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CONSTITUTIONAL EMPATHY AND JUDICIAL DIALOGUE IN THE EUROPEAN UNION

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1. INTRODUCTION

Constitutional law in Europe is a composite and a pluralistic construct. The development thereof entails a cooperative effort, which must be mainly designed by courts of justice. This paper focuses on judicial dialogue in the European Union, and particularly on the constitutional conversation between the European Court of Justice and Member States constitutional or supreme courts. Firstly, I discuss the notion of constitutional empathy. Secondly, I point out some of the consequences stemming therefrom regarding the two main dimensions of judicial dialogue in Europe: on the one hand, a formalized dialogue through preliminary rulings submitted by domestic courts to the Court of Justice; on the other, a non-formalized dialogue developed as courts adapt their decisions to other courts' case law.

In a context of legal pluralism empathy becomes a constitutional virtue. Legal interfaces governing intersystem relations among EU and national laws must be devised and implemented accordingly. This article explores some of the conclusions that might be drawn from this in the area of judicial dialogue. As for the formalized dialogue, analysing the structure of communication interfaces provides, on the one hand, a better understanding of the functions and rhetorical styles of references made by different national courts. On the other hand, the concept of constitutional empathy also allows for inferring rules of conduct in terms of drafting requests for preliminary rulings. With respect to non-formalized judicial dialogue, the paper argues that an empathetic design of legal interfaces might help national Constitutional or Supreme courts to improve the reception of driving forces that stem from EU law, both in their own case law and as regards EU law implementation by ordinary courts.

2. CONSTITUTIONAL EMPATHY

2.1. Pluralism and interfaces

The exercise of power in Europe is subject to a rationalization scheme that can be encapsulated in the notion of open constitutional pluralism. The purpose of this assertion is not to take a stance in the ongoing debate on the descriptive and normative strengths of the theory of legal pluralism. I neither want to side with any specific version of such theory, and let alone to provide an additional characterization of the model.[1] That is a complex matter and is beyond the scope of this work. I have more pragmatic intentions; this concept allows for synthetically putting forward the following two considerations.

On the one hand, EU law and Member States' legal orders work as different legal systems seeking to be grounded on their own basic norm, i.e. aspiring to autonomously lay down the validity criteria applicable to their rules.[2] This common claim results in particularly

[1] See G. de Búrca y J. H. H. Weiler (eds.), *The worlds of European Constitutionalism* (Cambridge University Press 2012); M. Avbelj y J. Komarék (eds.), *Constitutional pluralism in the European Union and beyond* (Hart 2012); K. Jaklic, *Constitutional pluralism in the EU* (Oxford University Press 2013); G. Martinico, *The Tangled Complexity of the EU Constitutional Process* (Routledge 2013).
[2] M. P. Maduro, 'Contrapunctual law: Europe's constitutional pluralism in action', in N. Walker (ed.), *Sovereignty in transition* (Hart 2003) p. 501.

troublesome relationships between these legal systems. Indeed, the purpose of the abovementioned theory of constitutional pluralism is to explain and reduce such complexity.[3]

On the other hand, EU law and national law are open legal systems, at least from two perspectives.[4] First, these are interconnected legal systems, meaning that each of them includes elements coming from the other. Second, based on their own criteria, both systems seek to implement a legal rationalization of those external legal references, as well as of the incorporation process itself. These criteria, which work as rules governing the applicability of other rules,[5] have a bearing on any external references.

Just like the operating system of a computer enables our interaction therewith, or a switch allows us to handle an electric circuit, relationships between legal systems revolve around interfaces, which in this case are of a virtual nature. As opposed to what happens in the previous examples, and even in relationships amongst other, non-autonomous legal systems (e. g., traditional federal-state law interactions), EU law and national law have a distinct relationship because the communication process does not revolve around common instruments. Conversely, each of these two systems has its own catalogue of interfaces or, in other words, they both have their own intersystem communication instruments.

This aspect can be easily verified. In EU law, constitutional traditions common to the Member States[6] and, more recently, the notion of national identity,[7] amongst other mechanisms of the kind, channel the incorporation into supranational law of legal norms stemming from national constitutions. The constitutional regimes of Member States also contain communication interfaces. For instance, the Basic Law for the Federal Republic of Germany provides that the Federation may transfer sovereign powers to the European Union, although it also sets out certain limits to this transfer of powers.[8] Furthermore, in Italy, certain breaches of EU law are a constitutional matter from an internal perspective[9]. Spanish constitutional law also lays down various instruments meant to fulfil this function. We can highlight the following: firstly, the interpretation guideline according to which fundamental rights shall be construed in accordance with international treaties and agreements ratified by Spain;[10] secondly, the empowerment to conclude treaties pursuant to which powers stemming from the Constitution shall be transferred to an

