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FUNDAMENTAL RIGHTS AND FREEDOMS AS BACKDROP FOR CONCEPTUALIZING CONSTITUTIONALITY OF THE EU[**]

Abstract

Constitutionality of the EU has been conceptualized over the course of the past several decades on the heels of the case law of the Court of Justice of the European Union. In the course of the past decade and a half, that intellectual undertaking relied substantially on the subject matter of fundamental rights and freedoms. That area thus started serving as the irreplaceable backdrop against which the doctrine on autonomy of EU law, as the cornerstone of constitutionality of the EU, has continued to develop itself. Most prominent milestones of the described development were the CJEU judgments in the seminal *Kadi* case of 2008, the opinion on accession of the EU to the ECHR, the judgments in cases *Melloni* and *Fransson* of 2013, and in *Tarrico I* and *Tarrico II* cases in 2015 and 2017, respectively. Fundamental rights and freedoms under EU law served in said cases as grounds for most varying purposes – from invalidating Member States' obligations under EU law to affording primacy to secondary EU law over Member States' constitutional provisions on basic rights and freedoms of their citizens. Prioritization of the aim of affirming EU constitutionality by virtue of CJEU case law by addressing the fundamental rights and freedoms has been made possible by relatively constructive participation of the Member States' national courts in the judicial dialogue with the CJEU. That aim may be fulfilled only if it remains clear to all stakeholders that the constitutionalization of the EU will ultimately lead to even stronger protection of fundamental rights across the EU.

Keywords: Constitutionality of the EU, Autonomy of EU law, Fundamental Rights, EU Charter of Fundamental Rights, Court of Justice of the European Union

I. INTRODUCTION

The aim of the paper is to show and explain the importance of fundamental rights and freedoms under European Union law for the development of the concept of the constitutionality of the European Union (the EU). That concept has not been codified in the treaties, and thus was not articulated directly by the Member States. Instead, it has been developed almost entirely on the basis of the caselaw of the Court of Justice of the European Union (the CJEU, Court, or ECJ). The CJEU laid the grounds for the concept of constitutionality of the EU constitutionality by relying on the principle of autonomy of EU

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law. It did that gradually, over the course of the past five decades. Within such long a timeframe, the last almost a decade and a half long period stands out as the time during which the intellectual undertaking of articulating and furthering the concept of EU constitutionality has mostly been performed by virtue of judgments and opinions rendered in relation to issues falling within the area of fundamental rights and freedoms. The start of the period coincides with the entry into force of the Charter of Fundamental Rights of the European Union within the Lisbon Treaty.

In this paper, we analyse the last phase of the development of the principle of autonomy of EU law, and, consequently, of the concept of constitutionality of the EU. As noted, that phase has taken place in the area of fundamental rights and freedoms.

The subject period may roughly be divided into two subphases, or, more precisely, perspectives – the first, during which the CJEU relied upon fundamental rights and freedoms under EU for the purpose of asserting or affirming the principle of autonomy of EU law, i.e. the constitutionality of the EU, and the second, comprising CJEU caselaw whereby that court confronted national constitutional courts of Member States by contrasting values, principles and rules of EU against fundamental rights under Member States' national constitutions. The presented case law shows that eventually both opposing predictions of the future role of the Charter of Fundamental Rights, which were being made prior to its entry into force, became true: fundamental rights have been used as a tool both for further integration of the EU and for protection national constitutional values.[1]

The paper shall, therefore, comprise three operative parts, in addition to the introductory and concluding parts: the first shall provide a conceptual understanding of EU constitutionality, whereas the remaining two shall analyse said two perspectives, respectively.

II. INTERPLAY BETWEEN FUNDAMENTAL RIGHTS AND CONSTITUTIONALITY IN THE EUROPEAN UNION

If one wishes to examine the birth and growing up of the concept of the constitutionality of the EU in CJEU case law, one should not look for the actual collocation “constitutionality of the EU”, since that is a doctrinal concept, for which the CJEU laid grounds in the form of one other principle, which it had devised: the autonomy of EU law. Although references to “constitutionality” appeared in CJEU caselaw in 1986[2] and continued to appear ever since it was on the basis of EU law autonomy that the jurisprudence has developed both the perception and understanding of the EU constitutionality.

