remedy under national law*”.

“*Even when the member state has made a declaration accepting the jurisdiction of the Court, Article 35 EU, unlike Article 234 EU, does not make the preliminary reference mandatory for courts against which there is no judicial*

Unfortunately there is no room to dwell on the distinction between common national judges (“giudici comuni”, i.e. ordinary and administrative judges) and national Constitutional Courts (seen as “*negative legislators*”⁷⁶) and one could say that behind the jurisprudence of the Constitutional Courts concerning the avoidance of the preliminary ruling there are considerations of “constitutional policy” (i.e. the need to guarantee the autonomy of their legal order’s fundamental principles).

This is probably true but I would like to base my reasoning on empirical evidence of the words used by the Constitutional Courts themselves to avoid the proceeding governed by art. 234 ECT in decision n. 536/1995 the Italian Constitutional Court denied raising the preliminary question to the ECJ because its functions are not jurisdictional in nature, since its tasks are of “*constitutional control, the supreme guarantee of the Constitution*”⁷⁷”.

In the last part of the paper I will try to contextualise the possible implications of the generalized *revirement* of many constitutional actors on the survival of the hidden dialogue techniques.

Stepping back to the comity principle and looking at the European judicial dialogue, one could find other analogies with the general principles which govern the jurisdictional relations between courts.

Being forced to deal with this constitutional diversity, the ECJ has adopted a strategy that reminds us of the attitude of other international Courts, following the *doctrine of margin of appreciation*⁷⁸.

remedy” (E.Spaventa, “Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Ruling in Pupino”, in *European Constitutional Law Review*, 2007, 5-24, 8). These factors jeopardize the provision’s interpretive and applicative consistency .

Moreover par. 6 of art. 35 EUT disciplines the reviewability of the decisions and framework decisions acknowledging only for the States and the Commission the faculty of instituting proceedings against (differently from what provided by art. 230 ECT provision).

Another difference is given by the absence of a provision similar to art. 231 ECT which disciplines the effects of ECJ judgements (F. Munari-C.Amalfitano, “Il ‘terzo pilastro’ cit”⁷⁸⁴).

⁷⁶ H.Kelsen, “Wer soll der Hüter der Verfassung sein?” in *Die Justiz*, 1930-1931, Heft 11-12. bd. VI 576-628, Italian translation . “Il custode della costituzione”, in H.Kelsen, *La giustizia costituzionale*, Giuffrè, Milano, 231-291, 256.

⁷⁷ See decision 536/1995, www.cortecostituzionale.it .

⁷⁸“*The doctrine of the margin of appreciation, as developed by the European Court of Human Rights (ECtHR), is an interpretational tool by which the court can delineate between what is properly a matter for each community to*

According to Shany⁷⁹, the doctrine of margin of appreciation is based on two core elements:

- a) judicial deference. The courts should grant each other a certain degree of deference and respect each other's discretion.
- b) Normative flexibility. Those international norms subject to this doctrine can be characterized as being open-ended or unsettled. Such norms provide the States with limited guidance and establish a broad zone of legality within which they are free to operate.

“Application of margin of appreciation doctrine depends on a variety of factors: a) the comparative advantage of local authorities-broader margins are afforded to local authorities with respect to questions they are better situated to assess (eg. Local moral sensitivities); b) the indeterminacy of the applicable standard- broader margins are granted over issues lacking a European consensus; and c) the nature of the contested interests- broader margins are granted when more important national interests are at stake and the alleged violation appears less fundamental”

This doctrine requires a certain attention to the legislative and factual situation of the national order involved in the case, and implies the need - for the ECJ - to immerge itself in the constitutional structure of the national laws in order to make a preventive evaluation of its judgments.

This would require a case-by-case approach by the ECJ and a more frequent use of comparative law tools before the EC judge in order to evaluate the nature of the contested interests, the specificity solution of the domestic legal order and the possible impact of its decision on this legal order.

In this context the comparison plays a fundamental role:

“The methodology of comparative law to be employed by the Court has, therefore, to balance the respect of national legal traditions with the need to accommodate them to the specific needs of the EU legal order...in other words, it is not simply a question of determining what legal solution is common to the national legal orders. It is also, or mostly, a question of determining what legal solution fits better with the EU legal order (in the light of its broader set of rules and principles and of its context of application).

decide at the local level and what is so fundamental that the same requirements are imposed on every State, regardless of variations in culture”. A. A. Ostrovsky, ‘What’s So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals’ (2005), 1, *Hanse Law Rev.*, 47-64.

