Short Symposium on the PSPP

The Wind of Change. On Some EU-Related Transformations of German and French Judicial Discourses

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'Et même,
à la fin de chaque vérité,
il faut ajouter
qu'on se souvient
de sa vérité opposée'.
(Pascal, *Pensées*, 1669)

Abstract

The 'transformative power of Europe' is a promising standpoint to shed light on national attitudes and beliefs formed in the course of centuries, as well as on paths taken by legal systems more recently.

The paper seeks to unravel some – more or less cryptic – legal changes driven by the EU integration process in both the German and the French judicial discourse.

In doing so, it argues that the *souveraniste* stance taken by the *Bundesverfassungsgericht*, as well as the 'constitutional identity' turn of the *Conseil constitutionnel*, contain the seeds of a new representation of what German and French constitutional judges consider to be their role in the relationships between EU law and domestic law.

I. Introductory Remarks

Irritating as it might be,[1] the German Federal Constitutional Court (hereafter: *BVerfG*) judgment of 5 May 2020 has at least the merit of not being ambiguous on how and to what extent EU responses in time of crisis – among which the Public Sector Purchase Programme (hereafter PSPP) launched by the European Central Bank (hereafter: ECB) in 2015 – represent a major test for the EU's cohesion, triggering Member States' different integration paths and their ability

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[1] According to the *Frankfurter Allgemeine Zeitung* even the president of the *BVerfG*, Andreas Voßkuhle, admitted that the decision, supported by the overwhelming majority of the Senat, 'could have an "irritating" effect in times of the coronavirus crisis', available at https://tinyurl.com/y74pcped (last visited 27 December 2020).

to overcome national sensitivities.[2]

Like every clash between domestic and EU law, it could be studied from multiple perspectives. A suggestion underlying this paper is that a focus solely on the 'orthodox', 'true' point of view of the EU institutions would miss the broader picture in which national actors operate.

The 'irritating effect' is indeed one of the most notable side effect of the creation of a supranational organization,[3] and we would do well to remember that it can be observed not only in relation to the *acquis*, expectations or requirements of the EU integration process, but also in respect to the legal, institutional, cultural and economic environment of Member States, as Gunther Teubner has brilliantly demonstrated.[4]

In many cases the reconfiguration of integration paths at the national level might be better explained through the 'legal irritants' metaphor, rather than the 'legal transplants' one. Hence, focusing on EU membership as a medium through which legal integration is implemented and experienced, but also contested and rejected, ought to be regarded by comparative law scholars as both a challenge and a goal to be embraced.

Comparative law is neither primarily about legal harmonization, nor about promoting legal diversity. It rather seeks to 'unpack'[5] legal systems on their own terms, in the very same way that the actors in these systems – hence their self-representations – do. In this vein, its main object is an 'interpretive social practice that both reflects and constitutes a community's commitment to governing itself in accordance with certain ideals'.[6]

Thus, whilst it is the job of EU legal scholars to look at the relationships between national legal systems and EU from the point of view of the European integration process, it might be the task of comparative lawyers, and particularly of those interested in inquiry into legal style and legal mentality, to take on the 'transformative power of Europe'[7] as a promising standpoint to shed light on

[2] See A. Supiot, 'La refondation de l'Europe ne pourra se faire sans sortir des Traités actuels' *Le Figaro*, available at https://tinyurl.com/y9xqv43r (last visited 27 December 2020).

[3] As F. Martucci, 'La BCE et la Cour constitutionnelle allemande: souligner les paradoxes de l'arrêt du 5 mai de la Cour constitutionnelle allemande' *Le club des jurists*, available at https://tinyurl.com/y6rjo8gx (last visited 27 December 2020), pointed out: '*Les Européanistes s'en offusqueront, les Internistes s'en réjouiront; l'inextricable nœud constitutionnel est celui de la prémisse fondamentale, les Traités pour les uns, la Constitution pour les autres. Dans la quête de spécificité de l'Union, on peut voir dans cette confrontation la tension inhérente à tout système d'intégration constitutionnelle*'.

[4] I am obviously referring here to G. Teubner's seminal study 'Good Faith in British Law or How Unifying Law Ends Up in New Divergences' 61 *Modern Law Review*, 11-32 (1998).

[5] G. Marini, 'Taking Comparative Law Lightly. On Some Uses of Comparative Law in the Third Globalization' 3 (1) *Comparative Law Review*, 15, 1-20 (2012).

[6] C. Valcke, Comparing Law: Comparative Law as Reconstruction of Collective Commitments (Cambridge: Cambridge University Press, 2018), 97.

[7] T.A. Börzel and T. Risse, 'The Transformative Power of Europe: The European Union and the Diffusion of Ideas' 1 *KFG Working Papers, Free University Berlin*, 1-28 (2009).

attitudes and beliefs formed over centuries, as well as on paths taken by national legal systems more recently.[8]

The paper seeks to unravel some (more or less cryptic) legal changes driven by the EU integration process in both the German and the French legal system.

The following section briefly shows that neither of the two EU founding members have ever driven the cause of European unity. As we point out, while every clash between domestic law and EU law may very well end up with a deepening of such unity, cutting through some of the rhetoric surrounding the functionalist narrative of crises seems necessary in order not to underestimate the extent to which national contexts and commitments could represent a brake on the integration process.

The third section, far from being an in-depth analysis of the 5 May judgment (something which we shall leave to more authoritative contributors), is an attempt at hatching some discontinuities in what Mitchel Lasser has famously described as 'a judicial self-portrait'.[9] Given the eminent role (and collective perception) of the *BVerfG* in the German legal process, we contend that its shift towards the most *souveraniste* side of the legal discourse spectrum has interestingly produced, in a somewhat Gaullist fashion, a new self-representation of the German constitutional judges, and arguably of the country as a whole in its relationship with the rest of Europe.

The paper then goes on to analyze French proceedings related to the ratification of EU Treaties as well as relevant *Conseil constitutionnel*'s rulings on European matters. Our aim is to offer some insights on the traditionally emblematic place accorded in France to sovereignty (fourth section) as well on some more recent developments epitomized by growing references to French constitutional identity (fifth section).

II. Looking Beyond the Functionalist Narrative of 'Crises': A Tale of National Sensitivities and Commitments

From the start of the PSPP judgment debate, it has been evident that the discussion ought to be neither just about technicalities of the *BVerfG*'s legal reasoning nor the ruling's impact in the wider context of Member States' cooperation in the EU.[10] Deeper arguments concerning Germany's self-

[8] With respect to the French legal style and mentality, see C. Amodio, *Au nom de la loi. L'esperienza giuridica francese nel contesto europeo* (Torino: Giappichelli, 2012), 211.

[9] See Mitchel de S.-O.-l'E. Lasser, 'Judicial (Self-)Portraits: Judicial Discourse in the French Legal System' 104 *Yale Law Journal*, 1325-1410 (1995), brilliantly showing that to a large extent, French judges do something different from what their formalist self-representation would lead us to think.

[10] Among the most recent and useful additions to the already voluminous literature on the ruling, see the Special Section on 'The German Federal Constitutional Court's PSPP Judgment' 21 (5) *German Law Journal* (2020).

representation are clearly in play.