[3] N. Walker, 'The idea of Constitutional Pluralism', 65 *The Modern Law Review* (2002) p. 317.
[4] G. Martinico, 'Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance', 35 *Yearbook of European Law* (2016) p. 318. Regarding constitutional openness in the realm of fundamental rights, see A. Saiz Arnaiz, *La apertura constitucional al Derecho internacional y europeo de los derechos humanos* [Constitutional Openness towards International and European Human Rights Law] (CEPC 1999).
[5] See J. L. Requejo Pagés, *Sistemas normativos, Constitución y ordenamiento. La Constitución como norma sobre la aplicación de normas* [Normative Systems, the Constitution and the Legal Order. The Constitution as a norm on the application of other norms] (McGraw-Hill 1995).
[6] Article 6(3) TEU.
[7] Article 4(2) TEU.
[8] Article 23(1) of the of the German Constitution.
[9] Article 117 of the Italian Constitution.
[10] Article 10(2) of the Spanish Constitution.

international organization or body.[11] Similarly, the right to an effective judicial remedy[12] renders constitutionally relevant certain misapplications of EU law.

2.2. Empathetic design

Assuming now a normative approach, we depart from the premise that when coming up with these instruments not only the own internal constitutional requirements must be taken into account, but also demands coming from the other system.[13] In other words, the actors involved in the development of relationships amongst the various systems must exercise their powers with a certain degree of empathy, i.e. with the necessary open-mindedness towards institutional demands from the remaining actors.[14] In a constitutional pluralist system such as the aforementioned, the empathy guideline requires, at least, that interfaces be compatible, so that communication processes can take place without any additional conflicts caused by a flawed design of the relevant instrument. This assertion has given rise to various scholarly works on constitutional pluralism in the European Union.[15] However, aside from its connection with the latter or other theoretical approaches,[16] the abovementioned criterion can also be grounded on the idea that a significant constitutional function is to promote the system's overall consistency, whilst reducing any regulatory conflicts and enabling the simultaneous exercise of powers by the competent bodies and institutions.

Although these instruments are usually tied to positive law, their scope is often determined by case law doctrine resulting from its interpretation. The examples provide abundant proof of this. Whilst the Court of Justice must come up with the meaning and scope of the notion of Member States' 'national identity', it is equally true that the history of the relationship between both systems also results from national case law doctrines aimed at setting the boundaries of the integration process. The well-known *Gauweiler* case, wherein the Court of Justice has dismissed an interpretation of Article 4(2) TEU just like the one provided by the German Federal Constitutional Court,[17] regarding

[11] Article 93 of the Spanish Constitution.
[12] Article 24 of the Spanish Constitution.
[13] G. de Búrca, 'The ECJ and the international legal order: a re-evaluation', in G. de Búrca y J. H. H. Weiler (eds.), *supra* n. 1, p. 105 at 136 and 281.
[14] See, for instance, M. P. Maduro, *supra* n. 2, p. 526. In Spain, this point has been developed specifically regarding judicial dialogue but, as it has been noticed, it has broader implications. See. P. Martín Rodríguez, 'Crónica de una muerte anunciada. Comentario a la Sentencia del Tribunal de Justicia (Gran Sala), de 26 de febrero de 2013, Stefano Melloni, C-399/11', 30 *Revista General de Derecho Europeo* (2013) p. 25; R. Bustos Gisbert, 'XV proposiciones generales para una teoría de los diálogos judiciales', 32 *Revista Española de Derecho Constitucional* (2012) p. 13; J. A. Xiol Rios, 'El diálogo judicial', in *Tribunal Constitucional y diálogo entre tribunales: XVIII Jornadas de la Asociación de Letrados del Tribunal Constitucional* [Constitutional Court and Judicial Dialogue] (CEPC 2013) p. 11.
[15] For a recent discussion of different views, see K. Tuori, *European Constitutionalism* (Cambridge Uniersity Press 2015) p. 102; and L. Halleskov Storgaard, 'Composing Europe's fundamental rights area: A case for discursive pluralism', 17 *Cambridge Journal of European Legal Studies* (2015) pp. 210.
[16] For instance, the doctrine of the German Federal Constitutional Court on the 'cordiality' or 'openness' with respect to European law (*Europarechtsfreundlichkeit*). See the Judgment of 30 September 2009, BvE 2/08, *Lisbon*. It is a principle implicitly contained in the Preamble of the German Federal Constitution whose meaning, nevertheless, may not be as closely aligned with the notion of constitutional empathy as its name might suggest. For a full review, see D. Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze* [Cordiality towards International and European Law as a Constitutional Principle] (Mohr Siebeck 2013).
[17] ECJ 16 June 2015, Case C-62/14, *Gauweiler*.

identity protection, shows how interfaces provided for by each individual system in order to govern the same communication process may not match.[18]

When it comes to structuring the relationships between EU law and national legal systems, case law and scholars have mainly focused on identifying the relevant red lines, i.e. the boundaries that cannot be crossed, under the threat of rendering the external reference provisions inapplicable,[19] or even invalid.[20] Although this is an extraordinarily important issue, the approach thereto has pushed into the background the need, for those actors who come up with communication instruments, to design them in accordance with the abovementioned functionality requirement. Since conflict is inevitable within a constitutional framework such as that of the European Union,[21] the aim must not be to remove conflict altogether but to design the relevant system's communication instruments seeking to mitigate conflict as much as possible, in light of the system demands coming from the other legal order. In sum, drawing red lines does not suffice; appropriate interfaces must also be designed. This task must be carried out by those actors who are called on for amending and interpreting the Constitution.

