JUDICIAL DEFERENCE IN THE RELATIONSHIP BETWEEN CONSTITUTIONAL COURTS OF THE MEMBER STATES AND THE EUROPEAN COURT OF JUSTICE

Tudorel Toader[1] **– Marieta Safta**[2]

ABSTRACT

The concept of judicial deference is generally seen as a tool that judges use to avoid getting involved in areas they may consider to be beyond their expertise or jurisdiction. It is often discussed in the context of the connections between the constitutional courts and state authorities with regulatory or law enforcement powers. The concept of judicial deference can also be applied to the relationships of constitutional justice in the EU. In the complex context of the EU legal order, judicial deference becomes particularly important in the relationship between the constitutional courts and the European Court of Justice (ECJ). In our study, we will first analyse the concept of 'judicial deference' in the context of EU constitutional justice. Then we will examine the limits of power and intervention of the constitutional courts and ECJ, especially in sensitive areas such as the interaction of legal systems, fundamental rights, and constitutional identity. The goal of this scientific article is to analyse these unique features and challenges and to show that balanced judicial deference is crucial for the development of an 'Ever-integrated Union.'.

KEYWORDS

judicial deference
constitutional courts
preliminary reference
European Court of Justice
equality

1. Introduction

The theme of conflicts between courts in the European Union (EU), reflecting the complex development of the relationships between constitutional and

1 | Full Professor, Faculty of Law, Al I Cuza University, Iași, Romania; ttoader@uaic.ro; ORCID: 0000-0003-2435-2441.
2 | Full Professor, Faculty of Law, Titu Maiorescu University, Bucharest, Romania; marieta.safta@prof.utm.ro; ORCID: 000-0001-5638-7708.

https://doi.org/10.55073/2025.1.217-237

quasi-constitutional courts (ECJ), is a common topic in legal debates. It is natural to be fascinated by the 'fights' between judges, on the one hand because of their status as guardians of the 'balance' of justice (so apparently alien to the 'passions' of battles), and on the other hand, because of the contexts in which such tensions occur, 'brimming' with ingredients, including those of a political nature. Sometimes, these phenomena are perceived as exaggerated, raising doubts about the solidity and future of the EU construction. As a possible solution, the theme of judges' dialogue has been explored as a way to address these conflicts in various dimensions and forms. The notion of 'dialogue' seems to be used in this context in a very broad sense, and perhaps sometimes inappropriately. Often, it is not about dialogue in the form of a 'conversation' but rather via parallel 'monologues.'[3]

Therefore, examining and addressing the topic of dialogue in constitutional justice[4] and following the general developments in the field, we consider that one more theme or direction could adequately fill the analysis of the relationship between judges and the constitutional courts, namely the (judicial) 'deference'. Even though it is usually discussed in the context of the connections between constitutional courts and state authorities with regulatory or law enforcement powers, the concept of judicial deference can also be applied to the relationships of constitutional justice in the EU. This approach, also promoting the idea of equality among constitutional courts within the EU, has constructive implications for shaping an 'Ever-integrated Union'.

A guiding framework regarding the concept of 'judicial deference' in constitutional justice could be found by following the works of the Congress of the Conference of European Constitutional Courts (CECC), hosted in 2024 by the Constitutional Court of the Republic of Moldova, with the topic Forms and Limits of Judicial Deference: The Case of Constitutional Courts[5]. In the preamble of the Questionnaire sent to the members of the Conference in order to prepare for the Congress, judicial deference is described as

> 'a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide.'

In light of this definition, the Questionnaire approach is oriented towards the relationships between the constitutional courts and, in particular, the authorities representing the legislative power. However, exceptionally, such relationships are mentioned when the interpretation and application of EU law is in question, for example in the Report of the Constitutional Court of Austria[6] which deals tangentially with the formal limits of the powers of this Court in relation to the powers of the ECJ, mentioning the preliminary reference as a connecting tool.

Our approach concerns applying judicial deference in the context of relationships between constitutional courts and the ECJ. In these relationships, the discussions are

3 | See, for example, Tremblay, 2005, pp. 617–648.
4 | See Varga and Berkes, 2023; Toader and Safta, 2016; Safta, 2022, pp. 78–91.
5 | The Questionnaires of the XIXth Congress of the Conference of European Constitutional Courts, Forms and Limits of Judicial Deference: The Case of Constitutional Courts. [Online]. Available at: https://cecc.constcourt.md/pages/congress/en/questionnaire.html (Accessed: 10 September 2024).
6 | The Report of Constitutional Court of Austria, Pct. 4c, p. 8. [Online]. Available at: https://cecc.constcourt.md/pages/congress/national_reports_for_the_CECC_Congress_2024/Questionnaire_Austria_EN.pdf (Accessed: 10 September 2024).

not about the separation of 'powers' between authorities performing different functions in the state, but rather a 'separation' of competences, which is crucial for the proper functioning of the EU legal system. We can analyse the 'spectrum of deference' and the concept of 'no-go' areas of the constitutional courts and the ECJ in their relationship in a similar way as debated in Congress with reference to the relationships between courts, the legislative and executive branches.

In our study, we will first analyse the concept of 'judicial deference' in the context of EU constitutional justice. We will then examine the limits of power and intervention of the constitutional courts and ECJ, especially in sensitive areas such as the interaction of legal systems, fundamental rights, and constitutional identity. We will also look at judicial deference in the context of using of the instrument of preliminary reference. We will consider questions such as: how deferential can a constitutional court or ECJ be without being accused of abandoning their role as a guarantor of fundamental laws and defender of the EU legal order, or of judicial avoidance? How active can a constitutional court or ECJ be without becoming overly authoritarian, infringing jurisdiction, and conflicting or evolving unpredictably? Are there tools to keep a constitutional court or ECJ within a reasonable margin of appreciation in this regard? Where is the fair balance and, more importantly, how does this fair balance correlate with the equality and effectiveness of access to constitutional justice in an 'Ever-Integrating Europe'? The conclusion of this study invites reflection on the role of judicial deference in the equation of the legal relationships that shape the EU legal order.

2. Judicial deference in European constitutional justice

2.1. The concept of 'judicial deference'

In reviewing the responses to the Congress of the CECC Questionnaire regarding the definition of 'judicial deference', it is clear that this concept is generally not explicitly mentioned in the case law of constitutional courts. Similarly, there is limited analysis of it in legal doctrine. The concept is used exceptionally in the case law, for example of the Czech Constitutional Court, which stated that

> 'the term was used once (...) in the judgment file No I. ÚS 980/14 of 18 June 2014, in which the Constitutional Court (...) stated the following: 'However, this certain deference on the part of the Constitutional Court to the decisions of the general courts on detention is conditioned precisely by the general courts' careful assessment of the specific circumstances of individual cases''[7]

Certain Courts refer in their Reports to the development of the concept in the doctrine[8], while others reveal that the doctrine does not even address this concept in rela-

7 | See Report of the Czech Constitutional Court. [Online]. Available at: https://cecc.constcourt.md/pages/congress/national_reports_for_the_CECC_Congress_2024/Questionnaire_Czech%20Republic_EN.pdf (Accessed: 10 September 2024).

