A Proportionate constitution?

Economic freedoms, substantive constitutional choices and derrapages in European Union law

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Bien entendu, on peut sauter sur sa chaise comme un cabri en disant l'Europe!, l'Europe !, l'Europe ! ... mais cela n'aboutit à rien et cela ne signifie rien

Charles De Gaulle, 14 December 1965

History is that certainty produced at the point where the imperfections of memory meet the inadequacies of documentation

Julian Barnes, The Sense of an Ending

Introduction

The European Court of Justice and the General Court of the European Union (hereafter, the European courts) [1] have come to play a key role as guardians of European constitutionality vis-à-vis national (and supranational) legislatures. In discharge of such a task, the European Courts have become inclined to support (and contribute to the dissemination of) a rather peculiar understanding of economic freedoms, and one could perhaps say, of fundamental rights in general. According to this conception of rights of the European Courts, priority should be assigned to the rights of capital-holders over the socio-economic rights affirmed in most of the fundamental laws of the Member States of the European Union (including, paramountly, collective fundamental rights and collective fundamental goods).[2]

This double move entails that the argumentative syntax characteristic of postwar democratic constitutional law (the proportionality review of all norms allegedly infringing core fundamental rights) seems to have been turned upside down and used to justify fundamental decisions which would appear to collide with the substantive content of the postwar European constitutions. This so because the national constitutions of the Member States (as, I would argue, the founding Treaties of the Communities) are underpinned by the characterization of the state as a Social and Democratic Rechtsstaat, aimed at the simultaneous realization of the civic, political and socio-economic rights of its citizens, something which required playing down and circumscribing the protection afforded to the right to private property.

[1] There is also a third European Court, the Civil Service Tribunal, which basically decides controversies between the institutions of the Union and the supranational civil service. This entails that such a Court rarely decides questions with a constitutional dimension. For that reason I do not pay attention to it in this paper.

[2] Admittedly, the constitutional role of the European Court of Justice is more salient. Not only it is the highest court of the European Union *now*, but it was the only European Court around for most of the history of European integration.

While the present shape of the case law of the European Courts is the result of a long and protracted process (which in this paper I date back to –at least- the *Cassis de Dijon* judgment), the Luxembourg judges seemed at first to be really tucked away in a fairlyland duchy, as Eric Stein put it long ago,[3] and later to enjoy an extremely good press with legal and politico-scientific scholars. Everything might have changed forever after the European Court of Justice decided in 2008 *Viking*.[4] Viking was a ferry company incorporated in and run from Finland, which intended to wind up its legal existence in that Nordic country and establish itself in Estonia. There was slight doubt that such a decision was motivated by the prospect of lower wages and a less onerous set of obligations for employers under Estonian labour law. When the Finnish trade unions managed to successfully engage into transnational collective action and block the smooth realization of the plans of the company, Viking started legal proceedings claiming that its right to freedom of establishment had been breached by the Finnish trade unions. The European Court of Justice, following the lead of Advocate General Maduro, basically agreed with the Finnish company. Both the right to freedom of establishment of the corporation and the right to engage into collective action of the workers were part of European constitutional law. But in the case at hand, the right of freedom of establishment should prevail.

This paper joins the growing chorus of critics of *Viking* and of the case law of the European Courts, but does so in a peculiar fashion, as it assumes that *Viking* is but another turn of a rather old screw. Instead of focusing on the reasoning of the Court in Viking or other isolated cases (and claiming, as has been convincingly done on what concerns Viking, that Community law as it stood before the ruling supported a different result in Viking; a line of criticism which underplays the extent to which Viking was but the natural follow up of the previous case law of the ECJ) or on the (limited) legitimacy of European Courts insofar as they are *supranational* institutions (from which it tends to follow the claim that that *national institutions, perhaps national courts,* should stop acknowledging the authority of the European Courts in an unconditional manner), this paper takes a more structural view and a more long-term perspective.

The paper assumes that the proper analysis of the case law of the Court requires distinguishing rather clearly two different problems that are somehow entangled in the debate on the legitimacy of the decisions of the European Court of Justice, and perhaps especially aftermath of Viking. These two questions are on the one hand the justification of the *structural* role that European Courts play as guardians of European constitutionality and on the other hand the justifiability of defining the *substantive contents* of European constitutional as they are spelt out in the case law of the

[3] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 (1981) *American Journal of International Law*, pp. 1-27.
[4] To be more precise, the quarter of Viking, Laval, Ruffert and Commission v. Luxembourg. Viking is here employed as symbolic of the line of jurisprudence resulting from these four cases.

European Courts, critically including the superior weight assigned to economic freedoms.

Two different questions, two different answers. There is a case to be made for European Courts playing the role of guardians of European constitutionality and for European Courts discharging such a task with the argumentative syntax of proportionality. But proportionality (because it is a formal and not a substantive principle) cannot not provide by itself legitimacy to a ruling by itself. The justifiability of a ruling crucially depends on the justifiability of the substantive choices made when undertaking the proportionality review. Making use of this critical potential of proportionality, I argue that *Viking and Laval* are but two instances of a larger and older pattern, the more recent consequences of a *constitutional derapage* that can be traced back to *Cassis de Dijon*. It was on that judgment that the European Courts introduced an autonomous, self-standing conception of economic freedoms, detached from the collective of national constitutions. It was by means of expanding and spelling out the implications of such a move that the European Courts developed a new understanding of the four economic freedoms which transcended their characterization as operationalisations of the principle of non-discrimination on the basis of nationality. That was indeed the road to *Viking* and *Laval* and to the constitutional primacy of the rights of capital holders over socio-economic rights. This leads me to make a plea for the recalibration of the jurisprudence of the European Courts on economic freedoms. In particular, it seems to me that some of the most problematic substantive choices made by the European Courts in their case law should be rendered coherent with the common constitutional law of the Member States and with the case law of national constitutional courts acting (admittedly, implicitly for the time being) as guardians of European constitutionality.

The paper is divided in three parts. In part I, I claim that there is a very good case for European Courts playing a fundamental role in the guardianship of European constitutional law, including the review of the European constitutionality of national statutes. Such a case is grounded on the *constitutional* nature of Union law and on the systematic interpretation of the Treaty provisions defining the different procedures before the ECJ and the shape and content of the rulings of the ECJ. However, the European Courts have to take seriously the peculiar constitutional nature of the European Union. In particular, the European Courts have to be conscious of the fact that the deep constitution of the European Union is the collective of national constitutions (the constitutional law *common* to the Member States, as the ECJ phrased it relying on the founding Treaties) and of the fact that the guardianship of European constitutionality must be *shared* between the ECJ and national constitutional courts, because they stand in a horizontal, not vertical and hierarchical, relationship. In part II, I present several criticisms concerning the way in which the European Courts have come to discharge their task as constitutional guardian when reviewing the European constitutionality of national statutes. Resort to

proportionality as the argumentative syntax of constitutional rulings can only carry the European Courts so far because proportionality is a structural principle, and not a substantive one. Contrary to what a good deal of the European literature seems to affirm, resort to proportionality is not enough to render a decision legitimate. On what concerns substantive choices and substantive legitimacy, proportionality is merely a useful analytical device, that allows us to distinguish more neatly the substantive choices made by the European Courts. Focusing on the case law on direct personal taxation, I conclude that the European Courts have tended to leave unjustified some of the most decisive substantive choices in the shaping of its argument. Not only the European Courts have failed to offer a strong justification in favour of its *new individualistic understanding of economic freedoms*, but it favours economic freedoms by assigning the argumentative burden systematically to any conflicting principle. Similarly, the ECJ sets idiosyncratic proof burdens against national norms allegedly infringing fundamental freedoms, and fails to take seriously the normative structure of the principles colliding with economic freedoms when giving concrete weight to each of them in concrete cases. The third and last part holds the conclusions.

I. The role of the European Courts in the guardianship of European constitutionality:

1. The fist thesis: European Courts as guardians of European constitutionality

§1. The first thesis I sustain in this paper is that the European Courts play a key role in shaping the law in the European Union. This is so to the extent that they elucidate the substantive contents of European constitutional law (foremostly economic freedoms) *and* review supranational and national norms against such a yardstick, thus acting as guardians of the core contents of the European constitution.[5] Or to put it differently, European Courts exert an authority to review the degree to which supranational and national laws fit with the fundamental principles of European constitutional law when applying supranational norms to concrete cases and when interpreting in general and abstract terms the provisions of Community law (this is what is hereafter referred as review of European constitutionality). This entails that the European courts have come to play a constitutional role which is not dissimilar from that characteristic of national constitutional courts formally empowered to ensure the direct effect of their national fundamental law (such as is the case with the German, Italian or Spanish constitutional courts).

§2. My first thesis is very likely to raise (at least) three sets of objections:

[5] For both historical (the European Court of Justice was for a long time the only European Court, which through its case law clarified the constitutional stature and dignity of Community law) and hierarchical reasons (the decisions of the General Court can in some cases be appealed before the European Court of Justice).

- Is it really the case that the rulings of the European Courts result in the fleshing out of constitutional standards that actually limit the breadth and scope of valid policy options to European legislatures? This question is essentially an empirical one, as its positive or negative answer depends on what is present European constitutional practice;
- Should Community law be regarded as a constitutional legal order? Can the alleged primacy of national constitutions be reconciled with the idea that supranational law contains the normative yardstick against which the validity of national laws is to be assessed? This question concerns the normative foundations of Union law; it requires showing that indeed there European Union law is a constitutional legal order, and one which comprises in one way or another national constitutional orders (and consequently, fleshing out the general lines of a constitutional theory for the European Union);
- Are European Courts justified in claiming a role as guardians of European constitutionality? Even if we are to grant that Community law is a constitutional order, is it one where courts are legitimately empowered to act as guardians of constitutionality? Given the transcendence of that choice, can it be traced back to any open political decision codified into the written law? This question requires us to undertake a careful and systematic reconstruction of the provisions of the founding Treaties dealing with the tasks of European Courts.

A) Do European Courts actually undertake the review of European constitutionality of supranational and national norms?

§3. Is it really the case that the rulings of the European Courts result in the fleshing out of constitutional standards that actually limit the breadth and scope of valid policy options to European legislatures (both supranational and national)? Is there really such a thing as the review of European constitutionality? This question is one that, as has just been said, has to be answered by reference to present European constitutional practice. It thus requires considering what European Courts actually do and how other constitutional actors (courts, parliaments, governments) react to it.

§4. The European courts pass judgments on the different procedures referred to in the Treaties (now in the Treaty on the Functioning of the European Union).

Some of these procedures do require the Court to decide on the validity of Community acts, including Community legislation. When the European Courts declare that one (or more) norms enshrined in a Regulation or Directive are void, such a judgment entails for all purposes that the said law is *unconstitutional*.

However, the literal tenor of the Treaties seems not to empower the European Courts to declare the constitutionality or unconstitutionality of national norms. The Court cannot rule on the validity of national norms, but at most, on the *infringement* of the

Treaties by Member States (a breach which may result from the contents of the national legal order) or on the general and abstract meaning of a Community norm (which may guide a requesting national court to decide how to solve an eventual conflict between a Community and a national norm). While this is *a formally correct* reconstruction of the case law of the Court, a proper consideration of the normative implications of the rulings of the Court will lead us to conclude that indeed the European Courts review the European constitutionality of national norms. This can be perhaps be better illustrated by two of the best known leading cases of the European Court of Justice, those in *Cassis de Dijon* and *Avoir Fiscal*.

§5. In the leading case on economic freedoms, *Cassis de Dijon*,[6] a German court requested the European Court of Justice to clarify the meaning of "measures having an equivalent effect to quantitative restrictions of imports" in what was formerly Article 30 of the Treaty of European Community. While, as we will see, the answer to a preliminary request is supposed to be general and abstract, the submitting Court could not but inform the ECJ that its doubts centered on a specific German law which conditioned the sale of liquors to their having a minimum alcoholic graduation. That was indeed the case which was pending before the requesting court, and the one for which that court requested the assistance of the European Court of Justice. The pending case hinged on whether that German law was to be applied to the case or not. French *cassis* was legally on sale in France, but had an alcoholic graduation which was lower than the minimum one legally mandated for fruit liquors in Germany. So the request concerned in formal terms how the concept of measures having an equivalent effect to quantitative restrictions of imports was to be interpreted, that question was inextricably linked, in practical terms, to the very concrete facts of the case, and consequently, to the interaction between a German and a French statute. The Court of Justice limited itself in formal terms to throw light on what a measure having an equivalent effect is under Community law. But in doing so, it could not but touch (even if under the veil of generality and abstractness) on the concrete legislation at stake. The operative part of the judgment is very telling in that regard and is worth quoting at length:

"The concept of measures having an effect equivalent to quantitative restrictions on imports contained in article 30 of the EEC treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a member state also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another member state is concerned".

So the Court stated that a *hypothetical law* doing what the German law *actually did* would constitute a measure having an equivalent effect. In substantive terms, this ruling implied that the German law prohibiting the sale of French *cassis* was in breach

[6] Case 120/78, [1979] ECR 649.

of Community law. Given the direct effect of the Treaty provision on freedom of establishment and the primacy of Community law, the necessary implication of the decision was that the German law was to be set aside. Or what is the same, the normative implications of *Cassis de Dijon* were exactly the same as those of a constitutional ruling of a national constitutional court reviewing the constitutionality of a national statute.

§6. In the leading case on the relationship between economic freedoms and national direct tax laws, *Avoir Fiscal*[7], the European Commission requested the European Court of Justice to declare that by means of giving a different tax treatment on the one hand to dividends paid to insurance companies with a registered office in France and on the other hand to dividends paid to insurance companies with a registered office in another Member State, France had breached the freedom of establishment of insurance companies with registered offices in other Member States.[8] The Court granted the claim of the Commission. Formally speaking the outcome of the case was the declaration that France had breached Community law. But in substantive terms, given the direct effect of the provision of freedom of establishment and the primacy of Community law, the ruling not only required the French State to eliminate these provisions from its *code fiscal*, but also entailed that any private party *should* be offered judicial protection against previous and future applications of that norm for as long as it remained in force. So the normative implications of *Avoir Fiscal* were very similar to those of a constitutional ruling of national constitutional court reviewing the constitutionality of a national statute.

§7. While in both cases the Court limited itself to a restrained judgment (the decision that by means of *this concrete normative provision* and *in this concrete case* France had infringed Community law and the decision that a *hypothetical* law banning the sale of goods which could be legally acquired in another Member State would constitute a measure having an equivalent effect to an import restriction), the normative implications of the two rulings had the same normative effects as rulings formally declaring that the German and the French provisions were unconstitutional and consequently to be set aside. While in *Cassis de Dijon* the Court seems to limit itself to offer a general and abstract interpretation of Community law, the judgment contrasts a German statute with a concrete Treaty provision (free movement of goods) and establishes a derivative constitutional rule which not only largely determines the concrete outcome of the case at hand, but also places some policy options outside of the realm of what national legislators can do. Similarly, in *Avoir Fiscal* the Court seems to restrain itself to a decision on a very narrow factual basis, but still the European Court of Justice sets a precedent applicable in similar cases. A precedent consisting in a derivative rule which places certain policy options outside the reach of the national legislator.

[7] Case 270/83, [1986] ECR 273.
[8] Par 29.

This is compounded by the fact that the structural principles governing the relationship between supranational and national law (primacy, direct effect and attribution of competences) result in the derivative rules having full legal effect not only within the supranational subsystem, but also within each and every national legal subsystem. We are thus confronted with the typical structure of rulings determining the constitutionality of a norm: a norm being reviewed (the German law, the French law), a constitutional yardstick (free movement of goods, freedom of establishment) and a decision on the breadth and scope of what the legislator can do in compliance with the constitution.

§8. Both the substantive case law of the European Courts and its structural implications (the assumption of a power to review the constitutionality of not only supranational but also national laws against the yardstick of European constitutional norms, hereafter referred as a review of European constitutionality) have come to be accepted by all major national constitutional actors. This is well documented in the literature, such as in Karen Alter's monograph on the "making of an international rule of law in Europe".[9] While she focuses on the acceptance of the structural principle of supremacy of Union law over national law, that process had a *substantive* dimension which basically concerned the unfolding conception of economic freedoms pushed forward by the European Court of Justice. Similarly, Joseph Weiler's writings on the osmotic relationship between the European Court of Justice and national courts (other than constitutional courts or supreme courts in systems without a formal constitutional court) consider the underlying structural reasons why national courts have contributed to affirm and consolidate the role of the European Courts as guardians of European constitutionality. A role that has not been systematically challenged by national legislators. National political actors may have made open critical remarks of this or that judgment, and been even tempted to be ferociously critical of the European Courts (especially of the European Court of Justice). But they have not acted upon such statements. That does not rule out national legislatures aiming at circumscribing or even circumventing specific rulings. But such a dynamic can also be found in national constitutional orders. The guardianship of a democratic constitution is always an open-ended process, in which it is *We the People* and not *We the Court* that has the last word.[10]

B) Should Union law be acknowledged a constitutional stature?

§9. It may well be that European constitutional practice has come to be so that the European Courts have successfully arrogated themselves the power to review the constitutionality of supranational and national norms, and that national constitutional

[9] *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe,* Oxford: Oxford University Press, 2001.

[10] Admittedly, whether the legislature manages to break the muscle of the court, or not, tends to depend on the extent to which the legislative countermove resonates in the electorate. Such a test is for the time being a rather improbable one in Community law.

actors have acquiesced to such a role. Still, we could ponder wonder *that* should be the case? Is this state of affairs constitutionally sound? Or does that constitutional practice undermine the pre-existing constitutional framework, in particular, the constitutional stature and dignity of Community law? What would remain of the claim of national constitutions to be the supreme law of the land if Union law would be acknowledged a constitutional status? Would that not necessarily entail *downgrading* the stature of national constitutions? Given that the supremacy of national constitutions is said to be based on the intense democratic legitimacy of such constitutions, would not that *downgrading* also entail the *subversion of democratic legitimacy?* And if, at the end of the day, we conclude that Union law *is not* a constitutional order, should then we not rebuff the claim of European Courts to be empowered to take decisions which imply contrasting national norms with a non-existent European constitutional yardstick? Indeed should we not conclude that rulings such as those in *Avoir Fiscal or Cassis de Dijon* would simply be *ultra vires* decisions*?*

§10. The answer to this question hinges on whether the European Union should or should not be regarded as a constitutional order. In *material* terms, that may be decided by means of considering the institutional structure, decision-making procedures and competences of the European Union. If all these three dimensions the European Union resembles a democratic federal state more closely than an international organization, we would have good reasons to conclude that the legal order which constitutes such institutions, decision-making processes and grants such competences is a constitutional legal order. Still, whether we should grant the European Union the normative acknowledgment of regarding its legal order as a constitutional one depends on the democratic legitimacy of Union law. Determining what is the legitimacy basis of Union law requires proper attention (and adequate reconciliation) of the regulatory ideals of a democratic constitution, of the primacy of the national democratic constitution, and of the structural principles of direct effect of certain Community norms and primacy of Community law. Or, in short, a proper constitutional theory of Community law.

a) Union law as a *material* constitutional order: institutional structures, decision-making processes and competences

§11. A systematic construction of the founding Treaties (and the successive amendments to them) allows us to make a good case for the constitutional stature of Union law. This is so because the political community that the Treaties constitute is characterized by the robustness of its institutional structure and of its decision-making processes; and by the breadth and width of the powers which have been transferred to the European Union. Consequently, a legal order that constitutes a polity with such features is to be regarded as a *material constitutional order*.