Examining the doctrine of the CJEU on EU law autonomy would fall completely outside and beyond the aim and scope of this paper.[3] Several brief points in respect of that doctrine, however, should be made. Tridimas emphasized the "elusive" nature of the meaning of the principle of autonomy of EU law, as articulated in CJEU case law, pointing out that the subject meaning has been both relational, in terms of denoting autonomy both *vis-à-vis* national laws of Member States and *vis-à-vis* international law and conceptual, referring to

[1] Maduro, Miguel Poiares. 2004. How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European Union. Weiler, Eisgruber (eds.). Altneuland: The EU Constitution in a Contextual Perspective. Jean Monnet Working Paper 5. http://www.jeanmonnetprogram.org/papers/04/040501-18.html (accessed on 20 February 2021). pp. 14-15.

[2] Judgment of the Court of 23 April 1986, *Parti écologiste "Les Verts"* v *European Parliament*, C-294/83, ECR 1986 -01339, EU:C:1986:166

[3] For an in-depth analysis of the gradual development of the CJEU doctrine of the autonomy of EU law see: Lukić, Maja. 2013. Autonomija prava Evropske unije u svetlu novije prakse evropskih sudova [Autonomy of EU Law in Light of Recent Caselaw of European Courts]. Univerzitet u Beogradu, doktorska disertacija [University of Belgrade, PhD thesis].

the obligation of EU courts to uniformly interpret terms and concepts in EU measures which make no express reference to the laws of Member States.[4] According to that author, the principle has a threefold function, it "makes exclusivity of the ECJ's jurisdiction as an untouchable, *sine qua non*, attribute of EU law, "requires that the ECJ ... has the final say on the interpretation and validity of EU law", and it "means that the obligations of Member States vis-à-vis the EU and vis-à-vis each other when they act within the scope of application of EU law must be determined exclusively by EU law."[5] We have also elaborated the relational nature of the autonomy of EU law, which comprised the shift of the substantive point of reference of that principle from the national laws of Member States to the international law, in support, *inter alia,* of the general conclusion that the CJEU "consciously, purposefully and over a long period of time" used the concept of EU law autonomy to promote the projected goal of sovereignty of the EU.[6] Based on the fact that most of the judgments of the CJEU in which the principle of EU law autonomy had been articulated pertained to the subject matter of fundamental rights, in view of the paramount importance of fundamental rights for the constitutionality of any democratic political community, a finding that the autonomy of EU had been devised as a key tenet of constitutionality of the EU was proposed.[7]

Due to the same reasons for which the CJEU needed to disguise the aim of establishing the constitutionality of the EU under the doctrine of autonomy of EU law, the concept of the constitutionality of the EU itself remains elusive. Political structures and many citizens of Member States are still not prepared to unequivocally support transformation of the EU into a self-standing political community. Referring to the framework of several possible meanings of the terms constitutionalism that Craig laid out two decades ago,[8] it seems to us that the constitutionality of the EU, in the eyes of CJEU however, has surpassed the meaning peculiar to the EC according to Craig, i.e. the transformation from an international to constitutional legal order, so that it purports to fall within the scope of legitimate exercise of political power and good governance.

The nexus between the constitutionality of the EU and fundamental rights has been proclaimed in Article 6 of the Treaty on European Union (TEU), which stipulates that fundamental rights constitute general principles of EU law. According to Tridimas, these principles have constitutional status and comprise "fundamental rules which define the EU's system of government."[9]

When writing about the concept of constitutionalism and its actual application in the form of constitutionality of the EU, in addition to the traditional textbook definitions of constitutionality, one should also consider the definition proposed by Weiler in his seminal paper on the constitutional transformation of the European Communities: "the two key

[4] Tridimas, Takis. 2016. Cahiers de Droit Européen. Colloque 10 septembre 2015. Les principes généraux du droit de l'Union européenne 50e anniversaire. 1. pp. 439-440.

