Law and Interdisciplinarity

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The Judicial Dialogue in the EU between Law and Politics*

Aqilah Sandhu

I. Introduction

In his laudatory address to the academic community of the Jagiellonian University at the honorary degree ceremony, *Reiner Schmidt* called the relationship between European law and the constitutional laws of the Member States "one of the most interesting questions"[1] of our times. He concluded that whereas the Federal Constitutional Court's (*Bundesverfassungsgericht*) normative programme was the enforcement of the law (i.e. of the German Constitution – the *Grundgesetz*), the European Court of Justice's (ECJ) programme was the subordination of law to the political programme of the European Union. He called into question whether the courts were overburdened with crucial political questions, especially with regard to the "teleology of the European project", which is left open in the primary law of the EU.

The question as to which Court has the last word and whether primary law is politicised has been accompanying the process of integration for a long time

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[1] *R. Schmidt*, Should monetary policy be taken to court? ("Gehört die Geldpolitik vor die Richter?"), address to the JU academic community at the conferral of the doctorate honoris causa, 15 October 2021, Krakow.

and keeps recurring. There is a tradition of accusing the ECJ of overstepping its limits as defined in the Treaties.[2] This has also been repeatedly voiced by judges of the Federal Constitutional Court. *Dieter Grimm*, former judge of the Federal Constitutional Court, for example, famously called the ECJ a "court with an agenda".[3] According to him, the ECJ is neither a guardian of the interests of the Member States nor a neutral arbiter, but rather a political institution with a one-sided bias in favour of European integration. From a methodological perspective, the scope of Union law is defined by means of teleological interpretation based on the objectives set out in the Treaties. Thereby, however, the ECJ has been overstretching the *effet utile* leading to the broadening of the scope of Union law far beyond the Union's original competence.[4]

In the European court system, national constitutional courts and the ECJ engage in a vivid judicial dialogue. This dialogue is not a purely legal one, but also a platform to fathom the respective powers – which is however, a highly political question. It is, of course, true that there is no sharp line between the interpretation of the law and judicial law-making, and that especially constitutional courts are inherently political actors. Yet the judicial dialogue in the EU adds another dimension to this old debate, which is mainly led with regard to the horizontal separation of powers in nation-states. In the EU, important legal issues are negotiated in an overarching judicial dialogue, replacing democratic debate in the competent parliamentary system, Treaty revision procedures or Treaty amending conventions. The pinnacle was reached in the dispute concerning the Public Sector Purchase Programme (PSPP), which almost led to direct conflict between the courts (see below II). Recapitulating the famous *Schmitt-Kelsen* debate on the legitimacy of the jurisprudence of constitutional courts (III), this contribution analyses the relevance of the judicial dialogue in the European court system (IV). It then questions the legitimacy of a predomi-

[2] See *M. Dougan*, The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens, in: M. Adams et al. (eds.), Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice (2013), 127–154, 128 (for further references); for an early critique, see *H. Rasmussen*, On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-Making (1986); *P. Neill*, The European Court of Justice: A Case Study in Judicial Activism (1995).

[3] *D. Grimm*, Europa ja – aber welches? Zur Verfassung der europäischen Demokratie (2016), 16. This criticism was repeated by the former President of the German Constitutional Court and member of its second senate responsible for the PSPP judgment, Andreas Voßkuhle, as cited by *A. Kaufmann*, "Befangener kann man nicht sein", Legal Tribune Online, 22 June 2021, https://www.lto.de/recht/justiz/j/ex-bverfg-praesident-andreas-vokuhle-zu-europischer-rechtsgemeinschaft-rechtsstaatlichkeit-ezb-entscheidung-eugh-polen-ungarn/ (accessed on 25 February 2022). The statement was originally made by *R. Wahl*, Das Recht der Integrationsgemeinschaft Europäische Union, in: C. Franzius et al. (eds.), Beharren. Bewegen. Festschrift für Michael Kloepfer zum 70. Geburtstag (2013), 233–259, 248.

[4] In the field of data protection, see e.g. *A. Sandhu*, Grundrechtsunitarisierung durch Sekundärrecht (2021), 56–61.

nantly indirect dialogue between the ECJ and national constitutional courts (V), which in recent times has taken the form of actual policy-shaping (VI). The traditional indirect dialogue has led not only to the migration of legal concepts to substantive law, but also to their adaptation in methodological terms. Teleological judicial interpretation is replacing political debate. The loss of democratic transformation is multiplied in the EU as a multi-level system. As will be shown in this contribution, the extension of the German Constitutional Court's competence by reference to its responsibility with regard to European integration under Article 23(1) of the Constitutio (*Integrationsverantwortung*) closely resembles the much criticised and strained use of *effet utile* by the ECJ.

II. Primacy of EU law and political promises

With the Federal Constitutional Court's *PSPP* judgment of May 2020,[5] the dispute between national constitutional courts and the ECJ on the last word in the supranational order of the European Union had reached yet another peak. The Federal Constitutional Court for the first time applied its *ultra vires* doctrine and declared a judgment of the ECJ concerning the Public Sector Purchase Programme of the European Central Bank to be "simply not comprehensible and arbitrary from an objective perspective so that, to this extent, the judgment was rendered *ultra vires*".[6] On the occasion of this ruling, what had traditionally been seen as a "cooperative relationship"[7] between both courts was now denounced as a euphemism, a "sham cooperation" or a "confrontational relationship"[8]. Although the Federal Constitutional Court was one of the first

[5] BVerfG, judgment of 5 May 2020, 2 BvR 859/15. One year later, the Court dismissed applications for an order of execution of its judgment as they went "beyond the factual and legal circumstances of the matter decided [in the PSPP judgment] and thus exceeded the permissible scope of an order of execution", BVerfG, order of 29 April 2021, 2 BvR 1651/15, para. 82.