§12. Even if the Union has (and always had) limited, enumerated competences, the breadth and scope of what the Union does largely corresponds to what one could expect a level of government in a federal structure to do. The founding Treaties envisaged in clear cut-terms *the transfer of the exercise if not the full title of significative public powers from Member States to the European Union.* In the case of the ECSC and the Euratom, this was somehow obscured by the fact that the power being transferred concerned a rather specific and narrow set of issues (even of dramatic importance, as coal, steel and atomic energy were the sinews of war in the 1950s). In the case of the EEC, there was some equivocation resulting from the combination of a detailed set of negative integration measures (aimed at realizing a "common market") with vague references to wider goals of economic and political Union. But in all cases what count as key competences in the political process of a democratic polity were agreed to be transferred to the European level. At the time of writing, not only the Union exerts fundamental regulatory powers concerning the single market and agricultural policy,[11] but monetary policy is in the hands of the very federal system of European central banks (with the European Central Bank at its height, and having opted for an interpretation of its own powers which leaves no doubt concerning the open fiscal implications its decisions have), while Union powers of "justice and home affairs" affect deeply the relationship between citizens and states as holders of the monopoly of force. Even the area of taxation has not been left untouched. Not only did the ECSC expect the Community to be self-financing through the use of its taxing power over coal and steel industries (thus granting the newly created institutions a limited but revealing power of the purse), but the EEC Treaty implied the full transfer of powers to the Community over customs duties as an unavoidable consequence of the creation of a common external tariff,[12] and a partial but decisive transfer of legislative competence over turnover taxes.[13] To that we must add the transfer of competences on external trade, also a logical part of the creation of a customs union. The road to the single market in the late 1980s led to a growing intervention of the Union on direct taxation, which has been deepened by the case law of the ECJ on personal and corporate income taxation.[14]

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[11] Agricultural policy (once the inconclusive provisions of the Treaty were rendered concrete in political practice), which was at the very centre of political debate in the fifties, given the higher economic and social importance of farming at the time (it might be added that a large part of the population was still occupied in the primary sector and that the failure to ensure a decent standard of living to farmers in the interwar period had facilitated the rise of fascists to power).

[12] Still a far from negligible tax, and historically a determinant one. See Alan Milward, 'Tariffs as Constitutions'. In Susan Strange and Roger Tooze (eds.), *The International Politics of Surplus Capacity*, London: George Allen and Unwin, 1981, pp. 57-66; and Barry Eichengreen *Golden Fetters*, Oxford: Oxford University Press, 1992, p. 9.

[13] That in itself implied transferring key taxing powers, which have always been at the very centre of the political constitution of democracies (and of revolutionary democratic politics, from the Glorious Revolution of 1689 to the French Revolution of 1789).

[14] Agustín José Menéndez, 'The Unencumbered European Taxpayer as the product of the transformation of personal taxes by the judicial empowerment of 'market forces'' in Raúl Letelier and Agustín José Menéndez (eds.), *The Sinews of European Peace*, RECON Report 8/2010, pp. 157-268.

§13. Although the founding Treaties resulted in a rather incomplete and undefined institutional structuring of the Union, the institutional structure resulting from them went well beyond what was (and is) generally associated with an international organisation. The institutional structure of the original Communities included (1) a supranational High Authority or Commission with competences much bolder than those of either a permanent secretariat or even a supranational independent administrative agency, and (2) a Parliamentary Assembly (which from early on had the vocation to become a parliament, that is, a body elected by the direct suffrage of the citizens),[15] and (3) a Court of Justice to whose jurisdiction Member States were compulsorily subject. This was further composed by the fact that the Rome Treaties of 1957, while resulting in the multiplication of the number of institutional structures (three Council of Ministers and three Commissions/High Authority, one for each Community) made the Assembly and the Court of Justice *common* institutions to the three Communities, thus laying the basis for a common institutional framework, which was indeed achieved through the Merger Treaty of 1965, and at any rate pointing to a decision to create a wide and encompassing supranational structure *beyond* the concrete Communities being launched to make integration feasible and possible at first. This has been basically achieved by the progressive development of the institutional structure of the Union, either replicating or adapting national institutional structures, or by means of experimenting with new institutional solutions (as has been remarkably the case of comitology).

§14. So much so that at the time of writing, Community decision-making process, even if widely geared towards the transfer of democratic legitimacy from Member States to the Union (as is typical in international structures), also generate *direct democratic legitimacy* (critically, through the decision-making processes in which the European Parliament plays a decisive role, such as the co-decision law-making procedure).

Firstly, The Communities were assigned from their very foundation normative powers, concretely, the power to approve regulations and directives. Such legal norms were not to be regarded as a congeries of technical or specific norms, but were framed by constitutional principles, of which they were expected to be concretizations. Key in that regard is the principle of equality before the law, which in the context of a process of European integration was essentially defined as the principle of non-discrimination (crucially on the basis of nationality, but also on the basis of sex; to which, much later in the process, race would be added).[16]

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[15] For an account of the Common Assembly's metamorphosis into the European Parliament, see Berthold Rittberger, *Building Europe's Parliament*, Oxford: Oxford University Press, 2005.

[16] Article 6 contained a clause on prohibition of discrimination on the grounds of nationality, and Article 119 stated the principle of equal pay for equal work for men and women. For the limited and truncated character of the constitution of anti-discrimination, see Alexander Somek, 'A Constitution

Secondly, Community law has pervasive effects over all EU citizens and EU territory, as a result of the wide acknowledgement that it stands in a structural relationship to national legal orders marked by the structural principles of *direct effect* and *primacy*. The doctrine of direct effect implies that the legal effects of Community norms are governed by Community, not national norms, even from the perspective *internal* to the national legal order. Primacy, as it emerges from European constitutional practice, implies that Community norms prevail over conflicting national norms, even if the latter are constitutional norms. Controversy remains on whether primacy is indeed absolute or, as seems more frequently accepted, it has limits. National constitutional courts, following the lead of the German constitutional court, have become quite interested in defining such limits by reference to an alleged set of "core" constitutional substantive contents, competences and now even "identity", whatever that means. It seems to me that this is a rather confused way of posing the problem, as it assumes that supranational and national constitutional norms are part of clearly distinct legal orders. But what is relevant at this stage is to highlight that even national constitutional courts have abandoned the characterization of Community law as just a peculiar form of international law and have progressively scaled back the breadth and scope of the so-called "hard core" of national constitutions, theoretically more than practically *superior* to Community law.[17]

b) The constitutional dignity of Union law: a synthetic constitutional order

§15. As has just been argued in the previous section, there are very good reasons to acknowledge that Union law has a *material* constitutional stature. The founding Treaties of the European Union constituted a polity with institutional structures, will-formation processes and powers which clearly set it apart from classical international organizations, and make it rather similar to a federal polity. Consequently, it makes full sense to characterize Union law as a constitutional legal order. Not only in a purely material sense (which is rather banale, as all legal orders have a constitution in this sense), but in a stronger, more restrictive sense, as one which identifies the polity and the legal order as proper and characteristic of a full-blown political community. But the democratic conception of constitutional law is even more demanding. Democratic constitutional norms, as all the constitutions of the Member States of the European Union claim to be, are characterized not only by their *material stature*, but also by their *normative* dignity, that is, by their enjoying a high and intense democratic legitimation.

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for Antidiscrimination: Exploring the Vanguard Moment of Community Law', *European Law Journal* 5 (1999): 243-271.

[17] The characterisation of Community law as public international law has been rather resilient in the doctrine. See for example Derrick Wyatt, 'New Legal Order or Old', European Law Review 7 (1982): 147-66. And indeed Treaty amendments keep on being characterised as mere matters of ratification of international treaties in many Member States (indeed most during Lisbon resulting from the characterisation of the process by the European Council).

§16. Can that be fairly said of European constitutional law? Is a supreme and directly effective Community law democratically required? In particular, in the absence of an explicit act of democratic constitution-making, or of legitimacy-carrying transformations which could justify in democratic terms the mutation of an international order into a constitutional one,[18] how can we explain that Community law is now widely regarded as a constitutional one? And should we indeed accept such a transformation?

§17. This constitutional *riddle* is due to a large extent to the inadequacy of the theoretical lenses through which Union law is reconstructed and assessed. If one reconstructs the law of the European Union, assesses its democratic credentials or tries to understand its institutional transformation through the lenses applied to an international organisation, to a revolutionary constitutional polity, or for that matter to an evolutionary constitutional polity, one ends up submerged in paradoxes and inconsistencies, paramountly the *riddle* concerning the mutation of an international order into a constitutional one. And thus one is confronted with a major dilemma: Union law has constitutional stature, European constitutional practice acknowledges it, but there is no good normative foundation for acknowledging constitutional dignity to Union law.

§18. This dilemma is thus not to be sorted out by denying the constitutional dignity of Union law, but by means of seriously reconsidering the constitutional theory with which we approach Union law. By this I do not mean the usual (and a trifle post-modern) claim that European integration being a new phenomenon we should put forward a radically new theory to understand it; which indeed boils down to repudiating centuries of democratic political and constitutional thinking.[19]

§19. My claim is much more limited. The basic normative components of democratic constitutional theory are fully relevant when reconstructing and assessing Union law. Democratic constitutional law plays a key role in the stabilization of democratic power by means of the proper combination of constitution-making, constitutionalisation and ordinary decision-making processes. Still, democratic constitutional theory should take into account the specific nature of the European Union, and in particular, the fact that the European Union is a polity made of constitutional polities which aimed at integrating through constitutional law. Democratic constitutional theory should be sensitive to the (1) peculiar shape of the process of European integration, and (2) the way in which constitution-making and constitutionalisation processes have been combined through the history of European integration. Together with John Erik Fossum, I have claimed that democratic

[18] Certainly the "limited judicial coup d'êtat" hypothesis will not wash. Who are the judges to undertake these changes? How could that have happened within years of the core Member States of "little Europe" undergoing transformative processes of constitution-making?

[19] I am thus no post-modernist, or what is the same for these purposes, no believer in the radical novelty of the European Union.

constitutional theory can be rendered sensitive to the genuine peculiarities of Union law by fleshing out a constitutional theory of integration through constitutional law, which, for a better name, we have labeled as "constitutional synthesis". The core of the theory can be summarized in three premises. Which are the following.

§20. The *first premise of constitutional synthesis* is that the constitutional law which frames and contributes to steer the process of European integration is neither revolutionarily established in a "Philadelphean" constitutional moment, nor the outgrowth or accumulation of "Burkean" constitutional conventions and partial constitutional decisions *à la anglaise*. On the contrary, constitutional synthesis is characterised by the central structuring and legitimising role played by the constitutions of the participating states (*seconded* to a new role as part of the collective constitutional law of the new polity),[20] or by the regulatory ideal of a common constitutional law, which is progressively recognised as the constitution of the new polity, and whose normative consequences are fleshed out and specified as the process develops further. To put it differently, instead of a revolutionary act of constitution-making, or the slow growth of constitutional conventions, constitutional synthesis is launched by an act which implies the secondment of national constitutions to the role of common constitutional law. This makes synthetic founding much more economical in political resources than revolutionary founding, and, at the same time, it is much quicker than evolutionary founding. The price to be paid is that, instead of an explicit set of constitutional norms, the founding Treaties reflect a scattered set of norms, while the bulk of the common constitutional law remains implicit, *a regulatory ideal* to be fleshed out as integration progresses.

§21. European constitutional law was composed of, and, to a large extent, keeps on being composed of, the *common constitutional law* of the Member States. The establishment of the European Communities was thus akin to a foundational moment; but, contrary to what is the case in a revolutionary constitutional tradition (such as the French or the Italian one), the constitution of the Union was not written by *We the European People*, but was defined by implicit reference to the six national

[20] The idea of a supranational constitutional law which is the result of seconding national constitutions was hinted at by the European Court of Justice in Case 11/70 *Internationale*, par 4 when claiming that the lack of a written bill of rights in the primary law of the Union came hand in hand with an unwritten principle of protection of fundamental rights, which was filled in by reference to the "constitutional traditions common to the Member States" properly spelled out in the context of European integration ("the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"). In doing this, the Court was following a line of reasoning pioneered by Pierre Pescatore: see "Fundamental Rights and Freedoms in the System of the European Communities", (1970) 18 *American Journal of Comparative Law*, pp. 343-51. On the technical aspects of legal synthesis, it must be stressed that a critical comparative approach has underpinned the case law of the ECJ since its very inception. See Koen Lenaerts, "Interlocking legal orders in the European Union and Comparative Law", (2003) 52 *International and Comparative Law Quarterly*, pp. 873-906. On the constitutional aspects of the idea of constitutional synthesis, see Agustín José Menéndez, "The European Democratic Challenge", (2009) 15 *European Law Journal*, pp. 277-308.

constitutions of the founding Member States. In this way, the French, German, Italian, Dutch, Belgian and Luxembourgeois constitutions were *seconded* to the role of being part of the constitutional collective of Europe. National constitutions started living a "double constitutional life". They combined their old role as national constitutions and the new role as part of the *collective* supranational constitution.[21]

§22. Constitutional synthesis is grounded on the national constitutional provisions which not only authorise, but also mandate, the active participation of national institutions in the creation of a supranational legal order as the only way of fully realising the principles which underlie the national constitution (s). Thus, the "opening" clauses of post-war constitutions, and the explicitly European clauses of the more recent ones are constructed as reflecting the self-awareness of the national constitution (s) about the limits of realising constitutional values in one single nation-state. Constitutional synthesis claims that there is a substantive identity between national constitutional norms and Community constitutional norms. In other words, European integration pre-supposes the creation of a new legal order, but not the creation of a new set of constitutional norms; a key source of the legitimacy of the new legal order is, indeed, the transfer of national constitutional norms to the new legal order. However, the process, by necessity, has major constitutional implications for each Member State. Firstly, the accession of a state to the European Union marks a new constitutional beginning for that state. Contrary to what is the case in most constitutional transformations, constitutional change is not mainly about the substantive content of the fundamental law, but concerns the *scope* of the polity (there is an implicit re-definition of who we acknowledge as the co-citizens of our political community) and the very *nature* of the new polity (as it actually aims at re-founding both the national and the international legal orders by means of transforming sovereign nation-states into parts of a cosmopolitan federal order). Secondly, the very essence of the process of constitutional synthesis is that of the progressive ascertainment of common constitutional standards which may eventually result in marginal changes in national constitutional norms *to align them* with the contents of Community constitutional law, which, in turn, is reflective of what is actually *common* to the Member States. In this regard, it should be noted that Community constitutional law is not defined by reference to individual sets of constitutional norms, but to what is common to *all* national constitutional norms. In those cases in which national constitutional norms point to different normative solutions, synthesis is not achieved by finding a common minimum denominator, but by means of considering which of the national constitutional norms is more congenial to Community law. This is to be decided by considering the underlying arguments for or

[21] This could be illustrated by using the image of the "field" as a metaphorical device. Indeed, the founding of the Communities implied that national constitutions abandoned their constitutional solitude as constitutions of the self-sufficient nation-state and placed themselves in the common European constitutional field. Constitutional autarchy was thus replaced by constitutional openness, co-operation and reflexivity.

against the competing national constitutional solutions, and, in particular, by considering the extent to which the national norm can be "Europeanised", both in the sense of fitting with European constitutional law as it stands (as already synthesised in the Treaties, the amendments to the Treaties or the legislation and case law of the Union), and with its consequences being acceptable in the Union as a whole.[22]

§23. The *second premise of constitutional synthesis* is that the supranational legal order comes hand in hand with a supranational institutional structure. But the latter is only partially established at the founding, takes time to be rendered functional in a process in which different national institutional cultures and structures try to leave their mark at the supranational level, and its structure is necessarily rendered more complicated as new institutions and decision-making processes are added in order to handle new policies. This entails that constitutional synthesis can be described as the combination of normative synthesis and institutional development and consolidation, two processes that have very different inner logics. While normative synthesis exerts a centripetal pull towards homogeneity, institutional consolidation is a more complex process with strong built-in centrifugal elements - it serves as the conduit through which the constitutional plurality of the constituting states is wired into the supranational institutional structure.

§24. Institutional consolidation concerns the outgrowth and consolidation of the institutional structure of the supranational polity. Its logic is not exclusively *normative*. Institutions are mainly about law, but not exclusively about law. Institutions are organisations infused with value. They occupy buildings, make use of objects with empirical existence, and are represented by very material (when not venial) beings. Institutional organisations cannot be brought into existence by a normative regulatory ideal; they have to be created, staffed and funded, and develop their own institutional identity. In a constitutional union of already established constitutional states, this process is complicated by three factors. Firstly, constitutional synthesis pre-supposes the combination of a single constitutional order with a pluralistic institutional structure, to the extent that supranational and national institutions are not hierarchically organised or ranked. Secondly, constitutional synthesis at the regional-continental level of government (*i.e.*, in between global organisations and nation-states) tends to proceed in a far from crowded institutional space. In contrast to the constitution of a nation-state, which *de facto* relies upon an existing institutional structure, constitutional synthesis requires the creation of new institutional structures. This usually entails that institution-making proceeds in a fragmentary fashion, that the synthetic polity starts with bits and pieces of an institutional structure, instead of with a complete one. Thirdly, the derivative

[22] If all national constitutional norms converge, as in most cases they do, the common norm is easy to establish. The strong affinity between national and Community constitutional norms is due to the history of European integration, to the fact that all Member States are parties to the European Convention on Human Rights; moreover accession to the European Union is conditioned to candidate states indeed fitting in the constitutional paradigm defined by the common constitutional traditions.

character of the synthetic polity implies that the *institutional void* is only formally a *void*, as the creation of supranational institutions consists of the *projection* of national institutional structures and cultures to the supranational level. But because such structures and cultures are much more idiosyncratic than national constitutional laws, the probable result is that the creation of supranational institutions is the site of a bitter contest between different national institutional structures and cultures.

§25. Upon such a basis, the *homogenising* logic of normative synthesis contrasts with the manifold pluralistic proclivities proper of institutional consolidation. This tension is aggravated over time, and a crisis emerges when the relationship between the two processes is polarised. As normative synthesis proceeds, it fosters some institutional convergence. But the synthetic process can also feed institutional pluralism and conflict, and thus produce a constellation incapable of solving institutional conflicts among the different levels of government.

§26. The *third premise of constitutional synthesis* is that the regulatory ideal of a single constitutional law comes hand in hand with the respect for national constitutional and institutional structures. This entails that, while supranational law is one, there are several institutions that apply the supranational law in an authoritative manner. The peculiar combination of a single law and a pluralist institutional structure results from the just mentioned fact that there is no ultimate hierarchical structuring of supranational and national institutions, and is compounded by the pluralistic proclivities of institutional consolidation at supranational level.

§27. The fact that the synthetic constitutional path is one in which participating states retain their separate existence, as well as their separate constitutional and institutional identity, implies that constitutional synthesis is a peculiar breed of pluralistic constitutional theory. On the one hand, it *is not* pluralistic to the extent that it endorses the monistic logic of law as a means of social integration through the *regulatory ideal of a common constitutional law*. The integrative capacities of law (its role as a complement of morality in the solving of conflicts and the co-ordination of action by means of determining, in a certain manner, what the common action norms are) require law to be as conclusive as possible. Were law to be as inconclusive as morality, it would not add much to our practical knowledge, and it would not be capable of operating effectively as a means of social integration. Both autonomy and the motivational force of law require that we assume that law gives one *right* answer to all the problems to be solved through it. Legal argumentation breaks down if we assume that the same case can have different, even contradictory solutions. This may be the case *empirically*, but, from an internal perspective of law, this cannot be endorsed as part of the social practice of integration through law. Democratic legal systems are further pushed into this peculiar form of "monism" by the normative requirements of the principle of equality before the law.

