Between Constitutional Tolerance and Judicial Activism: the 'Specificity' of European Judicial Law*

Giuseppe Martinico** and Oreste Pollicino***

A. An Overview of Judicial Power's Progressive Strengthening Throughout the Centuries

The classic idea of transforming the notion of the state structure (i.e. the vertical relationship between governors and citizens) seems able to affect the different (but related) issue of the institutional balance, in a horizontal perspective, of the constitutional powers within a State (i.e. legislative, executive and judiciary branches).

In particular, it is possible to see in the change from the nineteenth century liberal State to the present post-modern globalized governance – passing through the affirmation of the post-war welfare societies – a corresponding gradual strengthening of the role of judicial power.

It is well known that the 'minimal' State of the nineteenth century was characterized, with regard to the horizontal division of powers, by the absolute predominance of the Parliament over the executive and the judiciary branches, which were considered as ancillary powers of the popular sovereignty's representative body.[1] The parliamentary hegemony found its expression, in relation to the sources of law hierarchy, in the absolute predominance of the 'legal rule' which, according to a pure 'rule of law' logic, was prevailing also over the constitutional (flexible) documents.

With specific regard to judicial power, it was considered, in the very fitting Montesquieu metaphor,[2] no more than the *bouche de la loi*. It is well known that this expression tended to accentuate the element of pure and mechanical logic

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** PhD, Sant'Anna School of Advanced studies, Pisa.

*** Associate Professor in Comparative Public Law, Bocconi University, Milan.

1 *See* G. Zagrebesky, Il diritto mite 33 (1992); G. Bognetti, La divisione dei Poteri 29 *et seq*. (2001).

2 Montesquieu, *De l'esprit des lois*, *in* Oeuvres complètes, at II, XVI, 6, 404 (1951).

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in judicial decision making, while neglecting, or concealing, the voluntary and discretionary element of choice. This is the main reason that in the historical period under scrutiny, judicial power could be defined, only apparently paradoxically, as a 'non-power', because of the fact that it was not expected to express its own will but only to apply clear and precise rules defined by the legislative power.

In the twentieth century, with the affirmation of the social state, it is widely recognized that the executive power has taken the place of the Parliament in the leading role of modern welfare societies. The welfare state, in fact, by nature, cannot simply exercise traditional repressive functions or restrict itself to guarantee negative liberties but it must, on the contrary, provide the citizens an active and promotional protection. Such a policy involves by definition planning for future developments and affirming broadly formulated social aims and principles, leaving to the courts the task of concretizing, in real life cases, the meaning, extension and limits of these aims and principles.

It is evident that this kind of legislation has encouraged the creativity of judges and the freedom of choice[3] and the significant growth of state intervention in fields previously left to private self regulation has led to a corresponding increase in judicial activity.[4] More precisely, in the social State, through a process of 'judicialization' of politics, the distance between institutions and citizens has become narrower and the occasions of exchange of views between the same actors more frequent. The role of the Court, in this context, can be characterized as a privileged meeting place.[5] Moreover, after the Second World War, the spreading in many countries of the constitutional review of legislation contributed to increase the role of the judges and proved the inadequacy of the representation of powers conceived by Montesquieu.

This is confirmed by the debate on the 'nature' and 'strength' of the decisions of the Constitutional Courts (are they sources of law? Do they represent phenomena of law making process? Do they have *erga omnes* effect?).

With regard to the ordinary judges, we have to point out the birth of some self-governing bodies of the judiciary, provided in order to guarantee the external independence of the judges from the other powers (for example the Superior Council of the Judiciary in Italy). At the same time, from a 'functional' point of view we stress the 'death' of the legislative interpretative rules: provisions by which the legislators attempt to 'guide' the judge in the hermeneutical process.

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[3] It was no coincidence that, at the beginning of the 20th century, in parallel with the above named change in the institutional balance between the State's constitutional powers, a cultural and juridical movement was born, called "revolt against the formalism" which, against the excessive legalism of the post-codification era, argued that deciding a case could not consist of subsuming certain facts under subsuming rule of law. According to this view, the decision itself would add to the interpretation of the rule to be applied and may thus help to define its meaning. *See* F. Geny, Méthode d'interpretation et sources en droit privé positif (1899).

[4] *See* M. Cappelletti, Giudici legislatori (1984); M. Cappelletti, *The Law Making Power of Judges and Its Limits*, 1981 Munich University Law Review 15, at 22; Bognetti, *supra* note 1, at 65; O. Pollicino, *The Legal Reasoning of the Court of Justice in the Context of the Principle of Equality*, 2004 German Law Journal 284.

[5] *See*, for a similar point of view, M. R. Ferrarese, Il diritto al presente 208 (2002).

An example of such a phenomenon can be found in Art. 12 of the preliminary provisions of the Italian Civil Code where the judge is required to follow the rule literally as a first technique of legal interpretation. Only if a case cannot be solved by looking at a precise provision, the judge may use the analogy and – *in extrema ratio* – he may refer to the general principles of the state legal order.

The crisis of the interpretative clauses can be appreciated with regard to the English legal order by looking at the so called 'Europeanization of the British legal style.'[6]

Concluding this very brief overview, it seems evident that in the actual era of legal and economical globalization, the classical constitutional governance is changing those characteristics which marked its development process in previous centuries. In particular it seems to be that the historical constellation is characterized by the contextual presence in a definitive decline, within the same national borders, of the State, sovereignty and economy triangle.[7]

Post-modern constitutionalism is rather marked by a process of sovereignty's fragmentation followed by a parallel process of its re-articulation within a multilevel and polycentric order.[8]

In this scenario, it is decisive to find out the right and quickest routes to connect the different constitutional centres which provide the structure, at national, supranational and international level, of the new polycentric global order.

It is a common opinion that judicial decisions' multilevel network is the best interconnection route.[9] The 'road to juristocracy' consequently represents one of the main trends of the post-modern constitutionalism in the judicial globalisation era.[10] In other (more convincing) words, "judicial power has moved from being the 'weak link' of the chain to becoming the strong one."[11]

Judge-made law seems to be in a better position than legislative or administrative acts, in terms of flexibility and pragmatic approach, to face the challenge of legal systems as they become increasingly more interdependent and are in a constant

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6 J. Levitsky, *The Europeanization of the British Legal Style*, 42 American Journal of Comparative Law 347 (1994).

7 J. Habermas identifies a different kind of triangle (State, society, economy) at the basis of the classical constitutional governance. *See* J. Habermans, The Postnational Constellation: Political Essays (2001).

8 P. Carrozza, *Constitutionalism's Post-Modern Opening*, *in* M. Loughlin & N. Walker (Eds.), The Paradox of Constitutionalism. Constituent Power and Constitutional Form 169-187 (2007).

9 C. L'Heureux-Dube, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 Harvard Law Review 2049 *et seq*. (2001); A. M. Slaughter, *A Global Community of Courts*, 44 Harvard International Law Journal 191 *et seq*. (2003); A. M. Slaughter, A New World Order (2004); S. Choudry, *Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, 74 Indiana Law Journal 819, at 821 *et seq*. (1999); A. McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20(4) Oxford Journal of Legal Studies 499 *et seq*. (2000); A. Stone Sweet, On Law, Politics and Judicialitation (2002); A. Stone Sweet, Governing With Judges: Constitutional Politics in Europe (1992).

10 A. M. Slaughter, *Judicial Globalization*, 40 Virginia Journal of International Law 1104 (2000); R. Hirschl, Towards Juristocracy, the Limits and the Consequence of the New Constitutionalism (2004); G. N. Tate (Ed.), The Global Expansion of the Judicial Power (1995).

11 R. Dahrendorf, Dopo la democrazia 65 (2001).

and unforeseen transformation. To put it simply: global governance seems to prefer the language of the law in action to the ink of the law in books.

B. European Law Versus Global Common Law

We substantially agree with the conclusions of the scholars about the importance of a jurisdictional dialogue in the contemporary law-making process. Nevertheless the aim of our paper is to stress a number of obscure points and to specify the meaning of the formulas used to describe such phenomena. Let us, first of all, draw attention to the inappropriateness of the terms 'common law.'[12] Ferrarese uses this term to describe the progressive spreading of legal concepts, techniques and practices emanating from the Anglo-Saxon/American context. The link between legal globalization and Americanization of law has been further developed by scholars such as Shapiro[13] and Mattei. The latter stresses the importance of the "predatory economic globalization"[14] in order to explain the American law parable – which would represent the core of the Imperial law – from leadership to dominance. According to Shapiro:

> By globalization of law, we might refer to the degree to which the whole world lives under a single set of legal rules. Such a single set of rules might be imposed by a single coercive actor, adopted by global consensus, or arrived at by parallel development in all parts of the globe.[15]

Very briefly the global common law is characterized by several factors:[16]

1. the prevalence of the oral sources of law which implies less dogmatism and formalism;
2. the market-friendly approach;
3. the progressive "privatisation" of law with the triumph of the contract over the statute;
4. global law is de-constructivist, incremental and non voluntary. This characterization finds confirmation in the triumph of the achievement constitution ("costituzioni bilancio");
5. the predominance of the process over the procedure;
6. law is flexible.

The first point of our criticism is based on the generalization of the analysis which neglects the peculiarity of the European judiciary DNA.

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[12] *See* E. Zoller, *L'américanisation du droit constitutionnel : Préjugés et ignorances*, 44 Archives de philosophie du droit 77 (2001).