[6] BVerfG, judgment of 5 May 2020, 2 BvR 859/15, para. 116. The official translation is somewhat unfortunate and perhaps misleading, as the ECJ's judgment of 11 December 2018, Case C-493/17 – Weiss and Others, which was declared inapplicable by the BVerfG, was very well studied and indeed "comprehensible". However, the legal reasoning of the ECJ was considered inacceptable and intransparent, especially from a methodological perspective (in the German original: "schlechterdings nicht mehr nachvollziehbar"). Regarding this translation, see *F. Schorkopf*, Antwort auf eine entgrenzte Politik, Frankfurter Allgemeine Zeitung, Einspruch Exklusiv, 5 May 2020.

[7] This phrase goes back to the Maastricht judgment of the BVerfG, judgment of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, BVerfGE 89, 155, 175.

[8] *W. Kahl*, Optimierungspotenzial im "Kooperationsverhältnis" zwischen EuGH und BVerfG, Neue Zeitschrift für Verwaltungsrecht 39 (2020), 824–828, 827.

courts in the European Community to acknowledge the primacy of EU law,[9] it actually arrogated for itself the right to declare EU law inapplicable if it was necessary to safeguard state sovereignty and the national identity along with the principle of conferral, and thus the power to exercise judicial oversight over the ECJ. For some, these red lines seemed more like "a dictate" than an offer of dialogue with the EU Court.[10] In reaction to the *PSPP* judgment, the European Commission initiated infringement proceedings against Germany under Art. 258 TFEU. It found that with the Constitutional Court's ruling, Germany had violated "the general principles of autonomy, primacy, effectiveness and uniform application of Union law" and had failed to comply with Art. 267 TFEU as interpreted in light of the principle of sincere cooperation expressed in Art. 4(3) TEU.[11] The subsequent statement of Germany of August 2021 led to the closure of the infringement proceedings. In its statement, Germany formally reaffirmed the principles of autonomy, primacy, and effectiveness of Union law. It expressly recognised the authority of the ECJ in the EU, and it declared its intention to use all means at its disposal to actively avoid a repetition of an *ultra vires* finding in the future.[12] This last concession must be considered as an empty promise if it is not to be understood as being in conflict with the fundamental principle of judicial independence, guaranteed by Art. 97 of the German *Grundgesetz* and a basic element of the rule of law, a common value[13] on which the EU is founded. The German government cannot coerce the Federal Constitutional Court to abandon its *ultra vires* review without violating judicial independence.[14] Furthermore, the reserved oversight powers are an

[9] Albeit with a reasoning different than that of the ECJ, see BVerfG, order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 330, 374 (Solange II); *D. Grimm*, Der Dialog zwischen EuGH und BVerfG und das PSPP-Urteil, AnwBl Online (2021), 150–151, 151.

[10] *Kahl* (n. 8), 827.

[11] European Commission, Letter of Formal Notice, 9 June 2021, https://ruleoflaw.pl/wp-content/uploads/2022/02/doc-1-LFN-to-DE-EN.pdf (last accessed on 25 February 2022).

[12] European Commission, Press Release, 2 December 2021, https://ec.europa.eu/commission/presscorner/detail/de/inf_21_6201; for a summary of the proceedings, see Deutscher Bundestag, Aktueller Begriff Europa, Nr. 09/21, 23 December 2021, https://www.bundestag.de/resource/blob/873842/4b6dd11dc21afcfcb1ffa49cc665fe5b/Vertragsverletzungsverfahren-geg-BRD-data.pdf; Germany's full statement is available at https://ruleoflaw.pl/wp-content/uploads/2022/02/doc-2-DE-reply-to-LFN-de.pdf (each last accessed on 25 February 2022).

[13] On the rule of law as a common and fundamental EU value, see the settled case law of the CJEU, judgment of 16 February 2022, C-156/21 and C-157/21 – Hungary and Poland/Parliament and Council; judgment of 24 June 2019, C-619/18 – Commission/Poland.

[14] See also the critique of *M. Ruffert*, Verfahren eingestellt, Problem gelöst?, VerfBlog 2021/12/07, DOI: 10.17176/20211208-022437-0. Moreover, the Federal Constitutional Court is not integrated into the regular court system but is a distinctive constitutional organ as stipulated in § 1 of the Act on the Federal Constitutional Court (BVerfGG): "The Federal Constitutional Court shall be a federal court of justice which is autonomous and independent of all other constitutional organs." With a view to the interest of the Commission in lowering the standard

expression of the Member States' sovereignty as explicitly recognised in Art. 4(2) TEU, and as such they are not contrary to the primacy of EU law but merely mark the limits of EU competence. They are also grounded in Art. 23(1)(3) of the *Grundgesetz*, declaring the establishment of the European Union as well as Treaty amendments to be subject to Art. 79(2) and (3) of the *Grundgesetz*. In particular, Art. 79(2) and (3) *Grundgesetz* protect constitutional identity, the principles of the rule of law and democracy and the inviolability of human dignity. This provision is the legal basis for the reserved powers of the Federal Constitutional Court.[15] Thus, it is the German *Grundgesetz* itself that places the outermost limits on the otherwise unquestioned precedence of EU law over national law.