§28. On the other hand, constitutional synthesis is pluralistic in a double sense. First, the regulatory ideal of a common constitutional law co-exists with the actual plurality of national constitutional laws. The constitutional moment in synthesis only results in the endorsement of a regulatory ideal, and in the bits and pieces of the set of common constitutional norms. Most constitutional norms remain *in nuce*, or better put, in several drafts, as many national constitutions participate in the process of integration. The regulatory ideal of a common constitutional law is fleshed out in *actual* common constitutional norms (and, in general, in common legal norms) only very slowly (and not without setbacks and backlashes). Furthermore, the regulatory ideal of a common constitutional law comes hand in hand with a pluralistic institutional setting. As already indicated, instead of a hierarchically-structured institutional set-up, a synthetic polity is characterised by the existence of a plurality of institutions all of which legitimately claim to have a relevant word in the process of applying the "single" constitutional legal order. This is, in my view, the proper implication to draw from the "differentiated, but equal" viewpoints thesis. Indeed, constitutional synthesis has not led (and is not expected to lead) to Member States losing their autonomous political and legal identity (which has been coined, in the European constitutional jargon, as the national constitutional identity).[23] This is so *thanks to*, and not *despite of*, integration. The constitutional pluralism that comes hand in hand with constitutional synthesis is both rendered possible *and* stabilised by the new institutional structure and the growing substantive convergence between national constitutional orders. Constitutional synthesis could be seen as the political and legal counterpart to the common market of old (not the single market of the Single European Act!) in the objective of rescuing the nation-state;[24] in our view, it is more proper to consider it as a means of re-configuring and re-defining the state, and, thereby, at the very

[23] The term "national constitutional identity" entered the European debate in the famous ruling of the German Constitutional Court *Solange I*, 1974 WL 42441 (BverfG (Ger)), [1974] 2 C.M.L.R. 540, par. 22: "Article 24 of the Constitution must be understood and construed in the overall context of the whole Constitution. That is, it does not open the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution, that is, it does not open any such way through the legislation of the inter-State institution". It was then propelled to the supranational level in Maastricht (resulting in Article 6.3 of the Treaty of European Union, where the principle of respect of national identities in general terms was affirmed). And in the Constitutional Treaty and in the Treaty of Lisbon, this principle was spelled out by reference to constitutional identity. On the academic debate following the Constitutional Treaty, see Armin von Bogdandy, "The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe", (2005) 3 *International Journal of Constitutional Law*, pp. 295-315; Michel Rosenfeld, "The European treaty–constitution and constitutional identity: A view from America", (2005) 3 *International Journal of Constitutional Law*, pp. 316-31; Jan Herman Reestman & Leonard F.M. Besselink, "Constitutional identity and the European courts", (2007) 3 *European Constitutional Law Review* 3, pp. 177-81. In more general theoretical terms, see the interesting reflections of Gary Jeffrey Jaconsohn, in "Constitutional Identity", (2006) 68 *The Review of Politics*, pp. 361-97.

[24] Alan Milward, *The Rescue of the European Nation-State*, (London: Routledge, 1992).

minimum, detaching the state from the nation; and perhaps even disposing of the idea of the sovereign state completely.[25]

§29. Thus, constitutional synthesis articulates two key insights of the pluralist theory of Community law when (1) it stresses the open character of the process of constitutional synthesis (which accounts for the fact that no institutional actor has been acknowledged the power to solve, in an authoritative and final manner, conflicts between norms produced through Community and national law-making processes), and (2) it highlights the pluralist source of European constitutional law, the actual result of the process of constitutional synthesis of national constitutional norms. This not only provides the basis for the claim to the democratic legitimacy of Community law (transferred from the national to the European constitutional order when national constitutional norms become the core constitutional framework of the Union), but also reveals the complexity of constitutional conflicts in the European legal order, as they are, at the very same time, "vertical" conflicts between Community and national law, and "horizontal" conflicts between national constitutional laws, aspiring to define the common constitutional standard.

§30. However, the theory of constitutional synthesis reconciles pluralism with the normative defense of a monist re-construction of the European legal order, in part on account of the social integrative capacity of European law and the fostering of equality before the law across borders, in part on account of the substantive identity of European and national constitutional law. Moreover, it offers a limited, but comprehensive, explanation of the sources of stability of the European legal order, which, at the same time, accounts for the progressive weakening of the said sources.

§31. Equipped with the "synthetic" constitutional theory of European integration, we can realise why and in which sense the Union has been since its very establishment a constitutional polity and Community law a constitutional legal order. The path of democratic constitution-making followed by the Union was an innovative (even if not sui-generis) one. Indeed, that of synthetic constitutionalism. A constitutional animal neither constituted in a democratic revolutionary fashion through an act of constitution-making reflected in a written fundamental law, nor resulting from a protracted process of normative and institutional evolution punctuated by critical turning points where the evolved norms and structures get infused with democratic sanction. Thus a peculiar and innovative constitutional animal: a synthetic constitutional animal.

§32. The key features which seem *prima facie* to require denying the constitutional nature of the Union reveal themselves as compatible with the constitutional dignity

[25] William E. Scheuermann, "Postnational democracies without postnational states? Some skeptical reflections", (2009) 2 *Ethics & Global Politics*, pp. 41-63; Hauke Brunkhorst, "Reply: States with constitutions, constitutions without states, and democracy - Skeptical reflections on Scheuerman's skeptical reflection", (2009) 2 *Ethics & Global Politics*, pp. 65-81.

and stature of Community law. The tension between the international form and the constitutional substance and the lack of specific provisions empowering the ECJ to act as a constitutional court are but marks of the synthetic nature of European constitutional law. The aspiration to combine the regulatory ideal of a single law guaranteeing equality to its recipients, and a pluralistic institutional structure, where the final word on the substantive content of the common law is shared, rather than monopolized, is congenial with the establishment of what is substantially a constitutional structure through an international legal form (the founding and amending Treaties). Similarly, the assignment of a role in the guardianship of European constitutionality to the ECJ is not reflected in an explicit constitutional provisions, but results from the construction of specific Treaty provisions *in the light* of the substantive constitutional nature of Community law.

C) Can European courts claim to have a mandate to be the guardians of European constitutionality?

§33. Even if we were to accept the constitutional character of Community law, it would not necessarily follow that we should necessarily acknowledge that the European Courts are competent to undertake the review of constitutionality of legislation (especially on what concerns national statutes, not to speak of national constitutional norms). The assignment of the power of constitutional review to courts, or to be more precise, to those hybrid organs that constitutional courts are, is far from being a common feature of the fundamental law of the Member States of the European Union. Granted, the institutional setup of many Member States *does* include a constitutional court. It could further be said that the number of such Member States has tended to grow over time, and that even those legal orders whose historical evolution seemed more at odds with the judicial review of the constitutionality of legislation (such as France and the United Kingdom) are now close to accepting it in one way or the other. Still, judicial review of legislation is not foreseen in the fundamental laws of all Member States. And even if it were a common piece of the national constitutional edifices, it would not necessarily follow that such a power should be granted to the European Courts. So the question remains a relevant one: Where in the founding Treaties can we find a basis for this role of European Courts?

§34. The short answer is that the Treaties of the European Union mandate the European Court of Justice and the Court of First Instance (hereafter the European Courts) to ensure that the law is observed in the "interpretation and application of the Treaties" (art 19 TEU, originally art 164 TEC).

In discharge of such a task, the Treaties mandate the European Courts to review the "legality" of the legislative acts of Community institutions (Article 263 TFEU),

something which entails the empowerment to review the European constitutionality of Community norms.[26]

But leaving aside this specific mandate, a too literal interpretation of the specific provisions dealing with each procedure before the European Courts may leads us into the belief that the Treaties require the European Courts either to *interpret* Treaty provisions and/or secondary Community norms in a general and abstract manner, abstaining from any judgment on the normative validity of any national norm, or to apply Community norms to concrete cases, and thus deciding on the proper legal qualification of specific acts and decisions, which excludes passing judgment on the general validity of any norm. However, as I will argue in the following paragraphs (and as I have already indicated considering the normative implications of *Cassis de Dijon* and *Avoir Fiscal*), the discharge of both tasks requires doing something *more* than that, resulting in the task of interpretation requiring the consideration of the concrete normative and factual context; and the task of application resulting in the need to clarify the proper construction of certain norms. The fact that the European Court is required to discharge both tasks *simultaneously* increases the chances of the line between these two tasks becoming blurred.

§35. In a number of procedures the European Courts seem to be required to apply Community law; in particular, to review the legality of specific actions or omissions of the Member States or of the institutions of the Union by reference to European laws. In these instances, European courts are expected to produce a ruling with an operative part consisting in the legal qualification of a certain fact (the act or omission of a Member State or a European institution). This would seem to indicate that the decisive part of these rulings would be the finding of fact of whether a given act is or is not in compliance with "the law". In these cases, the task of European Courts comes rather close to that entrusted to national courts when reviewing the legality of the actions and omissions of the (national) public administration. This is largely the case of the infringement procedure concerning Member States (ex Articles 258 and 259 TFEU) and acts of the institutions of the Union (ex Art 263 TFEU) in breach of Community law (or failure to act of Union institutions ex Art. 265 TFEU). A specific application is the procedure on the non-contractual liability of the European Union (ex Art. 268 TFEU).

§36. The application of the law to concrete cases clearly will not infrequently hinge upon how the law to be applied is to be interpreted. Indeed, applying any legal norm, quite obviously including European Community norms, consists in ascertaining the

[26] The literal text of the article reads "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties"

specific and concrete normative consequences that a general norm has in a particular case. While any modern legal system can only function properly if in most cases such normative contents are known in advance of the act of application and remain rather uncontroversial, *hard cases* in which such substantive content is controversial may be very marginal in general statistical terms, but constitute a sizeable majority of the cases that are decided by courts (the remaining majority of cases being those on which the facts of the case are disputed). Whether a Member State or a European institution is in breach of Community law by means of having done or omitted to do something depends on what are the concrete normative implications of the general norms of Community law. Indeed, a good number of cases before the European Court of Justice and the General Court hinge on the proper normative breadth and scope of the substantive provisions of Community law and of the overriding interests that justify in the fullness of argumentation what *prima facie* seems a breach of Community law. Many infringement procedures turn on the breadth and scope of one or the other economic freedom. To apply Community law to one concrete case, one indeed needs to have established the actual content of Community law, and that in its turn may require interpreting Community law. That is the same as saying that in order to properly *apply* Community law, the European Court of Justice is not infrequently required to *interpret* Community law. In these frequent instances, the ruling will not only apply a given Community norm at the case at hand, but will also contribute to the specification of the substantive contents of Community norms, and either directly or indirectly, to the shaping of the fundamental principles of Community law by determining the content of derivative constitutional rules.

§37. Consider again the ruling in *Avoir Fiscal*. On the surface of the text of the judgment of the Court, its normative effects seem to be limited to declaring that this very concrete French law, applied to this very concrete case, constitutes an infringement of Community law. However, the actual normative implications of the judgment are certainly wider. To determine whether the French Republic was in breach of Community law, the European Court of Justice had to clarify the normative implications of the principle of freedom of establishment in this concrete case. This required the ECJ to engage into the interpretation of the principle and the clarification of its normative content in view of the facts of the case. As a result, the ruling not only contains a decision applying the law to a specific set of facts, but also a normative precedent, a derivative constitutional rule that should be applicable in all similar cases.

§38. European Courts are also assigned a special authority when it comes to elucidate the interpretation of supranational law. In these cases, they are instructed to explore and expose the normative consequences of Community norms, but they are barred from applying such an interpretation to the resolution of a concrete and specific case. Interpretative judgments would thus typically be expected to contain a general and abstract construction of one or several fundamental provisions of the Treaties *without*

engaging in the task of elucidating their normative implications in concrete cases.This is clearly the case of preliminary judgments (ex Art. 267), of judgments on procedures where the annulment of supranational legislation is sought (Art. 230), and of opinions concerning international agreements to be entered into by the Union (Art X).

§39. The interpretation of Community norms at the request of national courts proceeds under a very peculiar setting. While the European Court of Justice is expected to limit itself to explore in general and abstract terms the normative content of a Community norm or set of norms, the request always arises in a specific legal controversy. While the degree to which the actual facts of the case are known to the Court would rather depend on the way the national court would frame its request, it is certainly the case that national courts have an incentive to feed the European Court with the details of the case (I would even say with *their* specific reconstruction of the facts) so as to ensure that the reply of the European Court would be actually helpful in solving the case at hand, or even would be more likely to be in line with the answer that the national court would prefer to obtain. This results in a predictable tension between the generality and abstraction which is formally required from the European Court of Justice, and the degree to which it actually knows the facts and the effectiveness of its decision depends on considering such specific factual context when providing its interpretation of Community law.

§40. Consider again *Cassis de Dijon.* The submitting court informed the ECJ that in the case at hand, a German supermarket (Rewe) had had trouble selling a French liquor, on account of the fact that the German authorities insisted on applying a national law that required that any *cassis* had a minimum alcoholic graduation that the French product did not have. It was clear that the rationale of the German law was to avoid the consumers being fooled by the arbitrary labeling of goods by exporters and/or retailers. To avoid confusion, German law reserved the use of the label *cassis* to goods meeting the expectations of the average German consumer (the teutonic person in the Clapham omnibus, if one is allowed to use a rather old fashioned expression). That, however, failed to consider whether free movement of goods had placed beyond the realm of the constitutionally possible that specific legislative choice.

Formally speaking the ECJ limited itself in its ruling to offer a general and abstract interpretation of the provision on free movement of goods enshrined in the Treaties:

The concept of "measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member States falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned."

However, the rationale of the *ratio decidendi* of the case goes further: a ban on *any* product that was legally sold in *any* other Member State of the Communities would constitute *prima facie* a disproportionate infringement on the constitutional principle of free movement of goods. Consequently, any national norm putting obstacles to the sale of goods legally available in another Member State would be considered as a breach of a key European constitutional norm, and thus void unless there were countervailing reasons which could justify this infringement. While the ruling is phrased in general and abstract terms, it is hard to imagine how the German court could avoid the conclusion that the German law prohibiting the sale was to be set aside, as this blank selling prohibition was incompatible with Community law.

§41. Finally, the very fact that European Courts are required to do these two things at the same time was likely to result in the progressive blurring of the dividing line between interpretation and application of law. Such a dynamic is not unique to the European Court of Justice, and indeed can be said to be typical of the "hybrid" European constitutional courts established in the postwar period, such as the German, the Italian or the Spanish one. Entrusted once and at the same time with the task of undertaking the general and abstract review of constitutionality in the Kelsenian fashion and with the task of applying the Constitution to concrete cases in the US fashion, those courts have ended up combining those tasks in a rather unorthodox fashion. This is rather underlined by those instances in which the courts are confronted at rather the same time with an "interpretative" and an "applicatory" procedure which at the end of the day hinge on the very same constitutional questions. A clear instance of that is indeed the Bachman case, which was decided by the ECJ the very same day that it sorted out . Or by the fact that the Viking, Laval and Ruffert cases are part of the same line of jurisprudence as Commission v. Luxembourg.

§42. It must be noticed that the lack of an explicit empowerment of the European Courts to undertake the review of European constitutionality has a result that such a review cannot not be *directly* sought by the plaintiffs in any procedure before the European Courts, with the sole exception of those procedures in which the parties can request the annulment of a supranational norm. In all other cases, and very particular, on all instances where the European constitutionality of national norms is at stake, the Court retains a discretion to produce a judgment which entails the setting aside of the national norm. European Courts have made a rather strategic use of such a discretion, very especially on preliminary requests, by pitching their interpretation of Community law at different levels of generality and abstraction.

2. The second thesis: The shared guardianship of European constitutionality

§43. The second thesis of this paper is that the peculiar nature of Union law, and in particular, the very distinctive constitutional path it has trailed- that of constitutional synthesis- results in both (1) a very idiosyncratic relationship between supranational

and national constitutional law, but also in (2) a very characteristic bond between the ECJ and national constitutional courts (or supreme courts where no specific constitutional court exists as such), which definitely excludes the hierarchical superiority of the ECJ, and thus, necessarily entails a shared and collective exercise of the guardianship of European constitutional law instead of a *solo* discharge of the task by the judges sitting in Luxembourg. Instead, the ECJ stands in a complex (and clearly non-hierarchical) relationship with national constitutional courts, which are also properly said to be part of the "collective" that guards constitutionality and shapes the yardstick of European constitutionality. The very reasons that underpin the assignment of a key role to the ECJ in making effective the constitutional norms of the European Union also limit the authority of the ECJ.

§44. Firstly, the regulatory ideal of a single constitutional order under which Europeans can be equal under the law is not to be achieved by means of writing a supranational constitution anew and imposing it *at the top* on national legal orders, but on turning all national constitutions into a collective constitutional law. This constitutive feature of Union law explains why the tension between the primacy of Community law and of national constitutions is more apparent than real; the tension is indeed very much eased once we properly identify the very consistency of European constitutional law as what is common to national constitutions (and once we take properly into account the several factors and procedures which account for the remarkable axiological and even institutional similarities between the constitutions of the founding Members of the Union, and of the states which have successively joined it). Such a supranational constitutional order will be poorly served by assigning to the ECJ an exclusive role as guardian of European constitutionality, neglecting the key contributions which *should* be made by national constitutional courts as reflective of long-standing national constitutional traditions.

§45. Secondly, Union law aspires to be a single legal order, but not one supported on a single and hierarchically organized institutional structure. The genuine institutional pluralism of Community law also applies to the task of constitutional guardianship, and excludes that the ECJ and national constitutional courts stand in a hierarchical relationship. That is what, rather imperfectly, is captured in the fashionable reference to a "dialogue" between courts.

§46. It is important to notice that the fact that the process of European integration still follows the synthetic path (as a result of the failure to transcend it through an act of democratic constitution-making and as a consequence of the resilience of the established institutional and decision-making process vis-â-vis the attempts to reconfigure it according to the grammar of governance as an alternative means of social integration) implies that the regulatory ideal of a common constitutional law remains the key bedrock of the European constitution. This is closely related to the persistence of an institutional configuration shaped by the imperative of ensuring *the*

transferring of democratic legitimacy from national political processes to the supranational one and by *a horizontal relationship* between the supranational and national institutions. This creates a very peculiar constitutional setting, in which not only *constitutional law* as the higher law of the land becomes a resource to context the legitimacy of statutes *from within the legal order* (as is typical in all constitutional systems) but also where there may be a plurality of *constitutional laws* competing for the role of being *the* constitutional law.

§47. The second thesis of this paper will prove to be especially relevant when considering the justifiability of the substantive choices that underlie the proportionality review of national legal norms against the yardstick of European constitutionality. The pluralistic nature of Community law makes advisable that the European Courts ground their substantive choices on the substantive choices made by national constitution-makers and legislators, as systematically constructed by national courts. Something that the European Courts have been less willing to do since they started interpreting economic freedoms as transcendental faculties, substantively detached from the common constitutional law of the Member States.

