QUESTIONING 'PRIMACY': A PROPOSAL FOR A SYSTEMATIC UNDERSTANDING OF 'IDENTITARIAN ARGUMENTS' IN NATIONAL CONSTITUTIONAL CASE-LAW

La «primacía» a debate: una propuesta para una comprensión sistemática de los «argumentos identitarios» en la jurisprudencia constitucional nacional

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Abstract

Multiple national constitutional courts are raising 'identitarian arguments' to counter primacy as the 'fundamental constitutional and political structure' of the State concerned comes at stake. This work questions whether such arguments are acceptable, and to which extent, from the perspective of the evolution occurred in legal interpretation during the European integration process. It appears that their persuasiveness is the most intense if they are designed as rights to resist aiming to protect and restore the overall constitutional balance the Union has achieved. In this vein, violations of substantive rights and interests should be considered in relation with the respective procedural breaches to national sovereignty. As long as both such elements are involved, identitarian arguments, albeit preventing uniformity in the application of Union law, do not preclude further integration but keep it in line with the balance

that underpins the Union's constitutional arrangements; therefore, they must be held consistent with the law governing the Union's legal-political space.

Keywords

Primacy; Constitutional Identity; National Constitucional Courts; Conferral; Sovereignty; Fundamental Rights; Comparative Constitutional Justice.

Resumen

Al resultar en peligro la «estructura fundamental política y constitucional» de un Estado, un número creciente de Tribunales constitucionales nacionales plantea «argumentos identitarios» en oposición a la «primacía» del derecho de la Unión. Este trabajo quiere averiguar en qué medida estos argumentos sean «aceptables» a la luz de la evolución de los criterios interpretativos del Derecho que el proceso de integración europea ha provocado. Resulta que la fuerza de persuasión de dichos argumentos es máxima si se presentan como «derechos de resistencia» capaces de proteger y restaurar el equilibrio constitucional general que la Unión ha alcanzado: a este arreglo, cada violación de derechos e intereses sustanciales debe ponerse en relación con la respectiva infracción formal a la soberanía nacional. Mientras ambos estos elementos estén involucrados, los argumentos identitarios, pese a prevenir la aplicación uniforme del derecho de la Unión, no impiden el camino de la integración sino guardan su correspondencia con la constitucionalización de la Unión, y por ello han de considerarse compatibles con el derecho del espacio jurídico-político europeo.

Palabras clave

Primacía; Identidad Constitucional; Tribunales constitucionales nacionales; Principio de atribución; Soberanía; Derechos Fundamentales; Justicia constitucional comparada.

SUMMARY

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I. INTRODUCTION: PRIMACY AS THE TOOL OF THE INTEGRATION

When introducing his recent study on constitutional identity, Luke Dimitrios Spieker (2020: 361) sympathized with the reader's exhaustion for facing a further essay on that topic, which 'adds another layer of complexity' to a yet complicated debate. The truth is nevertheless that the complexity is there, and such studies undertake a meritorious task: shedding light on the 'tangled relations' (Martinico, 2013: 36) between the Union and the Member States. This work immodestly wishes to cooperate in the same enterprise.

The objective of this research is a systematic understanding of the arguments raised by the national courts – dubbed *identitarian* arguments, whether 'identity' is explicitly referred to (Weiler & Lustig, 2018: 315) – against Union law's 'priority-in-application', as the *Bundesverfassungsgericht* aptly calls primacy (Kokott, 1997: 120). Then, 'questioning primacy' comes with assessing whether, and to which extent, such arguments are acceptable (von Bogdandy, 2016: 529).

After *Internationale Handelsgesellschaft*[1] primacy has extended to national constitutional laws, too, which entailed the rise of a *European constitutional law* governing a *single European polity* (Balaguer Callejón, 2020: 202). Yet, a slight, but clear, subversion of the cause-effect relation emerges in comparison with national constitutional law: relations among acts precede, rather than follow, relations among orders. In other terms: should State-based constitutional categories apply, primacy would logically-chronologically follow the rise of a European constitutional law – rather than the opposite, as it is the case.

Reasons for this subversion lie in the law of the Union being an 'after-State' law, in which political authority is not given *a-priori* but is the object of perennial questioning. Two are the corollaries of this peculiarity.

First: what has been presented as the constitutional law of a single European polity is, more precisely, the law governing a space of competing political authorities and orders that were settled in the aftermaths of WWII. Ideally, for such a constitutional law to exist, claims stemming from such authorities-orders would have to peacefully cohere with one another, so that the socio-political-economic arrangements enshrined in the *post*-WWII constitutions find their consolidation at the supranational level. This was, in fact, the mission conferred on Europe since the Schuman Declaration:[2] to settle peace and prosperity within and among the Member States while preventing the Nazi-fascisms' comeback – a mission, indeed, first accomplished by the States' afterwar constitutions that the European project was to stabilize and transpose at a supranational level. Conversely, if such a coherence were disrupted, Europe's integration would turn into a constitutional mutation steering the Union far away from that peace-and-prosperity oriented settlement, which would jeopardise the Union's very *telos* while perturbing the fragile *post*-WWII political compromise within and among the Member States themselves.

Second, debates on the 'form of the Union' (Ibrido & Lupo, 2019: 9) i.e., on the constitutional arrangements of Europe as a single polity, hardly work as reference to assert whether the abovementioned coherence can be presumed, and primacy accepted unconditionally. In fact, whether, and to which extent, the need for such coherence translates into legal arguments constraining primacy is not a question of 'whether the Union must be seen as a federation, or anyway as a single polity' but a matter of legal interpretation in the passage

1 Court of Justice, Case 11/70, *Internationale Handelsgesellschaft*, 17 December 1970, ECLI:EU:C:1970:114.

2 Declaration presented by French Foreign Affairs Minister Robert Schuman on 9 May 1950.

from State-based (national-international) to 'after-State' (supranational) law. Therefore, despite their magnitude and obvious inherence to the topic, neither discourses on 'identity' nor theoretical accounts of Europe as a single polity – whether monist, pluralist, or otherwise construed – are dealt with in this work. While 'identitarian' arguments are simply all arguments crafted to question primacy, the relations between States' and Union's normative claims only refer to legal interpretation. Thus, they operate independently of what option is selected among 'available accounts of the integration process, and regardless of the specific direction allegedly taken by each national constitution' (Larsen, 2021: 477) although one is tempted to check their compatibility with each of them – which would nonetheless require a separate piece of work.

II. BACKGROUND: UNCONDITIONED PRIMACY?

Union law claims primacy over national constitutional laws as a result of an allegedly consolidated duty for national courts to abide by the rulings of the Court of Justice. Two are the main arguments maintaining the unconditioned nature of such a duty.

1. SUPPORTING UNCONDITIONED PRIMACY: ESTABLISHED PRACTICE AND CONSTITUTIONAL MATURITY

First: *established practice*, which is a twofold argument; advocates thereof claim that a practice of this sort must be considered settled (Arena, 2018: 300) and that it is also consistent with the practice of the international treaties establishing so-called 'internal primacy' – i.e., the priority of their own norms over national norms (de Witte, 1984: 425).

Second: *constitutional maturity*, which unfolds along a threefold line. First: the dispute on priority is a fatiguing perpetuation of the 'sovereign' question, which proves inappropriate in light of the accomplished constitutionalisation (Rodríguez Iglesias and del Valle Gálvez, 1997: 239) – as it could be inferred from national constitutions, too (Lupo, 2020: 379). Second: were it not so, unjustified discriminations would be allowed between a State seeking to skip the application of Union law and all the other States having to respect it nonetheless (Fabbrini, 2015: 1022 and Kelemen, 2016: 139) which would be unsustainable for the Union in both political and constitutional terms. Third: eventually, a Member State must either stay or exit, withdrawal being the only suitable option for those who do not want to follow any longer the law of the Union as decided upon by the Court of Justice (Kelemen, 2016: 148-149).