By the mid-1970s, in its *Solange* decisions, the *BVerfG* famously refused to accept the unconditional primacy of European law, particularly over the fundamental rights of the *Grundgesetz* (hereafter: *GG*).[11] This is still remembered as both a disruptive moment of resistance by a major national institution to European Court of Justice (hereafter: ECJ) attempts to establish the principle of autonomy of the European legal system, and the clearest expression of a broader reluctance to transfer sovereign competencies to a set of institutions lacking basic rights provisions. Over the decades *BVerfG*'s restrictive readings of the primacy of EU law, unanimously regarded as a crucial factor in the establishment of the counterlimits doctrine, have played an equally important, albeit less frequently acknowledged, role in pushing the issue of recognition of fundamental rights protection at the EU level.[12] With the Treaty of Maastricht, such concern eventually became a priority on the EU agenda in order to seek consensus on an unprecedented process of creating a political unity out of the original economic unity, albeit the former was – and to a large extent still is – functionally connected to the latter.[13]

It has been argued that the functionalist thinking indeed underlying the European integration process and discourses since the beginning, deliberately implies both incompleteness and a blurring view of political accountabilities and functions.[14] From this perspective, the *BVerfG*'s restrictive reading of the EU monetary policy mandate and its *ultra vires* position can be ultimately interpreted as an explosive response to the functionalist teleology famously epitomized, at the peak of the European sovereign debt crisis, in the former ECB President Mario Draghi's promise to do 'whatever it takes' to preserve the Eurozone.[15]

Certainly, the *BVerfG*'s refusal to accept the ECJ's verdict as for the proportionality of the PSPP came up to significantly blur the separation of functions between the ECJ and national courts enshrined in Art 267 TFEU. However, it did so on the assumption that the ECJ (and, upstream, *a fortiori*, the PSPP, which is in turn the form taken in recent years by the 'whatever it takes' promise) carries itself a blurring view of the separation between monetary

[11] Bundesverfassungsgericht 29 May 1974, 52; Bundesverfassungsgericht of 22 October 1986, 197, both published in Decisions of the Bundesverfassungsgericht, Federal Republic of Germany: International Law and Law of the European Communities 1952-1989, (Baden-Baden: Nomos, 1992), respectively 275 and 625.

[12] For a very stimulating reassessment of the topic, B. Davies, 'Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence', in F. Nicola and B. Davies eds, *EU Law Stories: Critical and Contextual Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017), 157-177.

[13] E. Spolaore, 'What Is European Integration Really About? A Political Guide for Economists' 27 (3) *The Journal of Economic Perspectives*, 125-144 (2013).

[14] ibid 133.

[15] On the problematic issue of ECB's market neutrality approach see eg A. Guazzarotti, '«Neutralità va cercando, ch'è sì cara»! Il Tribunale costituzionale tedesco contro la politicità dei programmi di *quantitative easing* della BCE' 43 (2) *DPCE Online*, 2811-2825 (2020).

and economic policies under EU law. One that, in the *BVerfG*'s view, would in any case 'lead to the *de facto* suspension or undermining of the principle of conferral'.[16]

It could even be contended, from a functionalist point of view, that such clashes are not a bug but a feature, serving the European integration purposes by creating pressure for necessary solutions and further developments.[17]

While it is still uncertain whether the 5 May judgment will urge EU institutions to provide a clear economic (and political) impact assessment of their monetary policy,[18] it is retrospectively true that the several crises the European continent has witnessed have ultimately led to significant progress and enabled European integration to take its current shape. Basically, there would be no European integration process without the historical crisis in which France and Germany cooperation was set up. The apparent disproportionate relationship between high ideals (the goal of sustainable peace in Europe, notably regarding Germany) and means to achieve them (the establishment of a partial common economic system) in which its genealogy lies, were largely contingent and fairly reflect that particular historical crossroad.[19]

But 'functionalist' reasons do not explain everything. More than high ideals were – and still are – at work. To a large extent, French concerns about Germany's reconstruction echoed France's distinctive geopolitical interests and ideas regarding its role in postwar European reorganization. This is to say that Franco-German

[16] Bundesverfassungsgericht 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, 112, available at https://tinyurl.com/y7mdvhqg (para 158) (last visited 27 December 2020). Interestingly enough, there are striking analogies between the reasoning in 5 May judgment and what the *Bundesverfassungsgericht* already stated in the Lisbon Treaty ruling: 'As a supranational organization the European Union must comply (…) with the principle of conferral exercised in a restricted and controlled manner'). See the para 298 of Bundesverfassungsgericht 30 June 2009, 2 BvR 182/09, 239–42, available at https://tinyurl.com/yab9lbqc (last visited 27 December 2020).

[17] As highlighted by G.W. Ball, 'Forward', in F. Duchêne ed, *Jean Monnet: The First Statesman of Interdependence* (New York: Norton, 1994), 4, there is a 'well-conceived method in (the) apparent madness' of launching of a deliberately incomplete supranational integration process.

[18] As G. Scaccia has observed more generally: 'The main question is how to think about these clashes normatively and how to understand them, not just as a sign of sovereigntist/populist resistance to EU law, but rather as an attempt to re-politicize it'. G. Scaccia, 'The Lesson Learned from the Taricco Saga: Judicial Nationalism and the Constitutional Review of E.U. Law' 35 (4) *American University International Law Review*, 823, 821-877 (2020).

[19] Perhaps the most interesting attempt to clarify this apparent disproportion in light of its neofunctionalist premises is provided by E.B. Haas, *The uniting of Europe: political, social, and economical forces, 1950-1957* (Stanford: Stanford University Press, 1958), passim. Ten years ago, in his rather pessimistic paper on Eurozone crisis, Timothy Garton Ash persuasively identified 'five great driving forces of the European project', namely 'the memory of war', 'the Soviet threat to western Europe', 'American support for European integration in response to the Soviet threat', 'the Federal Republic of Germany, wanting to rehabilitate post-Nazi Germany in the European family and also to win its European neighbours' support for German unification', and 'France, with its dual-purpose ambition for a French-led Europe' (T. Garton Ash, 'Europe is sleepwalking to decline. We need a Churchill to wake it up' *The Guardian*, available at https://tinyurl.com/y9clfaxy (last visited 27 December 2020)).

partnership was formally created on an equal footing but actually French-led. Interestingly enough, the nature of Franco-German relationship eventually changed and became increasingly asymmetrical in favor of Germany. To put it bluntly: European integration, formerly the most effective means for Germany's reconstruction from the ashes of World War II, is today Germany's most successful way of exerting soft power beyond its borders.[20]

Most importantly, neither of the two EU founding members have always driven the cause of European unity. Without a doubt, whereas the extensive use of the word 'crisis' is a constant in European integration narrative,[21] some of the most stinging challenges in its 68-year history have come from France or Germany.

Shortly after the creation of the first European Communities, few ideas have played such a decisive role as Charles de Gaulle's opposition to supranationalism. Three moments, in particular, have become touchstones of the legal scholarship as regards as the Gaullist 'intergovernmental' views of the tension between national sovereignty and European integration process: the failure of the Fouchet Plan (1961-1962), the two unilateral vetoes of the British application for membership (1963 and 1967), and the Empty Chair Crisis in 1965.[22] What is immediately noticeable about these events, as different as they may be, is that de Gaulle succeeded in identifying himself with (hence bringing to light) a deep-rooted feature of French political and constitutional culture, namely a strong belief in the self-determination and in the political impetus of the Nation,[23] whose sovereignty could both act as a brake to the integration process and transform its essence. As it has recently been observed by a French scholar, 'at base Europe is at the service of a national cause'.[24] This feature is hardly contradicted by the French debate on the European constitution and its rejecting result in the 2005 referendum.

In France like in Germany, the Constitution stands as the supreme norm, but a close look at the EU-related case law of the *Conseil constitutionnel* will reveal that domestic constitutional limits refer more to the procedural requirement to amend the Constitution before Treaties ratification, rather than to the inalienable

[20] Compare D. David, 'Paris and Berlin: History and the long term' 4 *Politique étrangère*, 87-98 (2019).