[5] Tridimas, Takis. 2016. Cahiers de Droit Européen. Colloque 10 septembre 2015. Les principes généraux du droit de l'Union européenne 50e anniversaire. 1. P.440.

[6] Lukić, Maja. 2013. Autonomija prava Evropske unije u svetlu novije prakse evropskih sudova [Autonomy of EU Law in Light of Recent Caselaw of European Courts]. Univerzitet u Beogradu, doktorska disertacija [University of Belgrade, PhD thesis]. pp. 294-295; Lukić, Maja. 2015. How long before a Bundle of Treaties becomes Sovereign? A Legal Perspective on the Choices before the EU. SEE|EU Cluster of Excellence in European and International Law. Verlag Alma Mater. pp. 127-137.

[7] Lukić, Maja. 2013. Autonomija prava Evropske unije u svetlu novije prakse evropskih sudova [Autonomy of EU Law in Light of Recent Caselaw of European Courts]. Univerzitet u Beogradu, doktorska disertacija [University of Belgrade, PhD thesis]. p.173.

[8] Craig, Paul. 2001. Constitutions, Constitutionalism, and the European Union. European Law Journal. Vol. 7, No. 2. pp. 127-128.

[9] Tridimas, Takis. 2016. Cahiers de Droit Européen. Colloque 10 septembre 2015. Les principes généraux du droit de l'Union européenne 50e anniversaire. 1. pp. 423, 419.

structural dimensions of constitutionalism in a nonunitary polity: (a) the relationships between political power in the centre and the periphery and between legal norms and policies of the centre and the periphery; and (b) the principle governing the division of material competences between Community and Member States."[10] According to Weiler, the CJEU's claim to competence for protection of fundamental human rights was needed to counterbalance the "democracy deficit in the Community decision making", but was also indispensable in the principal foundational period of the transformation of the European Communities from an international organization to an "inter-state polity", since the national courts of Member States would not have been able to accept the other three doctrines on which the "constitution-building" by the CJEU was based – the doctrines of direct effect, supremacy and implied powers.[11]

The peculiarity of the constitutionality of the EU was emphasized by Maduro by his characterization of that phenomenon in the period that preceded the Lisbon Treaty as "low-intensity constitutionalism", whereby he purported to imply that the subjection constitutionalism was "incremental and bottom-up", as well as "a product of both inter-governmental developments... and constitutional interpretation by the European Court of Justice in cooperation with a constituency of legal and political actors of national and supranational character," as well as "defensive constitutionalism", consisting in the "adoption of a series of constitutional doctrines necessary to justify and legitimise the assumption of normative and political authority by the European Communities."[12] Writing in the times when constitutional treaty was intensely debated, Maduro relied on the differentiation of two types of legitimacy, proposed by Bellami and Castiglione – regime legitimacy, relating to "the institutional and procedural mechanisms through which power is exercised in a polity", and polity legitimacy, i.e. "the need to justify the existence of that polity", in order to advocate the shift of the debates from the former to the latter, as a precondition for solving the constitutional challenges faced by the EU.[13] From the aforesaid, it is obvious that both Weiler and Maduro attributed the primary role in legitimizing the constitutionality of the EU to the protection of fundamental rights.

We agree with the general approach of Isiksler, who, noting that "constitutionalism represents a comprehensive system of validation for a public authority", accepts the claim that EU lacks democratic legitimacy of classic, i.e. democratic constitutionality, but puts forth instead of the concept of EU's "functional constitutionalism", whereby "the EU's over member states and their citizens is ... far more commonly justified on the grounds that it allows public power to be exercised more effectively".[14] It seems to us that the functionalist approach should not be allowed to deprive the concept of functionalism of substance, i.e. that the legitimation of the EU authority of EU bodies does and should not only, or even predominantly, come from "more effective" exercise of power, but instead from the substance of the aims for which the power is more effectively exercised, with fundamental rights forming the very focus of such substance, and thereby legitimation of the constitutionality of the EU. The significance of the