8 | Report of the Constitutional Court of Austria.

tion to the topic of constitutional justice.[9] A view that brings the term closer to its literal meaning is provided by the French Constitutional Council Report, which shows that the concept of 'deference',

> 'can be defined in French as a 'respectful consideration' or as a 'condescension mixed with consideration and dictated by a motive of respect', escapes the French legal vocabulary'[10]

(and has no place in the practice or in the case law of the Constitutional Council).

Regardless of approaches and nuances, it seems that the idea of judicial deference is linked to the extent of the Courts' actions, as determined by their jurisdiction outlined in the Constitution.[11] Many reports discuss related concepts such as 'self-limitation'[12], 'the principle of minimal interference with the powers of other public authorities',[13] 'judicial self-restraint'[14], 'judicial restraint',[15] 'judicial activism'[16] or 'positive legislature',[17] the 'margin of appreciation' ('rechtspolitischer Gestaltungsspielraum')[18], 'the legislator's option',[19] or 'legislative expediency'. All these concepts lead to the notion of a certain level of judicial deference intervening in specific fields or legal questions. Thus, the Constitutional Court of Portugal[20] explained that

> 'we take the term 'judicial deference' to refer to the practice, by a court, of choosing to give significant weight to judgments of other public authorities (the legislature, administrative bodies, or the executive) on a particular matter.'

In this light, it can be briefly concluded that the term 'judicial deference' refers to the respect shown by constitutional courts for the role and competence of other authorities. It appears that the concept of judicial deference includes both objective and technical aspects governed by the regulations of the role, organisation and functioning of constitutional courts, as well as subjective elements influenced by factors that shape the

9 | Report of the French Constitutional Council.
10 | Ibid.
11 | See the Report of the Constitutional Court of Croatia. [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Croatia_EN.pdf (Accessed: 10 September 2024).
12 | See Report of the Czech Constitutional Court; see also Report of the Constitutional Court of Latvia. [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Latvia_EN.pdf (Accessed: 10 September 2024).
13 | Ibid.
14 | Report of the Constitutional Court of Austria.
15 | Report of the Constitutional Court of Lithuania. [Online]. Available at: https://cecc.constcourt.md/pages/congress/national_reports_for_the_CECC_Congress_2024/Questionnaire_Lithuania_EN.pdf (Accessed: 10 September 2024).
16 | Ibid.
17 | Ibid.
18 | Report of the Constitutional Court of Austria.
19 | Report of the Constitutional Court of Romania. [Online]. Available at: https://cecc.constcourt.md/pages/congress/en/national-reports.html (Accessed: 10 September 2024).
20 | Report of the Constitutional Court of Portugal. [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Portugal_EN.pdf (Accessed: 10 September 2024).

interpretation of these rules and the mutual respect among judges and courts. In the realm of constitutional justice, judicial deference is also linked to the principle of loyal cooperation, which is equally important in the relationships between courts within the EU.

2.2. The interest of exploring 'judicial deference' in the European constitutional justice

Given the very specific focus of this study, we will use the term 'constitutional justice' to refer to the courts in the EU Member States (MS) that closely align with the European/Kelsenian model of constitutional review (specialised courts), in their relation with the ECJ[21]. The following MS have typical centralised and specialised constitutional courts, tribunals or councils: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. We will also refer to the European Court of Human Rights (ECtHR) in the context of the development of judicial dialogue in the sphere of fundamental rights protection. This is the 'three-dimensional' frame of reference in which we will place our analysis, regarding judicial deference in the EU constitutional justice.

Due to the specific role and jurisdiction, it can be said that the judges of these courts, 'look different and behave differently'[22] and their jurisdictional interaction results in a continuous 'shaping' of European constitutionalism. As guardians of the fundamental laws, they are responsible for upholding the core values around which the EU is built. The coherence of the European legal order itself is often the responsibility of the courts called to interpret and apply the national constitutional framework on the one hand, and the EU constitutional framework on the other: 'the system is, in fact, regulated by judges, who often carry out interpretations in compliance with the various rules'[23].

Since the role and powers of the constitutional courts are established by the Constitution and the law, but the law can also establish, as in the case of Romania,[24] that the constitutional court is the only one entitled to decide on its jurisdiction, the extent to which constitutional courts interpret and exercise their powers, striking a balance between activism and judicial deference, not only impacts access to constitutional justice, but also the entire system of authorities and legal relationships in which they operate. In this regard, noting the lack of references to judicial deference, the Constitutional Court of Portugal specified in its Report[25], that this

> 'should not, however, lead us to conclude that questions related to judicial self-restraint are not a relevant theme for the PCC. Self-restraint is one of the judicial virtues meant to guide the way in which the Court exercises its power of constitutional review, and a relevant one at that.'

21 | As a *sui generis* 'constitutional court' as long as it is responsible for guaranteeing the legal order of the EU created by the Treaties, see Lenaerts, 2013, pp. 13–60.
22 | Bell, 2006, p. 1; Claes and de Visser, 2012.
23 | Mathieu, in Călin, 2015, p. 223.
24 | Article 3 (2) of Law No 47/1992 on the organization and functioning of the Constitutional Court, republished (Official Gazette no. 807/3 December 2010). 'In the exercise of its powers, the Constitutional Court shall be the only authority entitled to decide upon its competence'.
25 | Report of the Constitutional Court of Portugal. [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Portugal_EN.pdf (Accessed: 10 September 2024).

Furthermore, in a complex system like the EU, these continuous 'adjustments' of competences are significant. The 'separation and balance' of competences of the courts at both national and EU levels are crucial for the harmonious evolution of the EU's legal order. However, this 'adjustment' does not work very harmoniously, as long as tensions and even conflicts appear repeatedly. As a result, beyond the inherent political aspects, it is important to study which are the most sensitive aspects that can challenge the constitutional courts and the ECJ regarding the establishment of competence limits in their relations within the EU. Factors such as judicial deference influence this process, so understanding them is crucial for creating legislative and institutional support measures to harmoniously shape the future of the EU.