II. How European Courts review European constitutionality

§48. In the first section of this paper, I have argued that the role of the European Courts as guardians of European constitutionality is grounded on a systematic interpretation of the Treaties to the extent that the latter are seen as part and parcel of a constitutional legal order. With that we have, however, only shown that review of European constitutionality by the European Courts is structurally justified. The line of arguments rehearsed in the previous section do not say much about the further question of whether the specific way in which the European Courts discharge such a task renders their decisions justified. To reach that further conclusion, we would have to show that the European Courts are not only empowered to undertake the review of European constitutionality, but also that they do so in a manner that could be regarded as proper by and large. And that, rather obviously, depends on *how* the European Courts *actually* review the European constitutionality of legal norms. That is the object of the second part of this paper.

§49. The *actual how* is to be considered in two steps. Firstly, we should consider the *structure* of the judgments in which the European Courts undertake the review of European constitutionality of legal norms. Such a framework is basically constituted by the argumentative framework of the principle of proportionality. This implies a major similarity between how the European Courts discharge their constitutional task and how national constitutional courts undertake theirs. As a consequence, resort to proportionality gives to the review of European constitutionality a formal resemblance

to the review of national constitutionality.[27] Secondly, we should also consider the substantive arguments with which the European Courts fill in the principle of proportionality. This requires us considering not only the substantive contents of the yardstick of European constitutionality, of the core principles which define the policy options which Community law deprives legislatures from choosing, but also (1) the specific conception of the substantive principles that make up the yardstick of European constitutionality, and very especially, of economic freedoms, that the European Courts have come to flesh out in their case law; (2) the way in which the European Courts assign argumentative burdens when there is a conflict between basic constitutional principles; (3) the criteria the European Courts follow in assigning proof burdens of the facts relevant to apply the adequacy and necessity tests at the core of proportionality; (4) the specific guidelines the European Courts use to assign specific weight to conflicting constitutional principles when undertaking the review of strict proportionality.

§50. The relationship between the formal argumentative structure and the substantive choices is mediated by the third thesis of this paper. As I argue at length in in subsection II.2, proportionality is only a *formal* principle, which defines an argumentative structure, but which does not by itself determine the substantive content of any decision. Contrary to what it is sometimes assumed in the literature on Community law, proportionality can thus only contribute to a rather minor extent to justify any ruling or decision (it is not a comprehensive and self-sufficient *legitimising* principle, resort to which guarantees institutional actors that their decisions should be regarded by its addressees as justified). Proportionality can and should indeed be used in a rather different fashion, as an analytical tool which renders visible the implicit substantive choices underlying a judgment, thus allowing the addressees of the decisions to assess by themselves the justifiability (and thus legitimacy) of the ruling.

1. Proportionality as the structural framework of the review of European constitutionality

A) The basic argumentative structure of the constitutional rulings of the European courts

§51. The third thesis of this paper is that the structural argumentative framework within which the European Courts justify their rulings on the European

[27] It is far from surprising that this is the structural framework in which the ECJ undertakes the review of European constitutionality. The grammar of proportionality has been the dominant one in European postwar constitutional argumentation. Its extension or projection to the supranational level is thus to be expected once Community law started to be constructed in a constitutional key. Institutional actors probably regarded this solution as rather congenial, as the "natural" (in the sense of obvious) one, and one which will contribute to smoothing the acceptance of the constitutional status and primacy of Community law. Indeed where such constitutional grammar had not been developed (as was in the case of the UK) the progressive affirmation of that constitutional grammar will contribute to reticence and resistance vis-à-vis the process of European integration.

constitutionality of both supranational or national norms is the principle of proportionality. Whether the European Courts do explicitly follow the structure of proportionality or not, their *constitutional* rulings are open to be reconstructed with the help of the principle (as I will illustrate by returning to *Cassis de Dijon* and *Avoir Fiscal*). Proportionality constitutes the *deep* argumentative syntax of the review of European constitutionality. Full proof of this argument would require reconstructing each and every judgment rendered by the European Courts, and showing that their *deep structure* corresponds to the argumentative syntax of proportionality. In this paper, I will limit myself to consider the reconstruction of *Cassis de Dijon* and *Avoir Fiscal* to illustrate how that reconstruction proceeds, and take for granted that all other judgments can be equally reconstructed. That is of course an assumption and not a proof. But not only undertaking such a complete reconstruction would be tedious and result in an even lengthier paper (perhaps a long monograph on its own, which would make an even less attractive read than this paper), but seems to me unnecessary. On the basis of an admittedly incomplete exposure to the case law of the European Court of Justice on economic freedoms, I am still to find a case that does not fit this pattern.

§52. The fourth thesis of this paper is that the argumentative syntax of proportionality requires the European Courts to follow five steps: (1) determine the constitutional principles which underlie the legal norms in apparent conflict; (2) assign argumentative burdens, by means of identifying a *prima facie* infringing norm and a *prima facie* infringed norm (the latter enjoying the argumentative burden); (3) test the adequacy of the infringing norm to realise its underlying principle; (4) the necessity of the infringing norm to realise its underlying principle; (5) determine the specific weight that should be assigned to each of the conflicting principles in the case at hand, and on the basis of that, solve the conflict by assigning *final* preference to one principle over the other, by means of a derivative rule that settles the dispute between the two conflicting norms by setting one aside in favour of the other.

§53. This implies adding to the standard understanding of the principle of proportionality as a three-stepped argumentative framework in the theory of legal argumentation two additional steps; to be more precise, what the systematic analysis of Community law renders visible and advisable is the convenience of rendering explicit these two first steps, which tend to be rather non-controversial in the national constitutional setting, but which have a major and eventually decisive influence when confronted with a less settled constitutional law, such as European Union law is.

§54. The review of the European constitutionality of a legal norm presupposes that there is a *prima facie* or *apparent* conflict between a supranational or national legal norm and a norm of European constitutional law, or what is the same, that a supranational or national legal norm *seems* to be in breach of European constitutional norm. This conflict is always amenable to be reconstructed as a conflict between two

principles, the principle of European constitutional which underpins the norm of Community law *allegedly* infringed and the constitutional principle underpinning the *allegedly infringing* supranational or national legal norm. Thus, in *Cassis de Dijon*, we had an *alleged* conflict between a German statute and Article 30 of the Rome Treaty, which was underpinned by a conflict between the principles of free movement of goods and of the protection of the consumer (which could be argued was already a principle of European constitutional law, and indeed has come to be acknowledged as such explicitly, both by the European legislator and by European Courts). In *Avoir Fiscal*, we had a conflict between a particular French norm included in the French tax code (regulating the assessment of the tax debt in the corporate income tax) and article 52 of the Rome Treaty. That conflict was underpinned by an apparent clash between the principle of freedom of establishment and the principle of autonomous and democratic configuration of national tax systems (and perhaps also, or alternatively, the substantive principle of tax fairness or even progressivity).

§55. Once the two principles underlying the norms in apparent conflict are identified, the Court has to assign the argumentative burden and the argumentative benefit in the case.

What I mean by that is the choice of the norm which is to be regarded prima facie as *infringing* and the norm which is (consequently) to be considered as prima facie *being infringed.*

The allocation of that burden basically depends on two factors. Firstly, on a pre-understanding of what is the *normative* center of gravity of the case, if one is allowed to borrow a concept developed in intra-state conflicts of law, or what is the same, of which of the conflicting principles is more relevant *prima facie* in the concrete factual and normative setting of the case. Was *Cassis de Dijon* mainly about free movement or was it about consumer protection? Which of the two clashing principles was more deeply affected, or more obviously relevant, in this context? Secondly, the assignment of the argumentative burden depends on the abstract weight acknowledged to each principle in previous constitutional, legislative and judicial decisions. Such sets of decisions *restrict* the remaining discretionality of Courts when assigning argumentative burdens. Is there sufficient authority to consider that in *Cassis de Dijon* preference should a priori be assigned to free movement of goods over consumer protection?

The commutative principle does necessarily apply to legal argumentation. Whether we start considering whether it is justified to breach principle X to realize principle Y, or whether we consider whether it is justified to breach principle Y to realize principle X, may be far from irrelevant. So how we allocate the argumentative burden might be of essence.

§56. The first two steps in the argumentative framework of proportionality lead to an implicit but rather detailed conceptualisation of the legal principles in conflict. It goes without saying that constitutional principles, both in the European and in the national constitution, are abstract and general, and as such, open in principle to different conceptualisations. The difference between European and national constitutional law lies on the density of the previous authoritative decisions that define and shape the conception of such principles. When a national constitutional court has to review the constitutionality of a given norm, it tends to have to come to terms with a very dense web of previous authoritative decisions which contribute to the detailed conceptualisation of the principles involved. In particular, national courts are guided by both the constitutional debates preceding key constitutional decisions (explicit constitution-making processes in "revolutionary" constitutional traditions -such as the French, Italian or to a rather large extent, Spanish one- and key constitutional moments in "evolutionary" constitutional traditions -such as the British or to a rather large extent, German one) and by the political debates preceding the passing of new legislation, in which the relationship between the new norms and constitutional norms might be of relevance. The European Courts have less guidance at their disposal from such sources. The peculiar constitutional path through which the European Union has evolved (§§) entails that contestation over the proper conceptualisation of basic constitutional principles is rendered endemic by the structural fact that Union law is the constitutional framework in which a (growing) number of constitutional legal orders integrate. While the constitutional principles are largely the same in all legal orders, the way in which such principles relate to each other and are thus conceptualised is far from homogeneous. At the same time, the synthetic constitutional path of European integration entails that European Courts are not to find much guidance from key constitutional debates (given the absence of constitution-making processes and the scarcity of constitutional moments which can be said to be akin to decisive ones in evolutionary constitutional traditions). While the peculiar way in which legislation proceeds at the European level restrains the authoritative guidance to be derived from legislative debates, even from such debates in the European Parliament.

§57. The structural differences in the density of the previous authoritative decisions defining the conception of basic constitutional principles explains why these two steps in the argumentative framework of proportionality seem rather uninteresting at the national constitutional level, but prove to be potentially decisive at the European level. As we will see *infra* (§), the European Courts assign *always* the argumentative preference to economic freedoms when reviewing the European constitutionality of national norms. The sheer invariability of this rule, despite the fact that European constitutional law is composed of other constitutional principles, and outstandingly, of the principle of protection of fundamental rights, turns both the specific conceptualization of economic freedoms and the assignment of argumentative

burdens highly problematic steps. These two steps are indeed at the core of the tension between European and national constitutional law.

§58. The third argumentative step requires us to assess the adequacy of the *allegedly infringing* norm to realise the principle which underlies it. In *Cassis de Dijon* we have to consider whether fixing minimum alcoholic graduation standards and banning the sale of products which do not meet these standards *will actually* protect the consumer against being misled by the name of the product into buying something different from what he wanted to purchase (a question which is implicitly answered in a positive manner by the ECJ). In *Avoir Fiscal*, we have to determine whether the power to treat differently insurance companies depending on where they have their registered office would contribute to the realization of the principle of autonomous determination of the tax system (and/or tax fairness of tax progressivity) (again answered in the affirmative implicitly by the ECJ).

§59. Fourthly, we have to determine the *necessity* of the allegedly infringing norm, or what is the same, whether there is no other normative alternative which would also realize the principle underlying the allegedly infringing norm while not affecting the alledgely infringed principle (or infringing it to a significant lesser extent). In *Cassis de Dijon* the ECJ claims that there are indeed other normative alternatives which allowed a better reconciliation of the principles in conflict; thus the German law is to be regarded as in breach of Community law. In *Avoir Fiscal* it seems to be the case that the ECJ accepts that the differentiated treatment is necessary to realize the *conflicting* principle.

§60. Finally, we have to weigh and balance the conflicting principles, so as to decide which should carry more weight in this concrete case. That operation was not necessary in *Cassis de Dijon*, as an outright ban was regarded as unnecessary, in the terms I have just rehearsed. However, it was decisive in *Avoir Fiscal*, the ECJ arguing that freedom of establishment should trump democratic configuration of the tax system and/or the principle of (national) equality or (national) tax progressivity.

§61. These five steps constitute the complete, deep form of proportionality as a syntactic structure. In actual practice, we may take for granted or regard as unnecessary some of these five steps (as we have indeed just seen on what concerns the first and the second step in the practice of national constitutional courts). Whether this implies that we have followed in an inadequate or incomplete manner the principle of proportionality, or whether it simply means that some of these steps do not need to be gone through because the answer is rather obvious is something that cannot be determined but in the light of the facts in each concrete case. But I want to stress here is that no structural differences can be established on the basis of how many of the limbs are used by Courts. In that regard, perhaps it is pertinent to anticipate that the *Wednesbury* review developed in British administrative law and the standard German constitutional proportionality review are *both* instances of

application of the structural principle of proportionality to legal reasoning. The difference is not structural, but as we will see, revolves around the different substantive assumptions made in each case. Similarly, the fact that in a given judgment a Court seems to obviate some of the "steps" in the proportionality syntactic structure should not lead us to the precipitated judgment that there are structural differences between different proportionality judgments.[28]

B) The limited justificatory power of proportionality

§62. The fifth thesis of this paper is that the claim that proportionality plays a key role in justifying the rulings in which the European Court of Justice reviews the European constitutionality of national laws is confounded (and unfounded). This is so because the principle of proportionality is a *formal* principle, a basic principle of legal reasoning, that by itself cannot reveal the right answer to a concrete and specific legal dispute. Each and every concrete decision depends on substantive choices that proportionality can only make more explicit. The mere *formal* character of proportionality derives rather immediately from the fact that the use of the principle of proportionality in legal reasoning does not depend on its being *positivised*, on its being explicitly referred to by the legislator, as on its being a principle of general practical reasoning. Whether or not judges can find a positive mention to proportionality, the will ample use of the structural framework characteristic of the principle once they are confronted with the typical questions which arise once the state assumes a wide set of *positive obligations*, once the state starts to actively shape its economic and social environment through law.

§63. The principle of proportionality is a structural principle of general practical reason which has become increasingly *legalized*, put to use in legal argumentation. But no matter how much used and resorted to in legal discourses, proportionality is properly described as the *structural syntax* of general practical reason through which we solve conflicts between colliding principles. In particular, proportionality forces us to consider *all relevant* interests at stake, to ponder on both the abstract and the concrete importance each of them has, and finally to make a considerate judgment in the fullness of reasoning. As David Beatty points, "proportionality requires judges [but really here we could say anybody taking a decision] to assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most."[29] In brief, "[Proportionality] makes it possible to compare and evaluate interests and ideas,

[28] Thus the standard distinction between "Proportionality I and Proportionality II" in the case law of the ECJ should be interpreted as calling our attention to the different substantive assumptions made by the ECJ when reviewing the constitutionality of Community and of national norms. The distinction between Proportionality I and Proportionality II is used by Takis Tridimas, *The General Principles of EU Law,* Oxford: Oxford University Press, 2007 and Paul Craig, *EU Administrative Law,* Oxford: Oxford University Press, 2008.

[29] David A. Beatty, *The Ultimate Rule of Law*, Oxford: Oxford University Press, 2004, p. 160.

values and facts, that are radically different in a way that is both rational and fair,"[30] as David Beatty claims in his book-length analysis of proportionality. This is indeed the core intuition behind Alexy's treatment of proportionality in *A Theory of Constitutional Rights*, as Mattias Kumm has reminded us: "The proportionality test provides an analytical structure for assessing whether limits imposed on the realization of a principle in a particular context are justified."[31] Proportionality as a syntactic structure of general practical reason is put to use in *legal argumentation*, by means of "filling in" the formal structure with arguments relevant from the standpoint of the specific legal system in which the principle is applied.

§64. This *borrowing* is closely related to the *constitutional turn* of modern law, which in its turn implies a radical reconsideration of the law as a means of social integration, and of the societal tasks to be trusted to the state as the embodiment of collective action. In particular, once law is charged with integrating society not mainly by means of solving specific conflicts but by means of coordinating action with a view to achieve collective goals, law tends to be written by reference firstly and foremostly to legal principles, not to narrow legal rules. Indeed, as Alexy reminds us in *The Theory of Constitutional Rights*:

"[There is a connection between the theory of principles and the principle of proportionality. This connection is as close as it could possibly be. The nature of principles implies the principle of proportionality and vice versa. That the nature of principles implies the principle of proportionality implies the principle of proportionality means that the principle of proportionality with its three sub-principles of suitability, necessity (use of the least intrusive means) and proportionality in its narrow sense (that is, the balancing requirement) logically follows from the nature of principles."[32]

Notice that it follows in *logical*, not *legal* dogmatic terms. And it follows logically because the structure of proportionality requires that before we take a decision, we consider in a rigorous and disciplined matter what is normatively at stake (as was already argued §64).[33]

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[30] Ibid, p. 169.
[31] Mattias Kumm, 'Political Liberalism and the Structure of Rights' in George Pavlakos (ed.), Oxford: Hart Publishers, 2006, p.131-66, at p. 136. Kumm goes on to support a rather formalistic understanding of proportionality which in my view will fail to overcome Habermas' firewall objection. However, Habermas' objection is addressed to a specific understanding of how proportionality is to be applied in legal reasoning, one that does not take seriously that the abstract weight assigned to certain principles (foremostly, the interdiction of torture and cruel and inhuman treatment) does away with the need of weighing and balancing characteristic of the third prong or step in proportionality review. The very central importance of such unqualified rules should make us doubt the convenience of approaching the application of law as a matter of weighing and balancing, and similarly, to describe principles as optimization commands (both terms, optimization and commands being objectionable).
[32] Alexy, *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2002, p. 66.
[33] Both Alexy and Beatty would further add that a constitution cannot exist without reference to proportionality as an optimizing principle (of the realization of constitutional principles) (Beatty, *supra*,

§65. This accounts for the fact that *proportionality* reviews tend to pop up in all legal systems once the development of the social and democratic state results in growing powers being assigned to state agents. Once law becomes an empowering device, and not a restraining device of state action, the democratic discipline of state power is carried through legal principles that are established to *programme* state action. As state action unavoidably collides with other legal principles, we need a structural framework with the help of which to think these problems. That framework is proportionality as a structural principle.[34]

Similarly, it is rather predictable that the use of proportionality will tend to be more explicit where decisions have to be taken by actors who lack a homogeneous legal culture, whether on account of different disciplinary backgrounds (public vs private law) or of different national backgrounds. Thus there is nothing strange in the leading role of constitutional courts in postwar Europe or in the ECJ and the ECHR in the explicit use of proportionality review.

§66. Furthermore this entails that the assumption that the principle of proportionality has become incorporated into positive European constitutional law as a transfer from German public law,[35] thus reflecting the influence of German law upon Community law (as part of the incoming tide of national legal systems fails into Community law) is misconceived. While resort to proportionality in the case law of the Court of Justice may have been explicitly advocated by German jurists, the trigger of its use is to be found in the very nature of the legal questions with which the Luxembourg judges were confronted. Indeed, the use of the principle of proportionality became widespread in France and in the United Kingdom[36] as soon as French and British

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fn 28, p. 163). But perhaps we can suspend our disbelief on this regard, as it may well be, as Habermas claims, that such understanding of principles fails to give proper due to some specific norms in modern legal systems, such as the prohibition of torture, which *should not* be regarded as being subject to being *optimized*. But that is not of essence in our previous discussion. What matters is that proportionality is not a positive principle, but a structural principle of legal reasoning.

[34] Assuming that state power is democratically legitimated, and so are principles. Keep in mind manipulative use of principles. Not natural lawyers, but on the one hand of Radbruch's claim; on the other on Bodenheimer, *Jurisprudence*: *The Philosophy and the Method of the Law,* Cambridge: Harvard University Press, 1962.

[35] Indeed, its "transplant" into Community law would have in the fullness of time resulted in the incoming tide of Community law "implanting" the principle of proportionality in the national public laws of the Member States.