Germany also expressed its commitment to formalise and institutionalise the so far merely informal dialogue ongoing between the ECJ and national supreme courts in order to foster a common understanding within the European network of courts (*Gerichtsverbund*). It suggested the instalment of a "platform of European Judges" to act as consultative body.[16] This entity could complement the already existing Conference of the Heads of the Supreme Courts of the EU Member States.[17]

III. The inherent political character of constitutional courts

The question as to which court has the final say in the vertically integrated judicial system of the EU leads to the problem of politicisation of the jurisdiction of the courts. As the president of the ECJ has put it: "By drawing the borderline between law and politics, courts in fact are drawing the contours of

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of review of the ECJ, see the critique of *K.F. Gärditz,* Ein Staatsstreich von oben?, Frankfurter Allgemeine Zeitung, Einspruch Exklusiv, 12 July 2021, https://www.faz.net/aktuell/politik/einspruch-exklusiv-ein-staatsstreich-von-oben-17434747.html (last accessed on 25 February 2022).

[15] See e.g. BVerfG, judgment of 30 June 2009, 2 BvE 2/08, para. 208; BVerfG, order of 1 December 2020, 2 BvR 1845/18, para. 40.

[16] Statement of Germany (n. 12), 4. There are already informal horizontal meetings between the supreme courts of the Member States: Since 2004, they have exchanged their ideas in the Network of the Presidents of the Supreme Judicial Courts of the EU, https://www.network-presidents.eu. However, this does not include the constitutional courts; Germany, for instance, is represented by the Bundesgerichtshof (BGH). The Conference of European Constitutional Courts established in 1972 brings together 46 European constitutional courts and is not limited to the EU Member States, https://www.confeuconstco.org/en/common/home.html.

[17] The heads of the supreme courts of the EU Member States (i.e. the constitutional courts) meet in conferences to discuss the role of the ECJ, see e.g. BVerfG, Press Release No. 13/2022 of 22 February 2022.

their own legitimacy."[18] The principle of separation of powers aims at drawing the line between law and politics. This is also true for the EU, where "legitimacy requires power to be allocated in accordance with the Treaties. An EU court will be deprived of its legitimacy […] if it intrudes into the political sphere, at either EU or national level […]".[19] It is thus of vital importance for a court's legitimacy not to intrude into the political process.

A. The role of constitutional courts in Kelsen's theory

Yet, when it comes to EU politics, the Federal Constitutional Court is no less a relevant political player than the ECJ, although the first usually raises its admonishing finger towards the latter for overstepping its powers. Instead, albeit without advocating a rigid distinction between law and politics in the sense of *Carl Schmitt*, who for his part functionally separated the legislature from the judiciary,[20] the political ambitions of both courts have to be seen critically. To *Schmitt*, constitutional jurisdiction was incompatible with the constitution being a mere political compromise between the dominant social forces. Establishing a constitutional jurisdiction which encompassed the power to annul laws enacted by the legislature would inevitably turn courts into political actors.[21] However, *Hans Kelsen* contended that

> "[t]he view that only legislation and not the 'actual' judiciary is political is just as wrong as the view that only legislation is a productive creation of law whereas judicial activity is only a reproductive application of law."[22]

The Federal Constitutional Court, in particular, is a political institution and certainly has an active, policy-shaping function, as, in the sense of *Kelsen*, constitutional questions are always political questions.

Nevertheless, *Kelsen*'s pure theory of law was not an illusionary vision of law created in a social and moral vacuum. Instead, he recognised that constitutional law was inextricably intertwined with politics, that law was the product

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[18] *K. Lenaerts*, The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice, in: M. Adams et al. (n. 2), 13–60, 13; on the importance of contextualisation of judicial rulings due to the inherent interest of the courts to expand their judicial powers, *O. Lepsius*, Kontextualisierung als Aufgabe der Rechtswissenschaft, Juristenzeitung 74 (2019), 793–802, 799.

[19] *Lenaerts* (n. 18), 14.

[20] *C. Schmitt*, Der Hüter der Verfassung (1931), 595.

[21] See the analysis of *R.C. van Ooyen*, Die Funktion der Verfassungsgerichtsbarkeit in der pluralistischen Demokratie und die Kontroverse um den "Hüter der Verfassung", in: idem (ed.), Hans Kelsen. Wer soll der Hüter der Verfassung sein? (2nd edn., 2019), VII–XXIII, XVI.

[22] *H. Kelsen*, Wer soll der Hüter der Verfassungs sein?, Die Justiz 6 (1931), 576–628, 586: "Die Meinung, daß nur die Gesetzgebung, nicht aber die 'echte' Justiz politisch sei, ist ebenso falsch wie die, daß nur die Gesetzgebung produktive Rechtserzeugung, die Gerichtsbarkeit aber nur reproduktive Rechtsanwendung sei." (Author's translation).

of social influences and a compromise between different interest groups, and that judgments of constitutional courts are political in nature.[23] Law is thus "politics in a congealed form."[24] However, the process of judicial interpretation and the application of the law should abstain from practising politics.[25] *Kelsen* warned that constitutional jurisdiction can be a means of safeguarding democracy if that constitution abstains from "phraseology".[26] In order to prevent a power shift away from the democratically elected legislature, i.e. the parliament, towards the judiciary, both the standard of review of the court and its legal requirements and principles had to be precisely defined in the constitution.[27] The next section discusses the political nature of the judicial dialogue and *Kelsen*'s theory in the European context.[28]

B. Phraseology in the EU Treaties

The ECJ has historically had a "gap-filling function"[29] due to the vagueness of the Treaties in the early phase of the integration process. Primary law leaves unresolved the question of what is the ultimate goal of the European project – which is fundamental to the process of European integration. According to Art. 1(2) TEU, "[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe", but what is the ultimate goal

[23] *H. Kelsen*, Was ist Reine Rechtslehre? (1953), in: H. Klecatsky et al. (eds.), Die Wiener Rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl und Alfred Verdross, vol. 1 (1968), 611–629, 620; *idem* (n. 22), 587. See also *H. Dreier*, Hans Kelsen's Wissenschaftsprogramm, in: M. Jestaedt/S.L. Paulson (eds.), Kelsen im Kontext. Beiträge zum Werk Hans Kelsens und geistesverwandter Autoren (2019), 29–66, 30.