Against these arguments, two lines of reasoning can be deployed.

2. AGAINST UNCONDITIONED PRIMACY: CHALLENGING ESTABLISHED PRACTICE

As for *established practice*, an early answer is that such a practice cannot be declared settled so long as there are national constitutional judgments attesting to the contrary. Then, typical replies sound as follows: Member States did not contest it on the intergovernmental plane and even consented to mention the primacy principle in the Declaration No. 17 attached to the Lisbon Treaty.[3] Such replies introduce the second part of the argument: consistent international practice shows that, once the provisions contained in a given treaty are granted priority on national laws, such priority extends to national constitutional laws, too.

Then, it should be objected that such practices, stemming from the law of international treaties, may hardly be used in straight forward support of Community (Union) law. In fact, the latter has a peculiar characteristic, labelled 'supranationality' (Mosler, 1951: 245; Schuman, 1953: I; von Bogdandy, 2000: 27): it allegedly establishes 'a legal order of a new kind' i.e. *different in nature* from international law (Constantinesco, 1966: 1). This difference, however phrased, has not remained in the empyrean of theory but has had a severe practical consequence: the subversion of the hitherto well-settled *Lotus* doctrine, according to which limitations to States' sovereignty cannot be presumed.[4] In fact, EEC law claimed priority on national laws within the boundaries of a teleologically oriented, ever-expanding scope of application (Bartoloni, 2018: 10) by referring to a *special autonomy* that made it *different* from international law (Pescatore, 1970: 167).

Hence, to refer to international law practices as evidence backing Community law's unconditioned priority looks like a logic fallacy. Either Community law is a kind of international law, or 'a law of a new kind': it cannot be *both* at the same time. If the former is true, priority can be accorded, but restricted to specific tasks attributed via the Treaties to the Community bodies. If the latter is true, priority can be accorded within an ever-expanding area; yet, it cannot be justified by referring to the international law practices – which would tie it to a more restrictive interpretation of its applicative scope

[3] See also the Annex containing the *Opinion* of the Council's Legal Service, 11197/07 (JUR 260) on the Primacy of EC Law, 22 June 2007.

[4] Permanent Court of International Justice, A-10, *Rép.* 18 (7 September 1927); see Bin Cheng 1953: 29.

(Zarbiyev, 2012: 247) – but must rely on some other arguments (Stein, 1981: 1) to explain how once sovereign States turned into 'Member States' (Bickerton, 2012: 21).

Then, as much as Community law's teleological, ever-expanding applicative scope stays undisputed, reference to international law is, alone, insufficient to back primacy on national constitutional laws.

3. AGAINST UNCONDITIONED PRIMACY: CHALLENGING CONSTITUTIONAL MATURITY

As for the second line of arguments, *constitutional maturity* is generally marked by a certain political bias echoing the 'nobility' of the European cause. To put it frankly, as Joseph Weiler (2012: 248) did, it echoes a *messianic* idea of Europe as a sort of ambassador of civility; ideological drifts aside, it looks at a united Europe as an 'end *per se*', and one that deserves a battle to be fought regardless of its social, political and economic costs (Fabbrini, 2015: 1018; Kelemen, 2016: 150; Baquero Cruz, 2018: 28). This approach inherits the enthusiasm of the early 'Community lawyers' who used to confuse the 'wish' for the 'ought' (Treves, 1969: 15); yet, such an enthusiasm may be outdated (Dawson & de Witte, 2013: 817) as the idea of a Union bringing benefits to all members on an equal plane has been aptly challenged in more recent times (Chiti & Teixeira, 2013: 683). Thus, should 'constitutional maturity' entail the Union law's overwhelming priority even *vis-à-vis* the overwhelmed Member States, it would look like a moral argument underpinned by an unquestionable 'preferability' of Europe's unitary destiny *whatever* the consequences; then, it would only find justification in political stances 'against constitutional pluralism', as advocates of this position openly, and honestly, declare (Baquero Cruz, 2018: 29).

Hence, the second part of the argument falls into circularity. If one takes the *a-priori* view that Union law must reject all differences, then such differences amount to a discrimination; otherwise, they do not.

At this point, one may rightly question the Treaties to discern whether such an aprioristic assumption is consistent with Union law. In this regard, an argument is offered by the link between Articles 4(2) and 9 TEU. Article 4(2) provides that 'the Union shall respect equality of Member States before the Treaties, as well as their national identity inherent in their fundamental structure, political and constitutional', thereby following a formal equality principle. Article 9 TEU adds that the Union follows the equality principle among Union's citizens 'who shall receive equal attention' from the Union's 'institutions, bodies, offices and agencies' (Zaccaroni, 2021: 20). If the two are read in combination, a twofold consequence may be advanced. First, a

kind of substantive equality among Union citizens comes to supplement formal equality among States. Second, this does not entail straightforward application of a uniform law but requests careful consideration of mutual differences – for 'equal attention' does not impose 'uniformity', but rather entails a more cautious, better-pondered action.

Following this line, one would be taken to argue that, while respecting formal equality, the Union also pursues substantive equality as a result of its own actions. This would lead to a tolerant stance on primacy (Weiler, 2001: 54): the Union understands that Member States bear *specificities* as far as their inner political-constitutional structure is concerned, and undertakes as a duty of its own to pursue common solutions for common benefits, on an equal footing, through fair political negotiations (Goldoni, 2012: 385).

As a corollary, it would descend that, while a situation in which one Member State is made exempt from applying a piece of Union law surely reflects a formal discrimination, yet this discrimination is lawful if it prevents substantive inequality. Hence, as that piece of Union law affects rights-interests related to the 'fundamental political and constitutional structure' of the State concerned while giving advantages to others, it would contrast with Union's primary law should it be recognised unconditioned primacy nonetheless.

4. *FOLLOWS*: THE FLAWS OF 'RADICAL EXIT'

The latter position is countered by *radical Exit* arguments: eventually, if a Member State rejects the consequences of adhesion, it cannot seek a Union law's application *à la carte* but must leave the Union altogether (Kelemen, 2016: 148; Gragl, 2018: 277). Though fascinating and *prima facie* persuasive, as often radical arguments are, this claim proves untenable in constitutional terms (Wilkinson, 2017: 213). In fact, Member States consented to a Union that respects their most sensitive rights-interests. This assumption, while coherent with the idea of the integration as the supranational prosecution of the post-WWII national constitutional settlement, dates back to the 'empty chair *impasse*' (Corsetti, 2012: 461) and points to the 'Luxembourg Compromise' as the *conditio-sine-qua-non* to depart from unanimity in Council (Weiler, 1981: 267).

Another corollary stems from this argument, which alludes to the 'European' role of the national constitutional courts (Komárek, 2014; Dani, 2017: 785). Such courts are called to shape the boundaries of the Union law's priority-in-application from the national side: if the Court of Justice has a monopoly of the interpretation of Union law, this may not *per se* include a monopoly over decisions concerning priority on national laws. In fact, should the Court of Justice alone decide upon the latter, it would result in

a self-assessment (self-limitation) of Union law 'irrespective' of the position of the Member State concerned – which hardly matches the 'respect' that the Union, in light of Art. 4(2) TEU, pays to national self-determination as shaped within the political-constitutional structure of that State. Hence, the argument linking national identity, as featuring in a provision of Union law, with the interpretive monopoly of the Luxembourg Court, falls into hyper-formalism (Tizzano, 2012: 811): a decision on primacy is not unilateral (Di Federico, 2019: 333) but stems from the interplay of the national and supranational courts involved (Bobić, 2022: 56).

Therefore, one is led to conclude that identitarian arguments raised by national courts are, in principle, admissible.