[10] Weiler, Joseph H.H. 1991. The Transformation of Europe. The Yale Law Journal. 100(8). p. 2408.
[11] Weiler, Joseph H.H. 1991. The Transformation of Europe. The Yale Law Journal. 100(8). pp. 2417-2418.
[12] Maduro, Miguel Poiares. 2004. How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European Union. Weiler, Eisgruber (eds.). Altneuland: The EU Constitution in a Contextual Perspective. Jean Monnet Working Paper 5. http://www.jeanmonnetprogram.org/papers/04/040501-18.html (accessed on 20 February 2021). pp. 14-15.
[13] Maduro, Miguel Poiares. 2004. How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European Union. Weiler, Eisgruber (eds.). Altneuland: The EU Constitution in a Contextual Perspective. Jean Monnet Working Paper 5. http://www.jeanmonnetprogram.org/papers/04/040501-18.html (accessed on 20 February 2021). pp. 1-2, 53.
[14] Isiksel, Turkuler. 2015. Functional constitutionalism in the European Union. EUSA Draft Paper. http://aei.pitt.edu/79343/1/Isiksel.pdf (accessed 1 February 2021). pp. 19, 27.

fundamental rights protection should be based on the fact that the protection of such rights at national level in the Member States forms the very pinnacle of respective national constitutions. We, however, believe that the functional approach should not be the exclusive basis for understanding the constitutionality of the EU and that its democratic legitimation should not be disregarded. Pure functionalist approach is based on the claim that democratic legitimation of EU constitutionalism is impossible due to lack of a constitutional *demos*, In our opinion, the argument that the sharing of democratic procedures and common values proves the existence of a European *demos*[15] cannot be easily rebutted. The possibility to rely, for the purpose of conceiving the constitutionality of the EU, on that argument in 2021 confirms the prophetic claim by Weiler, made two decades ago: "The only normatively acceptable construct is to conceive the polity as a Community of Values, ... when one grasps for a content for such a community ..., the commitment to human rights becomes the most ready currency."[16]

III. AFFIRMATION OF EU CONSTITUTIONALITY BY RELIANCE ON FUNDAMENTAL RIGHTS UNDER EU LAW

The doctrine of autonomy of EU law reached its apogee in the caselaw of the CJEU in parallel with the entry into force of the Charter of Fundamental Rights, i.e. towards the end of the first decade of the twenty-first century. The CJEU human rights jurisdiction, however, has been deepening and broadening in a linear fashion since the 2000s. Tridimas attributed such dynamics to the Court's "effort to enhance the legitimacy of the Union", by providing "a one-stop forum for the protection of fundamental rights."[17] The overlap of these two processes is marked by the CJEU case law that dominantly sought to further the constitutionality of the by relying on the fundamental rights under EU law.

In 2008, in its seminal *Kadi I* judgment,[18] the CJEU proclaimed EU fundamental rights and freedoms under EU law to have priority over international legal obligations, even over sanctions of the UN Security Council, promulgated under Chapter VII of the UN Charter.[19] The CJEU emphasized the overarching character of fundamental rights under EU law by affording them primacy over UN Security Council sanctions in respect of a person reported by a third country (the United States) for financing of terrorism. The Court found that Mr Kadi's rights of defence, effective judicial protection and property had been infringed by virtue an EU legislative measure designed to implement a United Nations Security Council resolution on the freezing of assets of the organisations, entities and persons identified by the United Nations Sanctions Committee as associated with Osama bin Laden, the Al-Qaeda and

[15] Bifulco, Raffaele, Nato, Alessandro. 2020. The concept of sovereignty in the EU – past, present and the future. RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law. European Commission. https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf (accessed 20 February 2021). p. 83.

[16] Weiler, Joseph H.H. 2001. Human rights, constitutionalism and integration: Iconography and fetishism. International Law FORUM Du Droit International, 3(4), p. 229.

[17] Tridimas, Takis. 2016. Cahiers de Droit Européen. Colloque 10 septembre 2015. Les principes généraux du droit de l'Union européenne 50e anniversaire. 1. p. 431.