[21] L. Warlouzet, 'European Integration History: Beyond the Crisis' 44 (2) *Politique européenne*, 98-122 (2014).

[22] See, among others, A. Moravcsik, 'de Gaulle and European integration: historical revision and social science theory' 8 (5) *CES Germany & Europe Working Papers*, May 2008, 1-84 (2008).

[23] See M. Volpi, *La democrazia autoritaria. Forma di governo bonapartista e V Repubblica francese* (Bologna: il Mulino, 1979), passim, highlighting some continuities between the General's political action and a Bonapartist tradition inclined to personalize to the extreme the link between Nation and State.

[24] O. Rozenberg, 'France in quest of a European narrative' 4 *Les Cahiers européens de Sciences Po*, 5, 1-15 (2016).

substantive core of the domestic legal order.[25] It is therefore of utmost relevance that the *Conseil constitutionnel* has recently rephrased its reservations to EU law, finding in the 'French constitutional identity' a new yardstick against which to conduct its review.[26]

Since the history of Germany stands in contrast, in many respects, with that of France, the term 'sovereignty', so crucial in France, does not figure in the *GG*, which indeed from the beginning was distinguished by its 'visionary openness towards Europe'.[27] As reported by eminent German scholars, Art 24 *GG*, the original constitutional 'integration provision' dealing with the transfer of sovereign powers to international organizations, was even described in 1948 by one of its drafters as a 'very nice answer' to the Art 15 of the Preamble of the 1946 French Constitution, which only enabled 'limitations' to national sovereignty.[28]

Rather than an identity based on a sovereign national state, thoroughly discredited by Nazism, the Federal Republic of Germany developed an attitude famously referred to as 'constitutional patriotism', that is a deep identification amongst German citizens with *GG* values[29]. The *Solange* doctrine on the examination of EU acts against fundamental rights enshrined in the *GG* perfectly shows how constitutional patriotism can be deployed to defend the ethos of a citizen-centred democracy at the national level.

Not later than 10 years ago described by its own President as being 'neither engine nor brake' of European integration,[30] the *BVerfG* is actually, above all, the 'watchdog' of domestic fundamental principles in legal practice,[31] enjoying a very high prestige within the German political system.[32] Its prestige and hence its proactive commitment in the rule-making process – quite different from those featuring the *Conseil constitutionnel* – should not be forgotten when assessing the potentially disruptive scope of the 5 May judgment.

[25] See below para IV.

[26] See below para V.

[27] F. Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' 10 (8) *German Law Journal*, 1219, 1219-1240 (2009).

[28] D. Grimm et al, 'European Constitutionalism and the German Basic Law', in A. Albi and S. Bardutzky eds, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (The Hague: T.M.C. Asser Press), 410, 407-492 (2019).

[29] J. Habermas, *Droit et démocratie entre faits et normes* (Paris: Gallimard, 1997), passim.

[30] As reported by W. Lehmann, 'European Democracy, Constitutional Identity and Sovereignty: Some Repercussions of the German Constitutional Court's Lisbon Judgment', available at https://tinyurl.com/y98k5mt7, (last visited 27 December 2020).

[31] F. Fontanelli, '*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v. Hans Åkerberg Fransson' 9 (2) *European Constitutional Law Review*, 2013, 315-334.

[32] Accordingly, the German Federal Constitutional Court is often compared to the United States Supreme Court, as recalled by S. Haberl, 'Comparative Reasoning in Constitutional Litigation: Functions, Methods and Selected Case Law of the German Federal Constitutional Court', in G.F. Ferrari ed, *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems* (Leiden-Boston: Brill, 2019), 295-324.

III. Has the *BVerfG* Become Gaullist? The PSPP Judgment as a New Germany's Self-Portrait

The PSPP reasoning might well be framed in a *Solange* fashion: *as long as* there is no meaningful review either at the stage of competence allocation or in the exercise of the competence for institutions of the EU, (i) the objection of *ultra vires* before the *BVerfG* might arise and (ii) the *BVerfG* will carry out such a review according with its own proportionality standards.[33]

Nevertheless, its comparatively more threatening tone, together with the very core of constitutional complaints directed against the EU, question the accuracy of this account, suggesting a 'new course' of the *BVerfG*'s EU-related case law.

Looking at the list of judicial reservations made in the 5 May judgment, one comes indeed to the conclusion that according to the *BVerfG*, the ECJ's main failure was to hand an EU institution with reduced democratic legitimacy (the ECB) nothing less than a *Kompetenz-Kompetenz*.[34] This to say that in the *BVerfG*'s view the allocation of competences itself (and not only its exercise) is far from being beyond dispute, as it might conceivably touch upon the essence of the principle of democracy as protected by the *GG* and particularly by its Art 79 (the so-called eternity clause).[35]

This shift towards the most *souveraniste* side of the legal discourse spectrum as regards to EU integration process is not unprecedented: it echoes concerns of 'creeping enlargement of competences' (*schleichende Kompetenzerweiterungen*) already present in the Maastricht debate and in *BVerfG*'s judgments on the European Arrest Warrant I and the Lisbon Treaty.[36]

In the context of the establishment of the European Union under the Maastricht Treaty, Germany has legitimized its participation in the European integration by specific constitutional clauses which were introduced in the *GG*. The same situation occurred in France, although it should be noted that in the shadow of General de Gaulle's will, the drafters of the Constitution of the Fifth Republic adopted in 1958 provided for a procedure specifically allowing the *Conseil constitutionnel* to review a draft treaty before its ratification. As a result,

[33] According to J. Ziller, 'The Unbearable Heaviness of the German Constitutional Judge on the Judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 Concerning the European Central Bank's PSPP Programme' (5), available at https://tinyurl.com/ycve48fg (last visited 27 December 2020), as from the Maastricht judgment 'the *BVerfG* (...) gradually extended the *Solange* reservation to the constitutional identity of Federal Germany - as did several other constitutional courts, including the Italian one with its doctrine of *controlimiti*. What is new (in the PSPP judgment) is the extension of the *Solange* reservation to methods of legal interpretation'.

[34] See eg D. Grimm, 'A Long Time Coming' 21 (5) *German Law Journal*, 946, 944-949 (2020).

[35] Compare on this topic A. Engel et al, 'Is this Completely M.A.D.? Three Views on the Ruling of the German FCC on 5th May 2020' (140), available at SSRN: https://tinyurl.com/y93dhfsf (last visited 27 December 2020).

[36] J. Ziller, n 33 above, 4.

the French Constitution has significantly been amended since 1992, typically according to the *Conseil constitutionnel*'s finding that a Treaty transferring further competences to the EU affects 'the essential conditions for the exercise of national sovereignty'.[37] Shutting down creeping supranationalism was clearly a major issue also in Germany, where the most relevant change effected in 1992 was to ensure that constitutional implications of subsequent transfers of sovereignty be legitimated by a constitutional amendment procedure, whether implicit or explicit.[38] All in all, in both legal systems, the already existing principles of openness towards international law (Art 24 *GG* and Art 15 of the Preamble of the 1946 French Constitution respectively) appeared to be no longer a sufficient constitutional basis for their constitutional participation in the European integration.