5. RATING IDENTITARIAN ARGUMENTS

The question becomes whether such arguments are all *equally* admissible, i.e., whether specific features can be identified which enhance, or reduce, their admissibility. Assuming that primacy is a matter for legal interpretation and that the Union's constitutionalisation comes as a consequence of primacy, the answer follows a fourfold analysis. First: what arguments for legal interpretation have been raised to establish primacy despite the strict positivism that dominated international law at that time. Second: what further arguments have been raised to support primacy *vis-à-vis* national constitutional law, too. Third, under what conditions has such an enhanced primacy been confirmed by national courts, and how has it crystallized in Maastricht to account for the Community's constitutionalisation. Four: how identitarian arguments must be advanced to comply with such conditions, i.e., with the constitutionalisation's formula.

The first three lines are walked along in the next paragraph; the remainder of the work contains a tripartite comparative analysis of identitarian arguments, a proposed pattern for such arguments, and some conclusive reflections.

III. 'PRIORITY-IN-APPLICATION' AND THE COMMUNITY'S CONSTITUTIONALISATION

An account of the arguments raised in support of Community law's primacy requests a step back in European legal history.

Claiming a special autonomy for Community law was far from uncontroversial even in the proceedings that led to *Van Gend & Loos* (Rasmussen, 2014: 136): the cautious approach of Advocate General Roemer reflected

the heated dispute between supporters of supranationality and advocates of the Community's international nature (Gallo, 2018: 9). The array of suitable positions, which reflected the controversial nature of the topic as a whole, might have suggested further prudence to the Luxembourg judges; yet, their approach was as determined as pragmatic. The chosen option enshrined an idea that sounded pretty radical to the ears of public law scholars: the link between a theoretical conception of the relations among legal orders and the practice of the relations among legal acts was a 'dogmatic anachronism', and simply needed to be severed 'in order to get things done, as predicated by the Court of Justice' (Catalano, 1964: 153). In this light, Community law was to be accorded a *de facto* priority on national law to eschew the national-international law guillotine that would have impaired the integration process (Trabucchi, 1965: 25).

1. BEYOND INTERNATIONAL LEGAL POSITIVISM: THE *PLANUNGSVERFASSUNG*

Behind this abrupt marginalization of hitherto settled theories lays an innovative idea, merits for which should be credited to Carl Friedrich Ophüls, a German jurist and diplomat, who used to name the Treaties *Planungsverfassungen* (*planning-constitutions*) since the 50's. This name was given a more specific connotation in the context of a *Symposium* on economic-administrative planning, published in a book edited by Joseph Kaiser in 1965.[5]

'Planning', in that book, was considered a distinctive feature of a constitution (Scheuner, 1965: 67) and, in Ophüls' terms, one that marked the Community Treaties, too. The underlying idea can be summarised as follows: bound by a special intent to 'lay the foundations of an ever-closer union' among themselves and their peoples, Member States embraced in a *common* planning entire sectors of their national economies, which was, assumedly, a typical constitutional feature; thus, the Treaties they ratified, while disposing for the ever-increasing, autonomous evolution of the Communities in execution of such planning, were of a constitutional nature, though of an 'in-planning' one (Miaja de la Muela, 1974: 987).

As for the scope of this work, four implications, perhaps unpredictable for Ophüls himself, bear the mark of this construct.

One: the link between the Member States' special initial intent and the common planning of their economies points to the Communities as the

[5] Ophüls, 1965: 229.

transposition on a supranational plane of the sociopolitical-economic settlements Member States achieved in their constitutions.

Two: following this line, Community law is assumed as coherent with the sociopolitical-economic settlement enshrined in the Member States' constitutions and, simultaneously, instrumental to implementing the Member States' special intent to expand that settlement on a broader scale.

Three: Community law is based on the Member States' original intent as it implements the Member States' constitutional project on the supranational plane.

Four: in legal interpretation, the argument of the original consent – based on a State's initial will – comes to coincide with an argument aiming at implementing that project – i.e., at an ever-expanding, teleologically oriented interpretation of Community law at the expense of national laws.

As a corollary, the Court of Justice is allowed to enter the border of States' sovereignty without formally contradicting the *Lotus* doctrine that dominated the interpretation of international law at that time. According to the latter, limitations to States' sovereignty could not be presumed; yet, in fact, Community law is assumed to expand precisely under the mandate of the State whose sovereignty is breached, and precisely in light of the latter's intent.

Then, on the wave of the *Planungsverfassung* idea, voluntarist-positivist arguments are gradually replaced by *others* in the interpretation of Community law, More precisely: as an ever-closer integration is considered as the supranational transposition of the national constitutions' settlement that aimed to secure peace-and-prosperity and to avoid the risks of nationalisms, a moral argument supporting an ever-closer integration as an end *per se* provides to the argument that identifies the Member States' original intent with a teleological, ever-expanding reading of Community law. In other words: the positivist-voluntarist reasoning that lies at the roots of *Lotus* eventually overlaps a moral-rational reasoning that endows Community law with an ethical preference on national laws as long as aiming at further integration.

In practice, *Planungsverfassung* worked as a Trojan horse to induce a turn in legal interpretation whose core translates into the following assumption: Community law *must* be applied with priority on national laws because it would not reach its effect otherwise. Clearly, according to the hitherto dominant legal logics, the effect of a norm comes as a consequence (*effect*) of its application and could not be the *cause* thereof. This subversion is only justified in light of the implications triggered by the influence of the *Planungsverfassung* on the Community's early integration.

2. CONVERGING CONSTITUTIONAL CHANGE: THE *WANDEL-VERFASSUNG*

Even building on such implications, Community law struggled to conquer the fortress of national constitutions. Clearly, *Planungsverfassung*-based tools did not suffice for primacy to fully settle, as constitutional lawyers raised up against it as Community law's expansion affected national constitutional rights.

At this juncture, a concept coined by the German scholar Hans-Peter Ipsen (1983: 29) happened to offer the constitutional background needed to support such an enhanced priority: the *Wandel-verfassung*, which in Ipsen's view came as a result of the Community being a 'purpose-oriented association' of States backed by their special initial intent.[6] With this neologism, Ipsen intentionally 'played with words' to fashion a consonance between the evolutionary motion *towards* a European constitution pivoted by the Court of Justice and the evolutionary change of national constitutions (named *Verfassungswandel* in established literature: Hsü Dau Lin, 1932) which was to be driven by national courts; both, as a consequence, being credited with identical legitimacy despite proceeding from opposite contexts.

Building on this concept, priority-in-application came to prevalently rely on moral bases, as this argument elaborated on the link between the integration and the project enshrined in the national constitutions – both reportedly originated from a common moral substrate of shared values. Accordingly, national constitutions and an alleged European constitution were reported to converge in a single stream of constitutional change that revolved around these values, in principle shared by all Member States and understood as the legacy Europe was to defend against the comeback of nationalisms. From such values, distilled in *common constitutional traditions*, the Court of Justice was entitled to derive general principles of Community law to be applied with priority on national constitutional laws even when fundamental rights were at stake (Tridimas, 2015a: 23).

While supplementing teleology in backing the Union law's priority-in-application, this assumption completes the turn from a positivist-voluntarist to a moral-rationalist reading of Community law (Campanini, 1965: 25). It offers the Member States' special intent a constitutional certification based on an assumption pertinently dubbed 'irenic' (Luciani, 2006: 1644) as flowing from common values, the converging constitutional change that encompasses the States and the Union would prevent the very emergence of political conflicts between claims raised by competing authorities. These conflicts would rather

6 '*Zweckverbände funktioneller Integration*', Ipsen, 1972: 196.

be blunted and turned into legal disputes to be treated within the multilevel *réseau judiciaire européen* (Bailleux, 2009: 341).

As for the purpose of this work, the corollaries of the *Wandel-verfassung*'s influence on the integration are four and lay the pillars of the Community's *constitutionalisation*.

One: as both derived from common values, national constitutional principles coincide with Community law's general principles – violations of national law being violations of Community law, too, and *vice-versa* (Faraguna, 2015: 174).

Two: as supreme constitutional principles constrain national constitutional reforms, too, Community law's frontiers coincide with limitations to national constitutional reforms, too, as both revolve around the same common values.

