How National Constitutions Strive to Recover Their Normative Force in Response to the Constitutionalization of the European Legal Order

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This article belongs to the debate » Europe’s Foundation and its Future: The EU Charter in Focus
01 November 2024

Reconciling National and European Constitutional Legalities

In light of the increasingly established autonomous European constitutional legality, national constitutional courts are now compelled to reconsider their roles. Through a progressive expansion of its direct applicability by national ordinary judges, the Charter of Fundamental Rights risks fostering the marginalization of national constitutional courts. To address this challenge, and to continue their task of resolving the tensions between legal and constitutional legality, they must include the European constitutional legality in their scope. To this end, however, the old balances established in Italy and Germany in the 1980s are no longer adequate. I argue that the solution lies in a highly differentiated consolidation of constitutional legalities that integrates and embraces the unique roles of national constitutional courts in their respective systems of adjudication.

The Charter of Fundamental Rights and the centralized judicial review of legislation: a tense relationship

Given the legal status of the Charter, national constitutional courts must be equipped, on one hand, to safeguard the normative force of national constitutions and, on the other hand, to assert their role as courts of European fundamental rights. In relation to these goals, within the broader process of constitutionalizing the Union’s legal system, the traditional structures that have been consolidating since the 1980s now seem inadequate.

This explains the reaction of some constitutional courts, starting in 2012, to the risk of marginalization by the EU legal order. Initially, the issue arose with the recognition of the EU Charter of Fundamental Rights as having the same legal value as the Treaties. This was further intensified by the Court of Justice’s interpretation of Articles 51 and 53 of the Charter, particularly following the *Fransson* and *Melloni* cases. In this context, to comprehend the most recent developments, it is essential to consider, from a comparative perspective, the procedural tools that characterize each legal system and differentiate the various centralized systems of constitutional justice.

In Italian constitutional literature, the discussion surrounding the tension between legal legality and constitutional legality is a well-established topic. Today, this debate can be particularly productive when viewed in light of the transformation brought about by the introduction of the Charter. After World War II, rigid constitutions filled with principle-based norms significantly reshaped the traditional 19th century conception of the rule of law. The impact of a written constitution, safeguarded by a constitutional court, has altered the principle of formal legality, necessitating to rethink the very nature of fundamental rights. These rights are now viewed not only as limits on public authorities' actions but also as driving norms whose realization is essential in the constitutionalization of the legal system. Constitutional legality, therefore, remains in a continuous state of tension with legal legality, since the full implementation of the constitutional text is an ongoing process that can never be considered fully complete.

From this perspective, judicial review of legislation becomes a crucial tool for managing the tension between these two forms of legality and serves as a privileged mechanism for the ordinary legislator. Allowing ordinary judges to directly apply European constitutional principles through the Charter could be seen as a threat to this prerogative, imposing on them the responsibility of managing and resolving that tension as if they were functioning within a decentralized system of judicial review. This approach suggests a substitutive effect of European constitutional legality over national constitutional legality. As a result, it becomes imperative to establish a new equilibrium in which national constitutional courts can play an active role in addressing the tension between constitutional legality and legal legality. Constitutional courts must be able to continue playing their role in constructing the unity of diverse legalities, among which European constitutional legality must now be included.

Constitutional legality and legal legality in a centralized system of judicial review and the importance of considering how a centralized system really works

In the landmark case *McCulloch v. Maryland* (17 U.S. 316, 1819), Chief Justice Marshall, articulating his guiding principle for constitutional interpretation, famously reminded us that "we must never forget that it is a *Constitution* we are expounding." In that context, constitutional legitimacy review is decentralized. As is well known, this means that any judge can determine the unconstitutionality of a federal law and decide not to apply it to the case they have to solve. As a consequence, the relationship between constitutional legality and legal legality is resolved so that the constitutional text can be fully applied by ordinary judges, not only to assess the unconstitutionality of statutes, but also to guide their application in practice.