In the *BVerfG*'s judgment on the Maastricht Treaty the *Staatenverbund* neologism (that is, a 'compound of states' close to a confederation)[39] was even coined to make clear that the dangers of the creeping supranationalism have to be addressed by relaunching the idea, once famously supported by de Gaulle, of an 'intergovernmental community'.[40]

Such a linguistic invention eventually reappeared in both the European Arrest Warrant[41] and the Lisbon Treaty rulings,[42] coupled with an even more explicit 'gaullist' *topos arguendi*: the qualification of Member States as 'masters of the treaties' and the construction of European competences as ultimately delegated by the sovereign 'constituent power' of the Member States.[43] Although both judgments are careful enough not to specify a *referendum* requirement, the *BVerfG* clearly suggested that a creation of a European federal state would transcend the existing domestic constitutional order and would consequently require that the exercise of 'the pre-constitutional (revolutionary?) right to give oneself a constitution' be ensured.[44]

[37] See below para IV.

[38] D. Grimm et al, n 28 above, 415.

[39] See Bundesverfassungsgericht 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, B.2.c5, available at https://tinyurl.com/ybltc8jx (last visited 27 December 2020).

[40] Compare the translation of the neologism Staatenverbund provided by the European Commission for Democracy through Law (better known as the Venice Commission), which in the Guidelines for the presentation of précis - Revised version 1998, speaks indeed of an 'intergovernmental community', available at https://tinyurl.com/y7lrlkv5 (last visited 27 December 2020).

[41] Bundesverfassungsgericht 15 December 2015, 2 BvR 2735/14, 36, 38, 40, available at https://tinyurl.com/y7n5shum (last visited 27 December 2020).

[42] Bundesverfassungsgericht 30 June 2009, 2 BvR 182/09, 239–42, n 16 above.

[43] Notably enough, in the Lisbon Treaty ruling, this expression recurs in not less than six sentences, one of which invokes '(t)he obligation under European law to respect the constituent power of the Member States as the masters of the treaties'.

[44] Bundesverfassungsgericht 30 June 2009, 2 BvR 182/09, 239–42, para 179. In the following paragraphs, the Court significantly stated that 'faith in the constructive force of the mechanism of integration cannot be unlimited' and made up another linguistic invention: 'the individual Member State's constitutional responsibility for integration' (para 238). Eventually the *Bundestag* followed

It is essentially in accordance with this approach that in the PSPP judgment the *BVerfG* pushes the *Bundestag*, the national parliament, to step up its involvement in EU decisions to come. Indeed, the *BVerfG*'s self-proclaimed right to decide as a court of last instance whether an EU institution violates its competences under the Treaties is built upon an even stronger emphasis on the essence of the EU as 'the multi-level cooperation of sovereign states, constitutions, administrations and courts'.[45]

Here again, the ruling seems to be departing from the *Solange* doctrine as *BVerfG* intensified his *souverainiste* approach by exclusively focusing on restricting the transfer of competences to the European level and gives itself a power whose activation completely depends on its will. Its reasoning is indeed unquestionably marked by a desire to protect national interests in a field – that is, economic policy – in which a somewhat old-fashioned idea of national self-determination is considered to be essential for the German growth model. It is undoubtedly interesting, and perhaps ironic, that the prevailing macroeconomic message underlying the restrictive reading of the EU monetary policy comes from a country whose contribution since the enactment of stability mechanisms has been crucial to make the separation between monetary policy and economic policy less obvious than what it was under the Maastricht Treaty.[46] In fact, as we have previously stressed, no country has been more performing than Germany in creating a relatively cooperative economic structure in which its own interests flourish.

Britain's Prime Minister Harold Macmillan once remarked that when de Gaulle says 'Europe', he actually means 'France'.[47] Perhaps today it would not be exaggerated to say that when the Karlsruhe judges say 'Europe', they really mean 'Germany'. Surprising as it may be, given German political history since 1945, their last *souverainiste* shift might easily be explained by their quest for the safeguard of the German ordoliberal approach to monetary and economic policy, which is largely drawn on the premise of an independent, inflation-targeting *Bundesbank*.[48]

the *BVerfG* by enacting a new package of legislation, including the so-called 'Responsibility for Integration Act'. On 'sovereign statehood' as the 'new leitmotif" of the *BVerfG*, see D. Thym, 'From Ultra-Vires-Control to Constitutional-Identity-Review: The Lisbon Judgment of the German Constitutional Court', in J.M. Beneyto and I. Pernice eds, *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Baden-Baden: Nomos, 2011), 31.

45 Bundesverfassungsgericht 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, 112, para 111.

46 P. De Grauwe, *Economics of Monetary Union* (Oxford: Oxford University Press, 2013), passim.

47 Such a famous statement is reported, among others, by the richly documented J. Lacouture, *de Gaulle*, vol. 3 (Paris: Seuil, 1986), 315.

48 This is actually a two-decades-long quest, since in the Maastricht judgment already, the *BVerfG* gave price stability and central bank independence a constitutional significance (not less than the one entailed in the eternity clause), that they had never had before under the Basic Law: see M. Goldmann, 'The European Economic Constitution after the PSPP Judgment: Towards

There is nothing new about the risk of conflict between the *BVerfG* and the ECJ, but the impression 'that something unimaginable has occurred'[49] is widely shared. At some point in the sixties, the French veto of the British application for membership, as well as the Empty Chair policy, were no longer just a sword of Damocles hanging in the air. Whether we like it or not, the same holds true today for the *ultra vires* review, long thought to be an instrument of last resort.

IV. French Proceedings and *Conseil Constitutionnel*'s Rulings Related to the Ratification of EU Treaties as a Means to Enforce a Certain Idea of Sovereignty (and of a Constitution)

> 'France can always modify its Constitution. It therefore retains its sovereignty'.[50]

This statement, made by a former President of the *Conseil constitutionnel* in the context of the ratification of the Maastricht Treaty, is perhaps not easy to interpret,[51] but it fairly reflects the French attitude of apprehending the tension between national sovereignty and European integration process from a very peculiar, voluntarism-b(i)ased, perspective.

Old fashioned as this perspective might appear given the *status* of the EU (exceeding by far that of a 'classic' international organization), to claim such perspective's death would amount, in fact, to little more than wishful thinking with respect to the French *perception* of the EU as a unified system of rules and institutions *ultimately* emanating from States' own free will.

Classical international legal voluntarism might be (and indeed has been) criticized on several grounds, especially from being overly obsequious to State sovereignty.[52] Yet, due to its constitutional history, this is still a very powerful framework in France. As the previously referred statement eloquently sums up, there is no contradiction between such a voluntarist paradigm and the power of a State to use its present sovereign powers to limit (even substantially) its future sovereign powers, since this is *precisely* an attribute of sovereignty. Moreover, this view includes conceiving the Constitution as (above all) a means of sovereignty

Integrative Liberalism?' 21 (5) *German Law Journal*, 1069, 1058-1077 (2020). See also A. Supiot, n 2 above.

[49] D. Grimm, n 34 above, 944.

[50] F. Luchaire, 'La Constitution pour l'Europe devant le Conseil constitutionnel' *Revue du droit public et de la science politique en France et à l'étranger*, 58, 51-58 (2005).

[51] Compare O. Beaud, 'La souveraineté de l'État, le pouvoir constituant et le Traité de Maastricht. Remarques sur la méconnaissance de la limitation de la révision constitutionnelle' *Revue française de droit administratif,* 1057, 1045-1068 (1993).