Three: as the mutual borders overlap, no area of national law is in principle precluded to Community law, and no reserved competence may be claimed for national law (Rossi, 2002: 565).

Four: the Court of Justice prevails on national constitutional courts even if fundamental rights are at stake, as it applies on a Union-wide scale the same law – better: a law allegedly stemming from common values hence, *equivalent* as for the content of the protection provided – that national courts apply domestically (Lenaerts, 1999: 423).

Thus, as the Community's constitutionalisation kicks in, primacy is openly accorded on national constitutional laws, too. However, such a primacy only exists within the perimeter of the constitutionalisation's abovementioned pillars, i.e., as long as the *irenic* assumption underpinning the constitutionalisation is not contradicted in practice.

3. A 'CONSTITUTIONAL BALANCE' TO ACCOMMODATE PRIMACY

Confirmed by landmark judgments of the Italian Constitutional Court (*Granital*)[7] and of the German Federal Constitutional Court (*Solange II*)[8] the constitutionalisation leads to Art. F of the Maastricht Treaty (Gaja, 1990). This provision lays in written the conditions for this process to support Community law's priority-in-application on national (constitutional) laws. Accordingly, the new-born European Union (EU) respects Member States' *equal sovereignty* exercised by democratic self-government while protecting fundamental rights by *equivalent standards* in comparison to national laws.

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7 Italian Constitutional Court, Judgment No. 170/1984 (8 June).

8 German Federal Constitutional Court 73, 339 – 2 BvR 197/83, *Wünsche Handelsgesellschaft* (*Solange II*) (22 October 1986).

This provision confirms that acquiescence to primacy did not come without guarantees. As noted in Weiler's well-known investigation, the transformation of Europe received as much impulse from 'integration through law' as attention from the political sphere (Weiler, 1991: 2403). The Luxembourg compromise consolidated a *consensus* method at the intergovernmental level, which was crucial to overcome the 'empty chair' crisis; hence, it was perpetuated in the relations among Member States, which never really abdicated to their 'space-to-think' in European affairs (Nugent, 2017: 21; 111).

This assumption survives the rise and decline of the Constitutional Treaty and enters the Treaty of Lisbon. In fact, as far as Art. 4(2) TFEU is concerned, the safeguard of 'national identity' (Guastaferro, 2012: 263) enshrined in the political-constitutional structure of a State seemingly alludes to a *suspension* of Union law's priority (von Bogdandy & Schill, 2011: 1417) which elucidates the link between primacy and a duty of fair cooperation on the political side (Faraguna, 2017: 1621). While prioritising qualified majority to unanimity in Council, this duty recalls the formula that Weiler borrows from Hirschman (1970: 19), *Exit*, *Voice* & *Loyalty.* Accordingly, in exchange for *loyalty* to Union law: a sort of 'federal loyalty' (Klamert, 2014: 47) – States are granted rights to *voice* in law-making to an extent that their fundamental structure cannot be affected by EU law.

This arrangement points to a stabilization, yet *precarious* and *dynamic* – like riding a bike on an endless road – of the Union's *after-State* space, which works as a surrogate for a State-like stabilized political authority: it provides guidance as for the law applicable in that space.

Dwelling on the characteristics of such a peculiar constitutional arrangement would be too burdensome a task for the limited scope of this work. However, for the sake of clarity and brevity, one may describe this peculiar (un)settlement (Walker, 2014: 529) in the guise of a balance. In fact, the achieved compromise points to a threefold equilibrium encompassing the relations between: 1) the Union and the Member States; 2) the institutional arrangements and the legal acts; 3) the moral/rationalist and the voluntarist/positivist elements in law-making.

According to 1), the Union and the Member States cooperate on the assumption that, should any piece of Union law breach sensitive rights-interests of a Member State, it would be, in principle, suspended in that State as for its binding effects until the conflict receives adequate political solutions.

In light of 2), the Union citizens are to democratically determine the content of the rights they are recognised through the national-supranational institutional architectures, so as to meet through fair political bargaining the 'equivalent standards' EU law protects judicially. Hence, national sovereignty stays in a circular relation with the protection of rights and these rights would

be genuinely recognized, rather than *octroyés* by an authority beyond the citizens' control.

Finally, under 3), the States' original intent must couple with a sufficient(ly) solid consent supporting today's Union law. Hence, the latter cannot consist solely of general principles of doctrinal and judicial descent but must also keep effective links with the *voluntas* of those who must obey it.

Then, the question is whether the arguments deployed to oppose primacy comply with Union law whatever their form-content, or if they need certain requirements to be in line with the Union's constitutionalisation – i.e., with the constitutional balance governing the Union's space.

IV. IDENTITARIAN ARGUMENTS AS 'RIGHTS TO RESIST'

Following this line, the abovementioned question appears an ill-formulated one. In fact, the clash between Union's and national laws is a conflict between normative claims coming from separate legal orders that compete in a space in which the sovereign authority is *not* given *a priori* (Walker, 2002: 317). Hence, such claims cannot be labelled 'lawful-unlawful' in absolute terms, the only criterion for 'lawfulness' being their capacity to adjust to the constitutional balance upholding that space (Goldmann, 2008: 1865; Ventzke & Mendes, 2018: 85). Thus, 'compliance' and 'non-compliance' cannot be taken as on-off qualifications but should be rather placed on a scale of relative acceptability according to their consistency with the Union's constitutional balance.

As a result, identitarian arguments should: 1) refer to a violation of such a balance, rather than simply claiming a breach to a national constitutional right or invoking national sovereignty as such; 2) be construed in view of restoring it through fair cooperation on the political side.

In this vein, a tentative, yet rough classification can be drawn in three steps. The first hosts identitarian arguments that deny or support priority with no alignment with such balance. On the second, priority is backed or denied with reasons that point to (a breach of) a material national constitutional principle solely: the identitarian arguments deployed aim to preserve that balance, but lack in potential to restore it – they possess the *pars destruens* only. On the third, identitarian arguments highlight a breach to a national constitutional principle and link it with the respective violation of national sovereignty: they question whether the original intent of the State concerned covers the effects of the Union norm whose application is sought. Then, in principle at least, such arguments pave the way to further integration carried out under the responsibility of the competent political bodies: they

display both *pars destruens* and *pars construens*, as they aim to both preserve and restore the abovesaid balance.

If this reasoning is confirmed, the constitutional anchorage of an identitarian argument follows the path of a *right to resistance* (Menéndez, 2013: 454)[9] as it possesses both the typical features of that right. First, it is raised in reaction to a rupture of a settled constitutional order – the order that originates from the *post*-WWII national constitutional settlements – when no other remedy is available to oppose a decision that yet touches on rights-interests of the utmost sensitivity. Second, it is raised in the name of that order, with a twofold aim: 1) to protect it from a legal-constitutional standpoint – namely, preventing that tacit constitutional changes consolidate through acquiescence, whether spontaneous or secured under coercion – and 2) to restore it on the political side.

Some examples derived from well-settled (yet renowned) case-law may better explain these points.

V. STEP ONE: MISALIGNED IDENTITARIAN ARGUMENTS

Identitarian arguments that do not align with the Union's constitutional balance have been put forward, though in opposite directions, by the Hungarian Constitutional Court and by the Estonian Supreme Court.

1. HUNGARY

The Hungarian case must be read in the context of the constitutional crisis begun in the aftermaths of the 2010 elections, as the right-wing *Fidesz* party seized a majority in the Parliament and Viktor Orbán was sworn in as Prime Minister (Bánkuti, Halmai & Scheppele, 2012: 138). Pursuant to the adoption of a new Basic Law, numerous restrictive measures impinging on fundamental rights were adopted, but (partly) cancelled by the Constitutional Court (Lembcke & Boulanger, 2012: 269) once they were transposed in acts of constitutional rank (Boros, 2013) the Court went as far as to craft a doctrine of 'unconstitutional constitutional amendments' to strike them down (Halmai, 2012: 182). Yet, the Government eventually prevailed in the duel, the Court suffering reductions in powers and independence of its members (Spuller, 2014: 637).