In continental Europe, this solution – known and debated since the 19th century – has been firmly rejected. At that time, on the one hand, the concept of the Constitution as paramount law remains contentious. On the other, the creation of a genuine constitutional legality requires acknowledging both the normative force and the primacy of constitutions. This process culminated after World War II with the establishment of centralized review

mechanisms, inspired by Kelsen, which serve as judicial safeguards for constitutions. These constitutions, however, embody rich sets of values, and thus, since then, in Europe, constitutional legality does not merely reflect the completion of the 19th century notion of the rule of law. Over time, the role of the constitutional judge has expanded beyond merely verifying compliance with hierarchical legal principles, assuming a primary role in protecting and promoting the values embodied in constitutions. As such, the tension between constitutional legality and legal legality is structural and cannot be definitively resolved.

In this framework, however, recognizing the normative force of constitutions has entailed acknowledging that constitutional principles must be treated as *ius quo utimur*. Although centralized judicial review is entrusted to a specialized court, this does not fully encompass the practical application of constitutional principles. A fundamental role remains for the broader legal system, starting with ordinary judges. It is not surprising, therefore, that someone has paraphrased Carl Schmitt's famous Diktum by suggesting that the true sovereign is the one who has the final say on constitutional interpretation (G. Püttner). From this point of view, in Germany, the *Urteilsverfassungsbeschwerde* (constitutional complaint procedure against judicial decisions) has over time positioned the German Federal Constitutional Court (*Bundesverfassungsgericht*) at the apex of constitutional adjudication, particularly with respect to the interpretation and application of constitutional principles. In contrast, in Italy, this has not occurred, and a significant part of the Constitution's practical application escapes the Constitutional Court's oversight.

This leads to a reflection on the characteristics of centralized judicial review of legislation from a comparative perspective. In facing the emergence of a European constitutional legality, even minor differences between national systems may become significant. More specifically, the centralized structure of constitutional justice models does not, by itself, ensure that specialized courts function uniformly. No single model can be considered paradigmatic. Consequently, different approaches to constructing the unity of legality emerge. Constitutional legality and legal legality can only interact in diverse ways, depending on the degree of penetration allowed for the former and the scope of the constitutional court's intervention to ensure uniform application, potentially valid *erga omnes*.

Considering these points, it is essential to assess the recent developments concerning the Charter of Fundamental Rights of the EU and the necessity of involving national constitutional courts in defining the new unity of legality in the European *Verfassungsgerichtsverbund*. This might require revisiting certain long-established arrangements concerning the process of constitutionalization of Union law.

From the old balance to the risk of isolation of national constitutional courts

These considerations shed a new light on the need to rethink the traditional structures that have developed over time, especially through the ongoing interaction between the Court of Justice, the Italian Constitutional Court, and the German Federal Constitutional

Court.

The Charter of Fundamental Rights, through a progressive expansion of its direct applicability by national ordinary judges, risks fostering the marginalization of national constitutional courts. Its ability to produce an effect similar to incorporation, compelling the ordinary judge not to apply domestic law without referring to the national constitutional court, could thereby replace the normative force of the national constitution with the European constitutional legality. However, to understand why the displacement effect produced by the Charter operates differently in various legal systems, it is essential first to reconstruct the old framework of relationships.

In particular, I refer to the doctrine established in Italy starting in 1984 with the *Granital* decision (Judgment No. 170 of 1984), and to the *Trennungsthese* of the German Federal Constitutional Court. The *Granital* decision imposed an obligation on ordinary judges to disapply domestic law that conflicts with European regulations, rendering constitutional legitimacy questions inadmissible when Union law has direct effect ("*Granital* rule"). Meanwhile, the *Trennungsthese* has allowed the German Federal Constitutional Court to gradually develop the idea – based on the principles of *Solange II*, – that the Basic Law cannot serve as a standard of review in areas fully determined by Union law.