⁷⁹ Y.Shany, *Regulating jurisdictional cit.*, 185.

*Comparative law becomes, in this way, one more instrument of what is the prevailing technique of interpretation at the Court: teleological interpretation*⁸⁰.

We can find a confirmation of such an approach in the latest judgements dealing with the issue of the State liability in case of breach of the EC law. In *Konle*⁸¹:

“The answer to the fourth question must therefore be that, in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled”.

At the same time, it is possible to read *Grant*⁸² and *P v S*⁸³ coherently by looking at the different impact of the ECJ’s decisions on the factual background. In those cases it was self-evident that the acknowledgement of rights to homosexual couples would have had much worse financial repercussions on the Member States than those caused by the possible acknowledgement of transsexuals’ rights. Consequently, such a decision would have been less understood by the States.

The ECJ well plays its role of systemic actor when it pays attention to the impact of its decision on the member states and to the current phase of European integration, for example in *Grant*:

*“In the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex, and an employer is not therefore required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex. It is for the legislature alone to adopt, if appropriate, measures which may affect that position”*⁸⁴.

These are only two examples of the attention given by the ECJ to the constitutional structures of

⁸⁰ M.Poiars Maduro, “Interpreting European *cit*.”

⁸¹ 302/97 *Konle* [1999] ECR I-3099.

⁸² 249/96 *Grant c. South west trains Ltd* [1998] ECR I-621.

⁸³ 13/94 *P / S and Cornwall County Council* [1996] ECR I-2143. See O. Pollicino, ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint’ (2004) 5 *German Law Journal*, 3, <http://www.germanlawjournal.com/article.php?id=402>

⁸⁴ See also the *Dynamic Medien* case: “...it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it (see, by analogy, *Omega*, paragraph 37). As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion”. *Dynamic Medien Vertriebs GmbH*, C-244/06, in www.curia.eu.int

the Member States and they can be seen as a strong hint of a judicial comity attitude by the Court and recently, the ECJ has demonstrated a tendency to allow for national constitutional traditions and structures which are not common to all Member States, but specific to one Member State (*Azores*⁸⁵, *Omega*⁸⁶).

Final Remarks on the Destiny of Techniques of Hidden Dialogue in the Future

As we have already recalled after the example given by the Belgian, Austrian and Lithuanian Courts have accepted the logics of the preliminary rulings raising interpretive rulings to the ECJ. Recently one of its most famous rival- the Italian Constitutional Court- decided to raise the question to the ECJ.

The general and latest trend seems thus to confirm a sort of general *revirement* of the Constitutional Courts with regard their mandate in the multilevel constitutionalism: from interacting but at the same time rival actors against the blind primacy claimed by the ECJ they are changing their behavior, becoming *stricto sensu* cooperative agents.

The literature has already pointed out that there are two factors that have induced the Constitutional Courts to avoid the preliminary ruling; the first can be inferred from a passage contained in the very famous *Solange I*⁸⁷:

“The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level”.

According to the German Constitutional Court the democratic *deficit* is therefore seen as the cause of the presumed lack of rights’ protection at EC level (which represents that was called by the scholars the “axiological issue⁸⁸”).

⁸⁵ *Portugal / Commission*, ECR, 2006, I-7115, especially paras. 62-67.

⁸⁶ *Omega*, ECR, 2004, I-9609, paras. 34-35, 39-41. On *Omega* see Alberto Alemanno, ‘À la recherche d’un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur. Quelques réflexions à propos des arrêts Schmidberger et Omega (2004), 4, *Revue du droit de l’Union Européenne*, 709-751.

⁸⁷ *BVerfGE* 37, S. 271 ff.

⁸⁸ For a similar distinction see M.Cartabia, *Principi inviolabili e integrazione europea*, Giuffrè, 1995.

Beside the axiological side there was the “institutional issue”: the Constitutional Courts, as we saw, did not want to lose the interpretive power, conceiving the preliminary ruling as the end of their interpretive sovereignty.

Stepping back to the axiological issue, the Constitutional Courts themselves have changed their position acknowledging the progressive “transformations” of EC law⁸⁹.

The fact that the Constitutional Courts have not ever put such counter-limits theory into practice can be partially explained by the progressive constitutionalisation of the EC law.

Normally by the formula “constitutionalisation” of the EC legal order, the authors⁹⁰ mean the progressive shift of the EC law from the perspective of an international organization to a federal State perspective. At the same time “constitutionalisation” can be used to describe the progressive “humanization” of the law of the common market.