The notion of constitutional empathy is useful because it allows for drawing significant conclusions in various areas of analysis. One of these relates to the constitutional conversation or engagement between the European Court of Justice and Member States' Constitutional or Supreme courts. This institutional communication process unfolds in two different scenarios. The first one is the formalized judicial dialogue initiated by Member States' judicial bodies by means of requests for preliminary rulings, subsequently completed by the Court of Justice through decisions that put an end to these judicial proceedings. The second one amounts to the non-formalized judicial dialogue, which materializes in the own (internal) case law in light of external case law. As it will be duly justified below, the notion of constitutional empathy facilitates understanding and provides a driving force to enhance these two dimensions of judicial dialogue in Europe.

3. FORMALIZED JUDICIAL DIALOGUE

There are two main points put forward herein regarding the use of preliminary rulings: the first one, of a descriptive nature, relates to the reasons for the various uses of this instrument by different Constitutional or Supreme courts; the second one, of a normative nature, suggests these Constitutional or Supreme courts to apply a specific criterion concerning referral of preliminary rulings.

3.1. Different styles

[18] Cfr. the Opinion of Advocate General Pedro Cruz Villalón on 14 January 2015, Case C-62/14, *Gauweiler*, para 59; and German Federal Constitutional Court (hereinafter BVerfG), Order 14 January 2014, 2 BvE 13/13, *Gauweiler*, para 29.
[19] See Tribunal Constitutional español (hereinafter TC), Opinion 13 December 2004, No 1/2004, *EU Constitutional Treaty*; and BVerfG Order 15 December 2015, 2 BvR 2735/14, *European Arrest Warrant*.
[20] This is the bottom-line of the EU law *ultra vires* doctrine in BVerfG Judgment 6 July 2010, 2 BvR 2661/06, *Honeywell*.
[21] G. Martinico, 'The 'polemical' spirit of European constitutional law: On the importance of conflicts in EU law', 16 *German Law Journal* (2015) p. 1343.

Member States' Constitutional or Supreme courts have to comply with a twofold requirement. On the one hand, as judicial bodies, they are European judges bound by EU law, and particularly by the principles of direct effect, primacy and loyal cooperation. On the other, as hierarchically superior national bodies, they must preserve the constitutional identity of the relevant Member State, as well as the integrity of the internal legal framework that legitimates the transfer of sovereign powers to the European Union and the internal enforcement of the supranational legal system.

Although these judicial bodies endure these tension in all EU Member States, not all of them deal with it in the same way.[22] Not only because they apply different legal doctrines and dogmatic instruments, but also because they often differ in terms of style and rhetorical attitudes.[23] Amongst the Constitutional or Supreme courts that have referred for a preliminary ruling one can find requests whereby the national body raises a genuine issue, and subsequently requests assistance from the Court of Justice in order to solve the legal problem at stake. However, other judicial bodies have sometimes requested preliminary rulings by rigidly putting forward domestic constitutional requirements and mainly calling upon the Court of Justice to confirm a predetermined response. The reasons for such differences can vary, and go from the specific significance of the issue for the internal constitutional regime, to the kind of EU provision at stake,[24] including the rhetorical uses that have traditionally shaped each jurisdiction.[25]

An additional reason will be examined: the different manner in which Constitutional or Supreme courts have managed to shape the legal interfaces for the relevant intersystem communication process. Differently put: there are certain ways to design such interfaces that enable cooperative communication, whilst others encourage confrontational communication. In order to further illustrate this idea let's analyse the example of judicial dialogue in fundamental rights. Assuming a widely spread classification,[26] Member States' constitutional legal systems can shape the relationships between the European and the internal fundamental rights protection systems in accordance with two models.

Under the separation model, the impact of EU fundamental rights on the internal or domestic constitutional framework shows the following distinct features. On the one hand, the subject of internal judicial review is limited as a result of the decision to dismiss (on a general basis, and except for the application of doctrines such as that of the counter-

[22] See M. Cartabia, 'Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling', 16 *German Law Journal* (2015) p. 1791.
[23] M. Claes, 'Luxemburg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure', 16 *German Law Journal* (2015) p. 1340; S. Sciarra and G. Nicastro, 'A new conversation: Preliminary References from the Italian Constitutional Court', 23 *Maastricht Journal of European and Comparative Law* (2016) p. 202.
[24] S. Sciarra and G. Nicastro, *supra* n. 23, p. 202.
[25] A somewhat different issue relates to the more or less frequent use of the preliminary reference procedure. For an empirical account of the reasons that explain the differences among National courts, see A. Dyevre, and N. Lampach, *The Choice for Europe: Judicial Behaviour and Legal Integration in the European Union* (March 2, 2017), ssrn.com/abstract=2926496 (13 April 2017).
[26] D. Thym, 'Separation vs. Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice', 9 *European Constitutional Law Review* (2013), p. 391; L. Besselink, 'Parameters of Constitutional Conflict after *Melloni*', 39 *European Law Review* (2014) p. 531; X. Arzoz, *La tutela de los derechos fundamentales por el Tribunal Constitucional* [Fundamental Rights Protection by the Constitutional Court] (INAP 2015).