[36] In the leading ruling of the French Conseil d'État in Benjamin (19 May 1933), available at http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007636694&fastReqId=1286398039&fastPos=1: "Considérant qu'il résulte de l'instruction que l'éventualité de troubles, alléguée par le maire de Nevers, ne présentait pas un degré de gravité tel qu'il n'ait pu, sans interdire la conférence, maintenir l'ordre en édictant les mesures de police qu'il lui appartenait de prendre ; que, dès lors, sans qu'il y ait lieu de statuer sur le moyen tiré du détournement de pouvoir, les requérants sont fondés à soutenir que les arrêtés attaqués sont entachés d'excès de pouvoir". In the leading ruling of the British King's Bench in Wednesbury (Associated Provincial Picture Houses v Wednesbury Corporation [1947] 1 KB 223): "What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition (..)What then are those principles? They are well understood. They are

administrative law had to come to terms with the growing power of the state under the Social Rechtsstaat. The difference laid not so much on the *structure* of the legal train of reasoning, as on the substantive assumptions made in one case or the other. Indeed, when we consider that proportionality is a structural principle of general practical reasoning that is frequently "filled in" with legally relevant arguments, we come a long way to explain how proportionality has become pervasive in basically all modern legal systems,[37] even if the principle has not been explicitly posivitised in the Constitution or in statutes of a constitutional relevance and importance.

§67. Finally, the nature of proportionality is corroborated by the fact that the principle is used in all legal discourses, from discourses of application of the law to constitution-making discourses which by definition are not governed by authoritative legal norms.

§68. The difference lies not so much on the structure of the argument, but on the extent to which *authoritative law* weighs on the actual decision. In *constitution-making discourses*, proportionality is substantially filed by reference to prudential, ethical and normative considerations, but not necessarily by arguments referring back to authoritative legal arguments (if that arguments are authoritative in that situation is because of their normative value, not because of their legal authority). In *judicial discourses*, proportionality is filled to a rather large extent by what is taken to be the body of *authoritative legal decisions* making up the legal order. In *legislative discourses*, proportionality has to be filled by reference to constitutional authoritative decisions, but not by reference to previous laws and judicial decisions.[38]

§69. It follows from the structural character of the principle of proportionality that, contrary to what is widely assumed,[39] the *form of the syntactic structure* of

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principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters".

[37] Although there is also a specific *politics* of proportionality, but that has to do more with the confusion of the structural and substantive dimensions of proportionality, and indeed with the very substantive contents with which proportionality judgements are filled).

[38] Indeed, it may only be slightly exaggerated to claim that most of legal norms are the products of decisions taken with the help of the structure principle of proportionality. Something which should help us reconsider what happens when a decision is taken following the principle of proportionality in a simplified, incomplete manner. That is usually constructed as reflecting a deeper of more superficial decision-making process, or if proportionality is used to review not to decide, a stricter or more lax standard of review. In substantive terms, however, that implies also a specific attitude towards the extent to which we can rely for our judgment on past decisions, and the extent to which the proportionality judgments implicit in them are to be trusted or, on the contrary, are to be reconsidered.

[39] Beatty, *supra*, fn 28, p. 160 and 161. He claims this is because proportionality certifies the neutrality of the arguments of the courts, and as such can be seen as a *metalegitimating principle*. See also Kumm, *supra*, fn 30; and Tridimas, *supra*, fn 27.

proportionality can only play a modest legitimizing role. Taking a decision following the syntactic structure of proportionality (or even if some other form was used, writing rulings capable of being reconstructed by reference to that structure) is a necessary, but insufficient condition for the legitimacy of the decision. In particular, compliance with proportionality can only guarantee the *formal* correctness of the decision taken after following the four steps which compose it in the terms that I considered This minimal legitimacy is indeed the kind of legitimacy that follows from the *Wednesbury* review: that the decision is not foolish in the sense that its aim makes sense and that no obvious alternative solution that could reconcile the two principles at stake was available. It cannot provide a thicker legitimacy without borrowing it from the substantive principles with which the structural principle is filled in. Or what is the same, proportionality cannot guarantee the *substantive correctness* of the decision, which critically depends on the substantive correctness of the arguments with which the principle is "filled in".

2. The justifiability of the substantive choices made by European Courts (the *alternative* use of proportionality)

§70. The sixth thesis of this paper is that the principle of proportionality provides us with the analytical tools to subject any of the judgments of European courts to a more thorough critical review.[40] Proportionality renders easier to determine which are the concrete substantive choices which underpin a ruling, and consequently, makes also easier to assess the normative correctness of the decision (a judgment which largely depends on the coherence between the substantive choices underlying the ruling and the substantive choices that stem from a systematic construction of the legal order).

§71. Proper attention to the *structural* nature of the principle of proportionality as a syntactic structure of general practical reasoning should lead us to distinguish very clearly between the *formal* requirements of practical reasoning and the *substantive* elements with which we fill in the syntactic structure, and to which I have just referred. The correctness of a legal argument depends not only on following the structure of proportionality, but in getting the substance right. Indeed, in that distinction, in rendering us capable of making that distinction, resides the key analytical value of the principle of proportionality. It allows us to distinguish what parts of the decision are required by the very structure of legal reasoning (as a special case of general practical reasoning), which parts of the decision are dependent on substantive assumptions made in a rather uncontroversial way in previous legal decisions (essentially, through acts of constitutional significance and importance) and which parts depend on substantive assumptions made by the decision-maker. In particular, attention should be paid to the actual foundation of assumptions on the

[40] That is, it seems to me, the core point of Alexy's Theory of Constitutional Rights. To develop a sophisticated analytical approach so as to render as explicit as possible what is most of the time done implicitly, or even worse, done in such a muddled way that what is a substantive argument is presented as a structural one.

argumentative and proof burdens, the specific conceptions of each legal principle and the abstract weight assigned to each of them.

§72. In particular, I will consider (A) the definition of the yardstick of European constitutionality; (B) the unqualified assignment of the argumentative benefit to economic freedoms; (C) the conceptualization of economic freedoms as the operationalisation of a transcendental economic freedom; (D) the unrealistic assumptions which render possible to assume that there are less stringent alternatives to national measures which infringe economic freedoms; and (E) the distortion of the degree of non-satisfaction of national constitutional principles trumped by Community economic freedoms.

§73. While there is no exhaustive approach to the case law, it is perhaps pertinent to say that most of the cases here referred to concern the interplay and conflicts between supranational economic freedoms and national personal taxes. In addition to some substantive reasons which could perhaps be cited to ground such choice, the more contingent reason that these are the cases which the present author is more familiar with was determinant of the selection.

A) The yardstick of European constitutionality and the specific conceptualisation of economic freedoms

§74. The first set of substantive choices with which the syntactic structure of proportionality is filled in the elucidation of the constitutional principles which underpin the two apparently colliding norms. As we already saw (§), this step, together with the assignment of the argumentative burden, requires to and results in the conceptualization of the principles at stake, in particular the consideration of the concrete faculties they comprise.

§75. This conceptualization poses two sets of problems, related to two implicit substantive decisions made by the European Courts when undertaking it.

The first concerns the definition of the yardstick of European constitutionality. Because there is no written European constitution, but we have a regulatory ideal of a common constitutional law only partially fleshed out in the founding Treaties plus the set of national constitutional norms, the yardstick of European constitutionality is not formally established in a single authoritative constitutional document. This implies that the European Courts have a role to play in fleshing out the constitutional yardstick, a role in which they make substantive choices the justifiability of which is to be open to scrutiny.

The second concerns the characterization of the principles which make part of the yardstick of European constitutionality. Even if we assume that the European Courts have rightly decided that the substantive principles which make up the yardstick of European constitutionality are the four economic freedoms, the principle of non-

discrimination on the basis of sex and the principle of protection of fundamental rights, there are very good reasons to consider how the European Courts conceptualise each of these constitutional principles by means of fleshing out derivative constitutional norms that concretise the implications of each principle in specific factual and normative settings.

a) Defining the Yardstick of European Constitutionality

§76. As the reader has just been reminded, the synthetic path through which the European Union was constituted and has evolved into a full-blown constitutional polity entails that instead of a single and authoritative written European constitution, European Union law is based on the regulatory ideal of a common constitutional law, only partially fleshed out in the founding Treaties plus national constitutions.

§77. As a result, the yardstick of European constitutionality is not formally established in a single authoritative constitutional document. Instead, the European Courts played a key role in rendering explicit the implicit constitutional yardstick. This role is at the core of the process of *transformative constitutionalisation*, the internalization by constitutional actors (especially, national constitutional actors) of the constitutional character of European Union law.

§78. This process is marked by its four main features.

Firstly, it was rather belated. While the Court had enunciated the core structural principles governing the relationship between Community law and national constitutional law in the early 1960s (paramountly in the two leading cases of the case law of the ECJ *par excellence*, *Van Gend en Loos* and *Costa*), it was only in the 1970s that such structural principles were filled in with constitutional substance. The leading case on the protection of fundamental rights (*Internationale)* was decided in 1970 (a year after the first temptative affirmation of the unwritten principle of protection of fundamental rights in *Stauder*), and the leading case on the direct effect of economic freedoms was *Dassonville*, decided in 1974.

Secondly, the yardstick of European constitutionality is two-fold. On the one hand, we find the principle of protection of fundamental rights, which as has just been said, was for a long time an "unwritten" constitutional principle, in the sense that it was not explicitly affirmed and stated in the Treaties, but was derived from a systematic interpretation of the fundamental norms of the Union, with clear and explicit reference to the idea of a common constitutional law as the deep constitution of the European Union. While the principle ceased being an "unwritten" one once the preamble of the Single European Act contained an explicit reference to it,[41] the Union kept on having a judicially (sometimes wittily characterized as "praetorian") defined bill of rights until European institutions solemnly proclaimed the Charter of Fundamental Rights in 2000.[42] On the other hand, we find the economic freedoms

[41] "Determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice." Article F of the Treaty of Maastricht made fundamental rights part of the text of the primary law of the Union: "[T]he Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms (…) and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

[42] The Court enlarged the breadth and scope of substantive principles by going beyond the literal text of the Treaties and considering the *deep contents of European constitutional law*, namely, the constitutional law common to the Member States, and in particular, fundamental rights. The more the Union was acknowledged as the holder of full public powers, the more there was a pressure to counterbalance the exercise of such powers by protecting fundamental rights. In addition, major political events on both sides of the Iron Curtain accelerated the process of constitutionalisation in this regard. The Prague Spring of 1968 undermined the Soviet propaganda concerning the purely "burgeois" character of civil rights. Rights were more than ever to be part of Western cold-war diplomacy. (Besides which. Czechoslovak protestors would have indeed profited from having their rights respected). At the same time, the upheaval and unrest of May 68 in France and in other Western

plus the principle of undistorted competition. The Court turned these Treaty provisions into key components of the yardstick of European Constitutionality by means of affirming that the articles in which they were enshrined were to be acknowledged direct effect. [43]In formal terms, thus, the role played on national constitutional texts by the norms affirming a "constitutional core" (as the eternity clause in the German constitution, the norms distinguishing different review procedures and making more onerous to amend certain provisions of the Constitution in other constitutional traditions; or the norms defining the set of fundamental rights whose protection citizens can directly seek from the constitutional court) is played in Community law by the criteria which make of a Treaty provision a directly applicable one.[44]

Thirdly, there is an apparent marked division of labour between the two arms of the yardstick of European constitutionality. On the one hand, review of the European constitutionality of Community secondary norms tends to proceed by reference to the principle of protection of fundamental rights, and only rarely by reference to the four economic freedoms. This is the lasting legacy of the fact that under the traditional Community Method, the Council of Member States was required to unanimously support a given legislative proposal for its becoming Community law in force. Even if procedurally speaking a decision of the Council (even if unanimous) was rather different from a decision taken in an Intergovernmental Conference, the fact of the matter was that a unanimous decision of the Council came close to a decision

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countries made urgent the need to find a discourse to challenge the materialistic and alienating critique of Western welfare states. Cf P. Pescatore, 'Les Droits de l'Homme et l'Integration Européenne', (1968) 4 *Cahiers de droit européen* 629-673 and of the same author 'Fundamental Rights and Freedoms in the System of the European Communities', (1970) 24 *American Journal of Comparative Law* 343-51; J.Weiler and N. J. S. Lockhart, 'Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence', (1995) 32 *Common Market Law Review* 51-94 and 579-627. In developing the set of rights protected under Community law, it is important to stress that the Court engaged in the weighing and balancing of different types of constitutional rights from an early date.

[43] Schermers and Waelbroek concluded ten years ago that such articles were (in the numbering relevant at that time) 12; 23; 25; 28,29,and 30 (free movement); 31(1) and (2); 39-55; 81(1); 82; 86(1) and (2); 88(3); 90, first and second paragraphs; and 141. [43] This basically means that the positive argumentative burden is assigned to the four economic freedoms, undistorted competition and non-discrimination on the basis of sex. See their *Judicial Protection in the European Union*, Kluwer: The Hague, 2001, pp.183-5.

[44] The "economic" side of the substantive constitutional yardstick was only very preliminary developed in the early case law of the ECJ on customs (as in Van Gend en Loos) and in the old Article 95. But it was fleshed out in earnest from mid 1968 onwards, that is, once the fourth stage towards the common market was completed. From that date onwards, the ECJ considered that three of the four economic freedoms (and the principle of undistorted competition) were so defined in the Treaties as to merit to be acknowledged direct effect once the transitory phases were over. The fourth freedom (the free movement of capital) was so circumscribed and limited in the original drafting of the Treaties as to be considered as not having direct effect. That would remain being the case until the 1988 Directive (ad intra) and the Maastricht Treaty (1991) radically changed the Community legal discipline and consequently the status of this freedom, which within a decade moved from cindirella to über-freedom.

supported by a constitutional will. So in fact the ECJ tended to look for inspiration to construct Treaty provisions on secondary legislation and not the reverse. Even if qualified majority making and co-decision have changed things, the fact still is that the degree of legitimacy which a regulation or directive carries with it makes the ECJ very cautious when undertaking review on the basis of economic freedoms. Very different considerations apply when it comes to the protection of fundamental rights. Here it is not only the case that the main reference point cannot be the decisions of the Council of Ministers (a body of an open executive nature), but the substantive contents of national constitutions. On the other hand, review of the European constitutionality of national norms proceeds by reference to economic freedoms, while the protection of specific fundamental rights has traditionally been used, and only to a rather limited extent, as a reference point when shaping the canon of exceptions to economic freedoms. This is the result of the fact that the principle of protection of fundamental rights was not enshrined in the original Treaties, but derived by the ECJ from the constitutional law common to the Member States, and consequently, regarded as limiting not the power of the Member States (already constrained by each of the fundamental rights constitutional traditions which are part of the European collective).

Fourth, this does not do away with the fact that the yardstick is not only two-fold but Janus-faced for the simple reason that the key constitutional issue, in Community law as in all other constitutional legal orders, is how these two sets of principles relate to each other. While this conflict was present all through the process of European integration, the case law of the European Courts remained rather unproblematic until the late seventies. Indeed, the European Courts solved this conflict in line with the basic constitutional choices of postwar national constitutions. It is worth keeping in mind that the first cases on the protection of fundamental rights concerned in many occasions the conflict between the right to private property and the collective goals pursued through common agricultural policy. By means of giving preference to the latter, the European Courts may have been furthering European integration; but in doing that, they were solving the conflicts in a way congenial to the characterization of private property in the social and democratic Rechtsstaat. In fact, the key leading cases concerned conflicts in which Community law fostered collective goods and interests, and plaintiffs claimed that it was in breach of their right to private property.[45] However, once the European Courts affirmed an autonomous and self-standing conception of economic freedoms, once they favoured a different conceptualization of economic freedoms, the tension at the core of the yardstick of European constitutionality could only mount over time. This is a typical, almost

[45] Typically, Case 4/73 *Nold* [1973] 491 and Case 44/79 *Hauer* [1979] ECR 3727, where the right to private property was invoked against regulatory powers on coal retailing and on use of agricultural land.

millenarian conflict at the core of fundamental rights protection.[46] *Viking* and *Laval* are but late chapters in a long saga from this perspective.

§79. I will come back to the one of the aspects of the tension between economic freedoms and fundamental rights at the core of European constitutional law when considering the way in which the European Courts assign specific weight to conflicting principles (§).

What is worth highlighting now is that the criteria that determine whether a given principle is part of the yardstick of European constitutionality have been distilled by the European Courts from the set of European constitutional materials (from the constitutional law common to the Member States, the deep constitution of the Union, and from the text of the Treaties, which have rendered partially explicit the integrated common constitutional law). In this process of distillation, the European Courts have exerted their discretion through *substantive choices*, the justifiability of which cannot be grounded on the principle of proportionality, but must be grounded on substantive reasons.

The development of a jurisprudential bill of rights entails not only defining which rights are *fundamental* (something on which there is far from being complete agreement among the Member States) but also how different fundamental rights are to relate to each other (as indeed, the Social and Democratic Rechsstaat is based on the reconciliation, but on the full convergence, of the ideals of the rule of law, the democratic state, and the social/welfare state). The solemn proclamation of the Charter of Fundamental Rights and its later formal incorporation to the primary law of the Union should be regarded by the European Courts as authoritative decisions relieving them of many of these discretionary choices. However, as I will argue in the coming paragraphs, the Charter renders even more visible the problematic character of the assignment of the argumentative benefit to economic freedoms (§91ff) and the criteria which the European Courts follow when assigning specific weight to European constitutional principles (§102ff).

Similarly, the definition of the criteria according to which to determine whether a Treaty provision is to be regarded as directly effective or not is not to be found in the Treaties, but must be derived from a systematic and rather teleological construction of the constitutional materials of European Union law.

§80. Still, it seems to me that the definition of the yardstick of European constitutionality advocated by the European Courts is by and large well grounded. The very idea of integrating constitutional states through constitutional law requires

[46] What is revealing is that it is substantively identical to the ones which have been at the heart of public debate in the last years, with the revealing difference that what conflicted with collective goods was a Community protected economic freedom, and that the Court solved the conflicts according to a different normative logic.

placing the fundamental rights characteristic of the social and economic *Rechtsstaat* at the very centre of the yardstick of European constitutionality. While it is hard to contest that the case law led by *Internationale* was causally motivated by the challenge to the primacy of Community law and consequently to the institutional authority enjoyed by European Courts, the affirmation of the unwritten principle of protection of fundamental rights was clearly required by the regulatory ideal of a common constitutional law of democratic states integrating through constitutional law. The prominence of economic freedoms has a clear literal basis on the founding Treaties. And while much could be said (and should be said) on the peculiar conception of the economic freedoms supported by the Court (see next subsection), the centrality of the project of the internal market and the principle of non-discrimination on the basis of nationality, leading to the opening of national economies, is hard to contest.

b) Conceptualising the components of the yardstick of European constitutionality, especially economic freedoms

§81. In the previous section, I have claimed that the yardstick of European constitutionality is basically composed of (1) the fundamental rights which were first elucidated by the European Courts in its case law ("filling in" the unwritten principle of protection of fundamental rights) and have been recently enumerated in the Charter of Fundamental Rights of the European Union; (2) the economic freedoms at the core of the socio-economic constitution enshrined in the Treaty establishing the European Economic Community, and now reproduced in the Treaty on the functioning of the European Union. And I also concluded that there were good reasons why the yardstick of European constitutionality should be defined in these terms, even if such reasons were not all the time, not even most of the time, fleshed out by the European Courts in their rulings. However, it is still the case that general constitutional principles are formulated at a high level of generality and abstraction. As I also argued (§) there are very good reasons why the concretization of these principles, the progressive development of a specific conception of each of them, is a more problematic task under Community law than under national constitutional law. So what can be said of the way in which the European Courts have conceptualized the components of the yardstick of European constitutionality?