[52] eg T. Christakis, 'Human Rights from a Neo-Voluntarist Perspective', in J. Kammerhofer and J. D'Aspremont eds, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), 421.

and having faith in the Nation as the sole bearer of State sovereignty.[53]

There are several respects in which de Gaulle, the uncontested founding father of the Fifth Republic, succeeded to incarnate these ideas once he came to power. He 'adjust(ed) the previous regime'[54] in many purely domestic matters, to such an extent that the President of the Republic became the central institution of the renovated parliamentary system. His understanding of constitutional procedures and institutions has left a lasting mark on the Fifth Republic. He even conceived the constitutional judge as the 'watchdog' of the executive power, whose main role in the context of its *ex ante* review of constitutionality was to prevent Parliament from violating the limits that the rationalized parliamentarianism fostered by the new Constitution had imposed on the legislative power. Accordingly, the Constitution was not meant to be invoked by individuals. Pursuant to the original drafting of Art 61 Constitution, statutory laws may be challenged before the *Conseil constitutionnel* only by the President of the Republic, the Prime Minister, the President of the *Assemblée Nationale*, the President of the *Sénat*.[55]

But de Gaulle also managed to inscribe in the Constitution his distinctive position vis-à-vis of both the (at the time nascent) European integration process and the State's statehood. His essential concern was to ensure that the last word over any future supranational development be given to the French Nation.

While the Constitution of the Fifth Republic appears to have rested upon the premises of the monist tradition underlying the Preamble of the 1946 Constitution,[56] the primacy granted to international law over national laws by virtue of Art 55[57] is far from being the only feature to take into account when assessing French approach to the relationship between domestic legal order and European law.

[53] As it is well-known, these ideas owe their currency to Emmanuel-Joseph Sieyès, whose landmark *pamphlet* J-E. Sieyès, 'Che cos'è il Terzo Stato?' (1789), in Id, *Opere e testimonianze politiche*, G. Troisi Spagnoli ed, (Milano: Giuffè, 1993), I, 1, was to a great extent the theoretical impetus behind the French Revolution of 1789. On the significance attached by Sieyès to the Nation and to the Constitution, see G. Rebuffa, *Costituzioni e costituzionalismi* (Torino: Giappichelli, 1990), 41 and L. Jaume, 'Constituent Power in France: The Revolution and its Consequences', in M. Loughlin and N. Walker eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008), 67-86.

[54] G. Carcassonne, *La Constitution* (Paris: Seuil, 2013), 19.

[55] The *Conseil constitutionnel* has become increasingly active since 1974 following an amendment to the Constitution which allowed sixty Members of the *Assemblée Nationale* or sixty Senators (the so-called *bloc d'opposition*) to submit legislation for constitutional scrutiny. On the evolution of the French *ex ante* review of constitutionality, from its difficult start in 1958 to its close relationship with the material core of the Constitution, see C. Amodio, n 8 above, 131.

[56] Which is made part of the Constitution of 1958 by the Preamble of the latter, together with the French Declaration of the Rights of Man and of the Citizen and, since 2004, the Charter for the Environment.

[57] Art 55 Constitution provides that 'treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'.

Interestingly enough, and according to some commentators in a self-contradictory manner, French Constitution fluctuates between two principles. On the one hand, the openness towards international law underlying the Preamble of the 1946 Constitution and Art 55 Constitution; on the other, the emphasis on French constitutional sovereignty enshrined in Art 54 Constitution.[58] 'Limiting the consequences of the monist system, which were perhaps considered too harsh', has been even described by a former Member of the *Conseil constitutionnel* as the foremost goal of de Gaulle's mark on the drafting of Art 54 Constitution.[59]

Because de Gaulle's main fear was creeping supranationalism, he set in Art 54 Constitution a rather procedural boundary to any future transfers of sovereign powers, introducing the possibility of the constitutionality review of a draft treaty to take place before its ratification, so that in the case of a finding of unconstitutionality by the *Conseil constitutionnel*, a treaty cannot be ratified unless the Parliament convened in Congress, ie a joint session of both the *Assemblée Nationale* and the *Sénat*, enacts a constitutional amendment. To this end, Treaties may be referred to the *Conseil constitutionnel*, before their ratification, by the President of the Republic, the Prime Minister, the President of the *Assemblée Nationale*, the President of the *Sénat*, sixty Members of the *Assemblée Nationale* or sixty Senators.

Art 11 Constitution, providing that international treaties may be a possible subject of a referendum, was also drafted in strict accordance with the view of activating Nation's supreme sovereign powers (hereby directly and not through its democratically elected representatives), although the decision to hold a referendum falls within the discretionary power of the President of the Republic and it has typically operated as a (possible) lightning rod.[60]

All in all, a referendum only occurred three times in relation to European matters,[61] whilst there is a long succession of *Conseil constitutionnel* decisions starting in 1970 and ending in 2007 rendered in the framework of its *ex ante* review of EU agreements' constitutionality.[62] Following from Art 54 Constitution,

[58] N. Quoc Dinh, 'La Constitution de 1958 et le droit international' *Revue de droit public*, 515-564 (1959) and A. Pellet, '«Vous avez dit "monisme"»? - Quelques banalités de bon sens sur l'impossibilité du prétendu monisme constitutionnel à la française', in D. de Béchillon et al eds, *L'architecture du droit – Mélanges en l'honneur de Michel Troper* (Paris: Economica, 2006), 827-857.

[59] N. Lenoir, 'Les rapports entre le droit constitutionnel français et le droit international à travers le filtre de l'article 54 de la Constitution de 1958', in P.M. Dupuy ed, *Droit international et droit interne dans la jurisprudence comparée du Conseil constitutionnel et du Conseil d'État* (Paris: Éditions Panthéon-Assas, 2001), 20.

[60] Interestingly enough, this very same function is deemed to be fulfilled, in Germany, by the *BVerfG*: see D. Thym, n 44 above, 32. For an interesting comparative overview of the debate about direct democracy in EU related matters, see S. Seeger, 'From Referendum Euphoria to Referendum Phobia - How EU Member States Framed Their Decision on the Ratification Procedure of the Constitutional Treaty in Comparison to the Treaty of Lisbon' *Hebrew University International Law Research Paper* (2008).

[61] S. Seeger, n 60 above, 7.

[62] O. Beaud, 'Le Conseil constitutionnel sur la souveraineté et ses approximations' 10 *Jus*

it has indeed become a classical feature of French practice that when the *Conseil constitutionnel* finds that a EU Treaty affects 'the essential conditions for the exercise of national sovereignty',[63] the Constitution is modified in order to make it compatible with supranational provisions transferring further competences to the EU.

As from 1992, each ratification of EU Treaties, with the sole exception of the Treaty of Nice, has been the occasion of deploying such two-steps procedure: (i) a judgment of the *Conseil constitutionnel* and (ii) a revision of the Constitution, namely of its Title XV which was indeed introduced in 1992 in the context of the Maastricht Treaty ratification under the title 'European Communities and European Union'.[64]

The primacy of the Constitution is regularly recalled by the *Conseil constitutionnel* in its decisions. However, the frequency of EU-related constitutional amendments shows some inconsistencies. 'A Constitution' – it has been argued –

> 'is not a scrap of paper and it is deplorable that the French Constitution has to be changed every time France envisages the ratification of a treaty by which it transfers powers to an international organ'.[65]

In this regard, following the Italian model, a long-standing proposal to introduce, once and for all, a 'general Europe clause' in the Constitution,[66] has even been advanced.

The constant practice (as well as the ease) of amending the Constitution in order to advance further in the integration process, may indeed be interpreted, if not as 'a sign of a *de facto* primacy of international law',[67] at least as an expression of a 'certain idea' of the Constitution. Could it be contended that the latter is actually constructed as nothing more than a vehicle to assert sovereignty and to formalize the stage of integration at the EU level and its current decision-making asset?

The question arises neither in *a vacuum*, nor just in relation to EU matters, rather in the more general context of the development of the French constitutional

Politicum, 175-226 (2019).