3. Judicial deference – areas, intensities and sensitivities

3.1. Relationships between legal orders within the EU: About 'no-go' areas in constitutional review at the cross-roads of legal systems

As for the 'conflicts' we were referring to above, complex discussions are determined by the issue of the primacy, or priority of EU law, given the sometimes antagonistic positions of the constitutional courts and the ECJ on this subject.

Accession to the EU puts certain challenges in front of the national constitutional systems, such as the transfer of legislative powers to EU institutions, the direct effect and the priority or primacy of EU law in relation to contrary national rules, and the resettlement of the institutional relationships within each MS. These challenges have been enhanced by the different ways of regulating the relationships between the respective MS and the EU or the national legal order (identifying how the Treaties are incorporated into the legislation of the Member States), which inherently lead to a lack of uniformity in the approaches of the national authorities in their relationship with the EU.

Also the doctrine does not have a uniform approach. When it comes to the EU structure, there exists a lot of legal literature analysing it in relation to the concepts of monism and dualism, or different models such as: the model of distinct but interacting legal orders (27 legal orders plus 1); the model of a party belonging to the legal order of the member states (EU law must be understood as an aspect of each legal order); the model of the one and large order: there is only the EU legal order, so the national orders are below this order[26]. However, as expressed in an answer to the question – monism or dualism in the EU, formulated by the former judge of the German Federal Court Gertrude Lubbe Wolff, 'the relationship between EU law and the national law of the member states of the UE raises more questions than it can be reasonably answered by attaching any of these labels'[27] (A/N monism, dualism or legal pluralism). Or, in other words,[28] it is doubtful whether 'the choice between monism and dualism is a meaningful and far-reaching one when it comes to determining the best way to integrate EU law. (...) Monism and dualism do not offer a solution regarding the hierarchisation of norms between legal orders. That is

26 | Dickson, 2008, pp. 9 et seq; Dickson, 2012, pp. 46 et seq., Călin, 2015.
27 | Ibid., p. 209.
28 | Millet, in Călin, 2015, p. 309.

not their purpose. Because of this, by themselves, these theories do not help us determine which rule will apply in the event of a conflict'.

In the complex and ambiguous legal environment, the tasks of the courts are undoubtedly tricky. This study focuses on the constitutional courts' competence limits at the intersection or competition of rules within the EU regulatory system. It is interesting to analyse issues such as: in this amalgam of regulations, can 'no-go' areas be identified in the sense of a clear separation of powers in terms of the review of legal rules? Can a constitutional court review an EU act, and conversely, can the ECJ rule upon the compliance of the MS's national act with the same state's Constitution? Can a national rule be in accordance with the Constitution but contrary to EU law and vice versa? We will advance a few ideas on each of these questions.

Thus, when it comes to the authority of constitutional courts to assess EU regulations, it is important to distinguish between primary regulatory acts and secondary EU law. As for the first category, we can discuss the power of certain constitutional courts to review amendments to international treaties, including EU treaties. The rationale for such control is clear: it aims to prevent the introduction of norms that conflict with the constitution into the national legal system, or to facilitate the alignment of constitutional provisions with international rules in order to create a coherent legal system. For example, in Romania, according to the Constitution, the constitutionality of treaties can be reviewed by the Constitutional Court, before ratification, pursuant to Article 146 b) 'upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 Senators' or after ratification, through the exception of unconstitutionality, a conclusion resulting from the *per a contrario* interpretation of the provisions laid down in the first sentence of Article 147 (3) of the Constitution, according to which 'if the constitutionality of a treaty or international agreement has been found according to Article 146 b), such a document cannot be subject of an exception of unconstitutionality'.

So far, the CCR has not been vested with the review of treaties or acts amending EU treaties.[29] Other European constitutional courts have been vested in this regard and have ruled, such as the German Federal Constitutional Court, in notorious cases. In this hypothesis, we believe that it is entirely up to the MS to establish appropriate constitutional boundaries in order to conciliate the interests at stake and the coherence of the EU legal order. The concept of deference could be approached by considering the extent and manifestation of the sovereign will within a State, such in the rulings of the German Federal Constitutional Court on the conformity of the Treaty of Lisbon with the German Constitution, where it is held that

> 'As long as within the limits of a European federal state it is not possible for a unitary European people, as the subject of legitimization, to be able to politically effectively formulate a majority will, according to the principle of equality, it means that the peoples of the European Union within the member states will be the determining carriers of public power, including the authority of the Union. For the accession to a European federal state, in Germany it would be

29 | Toader and Safta, 2023, pp. 110–127.

> necessary to rewrite the Constitution, in order to explicitly renounce the sovereign statehood guaranteed by the fundamental law. In the present case, there is no such act.'[30]

In this context, we can analyse the relationship between the constitutional courts and the ECJ by considering how common principles, such as the rule of law, are interpreted. This can lead to a harmonious articulation of the constitutional foundation of the EU, which includes national Constitutions and EU Treaties.

The second category of rules, which is secondary law, raises more sensitive issues. Its regulations and directives are developed based on the EU Treaties, within a different normative system of reference than the national one. As a result, its 'constitutional' review should be carried out by the ECJ, not by the constitutional courts of the MS. Just as the ECJ cannot rule on a national regulation about that state's Constitution, neither can the constitutional courts rule on the compatibility of a directive or regulation or rules adopted by the EU institutions in relation to the EU treaties.

It cannot be ignored, however, that the issue of the compatibility of EU secondary law with the Constitution of the MS could arise. In this scenario, the national constitutional court must decide to involve the ECJ, in line with the principle of judicial deference and within its limits of competence. The most appropriate method is to use the preliminary reference. Of course, there is also the possibility of delimitation, in the sense of stating the lack of competence of the national court to rule upon the EU act. However, if that act raises serious issues in terms of constitutionality, a simple delimitation does not aim to achieve access to constitutional justice; rather it is an act of judicial avoidance. Similarly, we consider that the situation in which the national court finds only the unconstitutionality of the national act transposing the EU act is also a form of judicial avoidance; if the two acts overlap to the point of identity, the flaws found equally affect them. Laudable only by the 'Solomonic' way of avoiding conflicts (sense in which we have referred several times to the way in which the Constitutional Court of Romania found the unconstitutionality of the law transposing the Data Retention Directive[31]), such an approach gives a solution only in the short term and does not solve the substantive issue (or delays its settlement). In such situations, acknowledging this limitation of the competence of the constitutional courts represents an act of judicial deference with a clear reflection in the principle of rule of law. If the constitutional courts were to assume a 'constitutional review' of EU secondary law, it would act against the competence of the ECJ, potentially causing conflicts and difficulties to assess in terms of legal effects. In this sense ECJ stated in the case C- 430/21 that

> 'if a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for a preliminary ruling under Article 267 TFEU, in order to assess the validity of that provision in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid (see, to that effect, judgments of 22 October 1987, Foto-Frost, 314/85, EU:C:1987:452,

30 | Decision of 30 June 2009 – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, in Selection of decisions of the German Federal Constitutional Court, pp. 609–616. [Online]. Available at: https://www.kas.de/c/document_library/get_file?uuid=a9bd5fee-847e-3a3f-e251-4b909eaec632&groupId=268877 (Accessed: 16 May 2024).