It is a very famous story which started with judgements like *Nold*,⁹¹ *Stauder*⁹² and was enriched, in the latest years, by judgements like *Omega* and *Berlusconi*.⁹³

In *Omega*,⁹⁴ the Court said, for example, that: “*It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures*”.

⁸⁹Despite the strictness shown in their sentences, in fact, the Constitutional Courts have never used this “weapon” in the field of EC Law and in the recent years the German *Bundesverfassungsgericht* changed its position by substituting the case by case control (hypothesized in *Solange I*) with an abstract control of the general compatibility of EC law with the demands of the protection of rights (*Solange II*, *Maastricht*, *Banana*).

⁹⁰For example M. Cartabia - J. H. H. Weiler, *L'Italia in Europa*, Bologna 2000, 73. About the ambiguity of the notion of constitutionalisation in EC/EU Law see: F. Snyder, 'The unfinished constitution of the European Union', in J. H. H. Weiler - M. Wind (eds.), *European constitutionalism beyond the state* (Cambridge University Press, 2003); B. Rittberger - F. Schimmelfennig, 'The Constitutionalization of the European Union. Explaining the Parliamentarization and Institutionalization of Human Rights', in <http://www.princeton.edu/~smeunier/Rittberger&Schimmelfennig%20Princeton%20memo.pdf>

⁹¹4/73 *Nold* [1974] ECR 491.

⁹²29/69 *Stauder v. City of Ulm* [1969] ECR 419.

⁹³387/02 *Berlusconi and others* [2005] ECR I-3565.

⁹⁴36/02 *Omega* [2004] ECR I-9609, par. 41.

This statement should be read as the final line of a long run, which started after *Solange I*. *Omega* judgment intends to demonstrate (not by coincidence, before a German judge) the ripeness of the EU legal system and, in general, the outcome of the constitutional dialogue with national interlocutors. Something similar happened in the *Berlusconi*⁹⁵ case (before an Italian reference).

These argumentations are probably supported by strategic (and persuasive) reasons, also due to the broad notion of human dignity and of the retroactive application of the lenient penalty assumed by the Court; anyway it is clear that such decisions are the result of a long conversation with the national courts.

This process of convergence between the languages of the (national and supranational) courts has contributed to the creation of a common axiological field between the different (constitutional) legal orders. This common axiological field can be described as the “heart” of multilevel constitutionalism.

The rapprochement between legal orders is confirmed by the ‘structural continuity’ between common constitutional traditions and counter-limits. From a theoretical point of view, in fact, the counter-limits are related to the input of the Community legal materials in the inner order; the common constitutional traditions, instead, are related to the input of domestic legal materials in the European legal order. Apparently they both follow opposite routes and are inspired by different rationales: the former by the rationale of integration while the latter by the rationale of constitutional diversification. However, as stressed by Ruggeri⁹⁶, thanks to the hermeneutical channel represented by the preliminary ruling, the constitutional principles of the domestic legal orders arise from their origin (national level) and become common sources of EU Law; then these common constitutional traditions return to the origin in a new form when they are applied

⁹⁵ 387/02 Berlusconi and others [2005] ECR I-3565.

⁹⁶ A. Ruggeri, “Tradizioni costituzionali comuni” e “controlimiti”, tra teoria delle fonti e teoria dell’interpretazione’ (2003), 1, *Dir. Pub. Comp. e Eur.*, 102-120, the best example of such a dynamic is provided by the EC principle of proportionality as we saw above.

by the ECJ⁹⁷.

This progressive communitarization of national fundamental principles can be seen as another limit to the EU law primacy, as the scholars have stressed reading together Artt. I-5 (Art. 4 of EUT after the Reform Treaty of Lisbon) and I-6 of the Constitutional Treaty (disappeared in the Reform Treaty of Lisbon): in Art. I-5 of the Constitutional Treaty, in fact, we can find the proof of the counter-limits theory's communitarization as a result of the judicial dialogue between the Constitutional Courts and the ECJ⁹⁸.

With regard to the second issue (the institutional one) it is very hard to say what persuaded the Constitutional guardians to change their mind because this cooperative trend of the Constitutional Courts is very recent.

As we saw the Constitutional Courts try to defend their jurisdiction and prerogatives by inventing complicated mechanisms (dual preliminary; *erga omnes* effects of the interpretive judgments; disapplication vs. non application) in order to balance the rationale of the jurisdictional dialogue with the rationale of the constitutional identity.