[9] Compare Ugartemendía Eceizabarrena, 1999: 213; Buratti, 2006: 85 and Pizzolato, 2021: 136.

As a result, Hungarian constitutional judges have been criticized for supporting the Government's stances, especially on questions such as the discipline of migration flows. By Decision 22/2016,[10] the Court 'rubber-stamped' (Halmai, 2017: 1) the Government's arguments on 'Hungary's constitutional self-identity' to back the highly-controversial *Fidesz* Cabinet's position (Halmai, 2018: 25). In the Court's view, as fundamental rights are at stake, a scrutiny on the 'violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State)' is comes with by a review of 'the constitutional self-identity of Hungary'.[11] Yet, the latter prevails, for it 'is not a list of static and closed values'[12] but covers an unlimited range of cases in which Union law may affect 'the living conditions of the individuals, in particular their privacy…their personal and social security…their decision-making responsibility, and Hungary's linguistic, historical and cultural traditions'.[13] The Court openly subordinates the exercise of sovereignty and the protection of rights to consistency with such identity, which is 'not created, but merely acknowledged by the Fundamental Law', and, therefore, cannot be disposed of by the State via international treaties.[14]

Clearly, this argument neglects the Union's constitutional balance as hitherto construed, for two main reasons.

One: as conceived of in all-embracing terms, national identity *swallows* sovereignty and – despite the Court's *caveat*[15] – deprives it of any procedural value.

Two: as it is the State who exercises powers via Union's institutions, no conferral of powers, but only attribution of tasks occurs (Münch, 1957: 271) which excludes the ever-closer-union teleology as a self-increasing limitation to sovereignty and leaves the protection of constitutional rights in the hands of the State alone.

Therefore, a relation between procedural breaches of sovereignty and material violations of rights is excluded: both are reduced into identity, a concept whose boundaries the Court considers as an *a-priori* to the whole law-making. This argument aims neither to protect nor to restore the Union's constitutional balance: it denies primacy for reasons that rather point to

10 Hungarian Constitutional Court, Decision 22/2016 (xii 5) ab. (30 November 2016).
11 Hungarian Constitutional Court (n 10) at 46.
12 *Ibid.*, at 65.
13 *Ibid.*, at 66.
14 *Ibid.*, at 67.
15 *Ibid.*, at 54-60.

national identity as a barrier for *foreign* law to apply in Hungary (Körtvélyesi & Majtényi, 2017: 1721).

2. ESTONIA

At the opposite pole, but at the same latitude as for the purpose of this work, the Estonian Supreme Court elaborated on the Union's constitutional balance when adjudicating on the constitutionality of the ESM.[16]

The Court acknowledged that the Estonian Constitution builds on separation of powers and protection of rights, the power being 'vested in the people';[17] yet, it refused to make Union law's applicative priority contingent on compliance with both (Ernits *et al*., 2019: 817). Therefore, Art. 4(4) ESM – providing a speeded-up procedure for concession of financial aids that might bind Estonia to a contribution of around 8% of the national budget without Parliament's consent – was held constitutionally lawful.

The Court contended that the Parliament, by ratifying the ESM, legitimately disposed of constitutional powers and that the principle of proportionality was respected (Ginter, 2013: 335) although the disposal entailed irreversible self-limitations.[18] As the judges put it, the aim of Article 4(4) ESM is to pursue the ESM objectives in case of emergency, i.e., to safeguard the financial stability of the Eurozone as a whole; and this aim is the most compelling when urgency is the utmost, as it was said to be the case (the urgency-emergency overlap staying undisclosed, and unaccounted for, in the reasoning).[19] Then, as Estonia belongs to the Eurozone, 'a threat to the economic and financial sustainability of the Euro area is also a threat to the economic and financial sustainability of Estonia', being 'unlikely that

[16] ESM is an international treaty in which institutions of the Union are conferred on certain powers. In *Pringle*, the Court of Justice held that, while ESM is compatible with Union law, the institutions can be given powers outside the Union legal framework as long as their essential character is not affected; in *Ledra*, it was pointed out that they must also respect fundamental rights as laid down in the EU Charter. Therefore, both as for the interference with national sovereignty and the protection of fundamental rights, the ESM is part of the Union's constitutional equilibrium, which the institutions are bound to respect.

[17] Estonian Supreme Court, *Constitutional Judgment* n. 3-4-1-6-12, 12 July 2012, at 127.

[18] It is doubtful whether a Parliament may dispose of its own sovereignty in a context of parliamentary sovereignty: see Rossi (2008: 70).

[19] Estonian Supreme Court (n 17) at 165.

Estonia would be financially or economically successful' otherwise.[20] As a result, the objective of the Eurozone (defined by the Eurozone authorities solely) is *by definition* coincident with the objective of the Estonian Constitution, the latter depending, *in parte qua*, on the former (Fabbrini, 2014: 116). The Court is crystal-clear on this point: '[b]y disregarding the common purpose of the [Eurozone] Member States or the measure planned for the achievement thereof, Estonia cannot follow its objectives arising from the Constitution'.[21]

Such a statement does not go without constitutional repercussions; as for the objective of this work, it must be noticed that, albeit the ESM is held lawful, the Union's constitutional balance is neglected in all the three elements above elucidated.

One: the political genuflection Estonia accepted makes it substantially incorrect to say that equality among States is respected.

Two, the relation between national sovereignty and protection of rights is overturned, the two rather being in reciprocal opposition: in order for rights to be protected, sovereignty must be relinquished – though the citizens of the other States retain, in principle, their rights to democratic sovereign self-determination.

Three, since Estonia entered the Eurozone, the protection of national constitutional rights depends on circumstances that are to be accepted as *unquestionable facts*, as coming from a superior authority endowed with unchallengeable expertise. Yet, they are political decisions taken at a level in which Estonia's participation in the decision-making is simply insufficient to secure an effective right to *Voice*, but accepted nonetheless.

Conclusively, the argument construed by the Estonian judges and discarded to accord unconditioned priority to Union law mirrors the Hungary's introvert argument. Hungary alters the Union's constitutional balance to affirm its own self-identity as a bulwark against non-national laws; Estonia contradicts it by giving in its own sovereignty altogether, while rights are protected as a consequence of a *concession* deliberated elsewhere.

IV. STEP TWO: MERELY MATERIAL IDENTITARIAN ARGUMENTS

Identitarian arguments crafted in Spain and Italy gather in a second group, as the constitutional courts of the respective States claimed the violation

[20] *Ibid.*, at 157, for a significant linguistic difference between the Estonian version and the other languages.

[21] Estonian Supreme Court (n 17) at 168.

of a specific material right protected by the national constitution. This claim enjoyed no success in *Melloni*, and was more profitably raised in *Taricco*. Both cases are well-known; suffice then to mention some points that are relevant for the purpose of this work.

1. ITALY

Pursuant to the Court of Justice's response in *Taricco*,[22] the Italian Constitutional Court, via preliminary reference, held that the norms establishing limitation periods in penal law are of *material* (as opposed to *procedural*) nature, thus covered by the legality principle.[23] Accordingly, before this principle, a norm establishing limitation periods is held equivalent to a norm establishing a crime. Yet, the two situations are at polar opposites as regards the subjective element of the convicted. In the latter case, the legality principle prevents that somebody is perpetrator for a conduct that was *not* a crime when she acted (*nullum crimen sine lege*); in the former, the same principle protects norms that put an end to the prosecution of conducts whose qualification as crimes was known to the perpetrator when she acted. Hence, whether they deserve equal *status* under the legality principle is far from obvious: *de facto*, such construct is unique to Italy (Piccirilli, 2018: 814).