31 | See Toader and Safta, 2023.

> paragraph 20, and of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 96).'

As concerns the other perspective, meaning the national regulations, some recent tensions in constitutional justice have highlighted the issue of national laws that have been deemed constitutional but are being challenged for their compatibility with EU law. Can these laws be found to be in violation of EU law and therefore no longer applicable?

The ECJ seemed to answer affirmatively in cases concerning the laws of justice in Romania (establishment of the Criminal Investigations Directorate), meaning the Case C-430/21[32], having as its subject-matter a request for a preliminary ruling formulated pursuant to Article 267 TFEU by the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania). The ECJ ruled, *inter alia*, on the question of whether if the second paragraph of Article 19 (1) of the TEU in conjunction with Article 2 TUE and with Article 47 of the Charter must be interpreted in the sense that it opposes a regulation or a national practice by virtue of which the ordinary courts of a member state do not have the authority to review the compliance with EU law of a national legislation that the constitutional court of this member state found to be in compliance with a national constitutional provision that requires compliance with the principle of primacy of Union law (i.e. what the CCR did through Decision No 351/2021). Noting, from the referral decision, that ordinary courts are deprived of this competence when the national constitutional court has ruled that the legislative provisions in question are in accordance with a national constitutional provision that stipulates the relationship between national and EU law, ECJ ruled that

> 'the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.'

The saga of the ECJ and CCR decisions in this case were well-known and have been the subject of numerous studies.[33] In our opinion, the tensions related to this topic could have been avoided by appealing to judicial deference. In the case of the CCR, it could have reached out to the ECJ by making a preliminary reference. This could have been done because the dispute ultimately revolved around the legal value of certain recommendations from the European Commission in the implementation of the Mechanism Cooperation and Verification (so, not only an internal constitutional matter). As for the ECJ, which has the authority to interpret EU law, it should have found a way to allow the involvement of the constitutional court to participate in the case when its legal decisions are being questioned. In the absence of such a tool or at least practice (once again, judicial deference), errors or escalation of conflict situations could easily occur. Following these events, the

32 | ECJ – C-430/21 RS, 22 Judgment of the Court (Grand Chamber) of 22 February 2022 Proceedings brought by RS, Request for a preliminary ruling from the Curtea de Apel Craiova.
See, also, Case C-107/23 PPU, Lin: Request for a preliminary ruling from the Curtea de Apel Brașov (Romania) lodged on 22 February 2023 — Criminal proceedings against C.I., C.O., K.A., L.N., S.P.

33 | See, for example, Selejan-Gutan, 2022; Selejan-Gutan, 2021.

conflicts appear to have subsided, but we believe that the conflictual issue still persists. The ruling by the ECJ in the aforementioned cases focused on the independence of the national judge in relation to the constitutional court and the ECJ. It is correct to be considered unacceptable for the national judge to be prevented from seeking clarification from the ECJ on a problem related to EU law. However, the outcomes of this conflict between courts should be considered beyond just the independence of the judges. It should also be viewed in terms of legal certainty and the scope of authority of each court. In other words, the case–law of the ECJ in discussions have left us with a serious problem in managing in the EU. Allowing courts of law to choose not to apply decisions of the constitutional courts, which are binding according to the Constitutions, raises significant issues of coherence in the normative system within the EU. What happens when a decision of the constitutional court is challenged by a court of law? Can a domestic law comply with the Constitution and still conflict with EU Treaties? Does this indicate a problem with aligning the Constitution with EU Treaties, or is it only about the interpretation of that norm by the constitutional court? What has happened with the decision of the constitutional court in question?

Judicial deference could prevent the radicalisation of such situations and the raising of problems that seem at this moment without short-term solutions. From this perspective, it could be argued that challenging the effects of a decision of a constitutional court is, as a rule, a 'no-go' area of competence for the ECJ or other authorities. We can only discuss involving a mechanism for control and balance when the independence of that constitutional court is in question, and this mechanism should be carefully configured. The correction of certain judgment errors should be the responsibility of the respective constitutional courts, just as with the ECJ itself, which is not infallible. Or perhaps, from a different perspective, this issue could be an argument in favor of establishing an International Constitutional Court[34]. However, removing the authority of either the constitutional courts or the ECJ, or assuming the role of 'controller' of one over the other, does not promote legal certainty and harmonisation.

3.2. Complementary or overlapping competencies? Protecting the fundamental rights within the EU

In the realm of EU constitutional justice, a significant issue lies in the overlapping or complementary jurisdiction of different high courts (such as constitutional courts, ECJ, ECtHR) in protecting fundamental rights and freedoms. This issue arises when different sets of fundamental rights are simultaneously applicable, including those outlined in national constitutions, the Charter of Fundamental Rights of the European Union, and the Convention for the Protection of Fundamental Rights and Freedoms.

The most extensive recent debate (in terms of participating courts) took place at the XVIIIth Congress of the Conference of European Constitutional Courts held in Prague (26 -29 May 2020), with the topic Human rights and fundamental freedoms: the relationship of international, supranational and national catalogues in the 21st century.[35] The central issue of the debate is summarised in the General Report of the Congress in which it is shown that

34 | Albert, 2023; Marzouki, 1999.

35 | Questionnaire [Online]. Available at: https://web.archive.org/web/20240518055612/https://www.cecc2017-2020.org/congress/xviiith-congress/questionnaire/ (Accessed: 18 May 2024).