[18] Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P, ECR 2008 I-06351, EU: C:2008:461

[19] For a more detailed perspective on the systems of international sanctions and the significance of the subject judgment, see Lukić, Maja. 2015. The Security Council's Targeted Sanctions in the Light of Recent Developments Occurring in the EU Context. Malloy, Michael P. Economic Sanctions, Vol. II. Edward Elgar Publishing 2015. pp. 239-250.

the Taliban. Such background was therefore exploited for stressing not only the inviolability of fundamental rights but also the autonomy of EU law as their source.

IV. EU CONSTITUTIONALITY OPPOSED TO NATIONAL FUNDAMENTAL RIGHTS

In 2013, by virtue of simultaneously issued judgments in cases *Melloni*[20] and *Fransson*, the CJEU established that the EU Charter of Fundamental Rights, and, in *Melloni* case, EU secondary law, have primacy over provisions of both national constitutions and of the European Convention dealing with fundamental rights and freedoms.

In the case that led to the CJEU judgment in *Melloni*, the Spanish Constitutional Court was faced with the execution of a European Arrest Warrant in respect of an Italian citizen who had been convicted *in absentia*. While the Spanish Constitution was interpreted in the manner that it afforded to such persons the right to apply for retrial, the EU legislation on the European Arrest Warrant that was effective at the time explicitly excluded the possibility that the judicial authority executing such a warrant may refuse execution on grounds of conviction *in absentia.* The Spanish Constitutional Court requested a preliminary ruling from the CJEU, asking, *inter alia*, whether Art. 53 of the Charter allowed a Member State to make the surrender of a person in such situation "conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from EU law", based on the level of protection recognised by the constitution of such Member State.[21]

The response of the CJEU was uncompromising: "where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised."[22] By putting forth such wording, the CJEU relied on constitutional principles of primacy, unity and effectiveness of EU law in order to make sure that Art. 53 of the Charter may not be construed as an exception to the principle of primacy of EU law.[23] The authority, bestowed upon the national courts by virtue of that provision, to disapply the Charter in case that a higher level of protection of fundamental rights has been granted by virtue of a national constitution, should not mean that such a right may serve as basis for disapplying EU legislation.[24]

On the very same day on which it rendered its judgment in *Melloni*, which is discussed in the subsequent part of this paper, the CJEU rendered its judgment in another case of key importance for the constitutionality in CJEU: *Fransson*.[25] Both chambers had the same judge rapporteur. A Swedish court requested a preliminary opinion on whether Mr. Åkerberg Fransson could have been convicted pursuant to criminal charges for tax frauds for the same actions for which he had been fined by a tax-administration body, i.e. whether such

[20] Judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11, [2013] ECR, EU: C:2013:107.

[21] *Stefano Melloni v. Ministerio Fiscal,* par. 26.

[22] *Stefano Melloni v. Ministerio Fiscal,* par. 60.

[23] De Witte, Bruno. 2013. Tensions in the Multilevel Protection of Fundamental Rights, The Meaning of Article 53 EU Charter. Silveira, A., Canotilho, M., Madeira Froufe, P. (eds.).Citizenship and Solidarity in the European Union. P.I.E. Peter Lang. pp. 206-207.

[24] For a more detailed analysis of the *Melloni* judgment, please see Lukić Radović, Maja, Čučković, Bojana. 2020. A decade of balancing with EU human rights protection: between national and international competences and sources of law, individual and systemic interests. EU and Comparative Law Issues and Challenges (ECLIC). 4. pp. 24-48.

[25] Judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson* C-617/10, [2013] ECR, ECLI:EU:C:2013:105.

conviction would contravene *ne bis in idem* rules of the ECHR and the Charter.[26] The gist of the Court's reasoning in this judgment lies in its finding that it had jurisdiction to render preliminary opinion, i.e. that the matter at issue concerned "implementation of EU law" because Mr. Åkerberg Fransson's commission of tax fraud in relation to VAT interfered with the financial interests of the EU, which each Member State had a duty to counter.[27] On the basis of such rather wide interpretation of its own jurisdiction, the Court used the opportunity to proclaim that if a national court "is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised."[28] In addition to widening its own jurisdiction, in this judgment, the Court, similarly to what it did in *Melloni*, gave the same level of priority to the protection of fundamental rights under the Charter as to the other key elements of the constitutionality of the EU: primacy, unity and effectiveness of EU law.[29]