Be it as it may, the Court held that, as penal law falls outside the Union's competence, 'Member States are free to follow their own constitutional tradition', and the Court of Justice must accept it as part of Union law (Bernardi, 2017: 17). '[B]uilding on this right premise', a wholly material argument is raised to shield the Italian legal order from the application of a Union norm based on Article 325 TFEU (concerning effective protection of the Union's financial interests) which would have prevailed on national laws concerning limitation periods for the sake of an effective protection of the Union's financial interests. Such norm – the Court specified – is 'totally ineffective': the wording of Art. 325 TFEU makes it 'irremediably indeterminate', therefore in breach of the legality principle.[24]

In the preliminary reference, the Court went to say that supreme principles and inalienable rights of the person belong to a reserved competence that Union law is bound to respect as such – a principle re-affirmed in a subsequent judgment on the same topic.[25] This is the well-known Italian version

[22] Court of Justice, Case, C-105/14, *Taricco*, 8 September 2015, ECLI:EU:C:2015:555.
[23] Italian Constitutional Court, Order No 24/2017, 26 January 2017, at 6.
[24] Italian Constitutional Court, Judgment No 115/2018 (5 June) at 4.
[25] *Ibid.*, at 11.

of the identitarian argument: a 'counter-limit' whose range of application is basically left in the hands of the Constitutional Court (Cartabia, 2016: 37; Amalfitano & Condinanzi, 2015: 176). Notably, in this view, national law trumps Union law regardless of the national standard of protection for the fundamental rights at stake (whether equivalent, lower or higher than the standard of other Member States, or of the Union itself) which questions the very foundations of the 'common constitutional traditions' concept (Fichera & Pollicino, 2019: 1097).

However, in *M.A.S.*,[26] the Court of Justice apparently accepted this construct, as uniform application of Union law was sacrificed, and Italy's national courts were freed from the duty to give applicative priority to Union law in case of breach to supreme national principles (Rauchegger, 2018: 1521).[27]

For the purposes of this work, it must be noted that the argument raised by the Court fails to mention a violation of national sovereignty on the procedural side.[28] Consequently, Italy looks unavailable to engage in negotiations on penal limitation periods aiming at a more effective protection of the Union financial interest: the issue is made impermeable from Union law and entirely left to the Italian political arena.

At this juncture, it is worth noting that in 2019 the then parliamentary majority passed a reform aimed to stop limitation periods after a first-instance trial, which entered into force on 1 January 2020. That reform fully occupied national debates since the pandemic blew up; it raised a huge wave of criticisms among commentators and occasioned unprecedented protests by the Criminal Bar Association, as well as querulous complaints on respectable newspapers (Vosa, 2020: 171). The heated tones igniting the still-to-date ongoing debate on the issue[29] attest to the utter sensitivity of that topic in

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[26] Court of Justice, Case C-42/17, *M.A.S. & M.B.*, 5 December 2017, ECLI:EU:C:2017:936, para. 62.

[27] Clara Rauchegger, 'National constitutional rights and the primacy of EU law: *M.A.S.*' (2018) 55(5) Common Market Law Review 1521-1547.

[28] Compare the Opinion of AG Bot in European Court of Justice, Case C-42/17, *M.A.S.*, delivered on 18 July 2017, ECLI:EU:C:2017:564, at 179.

[29] See the debates on the counter-reform of penal limitation periods passed in August 2021 at the initiative of the Ministry of Justice Marta Cartabia: in order to secure a reasonable duration of the proceedings and to avoid that a person is convicted for too long, crimes (listed exceptions aside) are defined '*improcedibili*' ('no-longer-suitable-for-criminal-prosecution) after two years. Criticisms from the Judiciary Council (CSM) as well as from single magistrates, yet severe, seem recessive in the public debate. See Di Matteo (2021: 133).

light of the political-constitutional structure of the country: apparently a criminal law issue only, it has turned constitutional, as well documented in the '90s literature (Padovani, 1996: 448; Pulitanò, 1997: 3).

It can be concluded that the identitarian argument raised by the Italian Constitutional Court aims to protect the Union's constitutional balance but hardly fosters a restoration thereof.[30] Spain, in *Melloni*, walked a similar path, yet unsuccessful in practice, but with some differences.

2. SPAIN

The Spanish Constitutional Court declares itself to be legally bound to interpret national law in a manner that is consistent with Union law as interpreted by the Court of Justice.[31] Reference to this duty must be found in the national constitutional *openness* to international law as enshrined in Article 10(2) of the Constitution (de Carreras, 2000: 321) which allegedly supplements Article 93 in allowing prior application to international law and Union law (Sáiz Arnáiz, 1999: 20). As a consequence, the right to judicial defence protected by Article 24 of the Constitution (Arzoz Santisteban, 2020) must adjust to the Union standard even if the latter is apparently inferior (Torres Pérez, 2014: 308). However, no radical imposition of unconditioned primacy emerges from *Melloni*'s rationale (Donaire Villa, 2017: 637): the Court did not subscribe[32] to a fully substantive reading of Article 93 (Muñoz Machado, 1983: 59) and maintained the distinction elucidated in the *Declaración* n. 1/2004 on the Constitutional Treaty's compatibility with the Spanish Constitution[33] – according to which supremacy (*supremacía*) is to be distinguished from 'priority-in-application' (*primacía*). This distinction (Requejo Pagés, 1992: 41) echoes the German above-cited divide between priority-in-validity and in-application: *supremacía* recalls hierarchy and refers to the Constitution only, whereas *primacía* 'occurs for a number of [*de facto*] reasons' and suits Union law.[34] In light of that *Declaración*, in cases of clash between 'future

[30] *Identity-based* monism instead of a monism based on pure procedure: van der Schyff (2016: 186).

[31] Spanish Constitutional Court, Order No. 86, 9 June 2011; see Pérez Manzano (2012: 311).

[32] See the Dissenting Opinion (*voto particular*) of judge Pablo Pérez Tremps, in Spanish Constitutional Court (n 31).

[33] Spanish Constitutional Court, Declaration No. 1 (*Pleno*) 13 December 2004, at 4.

[34] *Ibid.*, at 133: «La primacía…no se sustenta necesariamente en la jerarquía, sino en la distinción entre ámbitos de aplicación de diferentes normas, en principio válidas, de

developments' of Union law and the Constitution, the people's sovereignty principle would urge the Court to deny *primacía* and to restore *supremacía*, that is, the supremacy of the Spanish Constitution that enshrines the roots of national self-determination and protection of rights.

Thus, albeit the identitarian argument is phrased as a simple conflict of material rights, an account of the Union's balance is envisaged, which may prompt the Spanish Court to re-formulate the argument in a fully-comprehensive way should the circumstances arise (Alonso García, 2005: 341). Moreover, the Spanish identitarian argument does not display Spain's reluctance to engage in political negotiation on the issue(s) concerned, and to adapt its position should the relevant decisions be backed by acts based on commensurate political responsibility (Azpitarte Sánchez, 2002: 69).

VII. STEP THREE: FULLY-FLEDGED IDENTITARIAN ARGUMENTS

On the last step, the Danish Supreme Court and the German *Bundesverfassungsgericht* display a clear match between the right whose violation is alleged and the infringement of national sovereignty. The identitarian arguments raised not only protect the Union's constitutional balance but also aim to restore it, as they pave the way for political solutions of the underlying conflict while allowing no *a-priori* reserved competence to the State.

1. DENMARK

The Danish Supreme Court in *Ajos*[35] issued a preliminary question to the Court of Justice on a case of discrimination on grounds of age in the private working sector. The norm concerned – the ban on age-based discrimination – is laid down by Article 3 of Directive 2000/78. However, in line with *Mangold-Kücükdeveci*, the Court of Justice holds that such norm is not based on that Directive, but on a general principle of Union law (Tridimas, 2015b: 425) – non-discrimination on grounds of age – to which the Directive 2000/78 'gives expression'.[36] As a result, limitations to direct effect of a norm based on a Directive do not apply (Robin-Olivier, 2014: 165); what applies,

las cuales, sin embargo, una o unas de ellas tienen capacidad de desplazar a otras en virtud de su aplicación preferente o prevalente debida a diferentes razones».