> 'both national and international catalogues of human rights are identical in that they contain a similar list of rights (...). National catalogues have entrusted the protection of fundamental values and fundamental human rights (...) to constitutional courts or equivalent judicial bodies. If these bodies are empowered not only to abstractly review constitutionality but also to provide a posteriori protection of human rights and freedoms, they must also address the question of the source of human rights and freedoms and the normative definition of such a source. Thus, in addition to the application of their national catalogues of human rights (...) they must evaluate, respect and protect the fundamental rights contained in international legal documents. The contemporary approach to the material rule of law is characterized by an effort to eliminate contradictions and gaps in the system of protection of fundamental rights. (...) This brings the European constitutional and equivalent courts to the question of the relationship between national, supranational and international catalogues of human rights. Is there a hierarchy between them? Are they competitive or complementary? What legal system should the Constitutional Court apply first?'[36]

Ideas such as 'layers of protection' have been developed in the debates ('in the European legal space, the highest level of protection can be achieved by different layers of protection that interact and complement each other, rather than by layers that are well separate'[37]). The importance of the principle of subsidiarity ('the protection mechanism established by the Convention has a subsidiary nature in relation to the national system of guaranteeing human rights' ECtHR – Handyside v. Great Britain, paragraph 48)[38] and the use of Convention/practice ECtHR as the 'common denominator' of the protection of fundamental rights in Europe was also emphasised. However, the General Report of the Congress reveals the lack of a consensus among European countries regarding the approach of these multiple catalogues:

> 'no uniform structure of application practice of international human rights catalogues'; 'each constitutional court de facto individually chooses a specific model for determining a particular human rights catalogue if one right is protected in more than one catalogue'.

This lack of coherence is also due to the fact that 'with a few exceptions (Romania), the method of determining the human rights catalogue is not normatively determined on the national level'.

In view of the present study, we are particularly interested in what the General Report identifies as 'solutions in the practice of constitutional courts' for 'the overlapping of human rights catalogues', in which the following are listed: the 'anti-collision' course, meaning 'the possibility to manoeuvre and decide flexibly on the application of a catalogue only when there are several options available' (e.g. Italy); to weigh the extent

36 | Rapport Général: XVIIIe Congrès de la Conférence des Cours constitutionnelles européennes [Online]. Available at: https://web.archive.org/web/20240518055627/https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/General_Report/Rapport_General_General_Report_e-version.pdf (Accessed: 18 May 2024).

37 | The recording of the proceedings of the Congress [Online]. Available at: https://web.archive.org/web/20240518051927/https://usoudcz-my.sharepoint.com/:f:/g/personal/david_krev_usoud_cz/EuIYvnC4eEdMlQ8skqXGgRsB8TC2AOzTPy9yzYOGdQzjZg?e=UR7EKc (Accessed: 18 May 2024).

38 | Radu, 2021, p. 37.

and effectiveness of the protection of a particular right in a particular catalogue, which results in priority of the legislation that provides a higher level of protection of rights (e.g. Belgium or Slovenia); to look for reference points within the guidelines set out in the Constitution itself (Poland) or to take into account the catalogue argued by the petitioner in his or her constitutional complaint. With the exception of the last method, all other solutions engage, to a greater or lesser extent, judicial deference, the most relevant example in this regard being the example of the Constitutional Court of Italy, which in its Report refers to the well-known 'Taricco saga' using the word 'respect' repeatedly. Thus, answering the question about the relationship, hierarchy, and competition of the catalogues of human rights in light of the protection afforded, Constitutional Court of Italy[39] emphasised that

> 'the multitude of catalogues protecting human rights has become a given in constitutional case law, and has its basis in the need (about which there is a consensus across Europe) to ensure higher levels of protection'.

According to the Constitutional Court of Italy, the relations between the Union and the MS

> 'are defined according to the principle of loyal cooperation, which implies mutual respect and assistance. This entails that the parties are united in diversity. There would be no respect if the requirements of unity were to demand the cancellation of the very core of values on which the Member State is founded. And there would also be no respect if the defence of diversity were to extend beyond that core and end up hampering the construction of a peaceful future, based on common values, referred to in the preamble to the Nice Charter' (Order no. 24 of 2017)'.

All the actors must participate in the affirmation of rights. The Court has envisaged a

> 'framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ [...] in order that the maximum protection of rights is assured at the system-wide level' (Judgment no. 269 of 2017)'.

In the same way, for 'all courts required to apply the ECHR, including the Constitutional Court', there is a necessary dialogue inherent in the 'progressive nature of the formation of case law' (Judgment no. 49 of 2015).

The conclusions of the Congress reveal a trend of gradual synchronisation of the protection of human rights at both national and international levels. Overcoming the various conflicts determined, in particular by the lack, until a certain moment, of an own catalogue of the EU in the field, means that the decisions of the constitutional courts converge

39 | The Constitutional Court: 18th Meeting of the Conference of European Constitutional Courts, 26-29 May 2020, Prague Human Rights and Fundamental Freedoms: the Relationship of International, Transnational and National Catalogues in the 21st century [Online]. Available at: https://web.archive.org/web/20240518060224/https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/English/Italy_-_Questionnaire_XVIII_Congress_of_CECC_eng.pdf (Accessed: 18 May 2024).

towards a harmonious expression of the protection systems, as results, for example, from the Report of the German Federal Constitutional Court[40] which reveals that

> 'in its more recent case-law, however, the Federal Constitutional Court has emphasised the 'interrelationship' between the Constitution and the Charter, as well as the ECHR as a common foundation. Here the idea of multi-level fundamental rights protection (Grundrechtsverbund) emerges'.

However, the challenges continue to exist, being determined by the difficulties regarding the identification of the catalogues applicable in a specific case (because the boundaries between the particular human rights catalogues are not 'impermeable'), and the lack of uniformity of the protection standards. Therefore, the competences incident in various specific cases to decide are in question and, consequently, the judicial deference. The use of instruments such as advisory opinions (related to the EtCHR) and preliminary references (related to the ECJ) could help prevent conflicts and provide a way for constitutional courts to affirm their views on human rights protection standards. From this perspective, we could analyse how constitutional courts address problems related to the standards of protection of fundamental rights in their interactions with the ECJ. This includes examining the ECJ's decisions and how they are integrated into constitutional reviews, as well as the decisions made by the constitutional courts in specific cases. It is crucial to consider nuances, as judicial deference involves substantive analysis rather than just a formal dialogue lacking substantial relevance.

3.3. Constitutional identity: avoiding to turn a shared issue among equals into a divisive one

The issue of national/constitutional identity seems to be the most suitable ground for explaining and affirming the importance of judicial deference. Thus, Article 4(2) TEU currently reads as follows: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

A contentious question in this context is who has the authority to define national identity: the national constitutional courts or the ECJ? This issue has sparked intense debates and has been the subject of extensive legal literature and varied opinions.[41] Starting from the idea that constitutional identity is, in essence, the legal expression of national identity, and constitutional courts are the guarantors of the constitution, it appears within their competence to appreciate what this identity means. At the same time, the concept of national identity is enshrined in Article 4 TEU, and the ECJ are competent to interpret binding treaties, therefore the concept of national identity is also

40 | We chose it as a relevant example because this court is the author of the counter-limits doctrine (including the protection of fundamental rights), opposed to the primacy of EU law; see XVIIIth Congress of the Conference of European Constitutional Courts, 2020 – National Report: Germany. [Online]. Available at: https://web.archive.org/web/20240518060233/https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/English/Germany_-_Questionnaire_XVIII_Congress_of_CECC_eng.pdf (Accessed: 18 May 2024).