[24] *Dreier* (n. 23), 30.

[25] *Kelsen* (n. 23), 620.

[26] *H. Kelsen*, Wesen und Entwicklung der Staatsgerichtsbarkeit, VVDStRL 5 (1929), 30–88, 70. See also *H. Dreier*, Hans Kelsen (1881–1973), in: Jestaedt/Paulson (n. 23), 1–26, 14.

[27] *Dreier* (n. 26), 14: "präzise Kontrollmaßstäbe".

[28] More in-depth studies examine the state-centred logic of pure legal theory specifically in relation to the European Community, see e.g. *I. Weyland*, The Application of Kelsen's Theory of the Legal System to European Community Law – The Supremacy Puzzle resolved, Law and Philosophy 21 (2002) 1–37; *T. Ehs* (ed.), Hans Kelsen und die Europäische Union (2008); *J. Busch/T. Ehs,* The EU as Rechtsgemeinschaft. A Kelsenian Approach to European Legal Philosophy, Rivista Internazionale di Filosofia del Diritto 2 (2008), 195–223; *S.-P. Hwang*, Demokratie im Mehrebenensystem: Integrationsfest oder integrationsoffen? Überlegungen zum Demokratiebegriff beim Lissabon-Urteil des BVerfG im Lichte des Schmitt-Kelsen-Gegensatzes, Rechtswissenschaft 2 (2013), 166–192. These studies tackle the question of parliamentary sovereignty of the Member States, the principle of supremacy of EU law and the applicability of Kelsen's theory to the EU as a political Union, which is special in that it has "a constitution without a state" (*H. Brunkhorst*, A Polity without a State? European Constitutionalism between Evolution and Revolution, ARENA Working Paper 14 (2003), 1–30, 19). They do not deal with the role of the ECJ as a "constitutional court" or as a political actor in the EU, where the counter-majoritarian problem is even more pressing.

[29] *Lenaerts* (n. 18), 15.

of this ever closer union? A federal state or only the smoothest possible internal market for persons, services, goods and capital? The final goal of the integration of Europe remains undefined in the Treaties.

For decades, however, the political integration of Europe has not been decided solely at the conferences in Rome, Maastricht, Amsterdam, Nice or Lisbon. It was very much negotiated between Luxembourg and Karlsruhe. It was the ECJ that established the principle of absolute primacy of Union law,[30] which was codified only in 2009 in Declaration no. 17 annexed to the Treaty of Lisbon.[31] The problem of the elusiveness of the Treaty provisions creating excess space for the "interpretative autonomy of the Court" had been identified in academic literature before, especially with regard to the internal market rules, which "leave open a host of vital questions".[32] And, as *Kelsen* prominently warned, it is especially true for the ECJ that "the less precise the mandate on the basis of which a court is asked to operate, the more power is delegated to that court to select among plausible alternatives."[33] The judiciary is given a power equivalent to that of the lawmaker if the constitution refers to formulistic principles like "fairness", "justice", "freedom", "equity" or "morality", without further specifying their content.[34] Delegating the definition of such values to the constitutional judiciary may turn out to be "highly dangerous"[35] if these principles are the standard of review for determining the validity of a legal norm. It is even more dangerous considering the power of the ECJ to set aside laws enacted by the parliaments of the Member States. Whereas the EU Treaty provisions are often criticised for being too detailed and thus creating an inflexible framework,[36] the recent rule of law controversy has shown that despite the vagueness of the values of the EU, their breach by the Member States may be sanctioned. The ECJ upheld the general regime of conditionality for the protection of the EU budget (Regulation 2020/2092).[37] It aims at protecting the financial interests of the EU and ensuring that financing is in line with the values set out in Art. 2 TEU. Art. 2 TEU could be regarded as a

[30] ECJ, judgment of 15 July 1964, Case 6/64 – Costa/E.N.E.L. See also *K.J. Alter*, Establishing the Supremacy of European Law (2003).

[31] See also BVerfG, judgment of 30 June 2009, 2 BvE 2/08, para. 331 – Lisbon, stating that the Declaration merely "confirms the legal situation as interpreted by the Federal Constitutional Court."

[32] *S. Weatherill*, The Court's Case Law on the Internal Market: "A Circumloquacious Statement of the Result, Rather than a Reason for Arriving at It"?, in: Adams et al. (n. 2), 87–108, 108.

[33] *Weatherill* (n. 32), 90.

[34] *Kelsen* (n. 26), 69; especially in the internal market context, "definitional precision remains elusive", as pointed out by *Weatherill* (n. 32), 95.

[35] *Kelsen* (n. 26), 69.

[36] *Grimm* (n. 3), 104.

[37] Judgment of 16 February 2022, Case C-156/21 and 157/21 – Hungary and Poland/Parliament and Council.

phraseological constitutional provision *par excellence*, referring, as it does, to principles such as "freedom, democracy, equality, [and] the rule of law", yet without contour and precision, thus granting the quasi-constitutional court of Europe a power that must be perceived as "absolutely intolerable" in the spirit of *Kelsen*.[38] With regard to its aims and values, the integration programme of the EU is not sufficiently precise.