Somewhat paradoxically, at least at first glance, the highest point of the ascending path of affirmation of the protection of fundamental rights as one of constitutional tenets of the EU, and of constitutionality of the EU as a whole, that has been reached thus far, seems to be the negative opinion of the CJEU on the EU accession to the European Convention on Human Rights (ECHR), issued in December 2014.[30] Several reasons for such conclusion that were offered by the CJEU may be subsumed under the claim that the draft agreement, by failing to take into account the specific structure of the EU and the specific nature of EU law, contravened the principle of autonomy of EU law, primarily by undermining the exclusive competence of the CJEU for interpretation of EU law.[31] Relying on its opinions in *Melloni* and *Fransson,* the CJEU found that the draft agreement on the accession to the ECHR was not capable of guaranteeing that the Member States when applying the ECHR, would not infringe upon the level of protection of pertinent rights under the Charter, or primacy, unity and effectiveness of EU law.[32]

Tridimas noted the change in respect of the purpose for which the Court relied on the principle of autonomy of EU law which transpired in Opinion 2/13: "whilst in Kadi it was used to enhance fundamental rights, in Opinion 2/13 it was used to lessen their protection."[33]

In the judgment in case *of Tarrico I*, rendered in 2015,[34] the CJEU further exploited the vein of the Treaty-based obligation of Member States to protect financial interests of the EU. It required that a national court "give full effect" to the provision of the TFEU which requires

[26] *Åklagaren v. Hans Åkerberg Fransson,* paragraphs 12-14.
[27] *Åklagaren v. Hans Åkerberg Fransson,* paragraphs 24-26.
[28] *Åklagaren v. Hans Åkerberg Fransson,* paragraph *29*.
[29] For a more detailed analysis of the *Fransson* judgment, please see Lukić Radović, Maja, Čučković, Bojana. 2020. A decade of balancing with EU human rights protection: between national and international competences and sources of law, individual and systemic interests. EU and Comparative Law Issues and Challenges (ECLIC). 4. pp. 28-33.
[30] Opinion of the Court 2/13 of 18 December 2014, [2014] ECR, EU: C:2014:2454.
[31] For a more detailed analysis of the *Fransson* judgment, please see Lukić Radović, Maja, Čučković, Bojana. 2020. A decade of balancing with EU human rights protection: between national and international competences and sources of law, individual and systemic interests. EU and Comparative Law Issues and Challenges (ECLIC). 4. pp. 33-35.
[32] Opinion 2/13, par. 189.
[33] Tridimas, Takis. 2016. Cahiers de Droit Européen. Colloque 10 septembre 2015. Les principes généraux du droit de l'Union européenne 50e anniversaire. 1. p. 441.
[34] Judgment of 8 September 2015, *Ivo Tarrico and Others* C-105/14, [2015] ECR, EU: *C*:*2015*:555.

that a Member State applies the same measures for protecting the financial interests of the Union against serious fraud that it applies to protect its own financial interests for such fraud, as well as that such measures comprise dissuasive and effective penalties (Art. 325 TFEU), even in situation in which giving full effect to said provision of EU law would entail disapplication of any provision of national law.[35] The ambiguity of such holding meant that even a provision of a Member State constitution would need to be disapplied. The judgment provoked controversy among legal academics, so that invocation of the *controlimiti* doctrine by the Italian Constitutional Court was feared.[36]