limits, or *controlomitti* doctrine,[27] the identity control[28] or the exceptions to the principle of primacy)[29] the cases brought in situations completely determined by EU law. On the other hand, the control standard applied by the national constitutional court in internal situations remains unchanged, insofar as it is made up of criteria exclusively rooted in domestic law. In these cases the interface has a twofold applicability: EU law applies to European cases and domestic or internal law to national cases.[30]

Under the integration model, the impact of European fundamental rights on the national constitutional jurisdiction works in the opposite way. On the one hand, the subject of domestic constitutional jurisdiction remains unchanged, since cases brought before the courts in situations fully determined by EU law are also going to be admitted. On the other hand, the control standard applied by the national judicial body is not only made up of internal provisions on fundamental rights, but also of EU law provisions. The extent to which the control standard is modified may vary, depending on the decisions regarding certain matters. One of them is whether this integration is implemented through the direct enforcement of EU law by the judicial body, ultimately taking prevalence over domestic law in case of conflict,[31] or through the interpretative effects of EU law on domestic law.[32] Another significant issue in this regard is whether the integration of EU law within the national control standard occurs only when one system and the other award the same degree of protection to the right at stake, as it is the case in Austria,[33] or if it also occurs if there are different levels of protection, thus triggering the need for a reciprocal adjustment, as it happens in Spain.[34]

These approaches do not only differ in terms of the content of the intersystem relationship built through them, but also in terms of the style of the constitutional dialogue driven thereby. The separation model ensures as a rule strict lack of communication between the given Member State's Constitutional or Supreme Court and the Court of Justice, since the first shall only request a preliminary ruling to the latter in case of an already serious conflict. Differently put: this interface only enables communication when the red line has been crossed – or it is about to be. In such cases, the conflict can already be very serious, thus leaving little scope for reciprocal flexibility and adaptation. Accordingly, formalized

[27] Italian Constitutional Court (hereinafter Corte cost.), Judgment 18 December 1973, No 183/1973, *Frontini*.
[28] BVerfG Judgment 30 June 2009, 2 BvE 2/08**,** *Lisbon*; Order 15 December 2015, 2 BvR 2735/14, *European Arrest Warrant*.
[29] TC Opinion 1 July 2004, No 1/2004, *EU Constitutional Treaty*.
[30] BVerfG Judgment 22 October 1986, 2 BvR 197/83, *Solange II*.
[31] This has been established regarding national ordinary courts by both the Spanish and the German Federal Constitutional Courts. See TC Opinion 1 July 2004, No 1/2004, *EU Constitutional Treaty*, and BVerfG Judgment 22 October 1986, 2 BvR 197/83, *Solange II*.
[32] As the Spanish Constitutional Court has declared regarding the interpretative influence of EU law over its own doctrine, via Article 10(2) of the Spanish Constitution, in contrast with the direct influence over ordinary courts, via Article 93 of the Spanish Constitution. See TC Judgment 13 February 2014, No 26/2014, *Melloni.*
[33] See Austrian Constitutional Court (hereinafter VfGH) Judgment 13 March 2012, No 19.632/2012, *EU Charter of Fundamental Rights*; A. Orator, 'The Decisions of the Austrian Constitutional Court on the EU of Fundamental Rights', 16 *German Law Journal* (2015) p. 1433.
[34] See TC Judgment 13 February 2014, No 26/2014, *Melloni*; A. Torres Pérez, 'Melloni in three acts: from dialogue to monologue', 10 *European Constitutional Law Review* (2014) p. 308.

dialogue will be less common, and the incentives to refer for a preliminary ruling assertively will increase.[35]

Conversely, the integration model leads to a more ordinary cooperation relationship between domestic courts and the European Court of Justice, inasmuch as the criterion of the latter is significant for the first before the conflict occurs. The case law of the Court of Justice on the Charter of Fundamental Rights of the EU or on the general principles of European Union law can be very useful for Member States' Constitutional or Supreme courts that have come up with a communication interface in line with this model. It can be useful as to ascertain the interpretative effects of EU law on the national fundamental right, or rather to acknowledge the terms under which the standard set out in the relevant domestic provision must adapt to the EU law standard. Within this framework, getting in touch with Luxembourg can be useful from a domestic or internal standpoint, not only to verify if the red line has been crossed, but also to learn the driving forces that stem from EU law and help in transforming national constitutional law. Interestingly enough, divergences or consonances in the respective narratives are not crucial in this respect.[36] In sum, the integration model furthers a kind of formalized judicial dialogue about fundamental rights in which referrals become more open, more flexible and more cooperative.[37]