IV. Necessity of the judicial dialogue

As the EU is not a superstate, being described instead as a "non-hierarchical and polycentric polity",[39] an omnipotent ECJ is met with distrust by the democratically legitimised constitutional courts of the Member States.[40] At the same time, however, judicial dialogue in the EU is intrinsic to its "multi-layered human rights architecture".[41] This encompasses not only the dialogue between the highest constitutional courts and the ECJ within the Union, but also that between Strasbourg and Luxemburg, a dialogue which is explicitly enshrined in the Declaration on Art. 6(2) of the EU Treaty, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.[42]

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[38] He warned that such formulas serving as "political decoration of the Constitution" ("dem politischen Schmuck der Verfassung dienenden Formeln") may easily be confused with material provisions on fundamental rights and freedoms. A constitutional court may thus annul a law referring to undefined principles such as "justice". In so doing, it would acquire an unacceptably unlimited political power ("eine Machtvollkommenheit […], die schlechthin als unerträglich empfunden werden muss"), *Kelsen* (n. 26), 69–70. The rule of law has been substantiated by the ECJ in its case law and defined in Recital 3 of EU Regulation 2020/2092. Art. 2 TEU was also addressed in the Lisbon judgment; however, the Federal Constitutional Court left open its legal character and made clear that the value-clause does not provide the EU with a "Kompetenz-Kompetenz", thus respecting the principle of conferral, judgment of 30 June 2009, 2 BvE 2/08, para. 332.

[39] *F. Snyder*, General Course on Constitutional Law of the European Union (1995), 55.

[40] *F.W. Scharpf*, Legitimationskonzepte jenseits des Nationalstaats, in: G.F. Schuppert et al. (eds.), Europawissenschaft (2005), 705–742, 728, also points to the possibility of the legislature to react to a decision of the Federal Constitutional Court by amending the constitution, whereas the ECJ's decisions are almost engraved in stone with regard to the complex Treaty ratification process.

[41] *F. Fabbrini*, The EU Charter of Fundamental Rights and the Rights to Data Privacy: The EU Court of Justice as a Human Rights Court, in: S. de Vries et al. (eds.), The EU Charter of Fundamental Rights as a binding instrument. Five years old and growing (2015), 261–286, 281.

[42] According to the Declaration "the Conference notes the existence of a regular dialogue between the [Court of Justice] and the [ECtHR]; such dialogue could be reinforced when the Union accedes to that Convention."

Union law is very much a product of transnational comparative reasoning, marked by the migration of methodological instruments.[43] Consequently, the ECJ has learned from the national constitutional courts. The principle of proportionality is, for example, widely considered as having successfully migrated from German law into Union law.[44] And when reading the reasoning of the ECJ in its case law on fundamental rights, one can certainly not deny the obvious impact of the Federal Constitutional Court's jurisprudence.[45]

A. Direct dialogue

Apart from the dialogue between the ECtHR and the ECJ, there is also the institutionalised dialogue between the ECJ and national courts – including constitutional courts – according to Art. 267 TFEU. The term "dialogue between courts" has its origin in the context of preliminary proceedings. As a Union of law, the EU is founded on the very fundamental premise that the Member States' judicial systems are governed by the rule of law. The direct dialogue only functions if it is practised by independent courts. The preliminary procedure is considered to be the "keystone" in the judicial system of the EU. It sets up "a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States".[46] The object of this dialogue is to secure the uniform interpretation of EU law and thereby to ensure the consistency, full effect and autonomy of EU law in the Member States.[47] Yet this dialogue has until recently rarely been relied on by the constitutional courts of the Member States, especially the Federal Constitutional Court. It is only in the past 15 years that references for a preliminary ruling have been submitted to the ECJ by the Italian (2008), Spanish (2011), French

[43] *E. Stein*, Lawyers, Judges and the Making of a Transnational Constitution, American Journal of International Law 75 (1981), 1–27; *F. Mancini*, The Making of a Constitution for Europe, Common Market Law Review 26 (1989), 595–614; *A. Stone Sweet*, The Judicial Construction of Europe (2004).

[44] On this, see *S. Choudhry* (ed.), The Migration of Constitutional Ideas (2008).

[45] ECJ, Joined Cases C-293/12 and C-594/12, para. 37: In the context of the storage of all telecommunications traffic data for several months, the Federal Constitutional Court considered the provision at issue to be disproportionate by, inter alia, referring to the "diffuse sense of threat" and "a sense of being permanently monitored" as a result of data storage.[45] One is very much reminded of this wording when reading the Digital Rights judgment only four years later, where the ECJ declared the underlying Data Retention Directive null and void, arguing that data retention without the users' knowledge "is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance."

[46] ECJ, Opinion 2/13, 18 December 2014, para. 176 – Accession to the ECHR.

[47] ECJ, Opinion 2/13, 18 December 2014, para. 176 – Accession to the ECHR.

(2013), and German (2014) constitutional courts.[48] And for the most part, the questions referred did not concern fundamental rights. One may wonder why such a direct dialogue has taken so long to develop.

Rulings of the ECJ under Art. 267 TFEU bind the referring court.[49] They are not directly binding upon the parties involved. Only the final decision of the referring court (applying the ECJ's interpretation) binds the parties of the proceedings (*inter partes*). The preliminary decision of the ECJ is binding only insofar as it answers the specific questions referred to it. "Dialogue" thus seeks to describe the binding effect of a preliminary ruling which is neither *erga omnes* nor *inter partes* in a strict sense. In a broader sense, and according to the *acte clair* or *acte eclairé* doctrine, these rulings factually bind all other national courts as well once they are confronted with a similar case.[50]

B. Indirect dialogue

Whereas direct dialogue between the ECJ and national constitutional courts has a relatively short history, the informal, non-institutionalised dialogue has a long tradition. One may distinguish this from the horizontal dialogue between the national courts, which is very intense. The latter takes place in informal meetings and conferences, but also in academic literature. In the landmark decision on the *Right to be Forgotten II*, the Federal Constitutional Court referred to the Austrian Constitutional Court, the Constitutional Court of Belgium, the French *Conseil constitutionnel* and the Italian *Corte costituzionale* in order to justify the review of the domestic application of EU law by German authorities on the basis of the EU Charter. Also, the famous *Solange II* decision of the Federal Constitutional Court was preceded by the *Frontini* case of the Italian *Corte costituzionale*, in which the *Corte* reserved to itself the right to adjudicate on the compatibility of Community legislation with fundamental rights under the Italian Constitution.[51] Particularly in *Solange II*, the Federal Constitutional Court aimed at pressuring the ECJ to improve fundamental rights protection to a standard equivalent to that of the national level, with the objective of increasing convergence between the two legal orders.