[13] M. Shapiro, *The Globalization of Law*, 1 Indiana Journal of Global Legal Studies 37, at 59 *et seq*. (1993); About the relationship between American and global law *see* R. D. Kelemen & E. S. Sibbitt, *The Globalization of American Law*, 57 International Organization 103 (2004).

[14] U. Mattei, *A Theory of Imperial Law: a Study on U.S. Hegemony and Latin Resistance*, 3(2) Global Jurist Frontiers (2003), also available at http://www.bepress.com/gj/frontiers/.

[15] Shapiro, *supra* note 13, at 39.

[16] *See* Ferrarese, *supra* note 5, at 159 *et seq*. and 73 *et seq*.

In fact everybody knows that many elements of common law are peculiar: the organization of the judiciary, binding precedent (which is a consequence of the hierarchy of the Courts), the style of sentences, the inductive method in the legal reasoning and so on. The formula 'global common law' neglects many components of 'real' common law. Then it confuses the mere predominance of oral law with the substance of common law. What about the primitive epochs or the Middle Ages? Was that law 'common law'? Perhaps it is possible to say 'yes' but it is, however, something which deserves discussion. Furthermore, it is not correct to talk about 'precedent' in the EU because the stare decisis principle presumes three elements:[17]

1. a hierarchy of the Courts (following the drawing up of the Judicatures Act);
2. a system of official reports;
3. the prevalence of the non-written sources of law over the written sources (with obvious consequences to the statutory interpretation).

The first element is not present in the EC law context due to the particular conformation of the judiciary system partly composed of national judges. If the primacy of EC law is obvious, it is more complicated to say that the relationships between the orders and their judges can be read in the light of the pure hierarchical criteria, while the EC Treaty itself seems to lean toward the competence criteria. A system of European Court Reports exists but it is not comparable with the English one. The third element is more questionable in the EU context: from a numerical point of view many examples of EC legislation exist but undoubtedly the interpretative judgments of the European Court of Justice (ECJ) have had a fundamental role in EC law development. Moving to the other features of global common law (procedure, de-constructivism, flexibility and privatisation), we will try to examine them in a critical way: sometimes we will agree with Ferrarese's conclusions, but usually we will strongly dissent.

From a constitutional point of view, in fact, this theory implies the failure and the impossibility of a strong constitutional law (and above all of a strong constitutionalism).

When looking at the works by Cassese,[18] this impression is confirmed: the global law of flexibility is judge-made law without strong constitutional (i.e. substantive) principles.

We would like to emphasize that the analysis of the European experience related to our topic constitutes an interesting field of research not only because it represents a meaningful expression of judicial globalization trends, but also (and

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[17] For example M. Zander, The Law-Making Process 215 (2004); *see also* T. Koopmans, *Stare Decisis in European Law*, *in* D. O'Keeffe & H. G. Schermers (Eds.), Essays in European Law and Integration 11-27, at 14 *et seq*. (1982).

[18] S. Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 38 N.Y.U. J. Int'L L. & Pol 663 (2006); *see also* S. Cassese, *La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all'ordine giuridico globale*, 57 Rivista trimestrale di diritto pubblico 609 (2007).

perhaps mainly) because, within this scenario, this experience seems to constitute a specific model of expansion of judicial power.

In particular, the specificity of European judiciary finds its roots in substantial and structural reasons, the former connected to the system of legal values which are part of the European dimension, the latter related to the specific DNA characterising the European legal order. Concerning the structural reasons, there are two elements which seem to make the architecture of the European legal order unique: the principle of evolving dynamism and the principle of constitutional tolerance. In our opinion the possibility of a constitutional discourse in the global era depends on the existence of a peculiar European law which has a strong constitutional core. Starting from such a dualism – global common law (without constitutionalism) versus European law characterized by a strong constitutionalism – we will attempt to show the constitutional implications of the ECJ activity in the conclusions of the paper.

C. The Principle of Evolving Dynamism and the Teleological Hermeneutical Approach

The first element (the evolving dynamism[19]) is characterized by the process of slow but constant transformation of the European humus. At the beginning in 1957, it was marked by an evident market-oriented goal, and, over the following years, has now incorporated a social and a political dimension. This transformation process has been driven by the courageous activism of the Court of Justice, which, due to an often embarrassing inertia of the European community legislative power, has taken on the 'job of constitutionalising' the EC Treaty.

In a well known piece, Stein wrote:

> tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.[20]

It would have been inconceivable to bring about such a radical transformation without applying a degree of judicial creativity.

Of course, every conquest has its price, and the ECJ has had to pay the price of no longer being subject to 'benign neglect' but becoming, on the contrary, the

[19] *See*, for a further analysis of the dynamic character of the European legal order, J. P. Jacqué, Droit institutionnel de l'Union européenne 12 *et seq*. (2001).

[20] E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AJIL 1-27 (1981).

target of harsh accusations[21] and the beneficiary of valiant defences[22] for the way in which it has interpreted its judicial function.

More precisely the European judges had the role, especially in the early years, to fill up the void left by the legislative branch. As Kutscher[23] explained, the inactivity of the legislature compelled the Courts to decide questions and solve problems which should have been dealt with by the legislature and, to a lesser degree, also by the European Parliament.

In particular, the well-known European democratic deficit – where the role of representative bodies in the legislative process is hard to define and where, more generally, the link between voters' wishes and political decisions has become extremely tenuous – confers legitimacy upon judicial creativity which courts lack in developed democratic system.[24] To put it differently, it can be underlined that the creative and activist role of the ECJ is directly proportionate to the legislative inertia of the Member States Executives powers joining the Council of the European Union. By contrast, when the Member States have taken seriously their role of constitutional legislators of the European Union, the European judges have often taken a step back.[25]

It is sufficient to enumerate some of the 'glorious period's' *grands Arrêts*,[26] to realize they coincide with the time when the Member States legislative inertia was

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[21] H. Rasmussen, On Law and Policy in the European Court of Justice (1986); H. Rasmussen, *Between Self Restraint and Activism: A Judicial Policy for the European Court*, 23 Eur. L. Rev. 28-38 (1998); P. Neill, *The European Court of Justice: a Case Study in Judicial Activism*, 1996 Intergovernmental Conference, Minutes of Evidence, House of Lords Session 1994-1995, 18th Report, 1995.

[22] J. H. H. Weiler, *The Court of Justice on Trial*, 18 CMLR 555-589 (1981); M. Cappelletti, *Is the European Court of Justice Running Wild?*, 12 Eur. L. Rev. 3-17 (1987); D. Keeling, *In Praise of Judicial Activism, but What Does It Mean? And Has the European Court of Justice ever Practiced It?*, *in* C. Curti Gialdino (Ed.), Scritti in onore di G. F. Mancini 505-536 (1998); T. Tridimas, *The European Court of Justice and Judicial Activism*, 21 Eur. L. Rev. 199 (1996); G. F. Mancini, *Attivismo e Autocontrollo nella giurisprudenza della Corte di Giustizia*, 37 Rivista di diritto europeo 229-240 (1990).

[23] H. Kutscher, *Methods of Interpretation as Seen by a Judge of the Court of Justice*, *in* R. Lecourt (Ed.), Reports of the Judicial and Academic Conference 27–28 September 1976, 5-51, at 6 *et seq*. (1976).

[24] T. Koopmans, *The Roots of Judicial Activism*, *in* F. Matscher & H. Petzoi (Ed.), Protecting Human Rights: The European Dimension (Studies in honour of Gerard J. Wiarda) 317, at 327 (1988).

[25] The reference is obviously to the pace back which Federico Mancini asked to the Court at the end of the 1980s. F. Mancini, *The Making of a Constitution for Europe*, 26 CMLR 595, at 614, 613 (1989).

[26] Judgment of 5 February 1963 in *Case 26/62*, *Van Gend en Loos v. Administratie der Belastingen*, [1963] ECR 3; Judgment of 15 July 1964 in *Case 6/64*, *Costa v. ENEL*, [1964] ECR 1141; Judgment of 17 December 1970 in *Case 11/70*, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125; Judgment of 31 March 1970, in *Case 22/70*, *Council v. Commision* [ERTA], [1971] ECR 263; Judgment of 8 April 1976 in *Case 43/75*, *Gabrielle Defrenne v. Societe anonyme belge de navigation aerienne SABENA (Defrenne II)*, [1976] ECR 455; Judgment of 9 March 1978 in *Case 106/77*, *Amministrazione delle finanze dello Stato v. Simmenthal,* [1978] ECR 629; Judgment of 20 February 1979 in *Case 120/78*, *Rewe v. Bundesmonopolverwaltung für Branntwein* [Cassis de Dijon], [1979] ECR 649.

more evident in revising the founding Treaty: i.e. until 1987 (when the European Union Treaty was drafted) and especially until 1993, the year of the 'Maastricht revolution'. The above named intergovernmental steps have represented the clear expression of the Member States' will to recapture their legitimate role as European law-makers. A role which was interpreted by the ECJ with surprising 'casualness' for more than twenty years.

More specifically, in Maastricht the Member States – by constitutionalising the principles of proportionality and subsidiarity – made clear their refusal to accept other judicial intrusions in the areas of expression of (the remaining) national sovereignty. On the other hand, the German and Italian Constitutional Courts had already 'opened the dance' of constitutional objections to the primacy doctrine.