The Italian Constitutional Court had regarded limitation periods, which were at issue in *Tarrico I*, as part of substantive criminal law, which meant that such periods could not be amended retroactively *in peius*, as the holding in *Tarrico I* would require. For that reason, the Italian Constitutional Court addressed the CJEU, in the preliminary reference procedure, with three questions, asking whether the rule from *Tarrico I*, requiring disapplication of a national law provision, would apply even when (1) "there is no sufficiently precise legal basis for such disapplication", (2) "in the legal system of the Member State concerned, limitation periods form part of substantive criminal law and are subject to the principle of the legality of criminal proceedings?" (3) "such disapplication is at variance with the overriding principles of the constitution of the Member State concerned or with the inalienable rights of the individual conferred by the constitution of the Member State".[37] In the judgment, rendered in December 2017, which became known as *Tarrico II,* the CJEU generally affirmed its holding from *Tarrico I* but allowed that disapplication of national law provisions based on EU law would not be required if it would entail violation of the principles of legality and non-retroactivity in criminal law.[38] The CJEU stressed that these principles were based on the Charter, and the common constitutional traditions of Member States, respectively.[39] These references should be contrasted to the Italian court's invocation (in question no. 3) of overriding principles of the Italian constitution.[40] The response of the CJEU was narrowly crafted: without pronouncing a general rule, it simply negated the obligation of the national court to disapply national provisions in situations referred to in questions no. 1 and 2, and avoided to respond to question no. 3.[41]

V. CONCLUSION

Over the past several decades not only has the EU been transformed from a legal order based on international law to constitutional order, but its constitutionality has also evolved. While in the period that roughly preceded the enactment of the Lisbon Treaty the optimal approach to understanding constitutionality of the EC would have been from a functionalist perspective, which would assume that the constitutionality of the EC was legitimate because it enabled a more effective exercise of public power, in parallel with the enactment and entry into force of the Charter of Fundamental Rights, the protection of fundamental rights took centre stage as the primary substantive area of law within which constitutionality of the EU developed further. That shift may be regarded as a sign that the legitimation of EU constitutionality changed its basis, from a functional to a substantive one, so that the common

[35] *Ivo Tarrico and Others,* par. 58.
[36] Bonelli, Matteo. 2018. The Taricco saga and the consolidation of judicial dialogue in the European Union. Maastricht Journal of European and Comparative Law. Vol. 25(3). pp. 358-359.
[37] Judgment of 5 December 2017, *M.A.S., M.B.* C-42/17, [2017] ECR, EU: C:2017:936 (*Tarrico II*), par. 20.
[38] *Tarrico II*, par. 62.
[39] *Tarrico II*, par. 51-52, 53.
[40] *Tarrico II*, par. 18, 20.
[41] *Tarrico II*, par. 22, 63.

values of EU citizens have started to form the foundation of the EU as a polity. In all these judgments, EU law has been found to be "autonomous" from, and senior to both international obligations of the EU and its Member States, as well as most provisions of Member States constitutions. The fundamental rights and freedoms under EU law have served in these cases as grounds for fulfilment of most varying purposes – from invalidating Member States' obligations under EU law to affording primacy to secondary EU law over Member States' constitutional provisions on basic rights and freedoms of their citizens. The significance of the fundamental rights subject matter for the constitutionalization of the EU is perhaps most concisely articulated in the holding and reasons of Opinion 2/13 of the CJEU, which stalled the accession of the EU to the ECHR.

CJEU judgments in cases *Melloni* and *Fransson* provided much needed tools for coordination of fundamental rights protection on EU and national levels. Furthermore, by prioritizing the preservation of "unity, primacy and effectiveness" of EU law, even in contrast to fundamental rights under a Member State's national constitution (in *Melloni*), and by stressing the equipotency of fundamental rights under the Charter and other core constitutional principles of the EU – primacy, unity and effectiveness of its law (in *Fransson*), the CJEU firmly promoted the constitutionality of the EU as the primary concern of EU law.

The prioritization of affirming EU constitutionality by virtue of case law of the CJEU in the area of fundamental rights and freedoms has been made possible by relatively constructive participation of the Member States' national courts in the judicial dialogue with the CJEU. The benevolence of such participation thus far is important, since the area of fundamental rights and freedoms is very sensitive and easily prone to assertions of sovereignty by national constitutional courts. However, *Tarrico I* and *Tarrico II* judgments together present a testament to the fragility of collaboration and coordination between EU and national levels. It still remains to be seen how large shall be the breach of the principle of primacy that shall remain after *Tarrico II.*

The affirmation of EU constitutionality through judicial dialogue will continue further only if it remains clear to all stakeholders that the constitutionalization of the EU is the only path to even stronger protection of fundamental freedoms within the EU because an effective EU-wide system of fundamental rights and freedoms requires constitutionality of the EU as its source.