[63] In its case law prior to 1992, the constitutional judge used to draw a distinction between limitations of sovereignty which were allowed, and transfers of sovereignty which were not. L. Burgorgue-Larsen et al, 'The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved', in A. Albi and S. Bardutzky eds, *National Constitutions in European and Global Governance*, n 28 above, 1190, 1181- 1223.

[64] Since the revision enacted in the context of the ratification of the Lisbon Treaty, the Title XV of the French constitution is named 'On the European Union' and consists of Arts 88-1 to 88-7.

[65] A. Pellet, 'A French Constitutional Perspective on Treaty Implementation', in T. Franck ed, *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (New York: Transnational Publishers, 2000), 293.

[66] G. Carcassonne, n 54 above, 377.

[67] L. Burgorgue-Larsen et al, n 63 above, 1218.

debate.

When considering the long arc of such development, most historians agree that it ultimately rests on the idea of organizing the structures of government.[68] Since the time of the 1789 Revolution, whatever the constitutional design choice was, the acknowledgement of the sovereign constituent power of the Nation has played a great, essential role, to such an extent that it does not dissolve on the adoption of a Constitution.[69]

This is to say that such 'logic' primacy of sovereignty over the Constitution became part of the political DNA of France long before its participation in the European integration process. In fact, the latter made the historical commitment to national sovereignty-as-constituent power just more palpable; and the French peculiarity according to which the constituent power relates to the Constitution not only *before* but also *after* its adoption, just more flagrant. In de Gaulle's view, few ideas fit better than these with its EU integration process-related position.

Of course, even the very peculiar role conferred by Art 54 Constitution to the *Conseil constitutionnel* had to carry on (hence to be displayed according to) such long-standing heritage. Up to its decision related to the Treaty establishing a Constitution for Europe (the Rome Treaty), asserting national sovereignty and calling for the intervention of the constitutional legislator, was indeed the main feature of the *Conseil constitutionnel* EU-related case law, the other being a significant reluctance to draw a clear differentiation between constituent and constituted sovereignty.

V. An Ongoing Change in French Understanding of the Constitutional Limits to European Integration Process: From Sovereignty to Constitutional Identity

Against the background described above, it comes as no surprise that constitutional identity and constitutional rights have traditionally not been an important part of the French constitutional judges' reasoning toolbox. The first meaningful potential conflict between the *Conseil constitutionnel* and the ECJ on these topics arose only in 2004, as the implications of a 'European Constitutionalism beyond the State'[70] had become more evident with the drafting

[68] M. Fioravanti, *Costituzione* (Bologna: il Mulino, 1999), 71.

[69] One of the most famous tenants of this approach is the former Member of the *Conseil constitutionnel* George Vedel, who notably wrote: 'The derived constituent power has the same nature as the initial constituent power: the constitution prescribes only a procedure (which can by the way be revised (…)), it cannot limit its exercise (since even the prohibition relating to the republican form of government in Art 89, last paragraph, loses its validity if revised). G. Vedel, 'Schengen et Maastricht: à propos de la décision n° 91-294 DC du Conseil constitutionnel du 25 juillet 1991' *Revue française de droit administratif*, 179, 173-184 (1992).

[70] J. Weiler and M. Wind eds, *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003).

of the Treaty establishing a Constitution for Europe.

In the Constitutional Treaty judgment[71], the *Conseil constitutionnel* refined its previously developed toolbox on some crucial points, on which eventually the subsequent judgment on the Lisbon Treaty[72] widely relied.

In both rulings, while at first sight reiterating the classical view according to which domestic constitutional limits to the EU integration process refer essentially to the procedural requirement (enshrined in Art 54 Constitution) to amend the Constitution, the *Conseil constitutionnel* actually opened the door for more substantive hierarchies, expressing its 'interpretative reservations' about the binding character of the EU Charter of Fundamental Rights as well as the principle of EU primacy. Thereby, the *Conseil constitutionnel* 'rebranded' itself as the master of the interpretation of EU law principles, warning that these will be considered compliant with the French Constitution only *as long as* they are interpreted in a strictly defined way.[73]

The *Conseil constitutionnel* judgments guide the way.

A first crucial point they made relates to the French deep-rooted notion of individual rights, which notably implies a strong disregard for any form of collective (including religious) identity. Accordingly, the *Conseil constitutionnel* recalled French constitutional proscription of 'any recognition of collective rights of any group defined by origin, culture, language or beliefs are thus respected', and made this stance a condition for France's acceptance of the EU Charter of Fundamental Rights' binding character.[74]

Echoing the very same concern of defending the formal republican principle of equality before the law, the *Conseil constitutionnel* offered also a rather restrictive reading of the 'right of everyone, whether individually or in community with others, to manifest religion or belief in public', serving the declared aim of 'reconcil(ing) the (EU) principle of freedom of religion and that of secularism (the famous French *laicité*)'.[75]

Furthermore, as to the regards to the principle of EU primacy, the *Conseil constitutionnel* stated in its Constitutional Treaty judgment that such a principle did not require any constitutional amendment insofar as 'any greater

[71] Conseil constitutionnel 19 November 2004, decision no 2004-505 DC, available at https://tinyurl.com/y9dsj8my (last visited 27 December 2020).

[72] Conseil constitutionnel 20 December 2007, decision no 2007-560 DC, available at https://tinyurl.com/y98l5h44 (last visited 27 December 2020).

[73] On these 'interpretative judgments of dismissal' see M. Cartabia, '"Unità nella diversità": il rapporto tra la costituzione europea e le costituzioni nazionali' 10(3) *Diritto dell'Unione Europea*, 607, 583-611 (2005).

[74] Conseil constitutionnel 19 November 2004, decision no 2004-505 DC (cons 16). Not content to have 'neutralized' every possible collective aspect of EU fundamental rights, the *Conseil constitutionnel* goes further and even deems this typically French stance in line with «the constitutional traditions common to the Member States». See also Conseil constitutionnel 20 December 2007, decision no 2007-560 DC (cons 12).

[75] Conseil constitutionnel 19 November 2004, decision no 2004-505 DC (cons 18).

scope than which it previously had' could be detected.[76] In doing so, he read the national identity clause included in the EU Treaties as containing an implicit limit to the primacy of EU law whenever that law would affect national constitutions, or at least their fundamental structures.[77]

The 'interpretative reservations' are one of the most interesting techniques that frequently pop up in constitutional interpretation processes, making it possible to ensure that the application of a statutory law not yet come into force will satisfy certain constitutional requirements without undermining its publication.[78] By applying such technique to EU law, the *Conseil constitutionnel* added an important footnote to the ongoing tension between constitutional limitations to EU integration process and EU integration process-related constitutional transformations. Despite raising potential constitutional issues, it avoided not only treaty censorship but also the call to amend the Constitution in matters that it identifies as part of the substantive core of the French constitutional order.

Like every other legal discourse, the one arising from 'interpretative reservations' conveys an attempt to construct reality by means of language.[79]

In this vein, the most important novelty of the judgments on the Rome Treaty and Lisbon Treaty is that hereby the *Conseil constitutionnel* deploys a narrative (and a self-representation, too) other than what the binary scheme 'conformity-non conformity' would have allowed. While it feels the need to openly challenge EU provisions (hence to call for the intervention of the constitutional legislator) only with respect to those pertaining to the EU functioning,[80] which by their nature limit the room for a *francisée*[81] interpretative construction, it raises in a rather *Solange* fashion the issue of domestic constitutional rights as a new yardstick against which to conduct its review. In

[76] Conseil constitutionnel 19 November 2004, decision no 2004-505 DC (cons 12). As The principle of EU primacy was repealed from the Lisbon Treaty, in the subsequent judgment on the Lisbon Treaty, the *Conseil constitutionnel* did not elaborate on it.