§82. The conceptualization of fundamental rights remains unproblematic to a rather large extent, if only because the number of cases in which the European Courts had engaged in the detailed specification of fundamental rights has been limited. As was already indicated, fundamental rights have been considered upon by the Court only when reviewing the constitutionality of Community norms, not of national ones. And when doing so, the European Courts have tended to be rather attentive to the substantive choices stemming from the common constitutional traditions and from the case law of national constitutional courts. This is something reflected, as was already said, in the preference assigned to fundamental collective goods realized

through public policies over the right to private property, or on the restrictive approach followed when it comes to define the extent to which legal persons (namely corporations) can be regarded as holders of fundamental rights. This pattern could also be recognized in the controversial *Kaddi* decision. The decision of the Court of Justice (in contrast to that of the Court of First Instance) did not only affect the structural principles governing the relationship between international law and Community law, but also the substantive content of certain basic civic rights-

§83. In contrast, the conceptualization of economic freedoms offered by the European Courts is highly problematic. Three observations are due in this regard. Firstly, that while economic freedoms have always been defined by reference to the normative ideal of "an internal market", what has been understood by the latter has changed over time. The historical reconstruction of Community law is revealing of the fact that the original understanding of the internal market as a common market has been superseded by the characterization of the internal market as a single market. The net outcome has been to turn economic freedoms from concretizations and operationalisations of the principle of non-discrimination on the basis of nationality (which entailed that the substantive content of economic freedoms depended on each national legal order) to concretizations and operationalisations of a self-standing and transcendental ideal of economic freedom. Secondly, that this shift implies a substantive choice which does not logically follow from the idea of the single market. Thirdly, that this shift has only been partially endorsed by successive constitutional amendments to the founding Treaties.

§84. Firstly, there has been a marked change in the conceptualization of economic freedoms. Under the common market conception of the Treaties, economic freedoms aimed at operationalising the right of a resident or economically active non-nationals to be treated in the same way that nationals are dealt with. A right which is more likely to be infringed than that of citizens for the very simple reason that European non-nationals are denied the right to vote in national elections, and as a consequence, lack in most cases direct means to influence the actual content of legislation.[47] Under the single market conception of the Treaties, economic freedoms are transformed into self-standing constitutional norms, the substantive content of which is to be determined by reference to a transcendental ideal of freedom. The rightholders of economic freedoms are no longer non-nationals, but actually all European citizens, including nationals, as the very aim of the single market is to get rid of all borders and distinctions, including reverse discrimination and purely internal situations. Any

[47] Their right not to be discriminated through the enjoyment of Community fundamental rights and economic liberties compensates the democratic pathology stemming from the mismatch between the circle of those affected by national laws and those entitled to participate in the deliberation and decision-making over national laws. This is perhaps the core implication of Weiler's principle of constitutional tolerance. See 'Federalism and Constitutionalism: Europe's Sonderweg', in Robert Howse and Kalypso Nicolaidis (eds.), The Federal Vision, Oxford: Oxford University Press, 2002, pp. 54-70.

obstacle to the exercise of *any* economic freedom of *anybody*, including a non-discriminatory one, would constitute a breach of Community law. Breaches of economic freedoms are thus no longer limited to discriminatory normative patterns (which implied the anchoring of the European yardstick of constitutionality to the national one, because non-discrimination is a formal, not a substantive, principle) but are now extended to cover any "obstacle" to the realisation of the economic freedoms (something which by definition could not be determined by reference to national constitutional standards).

The shift from the common to the single market conception of economic freedoms in particular and of the internal market in general is to be traced back to Cassis de Dijon. As we already saw, in that case the European Court of Justice reviewed the European constitutionality of a German statute setting minimum alcoholic contents of fruit liquors. By setting this statute aside, the ECJ established a derivative constitutional rule according to which goods in compliance with any national regulatory standard should allowed unhindered access to all national markets, as all national regulatory standards would realize a functionally equivalent regulatory function. Indeed, the Commission derived from the derivate constitutional rule affirmed in the *Cassis* ruling the wider paradigm of *the* mutual recognition of laws, which it claimed rendered unnecessary positive European regulation before incorporating specific goods or sectors to the *common market*.[48] This jurisprudential move was fully confirmed when the line of jurisprudence in *Cassis* was extended to the other three economic freedoms.[49] And the shift was normatively crowned in the ruling in *Martínez Sala*, as the European Court of Justice started to refer to citizenship as the new fundamental principle which economic freedoms operationalised under this new paradigm (and in the process, identifying European citizenship with a set of economically based, even if

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[48] Cf. 'Declaration of the Commission concerning the consequences of the judgment given by the European Court of Justice on 20 February 1979 ("Cassis de Dijon"), OJ C 256, of 30.10.1980, pp. 2 and 3.

[49] Key leading cases were Case C-76/90, *Säger,* [1991] ECR I-4221; Case C-55/94, *Gebhard*, [1995] ECR I-4165; Case C-415/93, *Bosman,* [1995] ECR I-4921; and after the entry into force of Directive 88/361 on free movemçent of capital, Case C-163/94, *Sanz de Lera*, [1995] ECR I-4821. On the literature, see Álvaro de Castro Oliveira, "Workers and Other Persons: Step by Step from Movement to Citizenship", (2002) 39 *Common Market Law Review*, pp. 77-127; Vassilis Hatzopoulos & Thien Uyen Do, "The Case Law of the ECJ concerning the free provision of services: 2000-2005", (2006) 43 *Common Market Law Review*, pp. 923-91; Eddy Wymeersch, "The Transfer of the Company's Seat in EEC Law", (2002) 40 *Common Market Law* Review, pp. 661-95; S. Mohamed, *European Community Law on the Free Movement of Capital*, (The Hague: Kluwer Law International, 1999); A. Landsmeer, "Movement of Capital and other Freedoms", (2001) 28 *Legal Issues of Economic Integration*, pp. 57-69; Leo Flynn, "Coming of Age: The Free Movement of Capital Case Law", (2002) 39 *Common Market Law Review*, pp. 773-805; Mads Andenas, Tilmann Gütt & Matthias Pannier, "Free Movement of Capital and National Company Law", (2005) 16 *European Business Law Review*, pp. 757-86. An overall interpretation congenial to the one hinted at here can be found in Alexander Somek, *Individualism*, (Oxford: Oxford University Press, 2008).

not economically conditioned, faculties).[50] *Viking* and *Laval* are but concrete applications of this new understanding of economic freedoms.

§85. Secondly, the "obstacle" conception of economic freedoms is not the "logical development" of the "discrimination" conception, but rather a different one, based on a rather different socio-economic and constitutional vision. Just consider the following four major structural implications.

For one, the obstacle conception implies a transcendental yardstick of European constitutionality, emancipated from national constitutional law, and mysteriously derived by the Court from the rather dry and concise literal tenor of the Treaties. This *dis-anchoring* is at the core of the "legitimacy" crisis of the European Union, and calls for either a rolling back of integration to render the old constitution of discrimination sustainable, or a federal leap through democratic constitution-making.

For two, the re-calibration of economic freedoms has resulted in a massive growth of the horizontal effect of European constitutional principles. Areas of national law which had not been much Europeanised through supranational law-making (such as personal tax law) or which seemed clearly outside the scope of the Treaties (such as non-contributory pensions) were *absorbed* into European constitutional law, with national policy decisions being progressively subject to a review of their European constitutionality. This is why we are confronted with vertical conflicts proper, in which the collision between supranational and national law is not the result of a horizontal conflict among national constitutional norms competing to define the common, collective standard, but rather results from a conflict between an autonomously defined supranational constitutional standard and national ones (even most or even all national constitutional standards, viz the kind of situation underlying Viking or Mangold). Indeed, *Cassis* implies doing away with the idea of a constitutional space in which economic freedoms do not mediate the constitutional validity of any national legal norm. Indeed, the idea of a *diagonal* conflict (as in Joerges' theory of constitutional conflicts) is either quaint and obsolete if one embraces *Cassis*, or else it constitutes an implicit vindication of the old understanding of economic freedoms as principles of non-discrimination.

For three, the engine of integration shifted from the law-making process (precisely at the time at which that was becoming potentially democratic with the direct election of the Members of the European Parliament) to the constitutional adjudication process into which preliminary requests were progressively transformed into the path of review of the European constitutionality of national statutes. If one endorses *Cassis de Dijon* and *Centros*, one is endorsing not a process of juridification (as these are matters which are within the realm of the law anyway) as a process of judicialisation.

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[50] Somek, *supra*, fn 46 and Agustín José Menéndez, More Humane, Less Social', in Miguel Poiares and Loïc Azoulay (eds.), The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, Oxford: Hart Publishers, pp. 363-393.

For four, as the shape of economic freedoms as constitutional standards became progressively specific, the negative move in mutual recognition was harder to combine with the positive move of re-regulation, because the combined effect of European constitutional decisions by the European Court of Justice was to foreclose the realm of national legislative autonomy. *Centros* is, indeed, a poignant case. The "optimistic" interpretation put forward by Joerges seems to me rather naïve. The best illustration of how far the judgment re-inforced the structural power of capitalists and weakened the taxing and regulatory grip of the state as *longa manus* of the public interest is provided by the 400% increase of the number of "shell" companies constituted in England after *Centros*, most of which were German.[51] It should be added that the more the Court has developed its jurisprudence, the more it has foreclosed the actual realm of re-regulatory discretion on the side of the Member States. This is, in my view, fully illustrated by the tragic and rather foolish case law of the Court on personal taxation,[52] where the much maligned harmonisation has, to a large extent, progressed thanks to the iron fist of market adaptation accelerated by the ECJ. The price of substituting politically-led harmonisation by market-led harmonisation is always paid in the hard currency of (a lesser modicum) of distributive justice, in flat contradiction with the basic principles of the *Sozialer Rechtstaat*.

§86. Thirdly, it is to be doubted that this new paradigm of economic freedoms can be grounded on positive constitutional choices.

While the leading case on the matter (*Cassis de Dijon*) could be said to reflect the ongoing transformation of the understanding of economic freedoms in certain national constitutional orders (paramountly, the British, and to a lesser extent, the German one as the result of the drift of the ordoliberal model towards a neoliberal understanding under the specific circumstances brought about by the two oil crises and the turbulence in the international monetary system), it did *anticipate*, and not *follow*, the changes introduced in the Treaties by the Single European Act and the Treaty of Maastricht. Moreover, the latter two Treaties made explicit that the European Union aimed at the realization of an internal market, and seemed to endorse the legislative changes resulting from the legislative programme put together in the White Paper on the Single Market.

The Single European Act and the Treaty of Maastricht *do not* contain an unequivocal endorsement of the *obstacles* conception of economic freedoms. Fistly, it is still the case that a different chapter is devoted to on the one hand economic freedoms and on the other hand the other four economic freedoms. And that in between these two, we find the chapter consecrated to the common agricultural policy. Secondly, the Treaties do still affirm the "neutrality" of Community law on what concerns national

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[51] The figures are taken from INITIAL. Becht, C. Mayer & F. Wagner, "Where do Firms Incorporate? Deregulation and the Cost of Entry", (2008) 14 *Journal of Corporate Finance*, pp. 241-56.

[52] See Menéndez, *supra*, fn 14.

choices on the legal regime of the right to private property. Thirdly, the amending Treaties are presented as means to further align the European Union to the constitutional ideal of the social and democratic Rechtsstaat , something that is especially reflected in the provisions on social policy enshrined in the Maastricht Treaty. And fourthly and paramountly, none of the amending Treaties alter the constitutional identity of Member States as social and democratic Rechtsstaats, something which seems difficult to reconcile with the characterization of economic freedoms as concretizations of a self-standing and transcendental understanding of economic freedom.

§87. All this leads to the sixth thesis of this paper, namely, that the "obstacles" conception of economic freedoms, according to which the latter are to be regarded as operationalisations and concretisations of a transcendental and self-standing ideal of (individualistic and economic) freedom is neither a logical development of the founding Treaties, nor is fully endorsed by the amendments to the Treaties, not even the Single European Act and the Treaty of Maastricht. Such a conception should be reconsidered and revised in the case law of the European Court of Justice. It does not only severe a basic source of legitimacy of Community law (the transfer of legitimacy through the key role played by the common constitutional law as the deep constitution of the European Union) but runs the risk of placing Union law at constitutional odds with national constitutional law, to the extent that the latter keeps on being inspired by the normative goal of reconciling the rule of law with the democratic and the social state. The Court should indeed take seriously the pluralistic basis of Community law, and keep in mind that its role as guardian of European constitutionality is one in which it has to be especially attentive to the substantive content of the constitutional law common to the Member States, and which it shares with national constitutional courts. Where the European Courts to persist in putting forward this peculiar understanding of economic freedoms, it is more than likely that national constitutional courts would act on the basis of their legitimate role as part of the collective of guardians of European constitutional law.[53]

§88. Two cases that illustrate the deep constitutional problems associated with the "obstacle" conception of breaches of Community law are *Schwarz* and *X*.

§89. *Schwarz*[54] revolved around the pretense of a German couple to be granted a deduction from their income tax liabilities on account of the cost of sending their children to Cademuir International School, a private (and expensive: 23400 sterling pounds full board a year in 2004/2005, or circa 34281euros) school in Scotland. The Schwarzs may have obtained the deduction if the school was established in Germany,

[53] A most benign manifestation of such a role would follow the path of the German Constitutional Court in several of its "European" judgments, including the Lisbon judgment. A rather less benign result would ensue if national constitutional courts would limit themselves to act as guardians of the national constitutional law.

[54] Joined cases C-76/05, *Schwarz* and C-317/08, *Commission v. Germany*, [2007] ECR I-6849.

and had been certified by the tax authorities. Germany claimed that even if the policy was articulated through a tax norm, the policy remained education. Deduction was necessarily linked with supervision by the state, which in turned ensured the achievement of a set of goals, including non-segregation by income of the parents. The Court, as will be considered again *infra*, disregarded the way in which the German authorities characterized the issue, and seizing the high constitutional ground to claim that the German tax norm was restrictive not only of the freedom to provide services of Cademuir (and in general, in the Comission proceedings of all providers of education for fees) but also of the right to citizenship of the children, which were discriminated against for the sole reason of making use of their right to be Europeans and move.[55] In the romantic language of the ECJ:

> "In so far as it links the granting of tax relief for school fees to the condition that those fees be paid to a private school meeting certain conditions in Germany, and causes such relief to be refused to payers of income tax in Germany on the ground that they have sent their children to a school in another Member State, the national legislation at issue in the main proceedings disadvantages the children of nationals solely on the ground that they have availed themselves of their freedom of movement by going to another Member State to attend a school there."[56]

But if one drops the romantic language, what the Court is saying is that European citizenship implies the right of extremely well-off parents not so much to send their children to study to an exclusive British school,[57] (a right which seems to me predates by far Community law: I am not aware of a prohibition to send children to study abroad in any European state in the recent European history), but also to be granted a tax deduction on account of the fees thus paid. But can we really accept that a fundamental right is at stake when we are discussing whether somebody who could paid a fee of 30000 euro plus in 2004 is to obtain a relatively modest tax rebate from the authorities? Can this be said to be a core content of the right to European citizenship?

§90. Even more telling is the Freudian lapse of the Court in joined cases *X and Passenheim-Van Schott*.[58] In this case it was discussed whether a recovery period of

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[55] Pars 129 and 130.

[56] par 92 of the Judgment. See also par 66: "Legislation such as that under Paragraph 10(1)(9) of the EStG has the effect of deterring taxpayers resident in Germany from sending their children to schools established in another Member State. Furthermore, it also hinders the offering of education by private educational establishments established in other Member States, to the children of taxpayers resident in Germany".

[57] And not long-lasting, alas! The school closed down in September 2006 due to financial difficulties, after severe doubts have been raised on the press concerning the actual quality of the education and of the care and protection children received at the school. Her Majesty Educational Inspectors were not especially enthusiastic in the first inspection of 2004 and were far from fully satisfied one year afterwards. Indeed the Court knew that this had been the case by the time both the Advocate General delivered the case and of course the Court gave its judgment.

[58] Joined Cases C-155/08 and C-157/08, [2009] ECR I-5093.

taxes which was longer when concerning income obtained abroad was or was not contrary to Community law. In X, Belgian authorities had spontaneously forwarded Dutch authorities information on capital holdings in a Luxembourgeois bank. Mr X happened to be among those holding capital without informing the authorities, and thus, without paying the taxes due. Mrs Passenheim-Van Schott was a widow who decided to make full disclosure to Dutch authorities of capital which her late husband and herself held in a German bank. In both cases the plaintiffs protested the pretense of the tax authorities to extend recovery to twelve years, instead of the five years which would have been applicable had the capital been held in The Netherlands. While the Court ended up finding that the longer recovery period was justified because it did not only contribute to the effectiveness of fiscal supervision[59] but was not disproportionate because Directive 77/799 does not require an automatic exchange of information, [60] it did find that the longer recovery period was *prima facie* restrictive of free movement of capital, on the basis of a very peculiar argument, which is worth reproducing:

> "The application to taxpayers resident in the Netherlands of an extended recovery period in regard to assets held outside that Member State and their income therefrom is such as to make less attractive for those taxpayers to transfer assets to another Member State in order to benefit from financial services offered there than to keep the assets, and obtain financial services, in the Netherlands"

Indeed, this seems to imply that economic freedom includes the right to minimize the chances of being caught avoiding taxes, which cannot be curtailed by the competence of the Member State to graduate the length of recovery period by reference to the intrinsic difficulty of monitoring compliance, on the basis of the information which is available to them.

B) Argumentative Burdens

§91. We have already considered that proportionality as the syntactic structure of constitutional argumentation is structured in five steps. And I already argued that a key move in the process of filling the formal structure of proportionality with substance so as to reach a decision through its application concerns the assignment of the argumentative burden. In this section I will focus on a feature of the review of European constitutionality of national norms, the choice of the ECJ to always assign

[59] Par. 52.

[60] And it is correct to assume that it will be hard to spot concealed tax information held abroad than in the Member State. See par. 72 of the judgment: "the fact remains that, in regard of assets and income which are not the subject of a system for the automatic exchange of information, the risk for a taxpayer that assets and income which have been concealed from the tax authorities of his Member State of residence will be discovered is less in the case of assets and income in another Member State than in the case of domestic assets and income."

the argumentative benefit to economic freedoms, and the argumentative burden to the principle or principles colliding with the economic freedom.[61]

§92. The *argumentative benefit* granted to economic freedoms was rather inconsequential as long as economic freedoms were understood as operationalisations of the principle of equality, and thus were substantially defined by national standards. This was so because the national standards of protection of economic freedoms were the result of weighing and balancing economic freedoms with other constitutional principles, so that the *renvoi* to national constitutional standards implies that the argumentative benefit is based on a previous balancing undertaken at the national constitutional level. Indeed, when national norms enter into conflict with economic freedoms as operationalisations of the principle of non-discrimination, what is put into question is exclusively the personal scope of application of the national norms, not their inner normative logic.

Things change considerably once we conceptualise economic freedoms as self-standing, transcendental standards defined at the end of the day by the European Courts. This is so because the Community conception of economic freedom replaces the national standard, and as such, does away with the crafted balance reached at the national level. But if that is so, there is no obvious reason why we should assign an *argumentative* favour to economic freedoms.