Despite taking different paths, and with the exception of issues related to constitutional identity and ultra vires reviews, these premises have led to the gradual isolation of constitutional judges from matters concerning Union law in both countries. For a long time, constitutional courts tolerated the reduction of their jurisdiction, under the assumption that Union law impacted only a limited number of areas. For example, in the *Frontini* decision (Judgment No. 183 of 1973), cited in the *Sondervotum* (dissenting opinion) of *Solange I*, the Italian Constitutional Court asserted the following:

> "[T]he legislative competence of the EEC bodies is provided for in Article 189 of the Treaty of Rome only with regard to matters concerning economic relations, that is, matters for which our Constitution does establish a reservation of law or a reference to the law, but the precise and specific provisions of the Treaty provide a sure guarantee, so much so that it appears difficult even in the abstract to envisage the hypothesis that a Community regulation could affect matters of civil, ethical-social, or political relations with provisions contrary to the Italian Constitution" (cons. in dir. para. 9).

The isolation of the constitutional judges has also fostered distrust of the preliminary reference procedure, which seemed to risk subordinating constitutional jurisdiction to the Court of Justice. However, in both Italy and Germany, there have been attempts to mitigate this trend. In Italy, one notable development has been the use of Union law without direct effect as an intermediate standard of review (see, ie. Judgment No. 263 of 2022 in the so called *Lexitor* case). Due to the use of Union law as an intermediate standard, the Italian Constitutional Court has long been able – despite some criticism – to intervene in applying derivative law by invalidating statutes that, while not directly subject to disapplication based solely on Union law (see, *Thelen Technopark*), are nonetheless

deemed unconstitutional for violating Articles 11 and 117, paragraph 1, of the Italian Constitution. In Germany, since *Solange II*, it is significant that individuals can file complaints for violations of the right to a legally appointed judge in cases where the obligation to raise a preliminary ruling has not been properly fulfilled.

Today, however, this outcome no longer seems sound. For some time, Italian legal scholars have criticized the strict correlation between direct effect and inadmissibility, while in Germany there has been an intense debate on the need to move beyond *Solange II* and the *Trennungsthese*. This debate is largely driven by the recognition that the once seemingly straightforward balance can no longer accommodate the increasing activism of constitutional courts, as exemplified by the case decided in the *Beschluss Europäischer Haftbefehl II*.

Similar problems, different paths: the need to strengthen an integrated European constitutional jurisdiction and why the differences between systems of constitutional adjudication matter

The strength of the German Federal Constitutional Court can be attributed to its consistent consideration of the relationship with the EU legal order to ensure adequate standards of protection. This approach reflects the idea of material integration between constitutional yardsticks. From this point of view, since the *Solange II* decision, national values have played a crucial role in shaping common constitutional traditions. In contrast, the Italian Constitutional Court's engagement with the EU legal order has been marked by a more formal conception of the relationship between legal systems, focusing primarily on resolving conflicts between legal norms.

Today, as the need to integrate standards becomes increasingly apparent, this historical divergence in approaches is highly significant. The challenge of constructing a European jurisdiction in the area of fundamental rights should hinge on the balance between European constitutional legality, national constitutional legality, and legal legality. The ability to bring about this balance, nevertheless, depends largely on the procedural role that national constitutional courts are afforded, particularly regarding the modes of access and the scope of their constitutional jurisdiction. For example, in Germany, there exists a distinct and autonomous *Grundrechtsgerichtsbarkeit*, which allows for comprehensive control over the substantive constitutional application of law. In contrast, in Italy, the jurisdiction over fundamental rights of the Constitutional Court is entirely subsumed within the review of the constitutional legitimacy of statute laws or acts with the force of law.