[77] See among many A. Levade, 'Le cadre constitutionnel du débat de révision de la constitution. Commentaire de la décision n° 2004-505 DC du 19 novembre 2004 «Traité établissant une Constitution pour l'Europe»', available at https://tinyurl.com/ydhxszbd (last visited 27 December 2020) and M.-C. Ponthoreau, 'Identité constitutionnelle et clause européenne d'identité nationale. L'Europe à l'épreuve des identités constitutionnelles *nationales*' *Diritto pubblico comparato ed europeo*, 1581, 1576-1588 (2007).

[78] In the more general context of constitutional adjudication, the way constitutional judges use the technique of interpretative reservations is an important subject of comparative inquiries: see eg T. Di Manno, *Le Juge constitutionnel et la technique des décisions interprétatives en France et en Italie* (Paris: Economica, 1999).

[79] R.H. Weisberg, 'Diritto e letteratura' *Enciclopedia delle scienze sociali* (Roma: Treccani, 1993), available at https://tinyurl.com/yckoeqr9 (last visited 27 December 2020).

[80] It must be pointed out, however, that the revision procedure enacted in 2004 was meant to be effective under the condition of the coming into force of the Constitutional Treaty.

[81] I owe this untranslatable word to one of the most skeptical scholars about the onthological possibility of 'legal tranplants': P. Legrand, 'L'hypothèse de la conquête des continents par le droit américain (ou comment la contingence arrache à la disponibilité)' 45 *Archives de philosophie du droit*, 41, 37-41 (2001).

doing so, the *Conseil constitutionnel* engages in a 'reconstructive enterprise' perhaps 'more real'[82], in any event more substantive, than the one focused on asserting the sovereignty of the French Nation.

A French scholar even went as far as to argue that 'thanks to Europe France has become aware of its identity'.[83]

Interestingly, another set of French constitutional judge decisions, dealing with the obligation to transpose an EU directive, entails the seeds of a new representation of what would be acceptable to give up, and what would not, in the name of European integration.

For the sake of simplicity, we will break the *Conseil constitutionnel*'s reasoning down into three steps.

In a first move, the *Conseil constitutionnel* holds that such obligation follows not only from EU law but also from the 'integration provision' (Art 88-1 Constitution) conferring constitutional standing to the French participation in the EU.[84] This statement, driven more by the aim to gain further room for *manoeuvre* in the dialectic between EU law and domestic law (in addition to the one related to the ratification of the Treaties) rather than to protect the enforcement of EU law by means of French constitutional law, allows the *Conseil constitutionnel* to foreshadow what has been defined as a 'conditional immunity' of EU directives.[85]

The *Conseil constitutionnel* indeed clearly suggests, in a second move, that a non-transposition of EU directives would be possible on the ground of an expressly contrary provision of the French constitution.[86]

The third part of this set of decisions evokes, without further clarification, a more general (counter)limit to the constitutional obligation to transpose EU directives, namely 'a rule or principle inherent to the constitutional identity of France'.[87]

This 'identity' turn of the *Conseil constitutionnel*, premised on the tenet

[82] For a provocative essay on these matters, J.S. Peters, 'Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion' 120(2) *Publications of the Modern Language Association of America*, 442-453 (2005).

[83] E. Dubout, '«Les règles ou principes inhérents à l'identité constitutionnelle de la France»: une supra-constitutionnalité?' *Revue française de droit constitutionnel*, 453, 451-482 (2010).

[84] This construction was first announced by the Conseil constitutionnel 10 June 2004, decision no 2004-496 DC (cons 7).

[85] See F. Picod, 'La costitutionnalité du droit communautaire dérivé…à la française' *Il diritto dell'Unione europea*, 869, 869-884 (2004) and F. Chaltiel, 'Nouvelles variations sur la constitutionnalisation de l'Europe - A propos de la décision du Conseil constitutionnel sur l'économie numérique' *Revue du marché commun et de l'Union Européenne*, 452, 450-454 (2004).

[86] See Conseil constitutionnel 1st July 2004, decision no 2004-497 DC (cons 18), available at https://tinyurl.com/y8o9r4yr (last visited 27 December 2020).

[87] Conseil constitutionnel, decision no 2006-540 DC of 27 July 2006 (cons 19), available at https://tinyurl.com/y7lkvw5g (last visited 27 December 2020). and Conseil constitutionnel 30 November 2006, decision no 2006-543 DC (cons 6), available at https://tinyurl.com/yckjoqhe (last visited 27 December 2020).

that the respect of the substantive core of the French constitutional order is a necessary precondition for EU directives to be transposed, obviously raises the questions of what exactly falls under the 'constitutional identity' of France and what would be the consequences of a finding of unconstitutionality.

As for the first issue, while most legal scholars mention the principles already referred to in the *Conseil constitutionnel* judgments on the Rome Treaty and Lisbon Treaty – such as religious neutrality and equality before the law – others embrace a more extensive reading, according to which the obligation to transpose EU directives may be entrenched by any principles requiring 'France (to) be an indivisible, secular, democratic and social Republic' (Art 1 Constitution).[88]

All in all, it seems accurate to say that the referred judgments lead to significantly deepen the French debate on 'constitutional identity' as well as on the relationship between EU law and domestic constitutional law.[89]

However, only at first sight did these developments have the effect of erasing the difference between the French model of (counter)limits and that of other European legal systems equally based on post- World War II constitutions.

As for the second issue previously referred to (that is, what would be the consequences of a finding of unconstitutionality), it is worth highlighting that in its most recent rulings dealing with the obligation to transpose EU directives, the *Conseil constitutionnel* paid further homage to the constitutional legislator's full discretion as to whether to modify the Constitution, as made clear by the following statement: 'the transposition of a directive cannot run counter to a rule or principle inherent to the constitutional identity of France, *except when the constituting power consents thereto*'.[90]

One cannot but notice in the latter formula the mirror of a more general dilemma surrounding French constitutional theory. Indeed, what led the *Conseil constitutionnel* to be so careful not to give a 'red lines' *status* to the French constitutional identity, is that Art 89-5 Constitution, stating that 'the republican

[88] A helpful survey of the debate can be found in F.X. Millet, *L'Union européenne et l'identité constitutionnelle des Etats membres* (Paris: Lextenso, 2012), 166. See also A. Levade, 'Identité constitutionnelle et exigence existentielle: comment concilier l'inconciliable', in J.-C. Masclet et al eds, *L'Union européenne: Union de droit, Unions des droits Mélanges en l'honneur de Philippe Manin* (Paris: Pedone, 2010), 109-128, and J. Rossetto, 'La primauté du droit communautaire selon les juridictions françaises: A propos des relations entre le droit communautaire et le droit constitutionnel national', in J. Rossetto and A. Berramdane eds, *Regards sur le droit de l'Union européenne après l'échec du Traité constitutionnel* (Tours: Presses universitaires François-Rabelais, 2007), 71-90.

[89] To be sure, all these issues were dealt with by the Commission that in 2008 was convened by the former President Sarkozy to identify potentially useful amendments to the Preamble of the current Constitution: see Comité de réflexion sur le préambule de la Constitution, 'Redécouvrir le préambule de la Constitution: rapport au Président de la République', 2009, available at https://tinyurl.com/y79sc5hm (last visited 27 December 2020).