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[48] *A. Lang*, How Constitutional Courts talk to each other: The Potential of the Preliminary Reference Procedure for Europe's pluralist Verfassungsverbund, VerfBlog 2014/11/28, DOI: 10.17176/20170601-145708.

[49] *AG Warner*, Opinion Case 112/76, ECR 1977, 1658, 1662 – Manzoni.

[50] In more detail on this aspect, see *Sandhu* (n. 4), 219–225.

[51] *P. Mengozzi*, A European Partnership of Courts. Judicial Dialogue between the EU Court of Justice and National Constitutional Courts, Il Diritto Dell'Unione Europea 3 (2015), 701–720. He also reports that the famous Solange II decision of the Federal Constitutional Court was preceded by the ground-breaking Granital decision of the Italian Corte Costituzionale. Wolfgang Zeidler, then President of the Federal Constitutional Court, and Antonio La Pergola, the reporting judge of the Granital case in 1984, had exchanged views previously at a meeting at the University of Bologna.

More dominant in public discourse is the indirect dialogue between the ECJ and the Member States' constitutional courts as a "non-hierarchical and polycentric polity".[52] This judicial dialogue is even more powerful than the Treaties. Major steps in the development of fundamental rights in the EU have resulted from the dialogue between the judges of, on the one hand, the ECJ and, on the other hand, the national constitutional courts. Emphasising the importance of the non-institutionalised judicial dialogue between the ECJ and national constitutional courts is more than subscribing to "a cliché" in EU constitutional law.[53] Rather, the indirect dialogue is perhaps its cornerstone.

V. Legitimacy of the dialogue

This raises the question of the legitimacy of such a dialogue that determines the scope of the ECJ's jurisdiction, especially in the field of fundamental rights protection. Article 51 of the Charter, from the outset, seems to set clear and precise boundaries on the jurisdiction of the ECJ. Its para. 1 limits the bindingforce of the Charter *vis-à-vis* the Member States to situations where "they are implementing Union law". Paragraph 2 ensures that the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." Yet the jurisprudence of the ECJ has vastly expanded the scope of application of fundamental rights over the last few years.[54] Article 51 of the Charter is a compromise, consolidating the ECJ jurisprudence on the one hand and leaving enough room for interpretation with dynamic reference to EU law on the other. The jurisprudence on the applicability of the Charter to measures of the Member States is therefore often of a political or even constituent nature.[55] The extensive interpretation of the scope of application of the Charter has been countered by the national constitutional courts – especially the German, Italian and French courts – in order to protect their national identity and the principle of conferral.[56] When the ECJ expands its jurisdiction by adopting a broad definition of the "scope of Union law", the national constitutional courts threaten to activate their review mechanisms in turn.

In the field of fundamental rights protection, the ECJ has increasingly adjudicated cases that fall within the exclusive competence of the Member States,

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[52] *Snyder* (n. 39), 55.

[53] *Fabbrini* (n. 41), 280 f.

[54] See especially the judgment of 29 February 2013, Case C-617/10 – Fransson.

[55] *D. Grimm*, Recht oder Politik? (2017), 19.

[56] In the ruling on the counter-terrorism database, the Federal Constitutional Court of Germany directly replied to the Fransson judgment, demanding a restrictive interpretation of the ECJ's ruling, see BVerfG, judgment of 24 April 2013, 1 BvR 1215/07, para. 91.

e.g. cases touching on criminal law, private law, citizenship law or the relationship between state and church. The case law of the ECJ on the church's right to self-determination in individual labour law matters and the prohibition of discrimination on grounds of religion was criticised by legal commentators as "massive encroachments on core elements of national identity such as the basic relationship between state and church".[57] The ECJ has ruled on a case concerning discrimination by the church on grounds of religion, leaving aside Art. 17 TFEU, which in turn is relevant with view to the question of competence.[58] It could do so, because Directive 2000/78/EC on equal treatment in employment and occupation, concretising the general prohibition of discrimination, has a broad scope of application. According to Art. 17 TFEU, the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. In this case however, the Court put aside the Member State's concern regarding its national identity by assuming that the EU legislature had taken this provision into account when adopting the directive.[59] Granting effective judicial review even in cases where the relation of Member States with churches and religious associations is concerned is in principle necessary and in line with secondary law. However, the Member States' reservations and the EU's duty of neutrality as expressed in Art. 17 TFEU must be given at least some consideration in the reasoning on this issue.

Instead of merely defending their constitutional orders, many national constitutional courts have adopted the practice of including the Charter into their respective standard of review. The Federal Constitutional Court for the first time applied the EU Charter of Fundamental Rights in the *Right to be Forgotten II* decision,[60] which some view as a sign of appeasement politics.[61] Others however, have rightly warned that applying the Charter straightforwardly could result in an interpretive hegemony in Europe.[62] The Federal Constitutional Court has thereby secured its position as the "ultimate guardian" of fundamental rights.

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[57] *Kahl* (n. 8), 826.

[58] ECJ, judgment of 17 April 2018, Case C-414/16 – Egenberger, now subject to a constitutional complaint currently pending before the BVerfG, 2 BvR 934/19.

[59] ECJ, judgment of 17 April 2018, Case C-414/16, para. 57 – Egenberger.