The situation described above results in a state of obliging instability that conceals a *de facto* synergy, despite formal and rhetorical calls for contrast.

As Panunzio⁹⁹ said, the counter-limits represent an instrument to force the courts to

⁹⁷ Emblematically the ECJ in *Omega*: “The Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories”.

⁹⁸ The model of Art. I-5 is undoubtedly represented by Art. 6 EUT (‘current’ version), which efficaciously described the proximity between common constitutional traditions and national fundamental principles: in this article, in fact, these two kinds of legal sources (common constitutional traditions and national fundamental principles) are mentioned in two subsequent paragraphs.

Here it suffices to recall the reference that Art. 6 (‘current’ version), para. 2 makes to the common constitutional traditions, and the reference to the “national identities” of its Member States that is set in para. 3 of Art. 6. I argue that within a legal context, by the formula “national identities”, the European legislator meant the constitutional identities of the Member States, that is the counter-limits, as defined by national constitutional courts. In this sense we can say that Art. I-5 of the Constitutional Treaty has only expressly codified such an interpretation by speaking about “constitutional structure” and in this way it delivered the interpretation of the counter-limits to the ECJ.

⁹⁹S. Panunzio, “I diritti fondamentali e le Corti in Europa”, in S.P.Panunzio (ed.), *I diritti fondamentali e le Corti in Europa*, Napoli, 2005, 1-104, 104.

communicate, they are like a “gun on the table” which induces the jurisdictional actors to interact and compare their visions.

Perhaps the possible communitarization of the EC counterlimits themselves can be seen as the factor which has induced the constitutional courts to accept the cooperative way.

Given that the ECJ has expressly begun to use the national constitutional material to shape the common constitutional traditions and the principles of EC/EU law, it can be very dangerous for the guardians of those national principles to attend passively to such an interpretation.

The building of a common “currency” the judicial transactions¹⁰⁰ could be seen as the real motive of a strategy change from the Constitutional Courts’ perspective.

My suspicion (but we will see what the future says) is that the communitarization of counterlimits has partially made “vain” the trigger-strategy of the Constitutional Courts, at least with regard to the first pillar while different considerations have to be made about the third pillar where the judicial clash on the counter-limits seem to be “exploded”¹⁰¹.

What about the techniques of hidden dialogue in such a context? It will depend on the specific reasons which conducted some Constitutional Courts to enter the mechanism of preliminary ruling, in this sense the Italian case is very useful.

¹⁰⁰ Which is represented by the language of fundamental rights and by the will to participate in determining it.

¹⁰¹ Recently the decisions of the Polish (*Trybunał konstytucyjny*, P 1/05, in <http://www.trybunal.gov.pl/eng/index.htm>) and German (*BVerfG*, 2 BvR 2236/04, in <http://www.bundesverfassungsgericht.de/en/index.html>) Constitutional Courts (but also see the decisions of the Cypriot- *Ανώτατο Δικαστήριο*, 294/2005, in www.cylaw.org and Czech- *Ústavní Soud*, Pl. ÚS 66/04, in http://test.concourt.cz/angl_verze/cases.html- judges), which have recalled the question of the ultimate barriers in the field of the European arrest warrant. J. Komarek, ‘European Constitutionalism and the European Arrest Warrant: in search of the limits of contrapunctual principles’, Jean Monnet Working paper, 10/05, <http://www.jeanmonnetprogram.org/papers/05/051001.html> See O. Pollicino, “EU Enlargement and European constitutionalism in a global context”, paper presented at ELINIS Conference, New York University, 19-20 May

On April 15th 2008, for the first time in its history, the Italian Constitutional Court agreed to raise a preliminary question to ECJ¹⁰² and this decision (102/2008) presents elements of both continuity and rupture with the previous ECJ's case-law.

A continuity point is represented by the firm distinction between between *principaliter* and *incidenter* proceedings¹⁰³ with specific regard to the “use” of EC law in the Italian Constitutional Court's activity.

The above mentioned judgment was pronounced in a *principaliter* proceeding, where the Italian Constitutional Court acts as the “true” judge of the controversy, as opposed to the *incidenter* proceedings, where the “true” judge of the question is the *a quo* national judge.

The *principaliter* proceedings represent one of the exceptions to the diffuse review of consistency between domestic and Community law (i.e. the ordinary or administrative judges have to monitor the consistency between domestic and EC law).