3.2. Help Luxemburg to behave appropriately

The second thesis has a normative nature. Within the development of the formalized judicial dialogue implemented through preliminary rulings, Member States' Constitutional or Supreme courts seek top-down driving forces, i.e. criteria from the Court of Justice that may be relevant for the exercise of their own jurisdiction. Although this is absolutely essential, national bodies should also help in developing and perfecting EU law.[38]

Going back to the fundamental rights example, Member States' Constitutional or Supreme courts must help the Court of Justice improve its doctrine on the Charter of Fundamental Rights and the general principles of EU law. Within a multilevel context of fundamental rights protection, one of the main duties of domestic courts is to help the European Court of Justice to act as a true Court of Fundamental Rights in the European Union. This mission is particularly significant if we take into account the following two factors. Firstly, the Charter of Fundamental Rights requires its top judicial authority to tackle problems that it had never had to face in the past. The second factor is the inertia that defines the Court of Justice since the times when it was not concerned with fundamental rights and, even once they began to fall within its scope, when they were

[35] Regarding the identity control, see BVerfG Order 15 December 2015, 2 BvR 2735/14, *European Arrest Warrant*. The same is valid *mutatis mutandis* with respect to the *ultra vires* control. See BVerfG Order 14 de January 2014, 2 BvE 13/13, *Gauweiler*.
[36] L. Arroyo Jiménez, *Empatía constitucional. Derecho de la Unión Europea y Constitución Española* [Constitutional Empathy. EU Law and the Spanish Constitution] (Marcial Pons 2016) p. 70. For an interpretation of Article 4(2) TEU as a right to constitutional narrative, see P. P. Linden-Retek, 'Cosmopolitan law and time: Toward a theory of constitutionalism and solidarity in transition', 4 *Global Constitutionalism* (2015) p. 156.
[37] See TC Judgment 13 February 2014, No 26/2014, *Melloni*. See L. Arroyo Jiménez, *supra* n. 36, p. 62.
[38] M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 5 *European Constitutional Law Review* (2009) p. 5.

merely an instrument in the service of market integration. The involvement of national judges can be crucial to help the Court of Justice in facing this twofold challenge.

Within the domain of fundamental rights protection, this requirement becomes self-evident, but it is not the only domain where this happens. Domestic courts, and particularly Member States' Constitutional or Supreme courts, must help through their preliminary rulings to improve the Court of Justice doctrine regarding other areas of EU law with constitutional relevance, such as the clarification of the power allocation system, the relationships amongst the various kinds of rules and acts, or the content of general legal principles tied to EU administrative law.

The very structure of the European Union's procedural system and the minimalism of the Court of Justice's performance[39] entail that the development of its case law doctrine should require the intervention of national bodies, and explain why the quality of the latter has an impact on the quality of the first. Departing from this assertion, one could infer a road map for Member States' Constitutional or Supreme courts. In the first place, they must submit their requests for preliminary rulings regarding specific aspects of EU law, and in doing so, they must look into the constitutional dimension that such cases may have. Secondly, these referrals must not only contain questions, alongside the relevant factual background and the applicable domestic provisions; in this kind of referrals, constitutional issues must be thoroughly described. Thirdly, as far as possible the matters raised must suggest alternatives and must include an assessment of their advantages and disadvantages, not only from a domestic law perspective, but also from an EU law standpoint. In sum, an empathetic reference must not only be made taking into account the constitutional and system demands of domestic law, but it must also have regard to demands stemming from EU law.

Two cases can further clarify this argument. The first one is the preliminary ruling submitted by the Spanish Constitutional Court in the *Melloni* case,[40] which resulted in a judgment delivered by the Court of Justice in 2013.[41] Although the case concerned the interpretation of a secondary law provision, the 2009 Framework Decision on the European arrest warrant, the Constitutional Court also raised two questions with constitutional relevance. The first one related to the limitation of the right to an effective judicial remedy and to a fair trial laid down in Article 47 of the Charter regarding a dimension that had not been tackled by the Court of Justice and, depending on its outcome, to the validity of a provision of the Framework Decision. The second one related to the interpretation of Article 53 of the Charter, and thus to how the EU and national fundamental rights protection systems should interrelate. Concerning this second matter, in particular, the requesting body did not merely suggest the Court of Justice to perform an interpretation in line with its own institutional interests promoting the stability of its own case law doctrine. Conversely, the Spanish Constitutional Court laid down three possible interpretation alternatives concerning Article 53 of the Charter, discussing the respective advantages and disadvantages of such alternatives. Obviously, it did so from the domestic law perspective, but also from the standpoint of EU law. The Court of Justice

[39] D. Sarmiento, 'Half a Case at a Time. Dealing with Judicial Minimalism at the European Court of Justice', in M. Claes, M. de Visser, P. Popelier, C. van de Heyning (eds.), *Constitutional Conversations in Europe. Actors, Topics and Procedures* (Intersentia 2012) p. 13.
[40] TC 9 June 2011, No 86/2011, *Melloni*.
[41] ECJ 4 April 2013, Case C-399/11, *Melloni*.

finally chose one of these alternatives, and in doing so it further specified how the European and the national sets of fundamental rights should interact. Assessed in light of *Gauweiler*, *Melloni* reveals itself as a paradigm of co-operative referral and of empathetic use of the preliminary ruling procedure[42].