41 | See for example Varga and Berkes, 2023.

enshrined in treaties. Choosing between the two options would place European courts in irreconcilable positions. In our view, addressing this topic in the context of judicial deference could provide a mechanism for harmonious cooperation while respecting the authority of each of the involved courts.

Thus, the constitutional courts are the guarantors of the constitutions and best placed to assess the content of national identity and its legal reflection. The ECJ is the guarantor of the Treaties and the best placed to determine EU values and possible incompatibilities with these values, concentrated in what the ECJ has more recently defined as 'very identity of the European Union as a common legal order'. [42] In the light of judicial deference, the definition of constitutional identity would mean a collaboration between the courts by way of a preliminary reference,[43] in which the competence of the constitutional courts would be to identify the elements subsumed to the national/constitutional identity, and the ECJ only to check whether the elements thus identified do not collide with the values or constitutional identity of the EU. We think that to this conclusion lead the text of the TEU and also the case law of the ECJ. Thus, Article 4 TEU speaks of the Union's respect for the 'national identities' of the MS, shedding light on the national plan, including the definition of the national or constitutional identity by a national authority. The ECJ, in the Case C-156/21 and C-156/21 established that

> 'The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.'

Also, the ECJ stated that article 4(2) TEU has neither the object nor the effect of authorising a constitutional court of a Member State [...] to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court[44].

In this way of 'shared' competence, the identity 'as a red line', limit of the integration and source of conflicts, of which some authors talk[45], can be converted into the identity as a dialogue bridge. Thus, the definition of national identity would not pit the MS versus the EU but would put the MS together within the EU, while respecting the specific nature of the EU legal order, which is fundamentally different from that of a federal state. In the context of another project within CEA (discussing the topic of federalisation), we

42 | Case C-156/21 Hungary v Parliament and Council ECLI:EU:C:2022:97, paragraph 127, and case C-157/21 Poland v Parliament and Council ECLI:EU:C:2022:98, para 145.

43 | For a perspective on the role of preliminary ruling procedure in the application of Article 4(2) TEU see also Drinóczi and Mohay, 2018.

44 | C-430/21 RS EU, paragraph 71.

45 | Perju, 2020, 'both national and supranational European courts have recognized identity not only as a political safeguard of Europe's admittedly 'sui generis community in the process of progressive integration' but also, and importantly, as a doctrine that '[constitutionalizes] national identity' at both national and European levels.' This highly adaptable doctrine has been used both defensively, as a closure mechanism that shields nation-states from deeper supranational integration, as well as offensively as a sword against the authority of the EU.'; see also the special issue published by European Public Law on that topic. See Fromage and de Witte, 2021.

deliberately selected federal states like Brazil[46] and India[47] to highlight the uniqueness of the EU as a state structure. Despite substantial differences in the structure of their federal structure, the concept of national and constitutional identity is unfamiliar in these countries. This legal concept is specific to the EU, where states differ significantly from a socio-cultural and historical perspective. Additionally, the various geopolitical contexts and regional conflicts have influenced and continue to influence the constitutional dynamics of the EU MS. Therefore, the constitutional identity of the states is not fixed and cannot be universally and permanently defined. Instead, it is a dynamic concept that can be nuanced in relation to each MS. Perhaps that is why the CC of Romania, when it defined the constitutional identity in Decision 390/2021 by referring to the provisions of Article 152 of the Constitution of Romania (limits of the revision of the Constitution, so-called eternity clause[48]) refers to those constitutional values and principles as representing the 'fundamental identity core of the Romanian Constitution'. Therefore, there is a wider content of the Romanian constitutional identity, and the Court accepts and affirms the possibility of identifying new elements that can be subsumed under the constitutional identity.

The concept of deference implies that constitutional courts should understand that constitutional identity does not mean to set 'red lines', but rather aim to provide a clear legal interpretation of what constitutional identity entails in order to preserve national identity. On the other hand, the role of the ECJ is to protect the EU order and each MS, setting limits to preserve the fundamental values of the EU, to which all MS have agreed, for both current and aspiring members. By protecting EU values, the ECJ protects, in fact, all MS and their very identity. It was emphasised[49] in this regard that before accession, a candidate State for EU membership must align its own constitution and national identity with those values. Once accession takes place, it is therefore presumed that the new MS respects the values on which the EU is founded and thus may join a legal structure based on the principle of mutual trust. In the light of that principle, each MS is equally committed to upholding those values and in so doing, to respecting EU law provisions that implement them. That compliance must be guaranteed for as long as a MS remains within the EU, since it is essential for the enjoyment of all the rights derived from the application of the Treaties to that MS. Such an approach would give substance to the idea of 'equality' and 'equal partners', respecting the competence of each and the coherence of the EU legal order.

46 | See Safta, 2023.
47 | See Safta, 2023.
48 | Article 152 stipulates a series of values, principles which cannot be amended, such as 'the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of justice, political pluralism and official language' , respectively 'no revision shall be made if it results in the suppression of the citizens' rights and freedoms, or of the safeguards thereof'.
49 | Lindeboom and Wessel, 2023; Lenaerts and Gutiérrez-Fons, 2023, pp. 1495–1511.

4. The preliminary reference and judicial deference

One of the tools repeatedly mentioned in the previous section is the preliminary reference, as a formal instrument and framework for the exercise of judicial deference. It was suggestively characterised as a kind of central nervous system, contributing to the organisation of legal, economic, and political integration. [50]. However, this nervous system must be supported for proper and efficient functioning, both through legislative measures and the approach by the constitutional courts.

The data shows that, unlike regular courts, constitutional courts use this tool much less frequently. There are also notable differences in approaches among the constitutional courts. According to statistical data available on the ECJ page for the period 1952-2023, the situation of preliminary referrals formulated by the constitutional courts is as follows: Austrian Constitutional Court (4); Belgian Constitutional Court (40); Bulgarian Constitutional Court (0); Croatian Constitutional Court (1); French Constitutional Council (0); German Federal Constitutional Court (2); Hungarian Constitutional Court (0); Italian Constitutional Court (7); Latvian Constitutional Court (1); Lithuanian Constitutional Court (2); Constitutional Court of Luxembourg (1); Constitutional Court of Malta (1); Polish Constitutional Tribunal (1); Constitutional Court of Portugal (1); Constitutional Court of Romania (1); Constitutional Court of Slovakia (1); Slovenian Constitutional Court (5); and Spain Constitutional Court (1). Why are constitutional courts more reticent, and why do they differ from each other?