It is in the light of the named institutional changes, that the Court, in the 1990s, chose the self-restraint route. Grogan[27] Meng,[28] Keck,[29] Kalanke,[30] Opinion 2/94,[31] and Grant[32] are the most famous examples of the new judicial deference attitude towards the legislative power of the European Union.

The principle of evolving dynamism at the heart of the European legal order – and the consequent special role interpreted by the ECJ as the engine of the European integration process – has been also fostered by the wording of the Treaty of Rome. The EC Treaty, in fact, should not to be seen as a list of already made conquests but, rather, as a programme to be realized progressively over time. In other words, it must be underlined that the congenital vocation of the Treaty, moreover the typical of Constitutional Charters, as being both an act and a work in progress. It is then obvious that the nature of the Treaties encourages creative law making. There are two reasons for this.

Firstly, because they are the product of a compromise between States which may share ultimate goals but still have different economic, social, political and legislative backgrounds and may hold strongly divergent views on specific policy areas.

Secondly, the Treaties are by nature programmatic, outlining policy in general terms without giving precise definitions. In this context Keeleng observed that the ECJ, entrusted with the challenging task of constitutional adjudication, is forced to exercise a highly creative role in weighing up such cryptic and vague rules, concepts, and values:

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[27] Judgment of 4 October 1991 in *Case 159/90*, *The Society for the Protection of Unborn Children Ireland v. Stephan Grogan and others*, [1991] ECR I-4685.

[28] Judgment of 17 November 1993 in *Case 2/91*, *Criminal Proceedings Against Meng*, [1993] ECR I-5751.

[29] Judgment of 24 November 1993 in *Case 267/91 and Case 268/91*, *Criminal Proceedings Against Keck and Mithouard*, [1993] ECR I-6097.

[30] Judgment of 17 October 1995 in *Case 450/93*, *Kalanke v. Freie Hansestadt Bremen*, [1995] ECR I-3051.

[31] Opinion of 28 March 1993 in *Case 2/94*, *Denkavit Internationaal and others*, [1996] ECR I-1759.

[32] Judgment of 17 February 1998 in *Case 249/96, Grant v. South West Trains Ltd*, [1998] ECR I-621.

> For many provisions of the EC Treaty, a narrow or a broad view of their scope is equally compatible with their wording. The choice between the two can only be governed by policy consideration.[33]

In order to apply the principle of evolving dynamism, the favourite method of interpretation of the ECJ has always been the teleological one, which seeks to interpret a rule by taking into account the purpose, aim and objective it pursues. This kind of purposive approach was clearly declared by the ECJ in the *CILFIT case*, where it affirmed that:

> Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[34]

The teleological method of interpretation is perfectly consistent with the dynamic and evolving nature of the European Community, which over the years has changed its objectives and its plans from a purely economic approach to a broader system of values which affects social and environmental issues, and the protection of human rights. Consequently, the Court has to reinterpret and to adapt the original meaning of the Treaty provisions in accordance with the new values and aims that are becoming part of the European dimension. In the light of these considerations, the question which should be asked, when examining an ECJ decision, is not whether the law has been applied or created, but rather what the Community's *telos* is. This is a difficult question to answer because the Member States and the European institutions have left their final intention open and obscure. The most objective guidelines are to be found in the European legal system itself and, above all, in the preamble of the EC Treaty and in the general principles of EC law. Concerning the first source, the most important aim is indicated by the introductory sentence of the preamble of the EC Treaty, namely the decision of the Member States "to lay down the foundations of an ever closer union among the peoples of Europe."

If a method of systematic interpretation is used to interpret this expression together with the more concrete aims of the first articles of the Treaty, then it is possible to have a clear view of the Court's approach to the judicial law-making process. With regard to the second source cited above, in order to determine the *telos*, the Court has emphasized the role of the general principles of EC law in the light of its mission to ensure that the law, and not only the rules of the Treaty, is observed. These unwritten principles extrapolated by the ECJ from the laws of the Members States show the creative function of the Court and, more generally, its contribution to the development of the Community from a supranational organization to a constitutional order of States. In this context, Takis Tridimas uses an evocative metaphor when speaking of general principles as "children of national law, but as brought by the Court they became enfants

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[33] Keeling, *supra* note 22, at 505-536.

[34] Judgment of 6 October 1982 in *Case 283/81*, *CILFIT v. Ministero della Sanità*, [1982] ECR 3415, at 3430, para.20.

terribles."[35] According to all the considerations mentioned above, it is clear that the methodology of decision-making characterizing the judicial approach of the Court of Justice, even if it often leads to creative operations by the European judges, is not a degeneration but the natural implication of the European legal system.[36]

D. The Principle of Constitutional Tolerance and the Double Level Judicial Strategy of the Court

The second element which concurs to shape the European legal order's uniqueness is the principle of constitutional tolerance, according to which, in Joseph Weiler's as usual brilliant terms:

> Constitutional actors in the Member States accept the European Constitutional discipline not because as a matter of legal doctrine …. They accept it as an autonomous voluntary act endlessly renewed by each instance of subordination …. The Quebecois are told in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of peoples of Europe, you are invited to obey …. When acceptance and subordination is voluntary, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance.[37]

By applying the principle of tolerance to the European adjudication mechanisms, it is evident that the European Court of Justice, unlike the American Supreme Court and the European Constitutional Courts, has almost no powers that do not ultimately derive from its own prestige or the intellectual and moral force of its opinions[38] and, in particular, it cannot rely upon a constitutional discipline which

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[35] *See* T. Tridimas, The General Principles of EC Law 4 (1999).

[36] In scholarly debate we often come across the conviction that a clear distinction exists between 'legal interpretation' and 'judicial activism'. According to this distinction, the former is considered a legitimate expression of judicial function and the latter its degeneration, involving a judge's arbitrary intrusion into the political arena by giving priority to values other than legal ones, such as, in the case of the ECJ, supporting the process of European integration. It must be emphasized that the aforementioned conviction is misplaced, being based on an old and reductive concept of judicial function, whereby the judge was seen as an inanimate, robot-like spokesman of the law. This concept confirms the idea that by purely deductive logic the judge could ascertain the law without personal responsibility or creative means. By contrast, it must be underlined that judicial function per se does not involve only the interpretation of law but also its creation. If one accepts this fundamental observation, there is no clear distinction between legal analysis or interpretation on the one hand and judicial law-making on the other. In fact both of them, far from belonging to different spheres, the former legal and the latter political, fall within the boundaries of legitimate judicial function.

[37] J. H. H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, Harvard Jean Monnet Paper, 10/2000, available at http://jeanmonnetprogram.org/papers/00/001001.html.

[38] *See* M. Cappelletti & D. Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, *in* M. Cappelletti, M. Seccombe & J. H. H. Weiler (Eds.), Integration Through law, Vol. 1, Book 2, 261, at 327 (1986).

forces the Member States to obey to its decisions. The obedience of the Member States is then purely voluntary and the Court is paying an incredible amount of attention to fostering this 'miraculous' attitude of constitutional tolerance.

The European judges, finding themselves between the need to be coherent to the principle of evolving dynamism and the necessity to respect the principle of constitutional tolerance, were forced to invent a complex judicial strategy in order to pursue the teleological spirit of the EC Treaty without abusing the constitutional tolerance shown by the Member States. Put differently, the ECJ had to find a compromise between two judicial routes which were going in opposite direction.

On the one hand, in the light of the principle of evolving dynamism, it has had to follow the judicial route addressed to pursue an activist and often creative teleological hermeneutical approach, in order to adapt the original economic vocation of the EC Treaty to the non-economic priorities emerging in the European dimension over the years.

On the other hand, in the light of the principle of constitutional tolerance, the European judges could not have allowed themselves to forget the judicial self-restraint route which has always prevented them from being too intrusive towards the Member States' constitutional legal orders, in order not to overstep the threshold of tolerability beyond which the principle of constitutional tolerance can change to his opposite (dark) side: the expression of the national constitutional arrogance.

E. The First-level Strategy: the Art of Judicial Persuasion

The 'compromise' judicial journey has been concretised by the ECJ in a dual strategy: a first level approach addressed to the national judges, a second one addressed to the legislative and executive bodies of the Member states. We will try to read these two groups of contacts in the light of the identified guidelines.

Concerning the first level of analysis, we know the persuasive approach used by the ECJ towards the national (ordinary) judges in their capacity as Community judges.[39] Such behaviour was fundamental in order to obtain their trust; this was functional to the cooperation described in the wording of art.234 ECT (before 177). This lucky alliance has caused moments of tension between the ordinary judges and their Constitutional Courts and this factor is one of the causes of the asymmetry between Constitutional guardians and the ECJ.[40]

If the history of the preliminary ruling (and of the consequent relationship between ordinary courts and the ECJ) is very famous, the troubled affair between the ECJ and the Constitutional Courts (or Supreme Courts in those countries without formal Constitutional Courts) is more obscure; the latter avoided the

[39] J. Temple Lang, *The Duties of National Courts Under Community Constitutional Law*, 22 European Law Rev. 3-18 (1997).