Bibliography:

Sources

1. Judgment of the Court of 23 April 1986, *Parti écologiste "Les Verts"* v *European Parliament*, C-294/83, ECR 1986 -01339, EU:C:1986:166
2. Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P, ECR 2008 I-06351, EU: C:2008:461
3. Judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11, [2013] ECR, EU: C:2013:107.
4. Judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson* C-617/10, [2013] ECR, ECLI:EU:C:2013:105
5. Opinion of the Court 2/13 of 18 December 2014, [2014] ECR, EU: C:2014:2454
6. Judgment of 8 September 2015, *Ivo Tarrico and Others* C-105/14, [2015] ECR, EU: *C*:*2015*:555

7. Judgment of 5 December 2017, *M.A.S., M.B.* C-42/17, [2017] ECR, EU: C:2017:936 (*Tarrico II*)

Literature

1. Bifulco, Raffaele, Nato, Alessandro. 2020. The concept of sovereignty in the EU – past, present and the future. RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law. European Commission. https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf (accessed 20 February 2021).
2. Bonelli, Matteo. 2018. The Taricco saga and the consolidation of judicial dialogue in the European Union. Maastricht Journal of European and Comparative Law. Vol. 25(3). pp. 357-373.
3. Craig, Paul. 2001. Constitutions, Constitutionalism, and the European Union. European Law Journal. Vol. 7, No. 2. pp. 125-150.
4. De Witte, Bruno. 2013. Tensions in the Multilevel Protection of Fundamental Rights, The Meaning of Article 53 EU Charter. Silveira, A., Canotilho, M., Madeira Froufe, P. (eds.).Citizenship and Solidarity in the European Union. P.I.E. Peter Lang. pp. 206-207.
5. Lukić, Maja. 2013. Autonomija prava Evropske unije u svetlu novije prakse evropskih sudova [Autonomy of EU Law in Light of Recent Caselaw of European Courts]. Univerzitet u Beogradu, doktorska disertacija [University of Belgrade, PhD thesis].
6. Lukić, Maja. 2015. How long before a Bundle of Treaties becomes Sovereign? A Legal Perspective on the Choices before the EU. SEE|EU Cluster of Excellence in European and International Law. Verlag Alma Mater. pp. 127-137.
7. Lukić, Maja. 2015. The Security Council's Targeted Sanctions in the Light of Recent Developments Occurring in the EU Context. Malloy, Michael P. Economic Sanctions, Vol. II. Edward Elgar Publishing 2015. pp. 239-250.
8. Lukić Radović, Maja, Čučković, Bojana. 2020. A decade of balancing with EU human rights protection: between national and international competences and sources of law, individual and systemic interests. EU and Comparative Law Issues and Challenges (ECLIC). 4. pp. 21-43.
9. Maduro, Miguel Poiares. 2004. How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European Union. Weiler, Eisgruber (eds.). Altneuland: The EU Constitution in a Contextual Perspective. Jean Monnet Working Paper 5. http://www.jeanmonnetprogram.org/papers/04/040501-18.html (accessed on 20 February 2021).
10. Isiksel, Turkuler. 2015. Functional constitutionalism in the European Union. EUSA Draft Paper. http://aei.pitt.edu/79343/1/Isiksel.pdf (accessed 1 February 2021).
11. Tridimas, Takis. 2016. Cahiers de Droit Européen. Colloque 10 septembre 2015. Les principes généraux du droit de l'Union européenne 50e anniversaire. 1. pp. 419-441.
12. Weiler, Joseph H.H. 1991. The Transformation of Europe. The Yale Law Journal. 100(80. pp. 2403-2484.
13. Weiler, Joseph H.H. 2001. Human rights, constitutionalism and integration: Iconography and fetishism. International Law FORUM Du Droit International, 3(4), pp. 227-238.