The second case is the recent preliminary ruling requested by the Italian Constitutional Court in the *Taricco* case. Within the context of a prior preliminary ruling referred by an Italian court, the Court of Justice had delivered a judgment in 2015 stating the following: (i) an Italian provision governing the limitation period in the context of pending criminal proceedings had the effect of neutralizing the temporal effect of an event interrupting the limitation period, which could render ineffective and non-dissuasive the counter-fraud measures set out by Italian law[43]; and (ii) national courts must give full effect to EU law, if need be by setting aside the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under European Union law.[44] The Italian Constitutional Court considers that if ordinary judges set aside these rules, certain significant constitutional principles regarding criminal law can be breached, such as non-retroactivity of criminal provisions and the *lex certa* principle. Thus, it has referred for a preliminary ruling basically urging the Court of Justice to reconsider its stance.[45]

In as much as it contains a visible threat to apply the counter-limits (*controlimitti*) doctrine, it has been rightly said that the reference in *Taricco* is reminiscent of Karlruhe's referral in *Gauweiler*.[46] Yet the most interesting aspect of this reference for a preliminary ruling is that the Constitutional Court does not simply explain why that criterion breaches the internal constitutional requirements and, particularly, the Member State's constitutional identity. It rather forces the Court of Justice to reassess the impact that its doctrine can have on the European constitutional standard and, particularly, on Article 49 of the Charter. The Italian Constitutional Court acknowledges that in the 2015 judgment the Court of Justice denied that its criterion breached this provision, but it rightly states that it was only from the perspective of the non-retroactivity principle and not from the standpoint of the *lex certa* principle.[47] In its view, giving judges the power to define, on a discretionary basis, a key element of criminal offences (as is the assessment of the limitation period) violates the European legality principle in its dimension of *lex certa*. It is true that the referring court provides Luxembourg with this interpretation seeking to bypass a conflict that could lead to the application of the counter-limits doctrine. It is also true that this matter probably should have been raised at the time by the judicial body that requested the first preliminary ruling and been examined by the European Court of Justice

[42] M. Dicosola, C. Fasone and I. Spigno, 'Forword: constitutional courts in the European Legal system', 16 *German Law Journal* (2015) p. 1327; M. Claes, *supra* n. 23, p. 1341.
[43] Article 325 TFEU.
[44] ECJ 8 September 2015, Case C-105/14, *Taricco*.
[45] Corte cost. Order 26 January 2017, No 24/2017, *Taricco*. See G. della Cananea, 'L'Italia e l'Europa nel caso Taricco', *Aperta Contrada*, 7 November 2016, www.apertacontrada.it/2016/11/07 (13 April 2017); F. Fabbrini and O. Pollicino, 'Constitutional identity in Italy: European integration as the fulfilment of the Constitution', EUI Working Papers, LAW 2017/06; D. Paris, 'Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco', 37 *Questions of International Law* (2017) p. 5; G. Rugge, 'The Italian Constitutional Court on Taricco: Unleashing the normative potential of 'national identity'?', 37 *Questions of International Law* (2017) p. 21.
[46] D. Paris, *supra* n. 45, at p. 6.
[47] Corte cost. Order 26 January 2017, No 24/2017, *Taricco*, para 9. See F. Fabbrini and O. Pollicino, *supra* n. 45, at p. 14.

itself. However, the Italian Constitutional Court is now giving the Court of Justice the chance to act like a real EU fundamental rights court, i.e. to improve the interpretation of the requirements imposed by the Charter on the EU and on Member States in order to define the substantive and procedural regime of criminal law. It is readily apparent that the referring court is here making virtue out of necessity, but this should not conceal that the former is a constitutional virtue.

4. NON-FORMALIZED JUDICIAL DIALOGUE

Judicial dialogue between Member States' Constitutional or Supreme courts and the Court of Justice can also take place through non-formalized mechanisms, i.e. by means of the mutual regard to each other's doctrine and the selective re-shaping of one's own case law doctrine based on the other's. [48] This non-formalized dimension is less dramatic than the one based on preliminary rulings. However, it definitely amounts to the ordinary channel of judicial dialogue in Europe. Below is an analysis of two of the scenarios under which it tends to play out, as well as of the part that constitutional empathy is called to play in them.

4.1. Thinking of oneself

The first scenario relates to the thoughtful adaptation of Member States' Constitutional or Supreme courts' case law to the requirements stemming from the Court of Justice with no preliminary rulings involved. The structure of the adaptation process is similar to the one through which the European Court of Human Rights' doctrine has been incorporated. On a general basis, the process is more or less open and transparent, depending on how thrilled is the national judicial body about the need to adapt its case law to the evolution of European courts' case law. The same happens regarding the setting of boundaries on the incorporation process, which are usually structured by differentiating the cases raised before national courts from those decided on by the Court of Justice. Furthermore, European courts' doctrine often becomes relevant at a national level in the context of internal conflicts amongst a given Member State's judicial bodies. These conflicts occur fairly often, on the one hand, between first instance courts and courts of appeal, and, on the other hand, between Constitutional and Supreme courts (in those countries where these roles are divided).