[40] Very recently cases like Traghetti Mediterraneo (Judgment of 13 June 2006 in *Case 173/03*, [2006] ECR I-5177) and Köbler (Judgment of 30 September 2003 in *Case 224/01*, [2003] ECR I-10239) are symptoms of the existence of some tension points between ordinary judges and ECJ.

procedure described by art. 234 ECT. Following the intuitions of those authors who stress that the peculiarity of the European judiciary system rests on the idea of cooperation guaranteed by such a procedure, we would like to show how there has never been a complete lack of cooperation between Constitutional Courts and the ECJ, thanks to alternative (and non-institutionalised) ways discovered by the 'enemies': the Constitutional guardians and the owner of Treaties' interpretation. Another reason for focusing on the 'constitutional' dialogues is the following: the Constitutional Courts do not want to hand over their jurisdictions to the ECJ, opening the 'sad' season of their euthanasia (Zagrebelsky) in terms of competencies. As we will see in the Danish Supreme Court's reasoning, this motive is questionable because the acceptance of the preliminary ruling dialogue does not imply the abandonment of their national constitutional guardian status. Such political factors allow us to appreciate the nature of the compromise (not perfect but perfectible) reached by the Constitutional Courts (especially by the Italian Constitutional Court): these judicial bodies have been forced to use their imagination in order to remedy the catastrophic refusal of the preliminary dialogue by inventing something else without abandoning the necessity of preserving the supranational integration.

F. From the ECJ to the Constitutional Courts and Back: Integration Versus Constitutional Resistance

In this part of the paper we would like to analyze and categorize the different kinds of relationships existing between the ECJ and Constitutional Courts. As we know, at the beginning of this 'love affair' the two Courts started from opposing positions of monism (ECJ) and dualism (Constitutional Courts).

During the following years this pureness was overcome and the Constitutional Courts began to talk about two "autonomous and separated, although coordinated" systems (Italian Constitutional Court for example in case n. 170/1984); at the same time the ECJ has demonstrated to appreciate the efforts of these national actors by assuming – sometimes – a benign and tolerant attitude: some scholars have defined such a situation of partial convergence by using the formula "(limited) flexibilization of supremacies."[41]

Despite this convergence, the tension between these two actors has not been missing because of progressive expansion of the ECJ activity in national fields.

First of all the ECJ has progressively obtained the trust of the ordinary judges, whose role is fundamental in the activity of the Constitutional Courts. A clear result of such an influence is the degeneration of the relationship between ordinary judges and Constitutional Courts: when the ordinary judges want to induce a clarification in the reading of the relationship between the EC law and

[41] V. Ferreres Comella, *La Constitución española ante la clausola de primacia del Derecho de la Unión europea. Un comentario a la Declaración 1/2004 del Tribunal Constitucional 1/2004*, *in* A. Lopez Castillo, A. Saiz Arnaiz & V. Ferreres Comella, Constitución española y constitución europea 77-100, 80-89 (2005).

the national constitutions, they do not refer to their Constitutional Courts but the ECJ. This is the outcome of the self-exile of the Constitutional Courts that rarely declare admissible questions concerning the relationship between legal orders. For example, in 2002, the Italian Constitutional Court decided only upon ten cases (among 500 in total) related to the EC legal order.[42]

Another strategy used by the ECJ was the progressive expansion of its jurisdiction in the matter of compatibility between national law (including constitutional provisions: see, for example, the famous *Kreil case*[43]) and EC law. Everybody knows that, according to the words of the Treaties, the ECJ has no jurisdiction with respect to the validity of national law contrasting with the EC law. Nevertheless, we know that, *de facto*, the ECJ used the preliminary ruling to declare such kinds of contrasts. As a consequence, the ECJ has spread its power beyond the boundaries designed by the Treaties, not limiting itself to the national provisions of the EC law implementation, conceiving it *stricto sensu*.

The first characteristic of the jurisdictional dialogue described is the 'mutability' of the starting position of the Constitutional justices. It is possible, in fact, to notice a strong evolution in the Italian Constitutional Court case law. In case n. 14/1964,[44] for example, the Italian Court interpreted the relationship between national and EC acts in the light of chronological criterion (on the basis of the fact that the enabling act of ratification of the Treaties was an ordinary legislative act); later, in case n. 183/1973[45] the Court changed its position saying that the constitutional basis of EC law primacy can be found in Art. 11 of the Italian Constitution:

> Italy … agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed.

This provision was conceived for the participation in UN or other limited-power organizations but not in the EU. The latter in fact imposes limitations of sovereignty for goals that go beyond 'peace and justice between nations'; the Italian Constitutional Court was forced to 'manipulate' the original meaning of Art. 11 in order to allow such limitations.[46] The Italian Court had entrusted the respect of such a primacy to itself (as a control of indirect violation of Art. 11 for those national provisions challenging EC law) but the consistency of EC law with the Italian Constitution could not be controlled by the Italian Constitutional Court because the latter can only rule on the validity of Italian laws. In fact in 1984 the Italian Court entrusted such a control to the national ordinary judges as we will see later.

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[42] M. Cartabia & A. Celotto, *La giustizia costituzionale in Italia dopo la Carta di Nizza*, 6 Giur. cost. 4477 *et seq*. (2002).

[43] Judgment of 11 January 2000 in *Case 285/98 Kreil,* [2000] ECR 69. *See* M. Calamo Specchia, *Il Conseil constitutionnel e le Corti europee: dall'indifferenza al dialogo?*, *in* G. F. Ferrari (Ed.), Corti nazionali e Corti europee 328 *et seq*. (2007).

[44] Corte Costituzionale, sentenza n. 14/1964, available at www.cortecostituzionale.it.

[45] Corte Costituzionale, sentenza n. 183/1973, available at www.cortecostituzionale.it.

[46] Since 2001 (revision of the 5th Title of the Italian Constitution) an explicit reference to the EC legal order has been contained in Art. 117.

Something similar happened in Spain, Germany (before the amendment of the *Grundegesetz* with the introduction of Art. 23) and Belgium. As we will see below with regards to the counter-limits, the German justices made their argumentations 'softer' after *Solange I* by conceiving a form of cooperation between courts for the protection of fundamental rights (*Kooperationverhältnis*) although they have never completely abandoned the dualistic vision. Before 1992, then, they have assumed Art. 24 of *Grundegesetz* (devoted to the participation to international organizations) to explain the penetration of the EC law.

In Spain, the *Tribunal Constitucional* considered Art. 93 of the Spanish Constitution as a basis to found the EC law primacy without giving the EC law a constitutional degree in the legal sources system. Nevertheless, it is possible to note a strong evolution in *Tribunal Constitucional* case law from the judgment n. 28/1991[47] and Declaración n. 1/1992[48] up to the very recent Declaration 1/2004. In this case the Spanish justices adopted a more substantial reading of Art. 93 of the Constitution, no longer conceiving it only as a procedural clause.

According to the *Tribunal Constitucional*, the contrast between EC law and national law cannot be seen as a figure of un-constitutionality of the national rule: it is a question of legality which has to be resolved by the ordinary judges, not a question of constitutionality.

Similarly there is an evident manipulation of the constitutional text operated by the *Cour d'Arbitrage* (now formally *Cour Constitutionnelle*) with regard to Art. 34 of the Constitution in order to give a partial super-constitutionality to EC law without endorsing the competence of its guarantee.

Such a premise is very important to understand the situation of instability which characterizes the relationship between Constitutional Courts and the ECJ. On the one hand, the Constitutional Courts have progressively accepted the EC law primacy and have entrusted its protection to the ordinary judges, despite the lack of a national or supranational clause of *primauté*.

In the Italian context, the Constitutional Court started to accept that the guarantee of EC law primacy was entrusted to the national judges with an important specification: technically, the judge cannot 'disapply'[49] the national law contrasting with the EC law but he must 'not apply' the national rule contrasting with directly applicable EC law (the regulation in case n. 170/1984[50] but then also self executing directives – see case n. 64/1990[51] – and interpretative judgments concerning directly effective and directly applicable norms – cases n. 113/1985[52] and 389/1989[53]). Disapplication, in the Constitutional Court's reasoning, is a

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47 Tribunal Constitucional, sentencia n. 28/1991, available at www.tribunalconstitucional.es.

48 Tribunal Constitucional, declaración, 1/1992, available at www.tribunalconstitucional.es. About this *see* P. Pérez Tremps, Constitución española y comunidad europea (1993).

49 Judgment of 09 March 1978 in *Case 106/77, Amministrazione delle finanze dello Stato v. Simmenthal*, [1978] ECR 629.

50 Corte Costituzionale, sentenza n. 170/1984, available at www.cortecostituzionale.it.

51 Corte Costituzionale, sentenza n. 64/1990, available at www.cortecostituzionale.it.

52 Corte Costituzionale, sentenza n. 113/1985, available at www.cortecostituzionale.it.

53 Corte Costituzionale, sentenza n. 389/1989, available at www.cortecostituzionale.it.

form of invalidity[54] which would presume a hierarchical relationship between supranational and national legal orders. It would imply the subordination of the Constitutional Court to the ECJ (the hierarchy between orders which conduct to the hierarchy of Courts) while the non-application is a figure of inefficacy limited to the specific case before the national judge.[55] The Italian case – along with the German one – is very relevant for completely understanding the reasons of the 'resistance'.

On the other hand, the Constitutional Courts have claimed to maintain their own role (the role of the guardians of the national constitutional identity) without exceptions. They denied the acceptance of dangerous monistic visions in order to preserve the constitutional identity of their legal orders.