According to decisions no. 384/1994 and no. 94/1995,¹⁰⁴ indeed, a centralized decision (i.e. decided by the Italian Constitutional Court) could be envisaged when a question of consistency between national and EC law was raised before the Italian Constitutional Court via the *principaliter* proceedings (both by the Regions and by the State).

¹⁰²Corte Costituzionale, *ordinanza* 103/2008, www.cortecostituzionale.it The decision commented is, instead, sentenza 102/2008 issued on the same day.

¹⁰³ According to the Italian Constitution the legislation's constitutional review can be triggered and pursued in two different ways: the *incidenter* proceedings and the *principaliter* proceedings.

In the *incidenter* proceedings a *a quo* judge (either ordinary or administrative) can raise the question of constitutionality (i.e. of consistency between the Italian law and the Constitution) before the Constitutional Court during a trial.

The Constitutional Court can regard the question as admissible only if it is “relevant” (i.e. significant for the solution of the case) and non-manifestly groundless.

On the contrary, the *principaliter* proceedings is regulated by Art. 127 of the Italian Constitution, that reads:

“(1) Whenever the government regards a regional law as exceeding the powers of the region, it may raise the question of its constitutionality before the constitutional court within sixty days of the publication of the law.

(2) Whenever a region regards a state law, another act of the state having the force of law, or a law of another region as infringing on its own sphere of powers, it may raise the question of its constitutionality before the constitutional court within sixty days of the publication of said law or act.”

¹⁰⁴Both on www.cortecostituzionale.it

In particular, in case no. 384/1994 the Italian Constitutional Court acknowledged that, due to the particular dynamics of the *principaliter* proceedings (where the role of the ordinary judge - who normally guarantees the respect of EC law - is irrelevant), its refusal to rule on such questions would have implied a dangerous gap in the protection of rights, and a breach of the legal certainty principle.

Therefore, it can be said that, due to the *principaliter* proceedings unique feature, the possibility to involve the Constitutional Court is justified only because the ordinary judge, who is the natural guardian of EC law primacy at domestic level, is totally missing from the scene.

This is not an irrelevant detail: as we know the role of the common national judges is fundamental to the functioning of both the *incidenter* proceedings before the Italian Constitutional Court and the preliminary reference mechanism before the European Court of Justice: they are the doorkeepers¹⁰⁵ entrusted with the initiation of both proceedings, and their cooperation is essential for the work of both the “higher” Courts.

We saw above that the technique of dual preliminary is based upon a judicial triangle: the national referring judge is due to raise two related questions to the European Court of Justice and to the Constitutional Court. As obvious, this can be true only in the framework of the *incidenter* proceedings which apparently is not taken into consideration in the judgement of the Italian Constitutional Court.

And frankly I would not be sure about automatically extending to the *incidenter* proceeding the conclusions reached by the Italian *Corte Costituzionale* with regard to the *principaliter* proceeding: in the wake of an interpretive competition logic, such an extension could lead to the loss of control on the national common judges (and we know how fundamental they are for the Italian Constitutional Court’s activity).

¹⁰⁵ To quote P.Calamandrei, “Lettera dedicatoria al prof.Enrico Redenti” in P.Calamandrei, *La illegittimità costituzionale delle leggi nel processo civile*, Padova, Cedam, 1950,XII

The decision is also relevant as regards two other hidden techniques: whilst it seems to overlook the distinction between non-application and disapplication¹⁰⁶, it agrees upon the theoretical grounds of the separation between *primacy* and *supremacy*, when it gives a description of the domestic and supranational legal orders as being two autonomous systems, although integrated and coordinated¹⁰⁷.

Nevertheless it is too early to foresee what will happen also by taking into account the nature of the hidden dialogue which is characterized by a high level of “discretion”: the interpretive struggle we have seen between courts was deeply influenced by the historical period it was set into, and in the future different conditions will most probably lead to different behaviours, in consistency with the dynamics of the comity principle.

In other words, often judicial cooperation must be set into an egoistic framework, given that the reasons triggering comity could well be the same that, in other occasions, determine the rise of competition between courts¹⁰⁸.

¹⁰⁶ In the judgment the Italian Constitutional Court uses the term disapplication.

¹⁰⁷ Corte Costituzionale, sentenza 102/08, www.cortecostituzionale.it Compare with the case 170/84 where these two legal orders were defined as “*autonomous and separated, although coordinated*”

¹⁰⁸ J. Allard and A. Garapon, *Les juges dans la mondialisation*, Seuil, 2005