In an interesting analysis carried out by Marek Pivoda in 2019, entitled Constitutional Courts and Preliminary References to the CJEU[51], the factors which might affect the decision of a particular court to refer or not to refer a preliminary question to the ECJ were classified into several categories: the type of the constitutional proceedings of the pending case (Procedural Factors); institutional factors including engagement of a CC in advisory opinion procedure according to the Protocol No. 16 to the ECHR, the caseload of the CC, the overall establishment of the CC and the existence and quality of analytical departments; factors concerning the personal characteristics of judges as well as structural factors.

In our opinion, all these factors are influenced by the concept of deference We need to consider both the objective and subjective perspectives when discussing the tool of preliminary reference, as they are closely related. We can talk about the deference of the legislator when creating the regulations of the process before the constitutional court and the instrument available for the judges, as well as the deference of the court itself in terms of actively engaging with international courts or the ECJ. This includes considering the judges on the court at a given time, who bring their own legal education and their willingness, or lack thereof, to engage with the construction of the EU.

The current EU law's preliminary referral procedure poses a challenge for the practice of deference. It fails to facilitate a genuine dialogue between equal partners and may lead to concerns among constitutional courts about losing their powers. It may be necessary

50 | XVIth Congess of the Conference of European Constitutional Courts: National report and their summaries. [Online]. Available at: http://www.vfgh.gv.at/cms/vfgh-kongress/en/xvi-kongress-2014/landesberichte.html (Accessed: 15 November 2024).

51 | Pivoda, 2019.

to adjust this mechanism to give a voice to answer and argue to the constitutional court and not just a voice to ask. The idea of a 'reverse preliminary ruling'[52] suggested by the scholars could balance the partnership required for more integrated European constitutional justice. Of course, it is possible to follow up a preliminary question with another one, which would allow the ECJ to adjust its position based on the arguments presented by the constitutional court. The Tarico saga serves as a good example of this. However, this process is complex and time-consuming. Ultimately, the focus of justice should be on the litigants and their rights, which includes resolving cases within a reasonable timeframe rather than solely relying on court proceedings.

5. Conclusions

In discussing the role of the ECJ, Professor Kochenov argues that

> 'the ECJ is the main driver of negative integration, while the legislator is in charge of positive integration. The scope of the latter is infinitely narrower than the scope of the former, making dialogue with the legislator much less impactful in the EU's constitutional context.'[53]

Being in agreement with the idea of this integrative power of the ECJ, we also believe that in the complex landscape of the EU legal order, the ECJ has to act as 'co-pilots' with constitutional courts, respecting each other's competences, because they have similar functions, even at different levels, which justifies the idea of their equality and partnership. The constitutional courts shouldn't be subordinate to the ECJ, and vice versa.

Why this plea for judicial deference? In a fascinating analysis about the political and legal culture of European integration[54], professor J.H. Weiler advanced the concept of the 'habit of obedience': the MS 'have learned to live with and by EU law'[55]. However, EU law is a creation of the MS, through the EU institutions, acting within the limits of the competences established in the treaties. Therefore, we should aim to promote a culture of deference (not obedience), implying mutual respect between national and EU institutions. This is essential to ensure that we stay aligned with our common goals. Both the constitutional courts and the ECJ should uphold their roles without forgetting their responsibilities. We don't need blind obedience or conflicts. A balanced deference could be the key to the evolution of a more integrated EU within the current framework of the Treaties and Constitutions.

The topic is actual and relevant, also in the light of very recent developments in ECJ case law about the relationship between constitutional courts and the ECJ, and the effects of the decisions of the constitutional courts within the EU legal order. Thus, in the Judgment in Case C-792/22 | Energotehnica, decided on 26th September 2024, that the ECJ established that a national court is not required to apply a decision of its constitutional court that infringes EU law. In that regard, the Court states that national judges must be

52 | See Bóka and Krajnyák, 2023; and also Krajnyák, 2024.
53 | Kochenov, 2023, pp. 1–16.
54 | Weiler, 2011, pp. 678–694.
55 | See Zglinski, 2018, pp. 1341–1385.

able to refuse to follow a decision of their constitutional court if that decision is contrary to EU law. Where that is the case, they cannot incur disciplinary penalties.[56]

Our study is for sure limited, as developing each of the highlighted points would require an in-depth analysis in itself. Nevertheless, some ideas were expressed to raise awareness about the importance of efficient tools to maintain the coherence of constitutional justice within the EU and to preserve and develop the EU legal order. All the questions mentioned in the introduction stand as topics for future debates in light of the points discussed in the sections of this article. Judicial deference should be expressed in both legislative measures and the formation of judges. From a legislative perspective, the preliminary referral mechanism should be improved to facilitate this exercise in deference, which is essential for a real formal 'dialogue' between the constitutional courts and the ECJ. As for the formation of judges, we can learn from the past and analyse, after emotions have died down, to discern between real juridical problems or subjective ingredients.

56 | ECJ – Judgment of the Court in Case C-792/22 | Energotehnica, Press release [Online]. Available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-09/cp240150en.pdf (Accessed: 28 September 2024).

Bibliography

Albert, R. (2023) 'Does the World Need an International Constitutional Court?', *Rutgers International Law and Human Rights Journal,* 3(3), pp. 3–25; http://dx.doi.org/10.2139/ssrn.4198354.

Bell, J. (2006) *Judiciaries within Europe: A Comparative Review*. Cambridge: Cambridge University Press.

Bóka, J., Krajnyák, E. (2024) 'The Supranational Interpretation of the Rule of Law: Trends and Conclusions from a Central European Perspective' in Bóka, J. (ed.) *The Supranational Interpretation of the Rule of Law. Studies of the Central European Professors' Network*. Miskolc, Budapest: Central European Academic Publishing, pp. 413–440; https://doi.org/10.54237/profnet.2024.jbrol.

Călin, D. (2015) *European Union law and the Constitutional Courts of the Member States. Interviews*. Bucharest: Universitară Publishing House.

Claes, M., de Visser, M. (2012) 'Are You Networked Yet? On Dialogues in European Judicial Networks', *Utrecht Law Review*, 8(2), pp. 100–114 [Online]. Available at: http://dx.doi.org/10.18352/ulr.197 (Accessed: 12 September 2024).

Dickson, J. (2008) 'How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union', *Oxford Legal Studies Research Paper,* 2008(40), pp. 1–27 [Online]. Available at: http://dx.doi.org/10.2139/ssrn.1279612 (Accessed: 12 September 2024).