The embracing of the Court of Justice case law doctrine by Member States' Constitutional and Supreme courts can pose specific challenges in those cases where the latter's jurisdiction has been established on an objective basis. I am referring to those cases where admission is subject to whether the case shows certain general or objective relevance, aside from the interests of the appellant (which are, indeed, individual or subjective). The significance of the Court of Justice doctrine in these cases can be evidenced by the example of Spain, since both the Supreme Court and the Constitutional Court have been recently subject to a system of this kind. Other judicial bodies whose jurisdiction is also objectively established, both in Europe (the German constitutional complaint of fundamental rights protection before the Federal Constitutional Court) and outside of

[48] G. Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden Dialogue'', 21 *King's Law Journal* (2010) p. 257.

Europe (the writ of certiorari granted by the United States Supreme Court) show that it is not an isolated trend.

On the one hand, since the amendment of the Act on Contentious Administrative Jurisdiction, which entered into force in 2016, cassation appeals are governed by a discretionary admission system pursuant to which the Supreme Court may grant leave to appeal if it finds an objective interest for it to hear the claim ('objective cassation interest' or *interés casacional objetivo*).[49] Amongst the criteria allowed by the law in order to justify the admission, one can find certain standards which are closely tied to EU law: (i) the judgment under appeal interprets EU law provisions differently from other judicial bodies; (ii) regarding these provisions, it lays down a seriously damaging doctrine for the general interest; (iii) it addresses a case wherein the intervention of the Court of Justice through a preliminary ruling can still be required; and (iv) it construes or applies EU law in open contradiction with the Court of Justice case law. In these cases (among others) the Supreme Court may, if it sees fit, grant leave to appeal. While the third case is an open door to formalized judicial dialogue,[50] in the fourth case the Supreme Court may use the cassation appeal to incorporate the evolution of the Court of Justice case law whilst adapting its own case law accordingly.[51] The notion of objective cassation interest operates thus as a procedural legal interface.[52]

On the other hand, since the amendment of the Organic Act on the Constitutional Court, which entered into force in 2009, appeals on constitutional protection of fundamental rights are equally subject to a discretionary admission system under which the Constitutional Court may grant leave to appeal if they have 'special constitutional relevance' (*especial trascendencia constitucional*).[53] In its case-law over the last eight years, the Constitutional Court itself has expressly stated certain cases where the said requirement may be met.[54] Amongst them, one can find specific cases that relate to the adaptation of the Constitutional Court doctrine to the evolution of the Court of Justice case law. These are, in particular, those appeals for constitutional protection that give the Constitutional Court the chance to either further clarify or modify its doctrine as a result of a shift in the case law doctrine of the European Court of Human Rights and the European Court of Justice. In these instances, the Constitutional Court considers that, in addition to the individual or subjective interest the appeal may have for the appellant, it can grant leave to appeal having regard to the special constitutional relevance of the case at stake. Consequently, the case allows the Constitutional Court to adapt its doctrine to the European Court of Justice case law.[55]

4.2. Thinking the system over

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[49] Article 88 of the *Ley 29/1998 de la Jurisdicción Contencioso-Administrativa* [Act on Contentious Administrative Jurisdiction].
[50] See Spanish Supreme Court (hereinafter SC) Order 15 March 2017, No 102/2016.
[51] See SC Order 27 February 2017, No 27/2016.
[52] L. Arroyo Jiménez, *supra* n. 36, at p. 114 f.
[53] Article 53 of the *Ley Orgánica 2/1979, del Tribunal Constitucional* [Organic Act on the Constitutional Court].
[54] TC Judgment 25 June 2009, No 155/2009, *Special constitutional relevance*. See L. Arroyo Jiménez and C. Ortega Carballo, 'Towards the Modernization of the Appeal for Constitutional Protection of Fundamental Rights in Spain', 20 *European Public Law* (2014), p. 31.
[55] L. Arroyo Jiménez, *supra* n. 36, at 123.

A different scenario where non-formalized judicial dialogue also appears is that of Member States' Constitutional or Supreme courts' power to review the application of EU law by ordinary courts of justice. It has been stated how these processes can help the first to adapt their doctrine to that of the Court of Justice. At this point, it is worth noting how they can be used to review the way in which judicial authorities of the relevant Member State construe and apply EU law and thus case law doctrine of the Court of Justice. The point here is that usually not every misinterpretation or misapplication of EU law by lower instance courts is relevant from the perspective of Constitutional or Supreme Courts' jurisdiction; in fact, only those judgments containing a serious misinterpretation or misapplication, or otherwise damaging for a given fundamental right (remarkably the rights to an effective judicial remedy and to a fair trial) would have such relevance.