As we know the English High Court,[56] the Irish,[57] Greek,[58] Danish[59] and Finnish[60] Supreme Courts have accepted the dialogue with the ECJ, while the Constitutional Courts (except for the Belgian[61] and Austrian[62] Constitutional Courts) in general have avoided it. They have always preferred to be excluded from the dynamics of the preliminary ruling by refusing to define themselves as 'judges' according to EC law. On the contrary, they have raised some ultimate barriers against the penetration of EC law in order to define the fundamental principles of the legal orders of which they are the guardians. Hypothetically, if a EU provision were in contrast with the fundamental principles of the national legal order, the Constitutional Court could strike out the national act of execution of the EC Treaty, thus causing a 'break' between national and supranational legal orders. The Constitutional Courts in fact normally have jurisdiction with respect to the national acts (like the legal source of the execution of the Treaties) but not over the EC provisions: the latter do not fall within their jurisdiction because, in their argumentation, they belong to another legal order. In this way if they accepted the possibility of striking out the EC law provisions, they would adhere to the monistic theory of the ECJ. It is a legal *fictio* which makes it possible to defend the hard core of constitutional legal orders by preserving the formal

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54 Corte Costituzionale, sentenza n.168/1991, available at www.cortecostituzionale.it.

55 The exceptions to this scheme are represented by the following: 1) the case of the '*processo in via principale*' (when the legislative act, which is supposed to be unconstitutional, is contested by a Region or the State on the basis of Art. 127 of the Italian Constitution); 2) the case of contrast between national norms and non-directly effective or non-directly-applicable EC rules; 3) the case of violations of the national counter-limits. In these cases the Constitutional Court considered itself to be competent. *See* P. Costanzo, L. Mezzetti & A. Ruggeri, Lineamenti di diritto costituzionale dell'Unione europea 284 (2006).

56 Judgment of 14 December 1979 in *Case 34/79*, *Henn and Darby*, [1979] ECH 3795.

57 Judgment of 06 November 1984 in *Case 182/83*, *Fearon v. Irish Land Commission*, [1984] ECR 3677.

58 Judgment of 19 January 1999 in *Case 348/96*, *Calfa*, [1999] ECR I-11.

59 Judgment of 16 January 1979 in *Case 151/78*, *Sukkerfabriken Nykøbing*, [1979] ECR 1147.

60 Judgment of 25 January 2001 in *Case 172/99*, *Liikenne*, [2001] ECR 475.

61 Cour d'Arbitrage, 19 February 1997, n. 6/97, available at http://www.arbitrage.be/fr/common/home.html.

62 VfGH, 10 March 1999, B 2251/97, B 2594/97, available at http://www.vfgh.gv.at/cms/vfgh-site/.

autonomy of the national and supranational orders and the jurisdiction of ECJ. The consequence of a possible declaration of invalidity would mean the pulling out of Italy from the EC.

A similar legal *fictio* is adopted in other legal orders like Belgium where the *Cour d'Arbitrage* admitted a compatibility control of the international treaties with the constitution, considering it as a control over their acts of execution. Nevertheless, in 2003, the special act devoted to the *Cour d'Arbitrage* excluded such a control for the acts of execution of

> un traité constituant de l'Union européenne ou la Convention du 4 novembre 1950 de sauvegarde des droits de l'homme et des libertés fondamentales ou un Protocole additionnel à cette Convention.[63]

This special act does not forbid the control over these acts of execution in the context of the *recours en annulation*.

The theory of the counter-limits doctrine ('*dottrina dei controlimiti*') was *de facto* conceived in *Solange I* by the German *Bundesverfassungsgericht*[64] and in case n. 183/73 (but see also case n. 170/84[65]) by the Italian Constitutional Court. Many Constitutional Courts accepted it in the following years: recently the *Conseil Constitutionnel* in 2004, in 2004-505 DC[66] and *Tribunal Constitucional* in Spain (D-1/2004 [67]), but before them in Great Britain[68] the High Court admitted the primacy of EC law by preserving a hard core of principles. One of the most interesting cases is the Danish one, *Carlsen*,[69] when the Supreme Court specified the possible dynamics of such a declaration as we will later see.

Recently the decisions of the Polish[70] and German Constitutional Courts[71] (but see also the decisions of the Cypriot[72] and Czech[73] judges) have recalled the question of the ultimate barriers in the field of the European arrest warrant.[74]

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63 E. Grosso, *Il dialogo necessario: la Cour d'arbitrage belga e le Corti europee, tra tutela dei diritti fondamentali e applicazione del diritto comunitario nell'ordine giuridico interno*, *in* G. F. Ferrari (Ed.), Corti nazionali e Corti europee 259, at 265 (2007).

64 BVerfGE 37, S. 271 *et seq*., available at http://www.bundesverfassungsgericht.de/en/index.html.

65 Corte Costituzionale, sentenza n. 180/1974, available at www.cortecostituzionale.it. About this *see* M. Cartabia, Principi inviolabili e integrazione europea (1995).

66 But *see also* Conseil d'Etat, dec. Sarran, 30 October 1998 ; Cour de Cassation, dec. Fraisse, 2 june 2000; Conseil d'Etat, dec. SNIP, 3 December 2001. In addition *see* Conseil Constitutionel 2004-496-497-498-499 DC 2004-505 DC

67 Declaracion of the Tribunal Constitucional 1/2004. About this point *see* Ferreres Comella, *supra* note 41, at 80-89 and A. Saiz Arnaiz, *De primacia, supremacia y derechos fundamentales en la Europa integrada: la Declaración del Tribunal Constitucional de 13 diciembre de 2004 y el Tratado por el que establece una Constitución para Europa*, *in* A. Lopez Castillo, A. Saiz Arnaiz &V. Ferreres Comella, Constitución española y constitución europea 51-75 (2005).

68 *Mc Whirter and Gouriet v Secretary of State for Foreign Affairs*, [2003], EWCA civ 384. About this: A. Biondi, *Principio di supremazia e 'Costituzione' inglese. I due casi 'Martiri del sistema metrico' e 'Mc Whirter and Gouriet'*, available at www.forumcostituzionale.it/site/index3.php?option=com_content&task=view&id=101&Itemid=82.

69 Højesteret, *Carlsen v Rasmussen*, 3 Common Market Law Reports 854 (1999).

70 Trybunał konstytucyjny, P 1/05, available at http://www.trybunal.gov.pl/eng/index.htm.

71 BVerfG, 2 BvR 2236/04, available at http://www.bundesverfassungsgericht.de/en/index.html.

72 Ανώτατο Δικαστήριο, 294/2005, available at www.cylaw.org.

73 Ústavní Soud, Pl. ÚS 66/04, available at http://test.concourt.cz/angl_verze/cases.html.

The theory of counter-limits represents the strong refusal of the Constitutional guardians of the dangers of a monistic approach in the reading of the relationship between legal orders. Despite the strictness shown in these judgments, the Constitutional Courts have never used this 'weapon' and in recent years the German *Bundesverfassungsgericht* changed its position by substituting the case by case control (hypothesized in *Solange I*) with an abstract control of general compatibility of EC law with the demands of the rights' guarantee (*Solange II*,[75] *Maastricht*,[76] *Banana*[77]). Something similar happened in Italy with judgment n. 232/1989.[78] From that decision onwards, in fact, the Italian Constitutional Court has implicitly admitted that the possible contrast with the Constitution would not cause the invalidity of the act of execution of the EC Treaty but only the non-applicability of EC rule.[79]

In the German *Grundgesetz* (Art.23) and in the Finnish (Art. 94) and Swedish Constitutions (X-5) the counter-limits principle has also been codified. In order to contrast such positions the ECJ clarified the following:

> Therefore the validity of a Community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure', although the 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of justice. 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. [80]

This kind of argumentation was drawn on in the recent order of the European Court of First Instance:

> Furthermore, in their observations on the objection of inadmissibility, the applicants cannot maintain that, to remedy this alleged lack of judicial protection, the Italian Constitutional Court could refrain from applying Community measures contrary to the fundamental rights proclaimed in the national Constitution since, in accordance with settled case-law, Community law has primacy over national law (Case 6/64 Costa [1964] ECR 614).[81]

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[74] In the paper we will focus on the first pillar because of the non-perfect comparability between Arts. 234 ECT and 35 EUT. About the role of the ECJ in this ambit *see*: J. Komarek, *European Constitutionalism and the European Arrest Warrent: In Search of the Limits of Contrapunctual Principles*, Jean Monnet Working Paper, 10/05, available at http://www.jeanmonnetprogram.org/papers/05/051001.html.

[75] BVerfGE 73, 339, available at http://www.bundesverfassungsgericht.de/en/index.html.

[76] BVerfGE 89, 155, available at http://www.bundesverfassungsgericht.de/en/index.html.

[77] BVerfGE 102, 147, available at http://www.bundesverfassungsgericht.de/en/index.html.

[78] Corte Costituzionale, sentenza n. 232/1989, available at www.cortecostituzionale.it.

[79] *See* M. Cartabia & J. Weiler, L'Italia in Europa 171-172 (2000).

[80] Judgment of 17 December 1970 in *Case 11/70*, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, para. 3.

[81] Judgment of 2 April 2004 in *Case T-231/02 Gonelli e Aifo v. Commission*, [2004] ECR II-1051, para. 57.

The 'neglect' of the ECJ towards the national constitutional provisions is confirmed by the famous *Kreil* judgment where the Court said that the principle of non-discrimination

> precludes the application of national provisions, such as those of German law, which imposes a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services. [82]

Many commentators stressed that in *Kreil* case the ECJ had dealt with a clear contrast between the EC law and Art. 12 of the Grundgesetz.