[60] BVerfG, order of the First Senate of 6 November 2019, 1 BvR 276/17.

[61] The BVerfG itself stresses that it should conduct its review "in close cooperation with the Court of Justice of the European Union", ibid., para. 68, and acknowledges the ECJ's "final authority for interpreting EU law", para. 69 (official translation).

[62] See *Rensmann*, pp. 113 ff., 148 ff., above, on the Federal Constitutional Court's tendency to interpret the EU Charter in the light of its own case law.

VI. From dialogue to policy-making

It is not the application of the Charter by the Federal Constitutional Court that gives rise to criticism, but rather the underlying reasoning. It seems to be more politically motivated than normatively guided. Thereby, the Federal Constitutional Court seems to succumb to the same methodological fallacies as the often rightly criticised ECJ: The law is subordinated to a political aim – instead of being the normative programme of the court itself. Whereas the ECJ centres its arguments around the *effet utile*, which mostly trumps legitimate national interests, the Federal Constitutional Court refers to "its responsibility with regard to European integration (*Integrationsverantwortung*)" under Art. 23(1) of the *Grundgesetz*[63] in order to justify the application of the Charter. This *Integrationsverantwortung* can be viewed as the argumentative counterpart to *effet utile*. It is only seemingly a more integrationist, EU friendly approach. In fact, the Court thereby claims an inherently political responsibility in order to define its own jurisdiction. *Integrationsverantwortung* was initially ascribed to the political constitutional organs, especially the federal government and the federal German parliament, the *Bundestag*. In its *Lisbon* decision, the Federal Constitutional Court initially referred to this "responsibility for integration" as a "special responsibility" that is incumbent on the legislative bodies and the federal government within the context of integration, thereby ensuring democratic participation in the ratification process and preserving the principle of conferral.[64] This responsibility is an expression of the limits on European integration as framed in the *Grundgesetz*. German state organs are not authorised to transfer sovereign power to the EU and are thus prohibited from conferring upon the EU the competence to decide on its own powers.[65] While ensuring that adherence to the European integration agenda is incumbent on all constitutional organs – albeit only within their respective constitutional powers – it does not allow the government to encroach upon the judiciary or vice versa. So, for example, referring to the *PSPP* judgment, the German federal government cannot prevent the Federal Constitutional Court from exercising its reserved oversight powers when asserting its *Integrationsverantwortung*. Conversely, the Federal Constitutional Court cannot expand its own jurisdiction beyond the limits set out in the *Grundgesetz* by asserting the exercise of its *Integrationsverantwortung*. And yet, this is what occurred in the *Right to be Forgotten II* decision, where the Federal Constitutional Court derived the standard of review from Art. 23(1) of the *Grundgesetz* in conjunction with the

[63] BVerfG, order of 6 November 2019, 1 BvR 276/17, para. 53.

[64] BVerfG, judgment of 30 June 2009, 2 BvE 2/08, para. 236.

[65] BVerfG, judgment of 12 October 1993, 2 BvR 2134, 2159/92, BVerfGE 89, 155, 187; BVerfG, judgment of 5 May 2020, 2 BvR 859/15, para. 102, 116; for an extensive analysis, see *Sandhu* (n. 4), 216–218.

provisions on its role with regard to fundamental rights protection.[66] Only by applying the Charter in cases within the scope of application of fully harmonised EU law is the court able to fulfil its role of providing comprehensive fundamental rights protection *vis-à-vis* German state authorities. The Federal Constitutional Court as a state organ possesses a genuine *Integrationsverantwortung* with regard to the participation of the Federal Republic of Germany in the EU, just like the parliaments at the federal or state level or like the federal or state governments.

However, the ruling of the Federal Constitutional Court in the Right to be Forgotten II case gives rise to two issues. Firstly, it conflicts with the explicit wording of Art. 93(1) no. 4a of the *Grundgesetz*, defining the relevant standard of review for constitutional complaints before the Federal Constitutional Court. The provision only refers to the infringement of basic rights and certain similar rights under the *Grundgesetz*. It does not include the EU Charter or the European Convention on Human Rights. The Federal Constitutional Court's ruling thus amounts to an amendment of the *Grundgesetz*.[67]

Secondly, fully harmonised EU law is not "state authority" in the sense of Art. 1(1) of the *Grundgesetz* and attributable to the German state alone. While stressing that EU law partially takes precedence over constitutional law, the Federal Constitutional Court at the same time tacitly centralises Art. 267 TFEU-proceedings at the federal level in fundamental rights questions. Ordinary courts may still initiate preliminary proceedings under Art. 267 TFEU to review the compatibility of a national provision within the scope of EU law in terms of fundamental rights.[68] More likely, however, they will refer to the Constitutional Court as the instance of final resort in fundamental rights protection (Art. 267[3] TFEU) and thus refrain from referrals to the ECJ. The minute differentiation between binding standards set by EU law and a Member State's discretion[69] then becomes irrelevant. In any case, the Federal Constitutional Court is competent to adjudicate, albeit with a differing standard of review (*Grundgesetz* rights or Charter rights). The Federal Constitutional Court has thereby secured comprehensive fundamental rights protection *vis-à-vis* the entire German state authority in all its manifestations. In doing so it provides a purely teleological reasoning for the expanded standard of review. This comes

[66] BVerfG, order of 6 November 2019, 1 BvR 276/17, para. 53.

[67] *D. Preßlein*, Grundgesetz vs. Grundrechtecharta? Zur "europäisierten Grundrechtsprüfung" des BVerfG nach den Beschlüssen zum "Recht auf Vergessen" und "Europäischer Haftbefehl III", Europarecht 56 (2021), 247–274, 247.