A well-known example is the doctrine of the German federal constitutional court on preliminary rulings and ordinary courts. On the one hand, it may constitute an infringement of the basic right according to which no-one may be removed from the jurisdiction of his lawful judge, proclaimed in Article 101(1), section 2, of the German Constitution, if a German court does not comply with its obligation to make a submission to the Court of Justice in preliminary ruling proceedings according to Article 267(3) TFEU. But, on the other hand, it is not the case that all violations of the obligation under Union law to make a submission immediately constitute a breach of the Constitution. Moreover, these judicial misapplications of Article 267(3) TFEU will only be unconstitutional if they no longer appear to be comprehensible and are manifestly untenable.[56]

The same applies, leaving aside the obvious differences, to the review performed by the European Court of Human Rights of the application of EU law by the courts of States parties to the European Convention on Human Rights. Indeed, in the recent judgment delivered in *Schipani*, the Court of Strasbourg has provided that the misinterpretation and misapplication of EU law provisions governing preliminary rulings do not always and in any event breach the right to a fair trial,[57] but only in certain cases, such as when the judicial decision is not duly grounded.[58]

Ultimately, in these cases there is a divergence between the obligations imposed by EU law on Member States' judicial bodies and those the violation of which can be remedied by Constitutional or Supreme courts through the protection of the rights to an effective judicial remedy and a fair trial. Recent case law from the Spanish Constitutional Court shows the tensions that can be noticed in the process of defining such mismatch. First, the Constitutional Court has ruled that those decisions delivered by lower instance courts applying a national law provision that has been declared to be in breach of EU law by the Court of Justice, both in infringement proceedings[59] or in preliminary rulings,[60] are contrary to the right to an effective judicial remedy.[61] Second, it has also ruled that those decisions delivered by lower instance courts setting aside Acts passed by Congress for being contrary to EU law also breach the rights to an effective judicial remedy[62] and to a

[56] BVerfG Judgment 31 May 1990, 2 BvR 1436/87, *Absatzfonds*.
[57] Article 6 of the European Convention on Human Rights.
[58] ECtHR 21 July 2015, Case No 38 369/09, *Schipani* v *Italy*, para 72.
[59] TC Judgment 2 July 2012, No 145/2012.
[60] TC Judgment 5 November 2015, No 232/2015.
[61] Article 24(1) of the Spanish Constitution.
[62] Article 24(1) of the Spanish Constitution.

fair trial,[63] insofar as the judicial authority had not referred for a preliminary ruling and the latter was mandatory under EU law.[64] Third, the Constitutional Court has also ruled that those decisions delivered by lower instance courts that fail to request a preliminary ruling when the latter is mandatory under EU law also violate the right to an effective judicial remedy,[65] even if no internal Act passed by Congress is set aside, provided that the decision is plainly arbitrary, openly irrational in terms of its legal grounds, or clearly wrong from a factual perspective.[66]

As can be seen, the Spanish Constitutional Court goes way beyond the case to which the European Court of Human Rights refers in *Schipani*. However, not every instance of EU law misapplication of Article 267 TFUE or any other EU rule is sufficiently relevant for it to be remedied by means of national constitutional law. In this context, Member States' Constitutional or Supreme courts face the need to deal with two opposing requirements. On the one hand, not every judgment wherein a EU norm is wrongly chosen, interpreted or applied should be rendered unconstitutional. Otherwise, the entire EU law would be granted internal constitutional relevance and this would be extremely dysfunctional from both a European and a national standpoint. But on the other hand, Constitutional or Supreme courts should encourage a good behaviour by the relevant Member State's judicial bodies from an EU law standpoint. An empathetic interface design entails adapting the applicable doctrine on the rights to an effective judicial remedy and to a fair trial in order to meet this latter requirement without being at fault with the former.

5. CONCLUSION

Within a framework of constitutional pluralism whereby different autonomous and open legal systems coexist and interrelate, empathy becomes an essential virtue. Unlike in other composite legal systems, intersystem communication relations among EU law and the laws of its Member States are simultaneously governed by each of them through their own legal interfaces. The notion of constitutional empathy suggests that these legal devices should be designed and implemented taking into account not only the domestic constitutional and institutional requirements, but also those coming from the other system with which an effective and functional communication has to be established.

This article has explored some of the conclusions that might be drawn from all this in the area of judicial dialogue, particularly from the perspective of the Member States' Constitutional or Supreme courts. As for the formalized dialogue that takes place through the preliminary ruling procedure, analysing the structure of communication interfaces provides, on the one hand, a better understanding of the functions and rhetorical styles of references made by different national courts. On the other hand, the concept of constitutional empathy also allows for inferring rules of conduct in terms of drafting requests for preliminary rulings, as it has been illustrated in the area of fundamental rights. With respect to non-formalized judicial dialogue, the paper has revealed that an empathetic design of legal interfaces might help national Constitutional or Supreme

[63] Article 24(2) of the Spanish Constitution.
[64] TC Judgments 19 April 2004, No 58/2004; 20 October 2010, No 78/2010; and 11 February 2013, No 27/2013.
[65] Article 24(1) of the Spanish Constitution.
[66] TC Judgments 18 December 2014, No 212/2014; and 25 May 2015, No 99/2015.

courts to improve the reception of driving forces that stem from EU law, both in their own case law and as regards EU law implementation by ordinary courts.