Despite the first impression provided by these jurisprudential statements, many authors have pointed out the mere rhetoric of the counter-limits argument.

First of all it is curious to note the connection between the counter-limits (recalling the language used by the Italian Constitutional Court) and the common constitutional traditions as pointed out by some scholars[83] and as *a contrario* Italian Constitutional Court admitted in case n. 286/1986.[84]

If the counter-limits are related to the input of the communitarian legal materials in the inner order, the common constitutional traditions, instead, are related to the input of inner legal materials in the European legal order. Apparently they follow opposite routes and are inspired by different rationales: the former by the rationale of integration while the latter by the rationale of constitutional diversification. As stressed, however, by Ruggeri,[85] thanks to the hermeneutical channel represented by the preliminary ruling, the constitutional principles of the inner legal orders rise from their origin (national level) and become common sources of EC Law; then these common constitutional traditions come back to the origin in a new form when they are applied by the ECJ. By looking at these flows we can find the best proof of the complex (i.d. intertwined) nature of the EU: in such a context common constitutional traditions and counter-limits are two sides of the same coin as demonstrated, in our opinion, by the letter of the Constitutional Treaty which had codified the latter in Art. I-5[86] (Art. 4 of EUT after the Reform Treaty of Lisbon).

The reference to the 'national identities' (already included in Art. 6 of EUT) and to the 'constitutional structures' gives the counter-limits expressed constitutional

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82 *Kreil case*, *supra* note 43, para. 32.

83 A. Ruggeri, *'Tradizioni costituzionali comuni' e 'controlimiti', tra teoria delle fonti e teoria dell'interpretazione*, 1 Dir.pub.comp.e eur. 102, at 107 (2003).

84 Corte Costituzionale, sentenza n. 286/1986, available at www.cortecostituzionale.it. About this *a contrario* argument *see* Costanzo, Mezzetti & Ruggeri, *supra* note 55, at 284.

85 Ruggeri, *supra* note 83, at 102-120.

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> 1. The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.
>
> 2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.

degree. This fact might cause some problems in identifying the guardians of these counter-limits: the Constitutional Courts or the ECJ?[87] When looking at the rationale of the Constitutional Treaty/Reform Treaty the counter-limits as well should be considered as parts of the EC Law.

In such a context the role of the ECJ could change and perhaps cases like *Berlusconi* and *Omega* testified the first signs of this evolution. In *Omega*, the Court said that:

> Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.[88]

This statement should be read as the final line of a long run which started after *Solange I*. This judgment would like to demonstrate (before a German judge: it is not a coincidence) the ripeness of the EU legal system and in general the outcome of the constitutional dialogue with the national interlocutors. Something similar happened in the *Berlusconi case* (in front of an Italian reference), when the ECJ stated that:

> The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly in the present cases, the directives on company law.[89]

In such argumentations there is probably not a lack of strategic (and persuasive) reasons due also to the broad notion of human dignity and retroactive application of lenient penalty assumed by the Court; however it is clear that such sentences are the results of a long comparison with the national instances.

On the other hand, it is possible to find other recent cases where the Court seems to accept a 'selective' doctrine of human rights. This is the case of *Schmidberger's*:

> Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the

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[87] About this point *see* A. Ruggeri, *Trattato costituzionale, europeizzazione dei 'controlimiti' e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, available at www.forumcostituzionale.it/site/index.php?option=com_content&task=view&id=3&Itemid=3-.

[88] Judgment of 14 October 2004 in *Case 36/02*, *Omega*, [2004] ECR I-9609, para. 41.

[89] Judgment of 3 May 2005 in *Case 387/02*, *Berlusconi and others*, [2005] ECR I-3565, paras. 68 and 69.

> rights guaranteed (see, to that effect, Case C-62/90 Commission v Germany [1992] ECR I-2575, paragraph 23, and Case C-404/92 P X v Commission [1994] ECR I-4737, paragraph 18).[90]

In *Schmidberger* the ECJ distinguished between two groups of fundamental rights: the absolute rights (which admit no restrictions) and other fundamental rights. Concerning the second category of rights, the ECJ admitted the necessity to evaluate through a case by case approach the proportionality of their possible restrictions. This selective and case by case approach seems to be in contrast with the very broad approach which the ECJ followed in the *Omega case*.

In conclusion, in *Schmidberger* this balance between fundamental and economic rights could be questionable and could appear incoherent with the ECJ case law because it comes just before the *Omega case*. Recently, the ECJ went back to the selective and case by case approach to the fundamental rights in the *Laval*[91] and the *Viking*[92] cases.

In these cases, the ECJ recognized the fundamental right to collective action as an integral part of EU law. This right can justify restrictions on the fundamental freedom of establishment or on the freedom to provide services guaranteed under the EU Treaty, in order to protect workers and guarantee their conditions of employment. The ECJ added that this action is legal "only if it pursues a legitimate aim such as the protection of workers" and it has left the decision of legitimacy in this case up to the national courts, balancing the rationale of market integration with the rationale of social policies.

Concluding, the ECJ's activity could be read as swinging between the two poles identified above (evolving dynamism and constitutional tolerance): following this reconstruction this mixture of acceleration and deceleration is explicable, as Morbidelli[93] pointed out, by reading the different choices made by the Court in terms of proportionality which is conceived as a costs/benefits analysis. We will clarify this point later but it is already possible to note that the approach adopted by the ECJ is case-by-case related to the political context and to the nature of the subjects involved.

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[90] Judgment of 12 June 2003 in *Case 112/00*, *Schmidberger*, [2003] ECR I-5659, para. 80. About the importance of Schmidberger and Omega in the ECJS' case law *see* A. Alemanno, *À la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur. Quelques réflexions à propos des arrêts Schmidberger et Omega*, 2004 Revue du droit de l'Union Européenne 709.

[91] Judgment of 18 December 2007 in *Case 341/05*, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet e a,* avalaible at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=IT&Submit=rechercher&numaff=C-341/05.

[92] Judgment of 11 December 2007 in *Case 438/05*, *The International Transport Workers' Federation and The Finnish Seamen's Union*, available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-438/05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

[93] G. Morbidelli, *La tutela dei diritti tra la Corte del Lussemburgo e Corte Costituzionale*, *in* G. Morbidelli & F. Donati (Eds.), Una costituzione per l'Unione europea, Giappichelli 9-61, 23-24 (2006).

G. The Techniques of the Hidden Dialogue

Having assumed the primacy of EC law, the Constitutional Courts dealt with another enigma: how could they guarantee the equilibrium between the levels as well as the dialogue with the ECJ?

As we know, in fact, many Constitutional Courts do not consider themselves as judges on the basis of Art. 234 ECT and have always refused to raise the question to the ECJ (see Italian Cases 206/1976,[94] 168/1991[95] and 536/1995;[96] Spanish Case 372/1993;[97] French Case 2006-540 DC [98]) in contrast with ECJ orientation (C-54/1996[99]).

To resolve such a problem, the national constitutional justices have invented some expedients that allow them not to interrupt the communication with the ECJ. For example, many Courts have tried to explain the EC law primacy by placing the EC rules above the primary sources of law but, at the same time, below the Constitution by introducing a new step in the legal sources hierarchy. Such an attempt has created confusion in the Constitutional Courts case law itself, as the contradictions of the *Tribunal Constitucional* demonstrate. In case n. 28/1991, in fact, the *Tribunal Constitucional* used two different formulas to define the normative strength of the EC law – "non constitutional law" and "infra-constitutional law" – while in other cases it used the formula "constitutionally relevant (law)."

Consequently, according to the *Tribunal Constitucional*, the contrast between the EC law and the national law cannot be seen as un-constitutionality of the national rule: it is a question of legality which has to be resolved by the ordinary judges.

Something similar happened in England in the *Thoburn*[100] case. In this case, the judge recognized the existence of a constitutional group of statutes and acts: this group of constitutional statutes and laws also included the 1972 EC Act. In this way, the English judges guaranteed the reasons of the integration and the EC law primacy but, at the same time, recognized that the primacy rests in the acceptance and in the self-limitation of the English Parliament.

Another example of creative constitutional case law is the distinction between "*primacia y supremacia*" used by the *Tribunal Constitucional*.[101] This was done in order to explain the compatibility between the reasons of integration and the guarantee of the Constitution. A further proof of this trend is the very recent acknowledgement (Case 58/2004[102]) of the exhaustibility of *recurso de amparo*

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94 Corte Costituzionale, ordinanza n. 206/1976, available at www.cortecostituzionale.it.
95 Corte Costituzionale, sentenza n. 168/1991, available at www.cortecostituzionale.it.
96 Corte Costituzionale, ordinanza n. 536/1995, available at www.cortecostituzionale.it.
97 Tribunal Constitucional, sentencia n. 372/1993, available at www.tribunalconstitucional.es.
98 Conseil Constitutionnel, 2006-540 DC, available at http://www.conseil-constitutionnel.fr/.
99 Judgment of 17 September 1997 in *Case 54/1996*, *Dorsch Consult Ingenieursgesellschaft / Bundesbaugesellschaft Berlin*, [1997] ECR I-4961.
100 High Court, *Thoburn v. Sunderland City Council*, 1 Common Market Law Reports 50 (2002).
101 Tribunal Constitucional, Declaración 1/2004, available at www.tribunalconstitucional.es.
102 Tribunal Constitucional, Sentencia 58/2004, available at www.tribunalconstitucional.es.

when the ordinary judge refuses to refer to the ECJ ex Art. 234 ECT. If this refusal implies the violation of a fundamental right guaranteed by *recurso de amparo*, it is possible to proceed before the *Tribunal Constitucional* for violation of Art. 24 of the Spanish Constitution. The *Tribunal Constitucional* thus compensated the ECJ for the refusal to accept the mechanism of preliminary ruling.