§93. Such an argumentative *favour* is contrary to a coherent characterization of Community law as a constitutional order. If Community law is to be understood as the means through which constitutional states integrate by reference to constitutional norms, there is a very good case to follow the consistent practice of national constitutional courts. The assignment of the argumentative burden depends on the different abstract weight assigned to the constitutional principles in conflict (something which is determined by reference to the fundamental law itself, and by the interpretation consolidated in statutes and previous judicial decisions) and by the "normative" center of gravity of the case (which is determined by determining on a case by case basis what is the central question at stake).

§94. It is doubtful whether the argumentative preference of economic freedoms could be grounded on the fact that economic freedoms were positively enshrined in the Treaties while the principle of protection of fundamental rights was not. Since the affirmation of the principle of protection of fundamental rights in *Stauder* and *Internationale*, even more so since the solemn proclamation of the Charter of Fundamental Rights in 2000, and definitely so since the full incorporation of the Charter to the primary law of the Union, such an assumption is at any rate highly dubious. At any rate, it cannot be sustained by claiming that the literal tenor of the

[61] Or eventually, with the principle of non-discrimination on the basis of sex by reference to Article 157 TFEU or to citizenship to the extent that it gives rise to autonomous rights.

Treaties limits the *yardstick* of constitutionality of Union law to economic freedoms (plus undistorted competition and the prohibition of discrimination on the basis of sex).

§95. Indeed, the full acknowledgment of the constitutional nature of the Treaties *after the formal incorporation of the Charter* would require a deep reconsideration of the assignment of the argumentative burden.

This is something which was hinted at in the opinion of the late AG Geelhoed in *American Tobacco*. Geelhoed revisited in his opinion the relationship between economic freedoms and social goals in Community law. He argued that at the stage of development at which it was a decade ago (following the solemn proclamation of the Charter in 2000), Community law did not aim exclusively at the creation of a single market, but there were also other fundamental legitimate goals of Community action, such as the protection of public health. The basis of the competence of the Union might still be grounded on the realization of the basic economic freedoms, [62] but this did not entail that the *actual* exercise of Community competences was to be exclusively aimed at market-making.[63] Indeed, some of the social goals constitute basic preconditions for a single market. This prompts the late AG to hint at a radical change in the structure of the review of European constitutionality. Instead of focusing in a first step on whether a given national provision distorts the common market, and only in a second step on whether such a measure can be justified by reference to some legitimate public goal, some paragraphs of the opinion invite a shift of the argumentative burden.[64]

The recent opinion of Advocate General Cruz in *Santos Palhota and Others*[65] might be hinting at something similar. The AG considers in particular the impact that the changes introduced by the Lisbon Treaty, and paramountly the incorporation of the Charter of Fundamental Rights, must have in the solving of conflicts between freedom

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[62] Case C-112/00, Opinion delivered on July 11, 2002, Par. 100: "The issue boils down to the following: if a (potential) barrier to trade arises, the Community must be in a position to act. Such action must, as I construe the biotechnology judgment, consist in the removal of those barriers. Article 95 EC creates the power to do so".

[63] Par 106: "In other words, the realisation of the internal market may mean that a particular public interest – such as here public health – is dealt with at the level of the European Union. In this, the interest of the internal market is not yet the principal objective of a Community measure. The realisation of the internal market simply determines the level at which another public interest is safeguarded" (my emphasis).

[64] Par. 229: "The value of this public interest [public health] is so great that, in the legislature's assessment other matters of interest, such as the freedom of market participants, must be made subsidiary to it."

[65] Case C-515/08, opinion of 5 May 2010, available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=515/08&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docdecision=docdecision&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&docppoag=docppoag&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher.

and establishment and fundamental collective goods. Cruz argues explicitly for recalibrating the specific weight to be assigned to the principle allegedly infringing a Community freedom in the fifth step of the proportionality argument (when considering proportionality *strict sensu*), but seems to be favouring implicitly a thorough reconsideration of the way in which proportionality is applied in line with the new literal tenor of the Treaties. It is worth quoting at length:

"As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality".[66]

C) Proof burdens

§96. The third set of implicit substantive choices made by the European Courts in the application of the principle of proportionality concerns the standards of proof of the facts on which (to a lesser extent) the adequacy and (to a large extent) the necessity of the prima facie infringing norm are to be assessed.

§97. Whether a measure is adequate or not to achieve a certain objective, and, very especially, whether there is a feasible alternative rule which reconciles better the two fundamental principles in conflict, depends to a rather large extent on the assumptions we make about the external (empirical) world. Such assumptions do not follow from the principle of proportionality, but depend on substantive decisions on how we pass judgment on the probability that a future event will come to happen.

§98. It would be expected of the European Court that it will apply the same criteria to consider the likehood of events whether they support the adequacy and necessity of the infringing norm or they work on the opposite direction.

However, that is not always the case. It can indeed be argued that in many occasions, the review of European constitutionality is biased in favour of economic freedoms and against the principles colliding with economic freedoms. This is so because the European Courts lower the threshold to proof the probability of a fact happening in the future when that fact contradicts the adequacy or necessity of the infringing

[66] Par. 53.

principle; and do the opposite (raising the threshold of proof) when the fact supports the adequacy and necessity of the infringing norm.

§99. This can be illustrated by considering (1) the standards applied by the European Courts when considering whether the "effectiveness of fiscal supervision" justifies limiting one economic freedom; (2) the standard applied by the European Court of Justice to determine whether a corporate structure is an artificial arrangement aimed at tax evasion;

§100. The "effectiveness of fiscal supervision" was one of the first "rules of reason" or "overriding interests" to be acknowledged by the ECJ as justifying the infringement of an economic freedom even if not explicitly stated in the Treaties.[67]

The Court has turned the principle almost ineffective by applying unrealistic proof standards to Member States invoking the principle. Firstly, the ECJ has systematically rejected that the curtailment of economic freedoms can be justified by any evidence of a revenue loss. No revenue loss is by itself proof that economic freedoms have to be curtailed. Secondly, the ECJ once and again has rejected the argument that the monitoring of tax compliance is hampered by "informative" deficits concerning economic transactions on other Member States, and thus restricting economic freedoms *ex ante* was justified. Member States have once and again stumbled on the rock of Directive 77/799, despite the fact that the Commission itself has recognised once and again the limited effectiveness of cross-border tax administrative cooperation,[68] and that indeed the Community seems now to be heading to automatic exchanges of tax information.

§101. Similarly, a very peculiar set of (highly artificial) factual assumptions concerns the rationale which moves tax lawyers to create complex corporate structures and incorporate companies in a multitude of jurisdictions where they have no observable business.

The ECJ has claimed that a breach of an economic freedom is justified if it is intended to avoid that "*wholly* artificial arrangements" (my italics) are employed to reduce the tax bill.[69] This has been confirmed in *Lankhorst*,[70] *Marks and Spencer*[71], *Halifax*[72] and *Cadbury Schweppes*,[73] and has been further developed in *X*.

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[67] Indeed even before that personal taxation was subject to review of European constitutionality in *Avoir Fiscal*. It was in the leading judgment on *Cassis de Dijon*, precisely in the ruling in which "rule of reason" exceptions were first referred to, that the ECJ coined the justification (see par 8 of the ruling).
[68] See for example the Commission Communication (2006) 254 on a European strategy to combat tax fraud, available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/control_anti-fraud/combating_tax_fraud/COM(2006)254_en.pdf; and the related initiatives at http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/reports/index_en.htm.
[69] Case C-264/96, *ICI v. United Kingdom*, [1998] ECR I-4711, par 26: "As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings

Still, the residual justification is not only limited, but the phrase "wholly artificial arrangements" is indicative of a rather peculiar understanding of economic and legal realities. In line with the structural implications of Centros and Inspire Art on freedom of establishment, the ECJ has said that "the fact that the company was established in a Member State for the purpose of benefiting from more favourable legislation [my note: thus including tax legislation] does not in itself suffice to constitute abuse of that freedom". It is only an abuse when what is being used is a mere "letter box corporation". Only that seems to qualify as a "wholly artificial" institutional structure.[74] *A contrario*, partially artificial structures, or for that purpose, any structure that is not "wholly artificial" should be considered as the exercise of economic freedoms, and consequently the justification could not be invoked. Can this be regarded as *factually* accurate?

D) Assigning concrete weight to principles in conflict; the strange case of coherence of the tax system

§102. The fourth set of problematic substantive choices with which the principle of proportionality is filled concerns the specific weight assigned to colliding legal principles in the concrete case. Or what is the same, the set of substantive choices with which the principle of proportionality *stricto sensu* is filled in.

§103. It is rather obvious that the principle of proportionality does not provide an objective (mathematical?) formula by the application of which we can solve concrete conflicts. In his recent work, Alexy has indeed stressed that what proportionality can do is to render explicit the weighing exercises which are undertaken. This basically corresponds to what he calls the "Law of Balancing":

"The law of balancing shows that balancing can be broken down into three stages. The first stage involves establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, the third stage establishes whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction, of the first".[75]

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does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment"

[70] C-324/00*, Lankhorst*, [2002] ECR I-11779.

[71] C-446/03, *Marks & Spencer*, [2005] ECR I- 10837.

[72] C-255/02, *Halifax*, [2006] ECR I-1609.

[73] C-196/04 *Cadbury Schweppes*, [2006] ECR I- 7995.

[74] Opinion of AG Mengozzi in C-298/05, *Columbus*, [2007] ECR I-10451, pars. 182 and 183: actual physical existence plus financial activity are enough to pass the test.

[75] Alexy, *supra*, fn 31, p. 401.

While discretion is impossible to eliminate, the law of balancing allows us not only to understand the actual shape of the decision-making process (especially on what concerns its last limb), but also to detect instances in which predetermined substantive choices are cloaked under the appearance of the proportionality principle stricto sensu.

§104. The case law of the European Courts on economic freedoms is biased in favour of economic freedoms in this regard on a double account.

Firstly, the European Courts tend to take for granted that any curtailment of an economic freedom results in a serious breach of Community law, thus always assuming that the weight of economic freedoms is to be high.

Secondly, the European Courts distort the weigh and balance assigned the principle underlying the infringing norm by means of appraising it from the perspective of the realization of the single market. Instead of taking *seriously* the point and purpose of the principle underlying the norm allegedly infringing the economic freedom, European courts appraise and reconstruct that principle as if the realization of a single market was the only or overriding goal of European integration. But that not only was *never the case* but is even *less the case* after the recognition of the unwritten principle of fundamental rights protection, and definitely not the case after the formal incorporation of the Charter of Fundamental Rights of the European Union. That was indeed the key argument made by AG Cruz in *Santos Palhota,* as already indicated.

§105. Perhaps the clearest example of this kind of bias is to be found in the jurisprudential development of the overriding public interest in the coherence of the tax system as justifying the infringement of one or several economic freedoms.

The European Court of Justice accepted in *Bachmann* that the coherence of the tax system could justify a prima facie breach of the freedom to provide services. In doing that, the ECJ seemed to take seriously the *systemic, multilateral* and *redistributive* character of tax fairness, resulting from the very character of taxes as the legal operationalisation of the solidaristic obligations that members of a political community have to each other. The systemic character of tax fairness entails that whether there is a proper allocation of the tax burden cannot be determined by means of considering individual tax systems, but by means of assessing the distributive implications of the tax system as a whole. The multilateral character of tax fairness means that the just allocation of the tax burden depends on the *relative* economic capacity of each taxpayer, and not on the benefits that each of them enjoys through the public provision of goods and services. And the redistributive character of tax fairness requires that the tax burden is allocated with a view not only to provide revenue to support the public provision of goods and services, but also to reduce economic inequalities, so as to ensure the full realization of social and economic

rights, and to make the socio-economic structure compatible with the social and democratic Rechtsstaat.

Since Bachmann, however, the ECJ has steadily narrowed down the understanding of coherence of the tax system, and moved to consider that the infringement of an economic freedom would only be justified if *compensated* by a tax benefit enjoyed the same taxpayer on regards of the very same tax figure. However, that narrow and peculiar understanding of what coherence of the tax system is flatly contradicts the referred *systemic, multilateral and redistributive character of tax fairness.* It reverts to a consideration of coherence at the level of each tax figure, considers tax fairness in rather commutative terms, and pays no attention to the redistributive purpose of a democratic tax system. Consequently, the restricted characterization of "coherence of the tax system" does not take seriously the coherence of national tax systems as a key part of the social and democratic Rechtsstaat, as indeed they are defined in the constitutional law of the Member States, and understood in the jurisprudence of national constitutional courts.

§106. Mr Bachmann (and the Commission)[76] contested the European constitutionality of Belgian tax norms governing the deductibility of certain premia (relating to insurance against a variety of risks, including sickness and old-age). In concrete, the plaintiffs argued that the contested Belgian tax provisions were in breach of both free movement of workers and freedom of establishment, because they subjected deductibility to the condition that premia *were paid in Belgium*. And this for two reasons. First, it was more than probable that the cohort of taxpayers denied the right to deduct insurance premia will be mostly formed by nationals of other Member States (who would have already contracted insurance before moving into Belgium); and that even if some Belgians will also be denied benefits, they were likely to suffer less economic damage than non-nationals (as they were likely to return to Belgium, and thus receive the benefits free of Belgian taxes). Thus, the contested norm posed obstacles which were likely to have some deterring effect on prospective "movers", and for sure entailed a less beneficial treatment for those who had actually moved into Belgium having previously contracted insurance in another Member State.[77] This was said to be enough as to ground the claim that the right to free movement of persons had been breached. Second, the Belgian tax provision placed insurance companies not established in Belgium in a less competitive position than that enjoyed by companies established in the country; rational taxpayers would add the "lost" tax deductions to the cost of the premium when deciding which policy to subscribe. The case concerned thus both the right of taxpayers as individuals to deduct insurance

[76] Joined Cases C-204/90, *Bachmann*, and C-300/90, *Belgium*, [1992] ECR I-249.
[77] As either the prospective mover had to accept the eventual cost of not being able to deduct his contributions, or the economic cost of cancelling her policy every time she moved.

premia when assessing their income tax liabilities and the right of insurance companies as entrepreneurs to provide their services all through the Community.[78]

Both the Advocate General and the Court were persuaded by the arguments made by the plaintiffs and declared that indeed the contested Belgian provisions infringed the economic liberties of the plaintiffs. Nonetheless, and to the surprise of many, they did not believe that this was the end of the argument. Indeed, they ended up finding that the norm was a necessary, adequate and proportional means to ensure the "coherence of the [Belgian] tax system", a newly formulated "rule of reason" exception to economic freedoms.[79] By this it seems that it was essentially meant that the European constitutionality of national tax norms could not be established in isolation; but had to consider in a systemic way all the norms which assess the economic ability to pay which derives from a given economic operation (in the case at hand, all the norms applicable to the taxation of the insurance contract over the whole life of the contract, from its signature to its "maturity"). This was especially so given the fact that there is no overarching Community framework governing the interactions of national tax systems, and this entails that each system could opt for different solutions.

The Court implied a definition of the "cohesion" exception which left open its precise views on its structural features. By appealing to the idea of "cohesion" of the "tax system" and not only of the "tax figure" or specific tax at hand, the Court seemed to open up the possibility of making prevail the collective interests articulated in different tax policy choices, or different objective or temporal elements in the treatment of a given tax base, over the subjective economic freedoms enshrined in the Treaties. In particular, the language of *Bachmann* seemed to consider not so much, or at least not only, the effects that the norms had upon the concrete individuals (Bachmann and those whose complaints have moved the Commission to open infringement proceedings) but the systemic *rationale* behind the way in which they were treated. This "objective" language is at play in Bachmann, perhaps more clearly in the following paragraphs:

> The cohesion of such a tax system, the formulation of which is a matter for the Belgian State, presupposes, therefore, that in the event of that State being obliged to allow the deduction of life assurance contributions paid in another Member State, it should be able to tax sums payable by insurers (Commission vs Belgium, 16).

[78] And although it was not explicitly said in the judgment, the ruling had potential far-reaching implications for the public finances of Belgium, and some other Member States (especially Italy and Greece) with high levels of public debt, by then still (partially). By the time the case was brought before the Court of Justice, the said States still imposed on the insurance companies established in their territory the obligation to subscribe public debt as part and parcel of their safe assets and reserves.
[79] On the origin of 'rule of reason' exceptions, originating in *Cassis de Dijon*, see Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, London: Sweet and Maxwell, 2004, pp. 165-6.

In the case at hand, determining whether the breaching legislation was nonetheless justified entailed assessing the relation between the rules governing the deduction of premia and the taxation of the benefits when the contract reached maturity. In particular, whether national norms could be justified as means of ensuring the coherence of the national tax system was to be determined by assessing whether the differentiated regimes applicable to "nationals" and "transnationals" were nonetheless equivalent in economic terms (or what is the same, whether the overall economic implications of the rights and duties imposed upon "national" and "transnational" citizens were equivalent).[80] The Court concluded that this was indeed the case with the Belgian tax system in the case at hand. On the one hand, taxpayers who subscribed a policy with an insurance company established in Belgium were entitled to deduct premia every year from their tax liabilities; but were also required to pay income tax on the benefits they eventually received. On the other hand, taxpayers who subscribed a policy with an insurance company which was not established in Belgium could not deduct premia, but were not required to pay any Belgian tax when receiving the benefits. Both systems were different, but equivalent. If "transnational" citizens would be entitled to both a deduction and not to pay taxes to the Belgian state upon receiving the benefits, this will destabilize the Belgian tax system (by undermining its coherence, to use the very phrase coined by the ECJ).

It follows that in a tax system of this kind, the loss of revenue resulting from the deduction of life insurance contributions, a term which includes pension insurance and insurance against death, from the total taxable income is offset by the taxation of pensions, capital sums or surrender values payable by the insurers. In cases where the deduction of such contributions was not allowed, those amounts are exempt from tax.[81]

Without denying the explicit relevance of other factors in getting to the final decision,[82] it is plausible to reconstruct the ruling in light of the institutional and democratic implications of the decision. Although both the request for a preliminary ruling and the infringement proceedings of the Commission originated in "transnational" citizens who were far from happy with suffering what they regarded as a discrimination with negative economic effects, the circle of those affected had the Belgian tax norm been quashed by the European Court of Justice would have been much larger than in other cases. Indeed, it is not far-fetched to claim that "national" citizens would have been affected mostly, both in numbers and in depth. Had a norm as the Belgian one been declared unconstitutional, and the right to deduct extended

[80] Second, whether the financial sustainability of national public finances would be imperiled unless the discriminating measure was regarded as justified.
[81] See especially par. 22 of the judgment.
[82] Indeed, the rather underdeveloped stage of Community law on what regarded the provision of insurance services, or the looming implications that a different result would have had for the sustainability of Belgian public debt (and with it, the prospects of a central Member State being part of the eventual third stage of the Monetary Union).

to premia paid to non-established insurers, more and more "national" citizens would have considered subscribing such kind of policy. In the short run, this would have required the Belgian state to reconsider overnight how to fund a sizeable part of its public debt, funded until then in part by insurance companies, obliged to invest part of its reserves in the acquisition of public debt. In the long run, it may have created structural pressures to alter the general framework of the taxation of pensions, especially if a sizeable number of "nationals" would decide to transfer their residence upon retirement, for which they would have an extra incentive: to avoid being taxed by tax authorities who had acknowledged them the right to deduct the premia.[83]

§107. For three years, the Court did not really reconsider what breaches of economic freedoms "coherence of the tax system" could justify as an overriding public interest. In the meantime, the said ruling was very discussed and actively criticized by legal scholars.[84] The coherence justification may have played a role in *Schumacker*, but the ECJ shifted the argumentative ground suggested by the parties, and decided the case on the ground that Community law required considering non-resident trans-frontier workers as residents for tax purposes. It was only in August 1995, when deciding *Wielocx,*[85] that the ECJ started to review *Bachmann*, and in doing so, to narrow the scope of the justification. Slowly but steadily, this "rule of reason" justification was narrowed down by developing a three-pong test for its application: (1) there should be a direct link between the tax constitutionally suspect and a tax advantage; (2) tax charge and tax advantage should be part of the normative framework of the same tax; (3) the taxpayer being charged and being assigned the benefit should be the same.