Dickson, J. (2012) 'Towards a Theory of European Union Legal Systems' in Dickson, J., Eleftheriadis, P. (eds.) *Philosophical Foundations of European Union Law*. Oxford: Oxford University Press, pp. 25–53; https://doi.org/10.1093/acprof:oso/9780199588770.003.0002.

Drinóczi, T., Mohay, Á. (2018) 'The preliminary ruling procedure and the identity review', *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 2017(1), pp. 192–209 [Online]. Available at: https://doi.org/10.25234/eclic/6528 (Accessed: 12 September 2024).

Fromage, D., de Witte, B. (2021) ''National constitutional identity ten years on: state of play and future perspectives', *European public law*, 27(3), pp. 411–426 [Online]. Available at: https://hdl.handle.net/1814/73603 (Accessed: 12 September 2024).

Kochenov, D.V. (2023) 'Restoring Dialogical Rule of Law in the European Union: Janus in the Mirror', *Cambridge Yearbook of European Legal Studies*, 2023(25), pp. 1–16 [Online]. Available at: https://doi.org/10.1017/cel.2023.16 (Accessed: 12 September 2024).

Krajnyák, E. (2024) 'Current trends in the supranationalization of the rule of law in the RU -Lecture', *A central european perspectivein the framework of Third Annual Scientific Conference of the Central European Academy (ASCEA).* Budapest: Central European Academy.

Lenaerts, K, Gutiérrez-Fons, J.A. (2023) 'Epilogue. High Hopes: Autonomy and the Identity of the EU', *European Papers*, 8(3), pp. 1495–1511 [Online]. Available at: https://doi.org/10.15166/2499-8249/726 (Accessed: 12 September 2024).

Lenaerts, K. (2013) 'The Outside and the Inside of the Court: Exploring the External and Internal Legitimacy of the European Court of Justice", R.R.D.E. (Romanian Review of European Law)' in Adams, M., de Waele, H., Meeusen, J., Straetmans, G. (eds.) *Judging Europe`s Judges. The Legitimacy of the Case Law of the European Court of Justice*. Oxford: Hart Publishing, pp. 13–60.

Lindeboom, J., Wessel, R. (2024) 'Introduction: The Autonomy of EU Law, Legal Theory and European Integration', *European Papers*, 8(3), pp. 1247–1254 [Online]. Available at: https://doi.org/10.15166/2499-8249/716 (Accessed: 12 September 2024).

Marzouki, M. (1999) 'Une structure judiciaire supranationale et indépendante pourrait agir en cas de scrutins truqués et rappeler les États au respect des libertés: Une Cour mondiale de la démocratie', *Libération*, 8 November. [Online]. Available at: https://www.liberation.fr/tribune/1999/11/08/une-structure-judiciaire-supranationale-et-independante-pourrait-agir-en-cas-de-scrutins-truques-et-_290047/ (Accessed: 12 September 2024).

Perju, V. (2020) 'Identity Federalism in Europe and the United States', *Vanderbilt Journal of Transnational Law,* 53(1), pp. 207–273.

Pivoda, M. (2019) *Constitutional Courts and Preliminary References to the CJEU. Master's Thesis.* Brno: Masaryk University.

Radu, R.H. (2021) *European Convention of Human Rights*. Bucharest: Universul Juridic Publishing House.

Safta, M. (2022) 'Courts vs Courts? Or a way together? Evolutions of the constitutional review in EU and worldwide', *Revista de drept constitutional/Constitutional Law Review*, 2022/1, pp. 78–91 [Online]. Available at: https://doi.org/10.47743/rdc-2022-1-0006 (Accessed: 12 September 2024).

Safta, M. (2023) 'The dialogue between courts and the future of coexistence in the European Union', *Central European Academy*, 26 May [Online]. Available at: https://centraleuropeanacademy.hu/en/hir/marieta-safta-the-dialogue-between-courts-and-the-future-of-coexistence-in-the-european-union/ (Accessed: 12 September 2024).

Safta, M. (2024) 'The Future of Coexistence in the European Union', *Central European Academy*, 14 February [Online]. Available at: https://centraleuropeanacademy.hu/en/hir/marieta-safta-the-future-of-coexistence-in-the-european-union/ (Accessed: 12 September 2024).

Selejan-Gutan, B. (2021) 'A Tale of Primacy, part III', *VerfBlog*, 2021/1, pp. 1–5 [Online]. Available at: https://doi.org/10.17176/20211117-202225-0 (Accessed: 12 September 2024).

Selejan-Gutan, B. (2022) 'Who's Afraid of the „Big Bad Court"?', *VerfBlog*, 2022/1, pp. 1–4 [Online]. Available at: https://doi.org/10.17176/20220110-195203-0 (Accessed: 12 September 2024).

Toader, T, Safta, M. (2023) 'Constitutional Identity and Relations Between EU Law and Romanian Law' in Varga, Zs. A., Berkes, L. (eds.) *Common Values and Constitutional Identities: Can Separate Gears Be Synchronised?* Miskolc–Budapest: Central European Academic Publishing, pp. 271–352; https://doi.org/10.54237/profnet.2023.avlbcvci_8.

Toader, T., Safta, M. (2016) *The dialogue of constitutional judges*. Berlin: Peter Lang GmbH; https://doi.org/10.3726/978-3-653-07031-6.

Toader, T., Safta, M. (2023) 'The Constitutional Review Of International Treaties, A Purely Decorative Power Of The Constitutional Court Of Romania', *The Annals of "Dunarea de Jos" University of Galati. Legal Sciences. Fascicle XXVI*, 6(1), pp. 110–127 [Online]. Available at: https://www.gup.ugal.ro/ugaljournals/index.php/als/article/view/6039 (Accessed: 12 September 2024).

Tremblay, L.B. (2005) 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures', *International Journal of Constitutional Law*, 3(4), pp. 617–648 [Online]. Available at: https://doi.org/10.1093/icon/moi042 (Accessed: 12 September 2024).

Varga, Zs. A., Berkes, L. (eds.) (2023) *Common Values and Constitutional Identities: Can Separate Gears Be Synchronised?* Miskolc–Budapest: CEA Publishing; https://doi.org/10.54237/profnet.2023.avlbcvci.

Weiler, J.H.H. (2011) 'The political and legal culture of European integration: An exploratory essay', *International Journal of Constitutional Law*, 9(3-4), pp. 678–694 [Online]. Available at: https://doi.org/10.1093/icon/mor054 (Accessed: 12 September 2024).

Zglinski, J. (2018) 'The rise of deference: The margin of appreciation and decentralized judicial review in EU free movement law', *Common Market Law Review*, 55(5), pp. 1341–1385 [Online]. Available at: https://doi.org/10.54648/COLA2018116 (Accessed: 12 September 2024).