The Italian Constitutional Court is particularly active in this field with expedients like the acknowledgement of erga omnes effects to the interpretative judgments of the ECJ and the dual preliminarity – '*doppia pregiudizialità*'[103] – (see cases n. 536/1995[104] and 319/1996[105]). The first technique was already mentioned above: the Italian Constitutional Court has recognized *erga omnes* effects to the ECJ sentences in its case law (mainly in 113/1985[106] and 389/1989[107]) because they share certain characteristics with the classic EC legal sources. These decisions have direct effect or direct applicability, when based *rectius* (when they are the results of the interpretation of legal provisions with such effects) on an EC provision provided with such features. In this way the Italian Court put the classic EC acts (regulations, directives) on an equal footing with the ECJ interpretative sentences. This is an indirect recognition of the strong role of the ECJ and implies the extension of the obligation of non-application (for the national judge) of national law contrasting with the interpretative judgments of the ECJ.

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

If these two questions are strongly related, the Italian Constitutional Court can decide to return the question (declaring it 'inadmissible') to the ordinary judge (536/1995[108]) or 'wait for' the ECJ to pronounce before judging (165/2004[109]). As we can see, the dual preliminarity is a technique by which the Italian Constitutional Court recognizes the 'priority' to the ECJ and to the ECJ question; at the same time, the dual preliminarity can work as a 'safety valve' in order to avoid a contrast with the ECJ with regard to the possible violation of the counter-limits. In the *Berlusconi case*, for example, the Italian Constitutional Court (165/2004[110]) waited for the ECJ's answer, preparing itself for a possible decision inconsistent with its fundamental principles. All this was also caused by the ECJ's progressive

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[103] M. Cartabia, *Il processo costituzionale: l'iniziativa. Considerazioni sulla posizione del giudice comune di fronte a casi di 'doppia pregiudizialità', comunitaria e costituzionale*, 5 Il Foro italiano 222-225 (1997). For a very similar point of view about the dual preliminarity *see* in English M. Cartabia: *'Taking Dialogue Seriously' The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union*, Jean Monnet Working Paper, 12/07, available at http://www.jeanmonnetprogram.org/papers/07/071201.html.

[104] Corte Costituzionale, ordinanza n.536/1995, available at www.cortecostituzionale.it.

[105] Corte Costituzionale, ordinanza n. 319/1996, available at www.cortecostituzionale.it.

[106] Corte Costituzionale, sentenza n. 113/1985, available at www.cortecostituzionale.it.

[107] Corte Costituzionale, sentenza n. 389/1989, available at www.cortecostituzionale.it.

[108] Corte Costituzionale, ordinanza n. 536/1995, available at www.cortecostituzionale.it.

[109] Corte Costituzionale, ordinanza n. 165/2004, available at www.cortecostituzionale.it.

[110] Corte Costituzionale, ordinanza n. 165/2004, available at www.cortecostituzionale.it.

orientation to accept questions concerning *de facto* the contrast between EC law and national legislative acts (although dressed as interpretative questions of EC law). Thanks to the dual preliminarity, the Italian Court allows the ECJ to decide whether or not to challenge the risk of a jurisdictional 'clash'. On the other hand it is perhaps possible to read the *Berlusconi case* as an attempt to avoid such a danger and as a chance to show the EC system ripeness for the protection of fundamental rights.

Having a look at these hidden techniques it is possible to notice a progressive approach between the Courts (national and supranational) through non-orthodox ways.

The ECJ has sometimes reacted strongly to such attempts by denying the possibility of the Court to refuse the preliminary ruling; by denying the possibility that Italian acts contrasting with EC law be considered valid; lastly by denying the possibility to build some ultimate barriers (even though of constitutional degree) against the penetration of EC law.

In other cases the ECJ approached the Constitutional Courts thus showing the ripeness of its legal system (the recognition of the fundamental rights in *Nold*,[111] *Stauder*,[112] *Omega*[113]) in an attempt to gain the trust of the Constitutional Courts. Such an alternation of soft (persuasion) and hard (primacy without exceptions) means in the ECJ activity confirms the equilibrium between the two forces as already summarized: constitutional tolerance and evolving dynamism. In ECJ case law it is not possible to simplify this scheme with chronological distinction (as the closeness of decisions which are so different proves): an 'activist' first stage and a 'persuasive' second stage. From the national point of view, the Constitutional Courts try to defend their jurisdiction and prerogatives by inventing complicated mechanisms (dual preliminarity; *erga omnes* effects of the interpretative judgments; disapplication vs. non application; counter-limits) in order to balance the rationale of the jurisdictional dialogue and the rationale of the constitutional identity. The result of this interlacement is a situation of obliging instability characterized by a *de facto* synergy despite formal and rhetorical call for contrast. As Panunzio[114] said the counter-limits represent an instrument to force the courts to communicate, they are a 'gun on the table' which induces the jurisdictional actors to compare their visions. As we said, a very interesting clarification about counter-limits is contained in *Carlsen*:[115] if there is doubt about the consistency of the EC act with the Constitution, the Constitutional Courts could raise the question by asking the ECJ to clarify the exact meaning of the norm. If the ECJ did not convince them of the compatibility, they could 'apply' the counter-limits

[111] Judgment of 14 May 1974 in *Case 4/73, Nold KG v. Commission*, [1973] ECR 491.
[112] Judgment of 24 June 1969 in *Case 29/69, Stauder v. City of Ulm*, [1969] ECR 419.
[113] Judgment of 14 October 2004 in *Case 36/02, Omega*, [2004] ECR I-9609.
[114] S. Panunzio, *I diritti fondamentali e le Corti in Europa*, *in* S. P. Panunzio (Ed.), I diritti fondamentali e le Corti in Europa 104 (2005).
[115] Højesteret, *supra* note 69.

theory.[116] Such a vision demonstrates that the Constitutional Courts have the last word even though they have accepted the preliminary ruling.

H. The Second-Level Strategy: the Constitutional Actors of Member States as Interlocutors. A Case Study in the Field of Discrimination Against Sexual Minorities

In relation to the Member States' possible reactions, the ECJ has increased sensitivity towards the limits of its judicial activism. In particular the Court has always been attentive to the potential impact of its decisions on the national legal, political and social orders of the Member States.

One of the defining parameters in this effect-oriented analysis seems to be the so-called majoritarian activist approach,[117] according to which, among the different possible solutions of a case, the European judges are going to choose the final ruling which is likely to meet with the highest degree of consensus in the majority of the Member States.

By analysing in this perspective the '(European) law in action', it is very common to face the following question: why should a couple of cases that are very similar in their factual and/or legal background be decided in an opposite, thus almost schizophrenic, way by the Court of Justice?

The key to the apparent enigma is found by reflecting upon the impact that a decision can have on the national legal systems by the application of the majoritarian activism approach, as will be shown by the following case law analysis of two decisions in the field of the protection of sexual minorities.

I. P v. S and Grant Cases: 'the right of freedom and dignity' vs 'the equal misery'?

At the time of the founding Treaty, the existence of sexual minorities was hardly conceivable. The equal treatment directive,[118] in introducing the principle of equality, refers to the principle of equal treatment for men and women, but was not intended to take into consideration discrimination on the ground of sex related to transsexual or homosexual issues.[119]

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[116] G. F. Ferrari, *Rapporti tra giudici costituzionli d'Europa e Corti europee: dialogo o duplice monologo?*, *in* G. F. Ferrari (Ed.), Corti nazionali e Corti europee, at VI *et seq*., XVII. (2007).

[117] Maduro identifies the same judicial approach in the different field of European economic constitution. *See* M. P. Maduro, We, the Court. The European Court of justice and Economic Constitution 72-78 (1998).

[118] Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40.

[119] A. Campbell & H. Lardy, *Discrimination Against Transsexuals in Employment*, 21 Eur. L. Rev. 412, at 413 (1996).

I. Factual Background and Novelty of the Legal Situation

1. P v. S

The Court had to decide whether the principle of equal treatment between men and women, contained in Directive 76/207, also applied to transsexuals or, in other words, if discrimination against transsexuals fell within the scope of sex discrimination.

The applicant in the main proceedings was dismissed from his employment following his decision to undergo gender reassignment. The question referred to the Court was whether the equal treatment directive precludes dismissal of a transsexual for reasons related to gender reassignment.

2. Grant

The Court had to decide whether discrimination on the grounds of sexual orientation fell within the scope of sex discrimination. In this case, the applicant, a female lesbian employee, argued that she was the victim of sex discrimination because she was refused certain travel concessions by her employer, which had been available to her predecessor for his cohabitant of the opposite sex on the grounds that her cohabitant was of the same sex.