§108. In *Wielockx*, the Court confronted another case in which what was at stake was the taxation of pension plans. The facts were somehow different from those in *Bachmann* for two main reasons, related to the fact that Mr Wielockx was self-

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[83] A good deal of the ensuing confusion with the notion of "coherence of the tax system" may derive from the fact that the Court wished two strike two objectives simultaneously: to retain the larger breadth and scope of economic freedoms, now "capturing" in their constitutional next national tax norms; and to avoid erecting itself in a constitutional judge of national tax norms. While in *Daily Mail* it opted from excluding from the very definition of freedom of establishment the legal prerogative to change the seat of the company without being forced to wind the company up, thus avoiding expanding the breadth and scope of freedom of establishment beyond the situations in which companies actually extended their economic activity across borders, it avoided affirming that the Belgian national tax law actually did comply with Community law. It could have done so claiming that while the tax treatment of transnational citizens was not exactly the same as that of purely "national" citizens who had never exercised their rights to free movement, or had done so without relevant economic consequences, the two regimes were equivalent. Had the Court done so, it would have to revise its blank rejection of similar claims made by national governments in previous and later cases (and even by some Advocates General). Still, the implications of an eventual ruling declaring that the Belgian tax provision was unconstitutional in a European sense would have had consequences not only and not mainly for transnational citizens (putting an end to what seemed to be negative economic consequences for them amounting to a minor discrimination)[83] but basically for the whole structure of the insurance business in the Union.

[84] See the case notes of Wolf-Henning Roth [30 (1993) *Common Market Law Review*, pp. 387-95] and Luc Hinnekens and E. Schelpe [(1992) EC Tax Review, pp.59-62].

[85] Case C-80/94, [1995] ECR I-2508.

employed (while Bachmann was a dependent worker). First, Dutch legislation contemplated the possibility that self-employed persons simultaneously constituted a pension reserve and enjoyed a tax incentive, while the assets so earmarked remained available to the company as company assets (and thus could be used by the company as a source of funding). Second, Mr Wielockx was national and resident in Belgium, but his company was established in the Netherlands. This entailed that even if Mr Wielockx would not be subject to personal income tax in the Netherlands after retirement, he will not be able to get hold of any benefit if the Dutch company did not pay them; thus the residual effectiveness of the power to tax of the Netherlands was in this case higher than that of Belgium in *Bachmann*. It is important to notice that Advocate General Léger made a quite wide interpretation of the *Bachmann* exception, which would cover a national tax law correlating the double advantage of tax deductibility and availability of the fund to the company to the taxability of the retirement benefits.[86] If Léger found that the Dutch tax norm was contrary to Community law was not because of that constitutionally justified correlation, but because the Dutch tax system did not impose such correlation all across the board. The network of Double Taxation Conventions signed by the Netherlands implied that the Dutch had opted for ensuring the "cohesion" of its tax system by means of negotiating mutual concessions with other Member States.[87] Still, the Court was much more laconic and less clear on the grounds why it found the Dutch norm contrary to Community law. In its ruling the Court seemed to hint at the requirement that the taxpayer whose economic freedom was being curtailed will be "compensated" by a specific tax advantage, especially when it claimed that "Fiscal cohesion has not therefore been established in relation to one and the same person by a strict correlation between the deductibility of contributions and the taxation of pensions".[88] Still, the reasoning of the ECJ seems to have been influenced by the same train of reasons that grounded the opinion of the Advocate General. To the extent that the Netherlands had signed bilateral conventions in the context of which mutual concessions were made concerning the power to tax contributions and pensions, the Dutch government was in *Wielockx* in a different position than the Belgian government in *Bachmann.* Coherence of the Dutch tax system was no longer protected by a bilateral equivalence at the level of each taxpayer, but was "shifted to another level, that of the reciprocity of the rules applicable in the Contracting States".[89]

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[86] Par 46. He added in the following paragraph; "Since Bachmann it has been clear that, in the name of the principle of the cohesion of the tax system, a Member State is free to base the tax regime applying to a particular type of pension on a principle of correlation between the deductibility of the contributions (granted for social reasons or to promote the financing of undertakings) and the taxation of the pensions (necessary for budgetary reasons)".
[87] Par 54.
[88] Par 24.
[89] Also par 24. And then in paragraph 25, the Court concluded: "Since fiscal cohesion is secured by a bilateral convention concluded with another Member State, that principle may not be invoked to justify the refusal of a deduction such as that in issue".

§109. In *Svensson and Gustaffson*,[90] decided three months later, the Court was of a clearer mind. In its ruling, it clearly introduced the first prong of what would become the three-pronged coherence test: the "direct link" between the tax constitutionally suspect and another tax advantage.[91] Moreover, the Court came to affirm that such a link had to be a revenue link, and not merely a "policy" link, something which implicitly pointed to the third prong of the "coherence" test, namely the identity of the taxpayer.[92] Still, it may be said that this case could still be interpreted as not determining which way the concept should be constructed; it could still be thought that the connection between the two policies was too far-fetched; whatever the historical context in which the decision was taken, the granting of such reduced rates was part and parcel of the definition of the economic ability to pay of all taxpayers, and there was no longer (if there ever was) a good reason to claim that the additional expenditure effort should be paid by financial establishments themselves.[93] The subjective turn consisting in the identity of the taxpayer was confirmed in *Asscher, ICI*[94] *and Saint Gobain,*[95]*.* In particular, in *Asscher* coherence was reinterpreted as requiring that the taxpayers whose economic freedoms were restricted received a proper compensation. There was to be a tax tit for tat, so to say, for coherence to be available as a justification.[96]

Still, it may be said that this case could still be interpreted as not determining which way the concept should be constructed; it could still be thought that the connection between the two policies was too far-fetched; whatever the historical context in which the decision was taken, the granting of such reduced rates was part and parcel of the definition of the economic ability to pay of all taxpayers, and there was no longer (if

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[90] Case C-484/93, [1995] ECR I-3955.

[91] Par 18 of the Judgment: In those cases there was a direct link between the deductibility of the contributions and the tax on the sums payable by the insurers under death and old-age insurance policies, a link which had to be preserved in order to preserve the integrity of the relevant fiscal regime, *whereas there is no direct link whatsoever in this case between the grant of the interest rate subsidy to borrowers on the one hand and its financing by means of the profit tax on financial establishments on the other*" (my italics).

[92] The Court constrained the breadth and scope of such coherence, by claiming that it was irrelevant whether the concrete history behind the granting of interest rate subsidies (limited to credits taken from nationally established banks) was associated with the existence of a taxing of the profit of financial establishments (which by definition was only applied to *national* financial establishments). Given that the wide majority of taxes in modern polities are not earmarked, the principle results in the narrowing down the potential breadth of "coherent" tax norms to those which "compensated" a discriminatory or restrictive tax levy with a peculiar tax benefit to the one and the same taxpayer.

[93] The rejection of the defence of cohesion in 55/98 Vestergaard may be taken as reflecting the distinction the Court made between cohesion and the effectiveness of fiscal supervision. It may have opted otherwise, cohesion becoming the larger exception within which the latter would be one part. But it did not so, and what the Court ruled here implied an invitation to Member States to keep the two defences clearly separated (see par 24 of the judgment)

[94] Par 29 of the judgment.

[95] Par 70 of the judgment.

[96] Asscher, par 60: "The application of a higher rate of tax does not provide any social security protection".

there ever was) a good reason to claim that the additional expenditure effort should be paid by financial establishments themselves.[97]

§110. In *Baars*,[98] the Court introduced the second prong of the coherence test, namely the requirement that the both the tax disadvantage and advantage concerned one and the same tax.[99] This implied that coherence was not to be established only at the economic level, but also at the formal level. This was confirmed in full clarity in *Skandia*, where the Swedish and Danish argument made an explicit appeal to the fact that the tax regime, even if formally affecting different taxes and taxpayers, did concern the tax regime of old-age and insurance pensions of the very same taxpayer.[100]

§111. The restrictive movement became full circle in *Verkooijen*.[101] The participating Member States in *Verkooijen* still fought their corner by reference to a wider interpretation of the coherence justification, sensitive to the multilateral and collective dimension of tax law. By doing so, they seemed to be convinced that there was still room for the Court to reconsider its case law. But from this ruling onwards, Member States started in earnest to consider which other overriding interests could be invoked to shelter national personal tax laws from a too radical review of European constitutionality.[102]

§112. The final coda did come in *Weidert and Paulus*,[103] where the Court seemed to abandon the extraordinary decision in Bachmann to find that openly discriminatory

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[98] Case C-251/98, [2000] ECR I-2787.

[99] See par. 39 and 40 of the Judgment: [39] "First, there is no double taxation of profits, even in economic terms, because the tax at issue in the main proceedings is not charged on the profits distributed to shareholders in the form of dividends but on the assets of the shareholders through the value of their holdings in the capital of a company. Whether or not the company makes a profit does not in any event affect liability to wealth tax; [40] Second, in *Bachmann* and *Commission* v *Belgium*, cited above, there was a direct link between the deductibility of pension and life assurance contributions and the taxation of the sums received under those insurance contracts, and it was necessary to preserve that link in order to safeguard the cohesion of the tax system in question. There is, however, no such link in the present case, which concerns two separate taxes levied on different taxpayers. It is therefore irrelevant, for the purposes of granting shareholders a tax allowance in respect of the wealth tax, that companies established in the Netherlands are subject to corporation tax in the Netherlands and that companies established in another Member State are not".

[100] See par 31 and 33 of the Judgment.

[101] Case C-35/98, *Verkooijen*, [2000] ECR I-4073.

[102] The case was also significant because the very same Advocate General (La Pergola) wrote two opinions on the case. While this double opinion-making was caused by some difficulties around the construction of national provisions, the first opinion was more amicable to a wider, more collective-oriented conception of coherence of the tax system; in the second, the Advocate General argued by reference to the prong test which have been forged in the case law that we have just considered. The Court did follow the second opinion, and thus consecrated the narrowing down of the coherence of the tax system justification.

[103] Case C-242/03, [2004] ECR I-7379.

tax laws could be justified by reference to "rule of reason" exceptions. In *Weidert and Paulus*, the ECJ claimed that coherence, as all exceptions to economic freedoms, should be interpreted narrowly. Indeed, it could be argued that this rendered explicit what the ECJ had been doing implicitly since *Wielockx*.

§113. Coherence was thus narrowed down as it was reinterpreted. From an exception which seemed to allow Member States to uphold a collective good (the *coherence* of the tax *system* as a whole being hardly open to be reduced to the coherence of the taxes charged upon concrete individuals), it was redefined into a guarantee of consistent taxation for each and every taxpayer. This entailed two shifts:

(1) from its objective definition to its subjective assessment, or what is the same, from coherence as the way in which the tax system allocates burdens and benefits among taxpayers, to coherence in the way each Community citizen is treated by each national tax;
(2) from coherence defined in the context of the social functions of the tax system to a narrow coherence limited to exquisitely equivalent treatment of each taxpayer;

§114. The very narrow reading of the justification was spectacularly confirmed in *Meilicke*,[104] where the ECJ did not only reject that the national tax law could be justified, but did not even acknowledge the grave economic and legal implications of affirming the unconstitutionality of the German law. While the figures were in dispute, and seemed to have been inflated by the German exchequer in the first stages of the proceedings, it was calculated that the unconditional declaration of European unconstitutionality of the national law would could cost the German exchequer up to a quarter of a point of the national GDP. Still, the Court refused to consider limiting the temporal effects of the ruling, a standard technique resorted by national constitutional courts to avoid dramatic negative effects.[105] Not even after asking a second opinion from a second Advocate General on the matter. Indeed, AG Stix Hackl managed to contribute to the "privatizing" turn of "coherence", or in general overriding public interests, by claiming that the limitation of the temporal effects of a judgment of the ECJ would only make sense if a limitation would enhance the legal security of taxpayers as private actors.[106]

Conclusions

In this paper, I have claimed that the European Courts have come to play a key role as guardians of European constitutionality (first thesis of the paper). This come controversially clear in the aftermath of the Viking saga of judgments. However, I have argued that the power of European Courts to undertake the review of European

[104] C-292/04, *Meilicke and others*, [2007] ECR I-1835.
[105] See Raúl Letelier, *Nulidad y Reestablecimiento en procesos contra normas*, Madrid: Civitas, 2011.
[106] Paragraph 67 of her opinion.

constitutionality of legal norms, including national legal norms, is well grounded on positive law. It follows from the systemic interpretation of the founding Treaties (and now from the Treaty on the functioning of the European Union). When such Treaties are rightly appraised as the founding block of a constitutional legal order, one is bound to conclude the Treaty provisions which define the task of the European Courts (to ensure that the *law*, and not merely the *Treaty*, is observed) and which articulate the different procedures before the European Courts empower the European Courts to become guardians of European constitutionality. However, the very arguments which support the constitutional nature of Community law also reveal the peculiar constitutional nature of European integration as a process of constitutional synthesis. And from the synthetic nature of European constitutional law follows not only that European constitutional law has a substantive pluralistic basis (with the constitutional law common to the Member States –the common constitutional traditions in the terms usually employed by the European Courts- being the "deep" constitutional law of the Union) but also that the guardianship of European constitutionality is shared by the European Courts and national constitutional courts (or supreme courts in those Member States where there is no constitutional court) (the second thesis of this paper). This should lead the European Courts to be especially attentive to national constitutions as they constitute part of the substantive contents of European constitutional law and to the rulings of national constitutional courts, as key interpreters not only of each national constitutional tradition, but also increasingly (even if implicitly) of the constitutional law common to the Member States.

There is a well-grounded *structural* case to be made for European Courts reviewing the European constitutionality of national norms. But is this task to be properly discharged? In the second part of the paper, I claimed that the past and present practice of the European Courts has been to employ more or less explicitly the argumentative syntax of the principle of proportionality (third thesis of the paper). By doing this, European Courts have basically followed the practice of national constitutional courts. However, two caveats must be added. The first one is that the critical reconstruction of the case law of the European Court of Justice reveals that the standard three-stepped reconstruction of proportionality (adequacy, necessity and proportionality) pays insufficient attention to two previous and occasionally decisive steps, namely, the elucidation of the constitutional principles underlying the colliding norms and the assignment of the argumentative benefit and burden. In these two steps, courts contribute to the concretization (conceptualization) of the conflicting principles and determine how the conflict is to be understood, from which principle, so to say, are we going to start the argument (third thesis of the paper). The second is that proportionality is a formal principle; this necessarily entails that resort to proportionality guarantees the formal correctness of the decision but cannot ensure the substantive correctness of the decision. That cannot but depend on the substantive justifiability of the substantive choices with which the formal

argumentative syntax of proportionality is "filled in". Indeed, far from being a *legitimizing* principle, proportionality must be understood as a critical analytical tool, equipped with which we can reveal the substantive choices made by a court, and assess whether they are properly grounded on previous legal authoritative decisions, on good substantive reasons put forward by a court, or on the contrary, are largely unjustified (fourth thesis of the paper).

Making use of the critical potential of proportionality I approach the case law of the European Court of Justice on economic freedoms. This leads me to four key problems in the fleshing out of European constitutional law in the jurisprudence. Firstly, I find that the while the affirmation that economic freedoms constitute a key part of the canon of European constitutionality is well-grounded, the European Court of Justice has shifted its characterization of economic freedoms from operationalisations of the principle of non-discrimination on the basis of nationality and building blocks of a common market to concretizations of a self-standing and transcendental economic freedom and vanguard of the single market. Such a shift may seem to have been endorsed (even if, *ex post casu*) by the Treaty amendments introduced by the Single European Market and the Treaty of Maastricht. However, I claim that it remains hard to reconcile with the synthetic constitutional identity of the European Union and impossible to square with the constitutional identity of the Member States as social and democratic *Rechtsstaats*. Indeed, it seems to me much more plausible to conclude that the jurisprudence of the European Courts took a *wrong turn* when it shifted from one conception of economic freedoms to the other, or what is the same, that *Cassis de Dijon* and the later jurisprudence expanding the "obstacles" conception of breaches to economic freedoms are properly characterized as part of a "constitutional dérapage" in the development of Community law. Secondly, I find extremely problematic the tendency of the European Court of Justice to invariably assign the argumentative benefit to the economic freedoms and the argumentative burden to the principle underlying the colliding norm. That is difficult to reconcile with the fact fundamental rights have long been acknowledged to be part of the yardstick of European constitutionality, and become formally and undeniably so after the formal incorporation of the Charter of Fundamental Rights to the primary law of the Union. The opinions of AG Geelhoed in *American Tobacco* and of AG Cruz Villalón in *Santos Coelho* could be so constructed as to become precedents of a more flexible and balanced approach. Thirdly, I have serious objections to the standards which the European Court of Justice employs to determine the probability of events when assessing the adequacy and necessity of the norms colliding with an economic freedom. While the ECJ assumes without paying much attention to any evidence that all breaches of economic freedoms would result in a *grave infringement*, it eventually sets a too high threshold to prove the adequacy and necessity of infringing norms. This was exemplified by the fully unrealistic assumptions the ECJ makes on the alternative means on the hands of Member States to ensure the effectiveness of fiscal supervision (flatly contradicted by the several legislative initiatives of the Commission,

only partially successful, to increase the degree of tax assistance, especially in the form of automatic exchange of tax data). Fourthly, the European Court of Justice tends to fail to approach on its own terms the principles underpinning the norms colliding with economic freedoms. The breadth and scope of these principles is not only defined in the most restrictive manner, but the inner normative logic of these principles tends to be neglected. This was exemplified by considering the peculiar characterization of the overriding national interest in the coherence of the national tax system.

Having argued all that, it might not be completely improper to conclude with a plea for the recalibration of the case law of the European Courts. There is a very good case for the European Courts playing a key role in the guardianship of European constitutionality. The European Court of Justice was reasonably successful in the way it discharged this task in the first decades of European integration. Not only the rulings were very attentive and indeed deeply informed by the pluralistic nature and institutional setup of the European Union, but the Court avoided pushing too far its autonomous characterization of the norms of Community law. The paradigmatic shift which followed from *Cassis de Dijon* led not only to a major structural change in the conception of economic freedoms, but also to paying much lesser attention to the pluralistic nature of European integration. The argumentative benefit assigned to economic freedoms, coupled with a tendency to distort the understanding of other colliding principles when assigning concrete weight to them and resort to biased criteria to determine the probability of future events have stressed if not severed the fundamental link between national and European constitutional law. The price of the wider autonomy in the short run may be a loss of legitimacy in the long run. The Court runs a double risk in that regard. As a supranational institution, it is not in a position to search for cover in the direct legitimacy of European decision-making processes, as that direct legitimacy is still very thin. As a judicial institution, it is in a position to limit the realm of what is politically possible, but not of taking constructive political decisions, not even when the cumulative effect of its case law is the full disempowerment of all levels of government.