35 Danish Supreme Court, Judgment No. 15/2014, 6 December 2016.

36 Court of Justice, Case C-555/07, *Seda Kücükdeveci* v *Swedex GmbH & Co. KG.*, 19 January 2010, ECLI:EU:C:2010:21, at 27, 32.

so long as the case falls within the competence of the Union, is the correspondent general principle.[37]

The Danish Supreme Court highlights that such application of that principle results in breach of legal certainty (Krunke & Klinge, 2018: 172). Noticeably, the Danish judges do not seek to directly balance the two principles, but refer to the Danish Act of Accession as a benchmark to evaluate whether compliance with the duty to interpret national law in a manner consistent with the non-discrimination principle (or not to apply it at all) falls within the limitations to national sovereignty Denmark has committed to. In this light, the Court does not impose its own constitutional standard as part of Union law – as the Italian Court does – but raises the following question: 'is this measure of Union law sufficiently based on the powers that Denmark conferred on the Union institutions? (Madsen, Olsen & Šadl, 2017: 140). The answer builds on the *travaux préparatoires* and refers to the circumstances of the case, as well as to the prejudice that would derive from the straightforward application of Union law (Neergaard & Sørensen, 2017: 275) to argue for the negative and free Danish courts from the duty to prioritise the application of that norm of Union law (Zaccaroni, 2018: 428).

2. GERMANY

A similar line of arguments emerges in German Federal Constitutional Court's case-law on the European integration. The *Bundesverfassungsgericht* (*BVerfG*) links the defence of national sovereignty with the protection of material rights to construe an identitarian argument whose anchorage lies in the 'substantive content of the right to vote' *ex* Article 38 *Grundgesetz*[38] – which points to an actual right to *Voice* in exchange for *Loyalty*.[39]

The Karlsruhe judges insist on the idea that a measure of Union law must rest on a sufficiently solid legal basis as a tie to an effective consent of the State involved[40] – all the more so when it comes to measures based on non-parliamentary 'strands of legitimation'.[41] 'Sufficiently solid', in this respect, refers to both the content of the legal basis itself (to avoid a 'blanket

[37] Court of Justice, Case C-441/14, 19 April 2016, *D.I. – Dansk Industri*, ECLI:EU:C:2016:278, at 26.

[38] German Federal Constitutional Court (*BVerfG*) 2 BvR 2728/13, 16 June 2016, 'OMT II', at 125.

[39] *BVerfG*, 2 BvR 859/15, 5 May 2020, 'PSPP', at 100.

[40] See *BVerfG* (n 38) 164 and (n 39) 104.

[41] *BVerfG* (n 38) at 164.

authorization')[42] and to its form, which must display commensurately robust parliamentary ties.[43]

Albeit disguised as proportionality, which possibly misleads the readers, this reasoning builds on the *Wesentlichkeitstheorie* (theory of essentiality: see Steinbach, 2014: 381) and refers to the *Vorbehalt des Gesetzes* (*reserve de loi*) in German law. Accordingly, secondary law is unlawful if it exceeds the 'content, purpose, scope' (*Inhalt, Zweck, Ausmaß*) of the legislative authorization (Ossenbühl, 2007: 183). The needed regulatory density (*Regelungsdichte*) of the legal basis (*Rechtsgrundlage*) depends on the sensitivity of the matter concerned; the reason being that, in order to preserve the 'substantive content of the right to vote', it must be for the Parliament, as the expression of the people's sovereignty, to take the 'essential decisions' (Kloepfer, 1984: 685) – 'essential' being understood in view of protecting fundamental rights.

Likewise, if a measure of Union law[44] is based on a Treaty's mandate that is interpreted too extensively with respect to the effects sought, this measure is considered as grounded on a legal basis that lacks regulatory density:[45] it goes 'too far' from the (wording of the) mandate that the sovereign people conferred on the Union, and is, therefore, non-binding on national authorities.

VIII. 'ESSENTIALITY' AS A MODEL FOR IDENTITARIAN ARGUMENTS?

In line with the examples provided so far, the scale of relative acceptability among identitarian arguments draws a pattern – essentiality – that deserves further attention.

Prima facie, it must be noticed that an essentiality argument naturally stays in tune with the Union's constitutional balance whose three points it matches perfectly.

One: it is grounded on the 'substantive content of the right to vote' whose normative ground is human dignity as expression of self-determination,

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42 *Ibid.*, at 134.

43 The more a legal act gets far from the parliamentary legitimacy, the more its legitimacy decreases: *Ibid.*, at 131.

44 Compare Bast (2003: 17).

45 As for the Union's case-law on secondary legal bases (whose landmark judgment is Court of Justice, 25/70, *Köster*, 17 December 1970, ECLI:EU:C:1970:115) see Ritleng (2016: 133).

individual and collective, of free women and free men.[46] Building on the centrality of the human person, perhaps 'the' core value of *post*-WWII constitutions, such anchorage, while preserving the continuity with national constitutional settlement, makes this argument equally valid for all Member States *vis-à-vis* both one another and the Union. Were it be otherwise, it would descend that the people of one State are recognised a 'superior dignity' allowing that State to exercise *hegemony* on ethno-anthropological grounds – which echoes very well-known theoretical constructs Europe has abandoned for good (Hück, 2003: 80).

Two: albeit phrased as a material right, the 'substantive content of the right to vote' aims to 'facilitate democratic decision-making processes as such'.[47] Untied to a specific content, it simply ensures that the rights recognized to citizens are substantively established in their content by the citizens themselves through the many layers of the Union's space;[48] hence, a circular relation between rights and powers – institutional arrangements and legal acts – is preserved.

Three: essentiality relies on 'public use of reason' (Habermas, 1995: 109) to balance moral-rational arguments backing integration 'whatever-the-cost' with voluntarist arguments referring to the consent of the law-recipients. In fact, it aims to protect the link between primacy and the actual will of equal European peoples and States.

Secondly, at least three specific features of the concept need to be highlighted.

One: essentiality builds a fully-fledged bridge between the Treaties and the constitutions. Taking Germany as an example, the match between Articles 4(2) and 9 TEU is backed by the combination of Articles 1 (inviolable human dignity) 20 (people's sovereignty) 23 (membership to the European Union) 38 (right to vote) and 79(3) (Eternity clause) of the *Grundgesetz*. Hence, such an argument is part of national constitutional law and of Union law *at the same time*, precisely as the Union constitutionalisation prescribes, and ties the 'will of peoples and States' to 'Europe's core values' as a support of, and limitation to, primacy.

Two: essentiality addresses both the intensity and the span of Union law – the more 'essential' the positions at stake, the stricter the margin for departure from the wording of the conferral. It is a *relational* quality that weighs up form

46 *BVerfG* (n 39) at 115; see Möllers (2013: 106).

47 *Ibid.*, at 100 (in German: '*Er dient nicht der inhaltlichen Kontrolle demokratischer Prozesse, sondern ist auf deren Ermöglichung gerichtet*').

48 *Ibid.*, at 98.

with matter, procedure with substance, which neutralizes the *introvert*, schmittian potential of 'identity' and makes the argument concerned satisfactorily *universalizable* (Poiares Maduro, 2003: 529). Therefore, it could work as a common code for judicial dialogue on the boundaries of the conferral, proportionality proving unfit to this purpose (Kosta, 2019: 198; Cohen-Eliya & Porat, 2013: 103).

Three: noticeably, as far as Article 79(3) is concerned, an essentiality argument takes the form of a *right to resist*: as no other remedy is available, a *Recht zum Widerstand* under Article 20(4) *Grundgesetz* may be exercised to ensure that primacy ultimately rests on a 'democratic authority' (Chalmers, 2020: 5).