II. P v. S. versus Grant. A Combined Motive Analysis: Why an Antithetical Approach for Two Similar Cases?

It would not be possible even to attempt answering this question if it were not to be recalled what has been written above about the peculiar position of ECJ in the European legal order and, in particular, about the Court's exigency to weigh its decision's effects in relation to their degree of 'acceptability' for the political bodies of the Member States. Keeping in mind these peculiarities of the European legal system, it is possible to identify some factors which can help us to understand the reasons for the apparently schizophrenic approach of the Court.

First of all, there is an important difference in the 'challenge' which transsexuals offer to social norms compared with lesbian and gay men. As it was brilliantly underlined:

> transsexuals effectively ask to be treated as the woman (or man) that they consider themselves to be, and whose external physical features they effectively possess after surgery and hormonal treatment. They move from belonging to one sex to the other but do not call into dispute the social roles and the expectations imposed on men or women as such. By contrast, for many people lesbians and gay men offer a more fundamental challenge to the social meaning assigned to what it is to be a 'woman' or a 'man' precisely because they do not wish in any way to be less of a woman or man by reason of their sexual orientation.[120]

Secondly, transsexuals formed in Europe, at the moment of the Court's ruling, a small group, whose number AG Tesauro tried to quantify: "One male every

[120] L. Flynn, *Case Note: P. v. S. and Cornwall CC*, 34 CMLR 375, at 381 (1997).

30,000 and one female every 100,000 have the intention of changing sex by surgery." In the same period of reference, the number of homosexuals in Europe, could have been calculated as around 35 millions.[121]

It is self-evident that the acknowledgement of rights to homosexual couples would have had much worse financial repercussions for the Member States than those caused by the issue regarding the rights of transsexual and, consequently, it would have been less understood by the same States.[122]

Furthermore, the Court clearly underlined, in the light of the majoritarian activism approach described above as the main parameter in the hard cases, that "in the present state of E.C. law, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex."[123]

While it is true, as AG Elmer underlined, that the prohibition of discriminations on the ground of sex must be kept free from the moral conceptions present in the Member States, it is, however, also true that the duty of the Court is also that of considering the degree of consensus that a decision may obtain in relation to the socio-political context of the Member States in order not to abuse their constitutional tolerance.

In light of these factors, we should wonder how the Member States would have reacted if in *Grant* the Court had decided that sexual orientation fell within the bounds of sex discrimination? Would this decision have been accepted or acceptable? Would it have remained within the boundaries of judicial function, albeit one with a high degree of creativity, or would the Court have assumed the role of the legislator?

The Court gave a reply which was as concise as it was peremptory to these questions: "In those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position."[124]

There is another element in the Court's decision that is helpful to understand why the judicial outcome was due to deference of the Member States. At the end of its judgment in Grant,[125] the ECJ made an express reference to Art. 13,[126] introduced by Amsterdam Treaty, which allows the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.

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[121] AG Conclusions, para. 42. Judgment of 30 April 1996, in *Case 13/94, P v. S and Cornwall County Council*, [1996] ECR I-2143.

[122] *See also* Judgment of 29 April 2004 in *Case 117/01 K.B. / National Health Service Pensions Agency and Secretary of State for Health*, [2004] ECR 541 and Judgment of 31 May 2001 in *Case 122/99* and *125/99, D and Suède v. Council*, [2001] ECR 4319. For a recent comment on the ECJ's case law related to sex discrimination *see*: C. Costello & G. Davies, *The Case Law of the Court of Justice in the Field of Sex Equality Since 2000*, 43 CMLR 1567 (2006).

[123] Grant case, *supra* note 32, para.35.

[124] *Id*., para. 36.

[125] *Id*., para. 48.

[126] On the value and the challenges of the new Article 13 in the context of the principle of equality, *see* L. Flynn, *The Implications of Article 13 After Amsterdam: Will Some Forms of Discrimination Be More Equal than Others?*, 36 CMLR 1127 (1999).

It should be noted that, at the time the Court made its decision in *Grant*, the Amsterdam Treaty had not yet come into force. Thus, Art. 13 did not at this stage have any legal force. In order to understand the real value of the *Grant* decision, we must ask why the Court saw the need to mention the fact of its adoption.

It can be explained by underlining, in the light of the characteristics of the principle of evolving dynamism as described above, that just as legislative inertia and European democratic failings are good reasons for judicial activism, by contrast, "when democracy advances and politics assert its claims, judges are bound to take a pace back."[127]

This was exactly what the Court did in *Grant*: a step back as a sign of due deference to the choice of the Member States to take appropriate action by legislative measures, once the need to combat the discrimination on the sexual oriented had been recognized by the legislative (even if not representative) power of the European Union.

In this context, if the Court in Grant had interpreted the existing law in such a way to include sexual orientation discrimination, it would have been acting in defiance of the Member States joining the Council of European union. The question remains the same: was that acceptable?

At the end of the motive analysis, it is possible to argue that if, on the one hand, the influence of the principle of constitutional tolerance on the judicial approach of the Court can be appreciated in a 'vertical dimension' connecting the European Community with the Members States' legal orders, and on the other hand, the principle of evolving dynamism expresses its meaning in a 'horizontal dimension', through a process of direct proportionality between activism of the ECJ and the inertia of the European constitutional legislator.

J. Final Remarks

In this paper we have tried to explain why the idea of a universal global judicial law does not suit the peculiarity of the EU experience. On the one hand, in fact, by using the formula 'global common law', there is a risk of not understanding what exactly real common law is; on the other hand the distinction between oral and written sources does not perfectly correspond to the distinction between legislative and non legislative sources of law[128] In Italy Gorla[129] demonstrated that the tribunal-made law dating back to the 16th-18th centuries was a laboratory for many common lawyers' instruments (for example dissenting opinion); at the same time many other cases of judge-made law exist. But do they all *stricto sensu* belong to the common law experience?

Above all, and this was the *fil rouge* of the paper, we tried to point out that the peculiarity of the European judiciary system reflects the 'secret'[130] of EC law: the mixture between the rationale of integration and the respect for diversity. This

[127] Mancini, *supra* note 25, at 613.
[128] *See* A. Pizzorusso, Sistemi giuridici comparati 262-263 (1998).
[129] *See*, *for example*, G. Gorla, Diritto comparato e diritto comune europeo 263-301 (1981).
[130] In Bagehot's meaning: W. Bagehot, The English Constitution 8 (2001).

idea finds confirmation in the dual force moving EJC behaviour as described in this paper: constitutional tolerance and evolving dynamism. When reading apparently contrasting decisions in the light of constitutional tolerance and the evolving dynamism, it is possible to understand the rationale of the approach of the Court in last few years. The ECJ is not a Supreme Court,[131] positioned at the top of a judicial hierarchy, and it has demonstrated not to want to appear as such. Cooperation but not subordination: this is the mirror of constitutional tolerance and the rationale of the persuasive techniques used by the ECJ.

Another limitation of the contested approach rests in the presumed connection between the fragmentation of sovereignty and the weakness of the constitutional discourse in the postmodern era.

The idea of contract-based law is linked to the crisis of the pillars of constitutional thought: the State and sovereignty. The impact of such a crisis on the reasons of constitutional law would be evident: the Constitutions could be imagined only in a procedural/non-substantive way.[132] According to Volpe,[133] the Constitutions (which would belong to the space of 'meta-narrations'), conceived as the foundation of social coexistence, are involved in the postmodern crisis. In this context, the Constitutions would be conceivable only as 'protocols', i.e. general procedural and organizational rules, functional to the spread of technology. Against this background, the constitutional discourse could not be based on strong and substantive values or fundamental goals and the only dimension for the constitutional form would be the dimension of the 'achievement-constitution'.[134]

We disagree with this orientation and argue that the emergence of flexible criteria and approaches – seen as a proof of the decline of substantive constitutionalism by those postmodern thinkers – can be read, instead, within an axiological oriented perspective.

For example, the techniques used by the ECJ and the Constitutional Courts in order to communicate (avoiding the preliminary ruling) are flexible but do not lack axiological premises; on the contrary, we argue that this judicial activity has been useful in order to empower the *acquis communautaire*. This example contrasts with the idea of global common law as a mere contract-based law as described by Ferrarese.[135]

The idea of the constitutional dialogue endorsed in this paper is a value-based one: moreover, this axiological dimension seems to precede the convergence of the 'parties' of the 'contract'.

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[131] As Jacobs pointed out. *See* F. G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: the European Court of Justice*, 38 Texas International Law journal 547 (2003).

[132] Ferrarese, *supra* note 5, at 112 *et seq*.

[133] G. Volpe, Il costituzionalismo del Novecento 258 (2000).

[134] C. Mortati, Le forme di governo 393 (1973): "With this definition (costituzioni "bilancio") Mortati explained the periodical constitutional reform typical of socialist countries owing to the Marxist doctrine according to which a constitutional reform marks necessary and progressive adjustment of the formal constitution to the achievements reached in the social order." Carrozza, *supra* note 8, at 176.

[135] Ferrarese, *supra* note 5, at 112 *et seq*.

The bargaining, in fact, is limited and there are clear substantive premises (recognized by supranational/national levels and usually linked to the written dimension of the Constitutional Charters) which are not negotiable: these premises are the counter-limits, which represent both the 'gun' on the table which forces the actors to have a dialogue and the ultimate barriers beyond which the dialogue cannot go on.

In this sense we can conclude that the presence of this non-negotiable space is the best proof of the existence of a 'strong' European constitutional law and of the possibility of a strong and substantive supranational Constitution despite the failure of the European Convention.