[90] Conseil constitutionnel 27 July 2006, decision no 2006-540 DC (cons 19), n 87 above. A slightly different formulation can be found in Conseil constitutionnel 30 November 2006, decision no 2006-543 DC (cons 6), n 87 above.

form of government shall not be the object of any amendment', has not been given an enforceable status in France.[91]

The argument of hierarchy within the French constitution would require the so-called 'supraconstitutional norms' not to be overstepped either by EU law or by the constitutional legislator. Recent decisions dealing with the obligation to transpose EU directives critically suggest that the *hard core* of the legal order is actually not untouchable. The same holds true for case law concerning, more generally, limits to constitutional amendments. Once again, we are facing what has been tellingly named

> 'a strange understanding of the supremacy of the Constitution: on the one hand, the constitutional legislator is 'sovereign' and stands higher than the Constitution whilst on the other hand the Constitution (or more precisely some of its fundamental principles) stands higher than EU law'.[92]

Such a deferential attitude toward the constitutional legislator obviously limits the practical consequences of the *Conseil constitutionnel*'s call for constitutional identity. This is yet not very surprising, given that enforcing the material limit on constitutional revision would require putting the French constitutional judges into a role they are not (and do not feel) legitimate enough to play.[93]

Limited practical consequences, however, do not undermine the relevance of the *Conseil constitutionnel*'s shift toward a *Solange* line of reasoning.

VI. Conclusion

All in all, a Franco-German comparative insight suggests that not only with respect to domestic matters but also in relation to European matters, the *BVerfG* 'has assumed an expansive role that casts it, at least in part, as a positive legislator prone to dictating (Constitution-oriented) policy',[94] whereas the *Conseil constitutionnel,* whose legitimacy is in any event much weaker than that of its

[91] A clear position was taken by the *Conseil constitutionnel* on purely internal matters in a 2003 case, where it succinctly dismissed the proceeding on the ground that it had no power to rule on the constitutionality of constitutional amendments: Conseil constitutionnel 26 March 2003, decision no 2003-469 DC, available at https://tinyurl.com/yb4ytbvd (last visited 27 December 2020). On this '*a minima*' construction of the Art 89 (5) Constitution, see eg S. Pierré-Caps, 'La questione della revisione costituzionale in Francia: la sovranità del potere costituente alla prova del metodo', in S. Gambino and G. Ignazio eds, *La revisione costituzionale e i suoi limiti: fra teoria costituzionale, diritto interno, esperienze straniere* (Milano: Giuffrè, 2007), 326.

[92] F. Hourquebie and M.-C. Ponthoreau, 'The French Conseil Constitutionnel: An Evolving Form of Constitutional Justice' 2 *The Journal of Comparative Law*, 279, 269-284 (2008).

[93] Compare, on the *BVerfG*' s undisputed right to review constitutional amendments, C. Möllers, '«We Are (Afraid of) the People»: Constituent Power in German Constitutionalism', in M. Loughlin and N. Walker eds, n 53 above, 87-106.

[94] M. Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' 2(2) *International Journal of Constitutional Law*, 640, 633-668 (2004).

German counterpart,[95] has constructed the French Constitution, yet deeply marked by the classic concept of national sovereignty (or perhaps, ironically, because of that), in a much less defensive way.[96] In short, the 'integrating effect of the Constitution', one of the salient features of constitutionalism so tellingly pointed out by Professor Ponthoreau, is by no doubt less visible in the French legal system than in the German one.[97]

Interpreted against this background, Germany's *souveraniste* self-portrait emerging from the 5 May judgment should be seen as its own new legitimation, with no need for likes. It is the work of a powerful national decision-maker already facing the future head on.

By contrast, the evolutionary character of *Conseil constitutionnel*'s call for constitutional identity cautions against drawing now definitive conclusions, and so does the fact that judicial activism is not easily assumed by French constitutional judges. Nevertheless, we would well to recall and to put in the very same broad context another major development of French constitutional law, that is the 2008 enactment of the constitutional revision introducing an *ex post* judicial review.

Without entering into a detailed description of the new *ex post* judicial review procedure, which is too articulate to be addressed here,[98] it should suffice to underline that the high-degree of penetration of European law within the French legal order, as well as the EU's constitutional *momentum*, are the events that mostly influenced this major legal change, hitherto leading to the end of the most famous French exception, namely the reluctance to conceive the *Conseil constitutionnel* as the guardian of constitutional rights and values.

Indeed, not only have concerns been expressed about the denationalization of fundamental rights protection,[99] but also about the limited relevance of the

[95] See among many M. Troper, 'Fonction juridictionnelle ou pouvoir judiciaire?' 16 *Pouvoirs*, 5-15 (1981), L. Favoreu, 'La légitimité du juge constitutionnel' *Revue internationale de droit comparé*, 557-581 (1994) and H. Roussillon, 'Le Conseil constitutionnel: une légitimité contestée', in J. Raibaut and J. Krynen eds, *La légitimité des juges* (Toulouse: Presses de l'Université Toulouse 1 Capitole, 2004), 119-126.

[96] Compare J. Gerkrath, 'Direct effect in Germany and France - A Constitutional Comparison', in J. Prinssen and A. Schrauwen eds, *Direct effect: Rethinking a Classic of EC Legal Doctrine* (Groningen: Europa Law Publishing, 2002), 134, 128-154.

[97] M.-C. Ponthoreau, 'La Constitution comme structure identitaire', in D. Chagnollaud ed, *Les 50 ans de la Constitution 1958-2008* (Paris: LexisNexis, 2008), 31-42.

[98] For further references, see C. Amodio, 'L'effet intégrateur de la Constitution en France, entre formes de présence du passé et nouveaux paradigmes en quête de reconnaissance' *Annuario di diritto comparato e di studi legislativi*, 699, 679-708 (2019).

[99] L. Burgorgue-Larsen, 'Les occupants du «territoire constitutionnel». Etat des lieux des contraintes jurisprudentielles administrative et européenne pesant sur le Conseil Constitutionnel français', in D. Rousseau ed, *Le Conseil constitutionnel en questions* (Paris: L'Harmattan, 2004), 45-75 and F. Jacquelot, 'La Convention européenne des droits de l'Homme et le procès incident de constitutionnalité: les perspectives croisées de la «priorité» en France et en Italie', in L. Gay ed, *La question prioritaire de constitutionnalité – Approche de droit comparé* (Bruxelles: Bruylant, 2014), 442, 439-458.

asserted supremacy of the French Constitution if not supplemented by jurisdictional measures of enforcement, such as the possibility for individuals to challenge *ex post* the constitutionality of legislative provisions that violate their rights.[100] In addition to that, there has been a notable trend to place greater emphasis on French constitutional principles as opposed to EU ones.[101]

To conclude, legal changes driven by the EU integration process may be more or less cryptic.

The pressure of EU supranationalism has already led to a new representation of what German constitutional judges consider to be their role in the relationships between EU law and domestic law.

French developments also suggest an ongoing change, particularly in the understanding of the Constitution-society relations. The integrating effect of the Constitution has now better chances to emerge. We cannot altogether exclude that the *Conseil constitutionnel*'s enhanced legitimacy will have, in turn, an impact on the coming relationships between EU law and the national Constitution.

[100] See 'Intervention de M. Jean-Louis Debré, Président du Conseil constitutionnel devant le Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Vème République', available at https://tinyurl.com/ya5czfdr (last visited 27 December 2020).

[101] See 'Déclaration de M. Nicolas Sarkozy, Président de la République, sur la place du Conseil constitutionnel dans les institutions de la Cinquième République', available at https://tinyurl.com/ybldkh99 (last visited 27 December 2020).