These systemic differences must necessarily be taken into account when one aims to construct a European constitutional jurisdiction that includes national constitutional judges. It should be noted that it is impossible to establish a one-size-fits-all rule that applies to all centralized constitutional judges. Given these two distinct experiences, it is evident that the process of integrating European constitutional legality with national constitutional legality cannot operate through identical mechanisms. From this point of view, the Court of Justice seems to be cognizant of the unique characteristics of different legal systems, even though, since *Fransson* and *Melloni*, it has appeared particularly

focused on establishing a dialogue with the German Federal Constitutional Court. The so-called "*Melloni*-limits" are emblematic of this approach, as they reflect both an acceptance and moderation of the principle that recourse to national standards is permissible only if the area is partially determined, while also presenting a significant challenge to the so-called *Trennungsthese*. Then, in three decisions from 2019, including *Pelham GmbH*, which preceded the turning point established with the *Right to be Forgotten I* and *II*, the German framework has been explicitly described by the referring court and, under certain conditions, endorsed by the Court of Justice.

In Italy, overcoming the isolation of the Italian Constitutional Court proves challenging due to the necessity of moving away from the older jurisprudence on "dual preliminarity" ("doppia pregiudizialità") and, then, to correct the "*Granital* rule". The risk here lies in potentially setting off a process that could revert the moderation established in *Granital* back to the principles of Judgment No. 232 of 1975, which culminated in the *Simmenthal* decision. Since *Melki*, however, it has become increasingly clear that, under certain conditions, the Court of Justice does not consider it problematic for ordinary judges to act first by referring a case to the constitutional court. The openness toward the Italian Constitutional Court is particularly noticeable in the *O.D.* ruling, where the Court of Justice, following a referral from the Constitutional Court, highlighted the specific features of the Italian constitutional process, justifying why it considered the procedure admissible.

Conclusion

The theoretical acceptance of *Parallelanwendbarkeit* of fundamental rights catalogues, along with the practice of using the Charter as a yardstick against the specialized courts' rulings, as seen in Germany, presents a significant challenge. Similarly, the Italian Constitutional Court's use of the Charter as an intermediate standard for assessing the validity of statutes, even when Union law has direct effect, as established in Judgment No. 269 of 2017, adds to this complexity. The challenge lies in the gradual construction of proper material integration between different constitutional standards.

It is crucial to establish a dialogue that seeks to optimize the integrated level of rights protection across Europe without undermining the progress already achieved or questioning the principles of direct effect and primacy. This dialogue should focus on the substance of protection while being mindful of the risks of a potential "patriation" of the Charter, which could diminish its normative value. This dialogue, which strikes at the core of the traditional role of constitutional courts in balancing constitutional legality with legal legality, should involve constitutional courts and take into account their political sensitivity in dealing with constitutional principles and values.

In light of this, it seems that this new constitutional legality presents a distinct challenge to the European *Verfassungsgerichtsverbund*. How constitutional courts can engage in this process will depend on the national procedural rules and the practical functioning of constitutional adjudication systems. The role of these courts must be clearly considered to ensure that the multiple and diverse values safeguarded by national constitutions, which underpin social coexistence, are not overlooked. One should not fear that existing

arrangements will change or that current balances will shift dramatically. Conversely, it must be considered that even though no singular constitutional text exists at the European level, the provisions in question have a materially constitutional nature. As Chief Justice Marshall once warned, this recognition is essential for understanding their significance. This is why, in Europe, it is not feasible to merely allow a general substitutive effect linked to the power of ordinary judges to disapply statute laws, ignoring the role of constitutional courts in building the unity of legality.

In the coming years, it will be up to the Court of Justice, in cooperation with national judges, to develop a differentiated approach to European constitutional jurisdiction. This approach must integrate national constitutional courts while considering the procedural particularities of each system of constitutional adjudication.

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SUGGESTED CITATION Saitto, Francesco: *Reconciling National and European Constitutional Legalities: How National Constitutions Strive to Recover Their Normative Force in Response to the Constitutionalization of the European Legal Order, VerfBlog,* 2024/11/01, https://verfassungsblog.de/reconciling-national-and-european-constitutional-legalities/, DOI: 10.59704/5560edfedf029b74.

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