One may object that an essentiality argument would prompt a stop to supranational law precisely in cases when rights and interests of the utmost sensitivity, and urgency, come at stake. Yet, a reply could build on the following point. If restraining the power of the majority has admittedly been the role of courts in modern constitutions, then a Court opposing an act of a majority (Curtin, 2014: 1) in the name of the reportedly threatened constitutional *acquis*, and in view of restoring such *acquis* just when the threat is the utmost, is, after all, *routine*. More than that: in a *rule-of-law*-based polity, it is a healthy, warmly welcomed, *routine*. The reasons why it is portrayed as an act of 'subversive felony' (Utrilla Fernández-Bermejo, 2020) point to the silent distortion accounted for hitherto, induced by the overwhelming prominence of moral arguments in support of primacy – which may unleash the 'unconfined power of EU law' (Chalmers, 2016: 405) to drag the Union towards uncontrollable, and unprecedented, goals.

It would be naïve to deny the difficulty of raising an essentiality argument against measures adopted pursuant to agreements laboriously reached at the supranational and national levels. However, it seems safe to contend that to side-step, or to repudiate altogether, the core of the essentiality argument would deprive the Union's constitutional balance of a solid democratic safeguard – as essentiality would help *reconstitute the European public spheres* (Chalmers, 2003: 127) to counter the 'de-democratization of the political constitution' occurred in Europe (Wilkinson, 2021: 95).

Nonetheless, it looks like the Court of Justice is unwilling to rephrase the bulk of the primacy's argumentative toolkit in terms of essentiality. This is very clear in the case law concerning the so-called protection of the *État de Droit* (Pech, 2022: 1; Lenaerts, 2020: 29). Particularly, the judgments delivered in the context of Rumanian 'monitored' adhesion,[49] as well as in

[49] See Court of Justice, Joint Cases C-83/19, C-127/19 & C-195/19, *Asociaţia «Forumul Judecătorilor din România»* v *Inspecţia Judiciară*, 18 May 2021, ECLI:EU:C:2021:393; Joint Cases C-357/19 et alt., *Euro Box Promotion* (et. alt.) 21 December 2021,

enforcing judicial independence in Poland[50] or in setting the 'rule of law conditionality'[51] on the Union budget all paint a picture of the Union space in exasperatedly monistic terms to overtly 'swallow' national sovereignty in matters of undisputed States' competence. This approach makes it explicit that the narrative of supranational law as a libertarian tool aims to impose unconditioned primacy within an integrated legal order (Kochenov, 2020: 14) the protection of individual spheres being a mere possibility – an occasional effect, a narrative *escamotage*, but not the ultimate purpose of the integration process.

While such an approach has potential to achieve a fully-fledged constitutionalization of the Union (Sadurski, 2012: 55) the consequences concerning the overall architecture of the Union's space are as numerous as relevant, and have hardly gone unnoticed in the Polish[52] and Romanian[53] constitutional case law. A rough summary thereof highlights at least three points.

First: the dominance of judge-made law (the Court of Justice being at the apex of the Union's judicial network) reaches a no-return point, as textual arguments are marginalized to the extent that they lead to lesser integration – or, else, to a direction the Court of Justice holds inconsistent with the Union's very objectives. As a result, the principle of conferral simply disappears from legal reasoning, the rule of law under Art. 2 TEU providing a moral argument that overwhelms all others.

Second: the dominance of moral arguments that build on the 'rule of law' protection prompts an unbalance between voluntarism and rationalism-moralism as elements of 'law'. As a corollary, the law of the Union space finds legitimation (no longer, not even partially, in the will of peoples and States, but) in an alleged conformity with certain, abstractly *pro*-Union rationales and ethics whose normative scope is for the Court of Justice solely to depict. The loudly proclaimed 'autonomy' of the 'European rule of law' (Perillo, 2021: 520) entails a definitive departure from the moorings of national constitutional

ECLI:EU:C:2021:170; C-430/21, *RS (Effet des arrêts d'une cour constitutionnelle)*, 22 February 2022, ECLI:EU:C:2022:99.

50 See Court of Justice, C-619/18, *Commission* v *Poland*, 24 June 2019, ECLI:EU:C:2019:531; C-824/18, *A.B.* et alt. *(Appointment of the Judges)*, 2 March 2021, EU:C:2021:153; C-896/19, *Repubblika*, 20 April 2021, ECLI:EU:C:2021:311.

51 Court of Justice, C-156/21, *Hungary* v *Parliament & Council*, 16 February 2022, ECLI:EU:C:2022:97; C-157/21, *Poland* v *Parliament & Council*, 16 February 2022, ECLI:EU:C:2022:98.

52 *Trybunał Konstytucyjny*, Case No. K 3/21, 7 October 2021.

53 *Curtea Constituțională*, Case No. 390/2021, 8 June 2021.

traditions in the name of a misconceived pan-European *irenism*, and it does so precisely when the conflict arises as the most virulent.

Third: the law of the Union space must revise its own concept of 'certainty', as no longer connected with written law passed by sovereign, democratically legitimated organs – as in national constitutional laws – but tied to a sort of moral-rational correspondence with the *environment* judges belong to. As legal texts abdicate before the 'respect' that values claim, judges directly derive from such values – particularly, from the 'rule of law' – concrete rules for specific cases (Zagrebelsky, 2008: 223). Thus, the marge of appreciation they come to enjoy turns *indefinite*, and touches the frontiers of *ex post* law making.

Protecting the État *de Droit*, therefore, may paradoxically turn into a formidable menace for both the *État* and the *Droit*; whereas a dialogue phrased in the essentiality vocabulary could, perhaps, help preventing what would be a drift towards inequality and uncertainty in the Union space. Yet, even in cases unrelated to the rule of law's safeguard (Salese, 2022: 1) the Court of Justice is reluctant to phrase identity conflicts in non-monistic terms, *Cilevičs*[54] being the most recent of such examples (Ferri, 2022: 1) although seemingly unproblematic in terms of constitutional conflict.

IX. CONCLUSIONS

Identitarian arguments are being crafted by national constitutional courts to question the Union law's 'priority-in-application' as it allegedly impinges on the 'political and constitutional structure' of the State concerned. This work aims to understand whether such arguments are acceptable, and to which extent.

Identitarian arguments read as competing sovereign claims launched in a legal-political space whose authority is by definition unsettled, hence subjected to legitimate contestation; then, rather than qualifying as 'lawful-unlawful', they align with the equilibrium reached between Union and States in the interpretation of Union law, which endorses a circular relation between democratic exercise of sovereignty and protection of rights at national and supranational level and secures a balance between voluntarism and rationalism/moralism in law-making.

Accordingly, such arguments gather on a scale of relative acceptability whose yardstick is their attitude to defend this threefold balance on the legal plane and, simultaneously, to aim at restoring it on the political side.

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[54] Court of Justice, C-391/21, *Cilevičs et al.*, 7 September 2022, ECLI:EU:C:2022:638.

Hence, the best-aligned identitarian arguments link a violation of a material right with a procedural breach to national sovereignty: they signpost a threat to core national constitutional principles and pave the way for political negotiations seeking commonly acceptable solutions by mutual sincere cooperation. Conversely, identitarian arguments simply aiming to exclude in principle certain domains from the application of Union law are partially acceptable, for they show the national reluctance to discuss a certain issue – *i.e.*, to debate it in a European public sphere. Finally, identitarian arguments misaligned with the Union's constitutional balance – whether effectively raised, or finally downplayed and reversed due to irresistible pressure – are credited with the lowest level of acceptability: this is the case of *non-dialogable* identity claims, but also of overt genuflections before overwhelming power, which ought never to occur in the European polity.

It emerges that these arguments are as much persuasive as they are crafted in the guise of 'rights to resist' a given Union law measure that triggers a drift from the constitutional equilibrium cited above. Particularly, essentiality, as inspiring the best-aligned arguments, emerges as a candidate paradigm for questioning primacy in accordance with the Union's constitutional arrangements.

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