[68] BVerfG, order of 6 November 2019, 1 BvR 276/17, para. 66: "As the organ guaranteeing comprehensive fundamental rights protection at the domestic level, the Federal Constitutional Court must review the decisions of the ordinary courts in this respect." ("Als Garant eines umfassenden innerstaatlichen Grundrechtsschutzes hat das Bundesverfassungsgericht die Fachgerichte diesbezüglich zu kontrollieren.") (Official translation).

[69] See e.g. BVerfG, order of 21 March 2018, 1 BvF 1/13, paras. 20–22.

very close to the one-sided methodology practised by the ECJ. *Wolfgang Kahl* brings it sharply to the point:

"Both sides are concerned with staking their 'claims' or 'territory' in order not to be marginalized as a 'player' in the European constitutional court network, whereby power considerations, the urge for cross-border glamour, external impact and perception (by the media and the public) as well as personal sensitivities and vanities are also at play […]."[70]

But while the amendments made by the Federal Constitutional Court to the *Grundgesetz* can be either adopted or rejected with a two-thirds majority in the German *Bundestag*, implicit treaty amendments made by the ECJ can effectively not be revoked as such action would require an unanimous decision by all Member States and a subsequent ratification process.

Just as the ECJ seeks to fill the gaps in the Treaties by means of judicial activism, the Federal Constitutional Court seeks to fix perceived deficiencies in the fundamental rights protection in the European legal order. Accepting the fact that according to the far-reaching jurisprudence of the ECJ much of the national legal order is within the scope of the Charter, rendering inapplicable the German *Grundgesetz*, the Federal Constitutional Court argues that it cannot "withdraw from fundamental rights protection in such constellations" because it would no longer be able to fulfil its role.[71] Is this an implicit hint that the ECJ does not fulfil this role sufficiently or that it is not intended to be a European Constitutional Court? For clearly, if the Federal Constitutional Court retreated on fundamental rights questions, the ECJ would inevitably take its place. This is rightly detected as an architectural deficit in the European legal order, above all for an individual citizen who is deprived of the constitutional right to complain in all cases fully harmonised by EU law and is forced to assert that German ordinary courts violated one's right to a lawful judge by refusing to initiate a long-winded preliminary procedure before the ECJ. The Federal Constitutional Court refers to exactly this

"gap in protection arising from the application of EU fundamental rights by the ordinary courts […] because individuals have no direct recourse to the Court of Justice of the European Union for asserting a violation of EU fundamental rights in such cases."[72]

However, in claiming to improve the doubtlessly insufficient legal recourse for individuals under EU law, the Federal Constitutional Court has adopted a political function far beyond its jurisdictional powers under the *Grundgesetz*. It is not the duty of the courts to correct deficiencies in the EU legal system. Judicial review by the national constitutional courts seeks to compensate for the narrow admissibility requirements for individual actions under Art. 263 TFEU. Case law can be seen as a form of counterweight to the dysfunctional

[70] *Kahl* (n. 8), 825 f. (author's translation).
[71] BVerfG, order of 6 November 2019, 1 BvR 276/17, para. 60.
[72] BVerfG, order of 6 November 2019, 1 BvR 276/17, para. 61 (official translation).

system of checks and balances in the EU. The lack of individual protection is a problem of primary law – selective relief by individual Member States only adds a horizontal dimension of inequality to the unsatisfactory fundamental rights protection in the EU. In order to change this – admittedly unsatisfactory – situation, the Treaties need to be amended. The situation is widely seen to be unsatisfactory, but changes to it should come from amendments to the Treaties by the responsible legislative bodies.

The diminishing relevance of the Federal Constitutional Court should not be countered with equally teleological reasoning, but with a more precise definition of the jurisdiction of the ECJ in the Treaties. Both courts should refrain from referring to a political object in order to justify either preserving or extending their powers.

VII. Concluding remarks: cooperation or confrontation?

The First Senate's expansion of fundamental rights review with reference to its *Integrationsverantwortung* proves to be a positive gesture of cooperation only at the surface. In fact, it enables an independent application of the EU Charter and secures the Member State's sovereignty of interpretation in fundamental rights issues even in cases determined by Union law.

Over the course of time, the "dialogue between courts" has been torn from its original context and turned into a judicial technique that goes well beyond what the law had in mind. It is rooted neither in a democratically legitimised process nor an accepted legal method provided or backed by primary law or by the constitution. Judicial dialogue has become a self-employed term, a projection of the respective expectations of each legal system. The Courts no longer interpret the law within their respective jurisdictions – they have seized the law in their own interests. The "dialogical logic"[73] has become an unquestioned and unchallenged axiom in legal literature. Primary law is reduced to a document that merely reproduces and codifies ECJ jurisprudence instead of canalising or limiting its power. According to the principle of conferral, the EU cannot determine its own powers. Yet, if the Court interprets EU law extensively, it acquires *Kompetenz-Kompetenz* – disregarding the fact that the ECJ is also subject to conferral.

Only a decentralised application of EU law as well as respect for the principles of subsidiarity and proportionality and the principle of conferral can lead to a proper functioning of the EU judicial system. The law is the main force of the EU as a community of law.

Perhaps the ECJ will, in reaction to the decentralised application of the Charter, learn once again from the national constitutional courts and define a

[73] *G. Buchholtz*, DÖV 2017, 837–845, 845.

core of the Charter that is not at the disposal of the Member States. And perhaps national identity will be found to be equivalent with a European identity in some regards – just as fundamental rights protection is made equivalent on both levels.[74]

[74] The recent arrest warrant case merges Art. 4 of the EU Charter and Art. 79(3) of the Grundgesetz in a ruling involving the protection of the constitutional identity, BVerfG, order of 1 December 2020, 2 BvR 1845/18.